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European Social and Employment policies

(Social Dialogue)



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INTRODUCTION

It is certainly no easy task to try to give an accomplished idea of the Community legal *corpus* on Employment in a few pages. Even more difficult is to try to provide a concise picture of the body of Community laws regarding work, directed at readers who have belonged to the Community. It is therefore necessary to provide a few but precise notions as a starting point; the beginning of a journey which will lead the reader therefore, in the shortest possible time, inside the judicial as well as the political system of the European Union.

We are not sure whether the result has totally fulfilled our initial objectives. However, what we have tried to do in the following pages, is to cover the largest possible number of topics, whilst realising that the limited space and the need to “not bite off more than one can chew”, at least during these first phases of the project, has forced us on one hand to exclude certain arguments from the dissertation and on the other hand to avoid going too much into detail.

Particular attention and space, has been given to the topic of free movement of workers within the Community, something that we felt was appropriate, considering that the merger between the Community labour market and that of countries about to enter it, represents a good opportunity both for them and for all Member States.

Other particular emphasis has been given to the topic of vocational training and of the European Social Fund, absolutely necessary instruments for the economic and social development of any Community country, and particularly for a country whose development must be strongly and appropriately supported.

Mention has also been made of the system of social dialogue in Europe and to its development; a system which is acquiring more and more importance in shaping the method of each country's industrial relations. We have given particular emphasis to the recent procedure for the “creation” of a European law with the direct involvement of social partners.

We have given a brief and sweeping overview of labour conditions in general; and lastly we have mentioned certain forms of occupational flexibility, through the very general terms indicated by recent Community directives.

In some instances single institutions have been described by means of their historical evolution: This may have been a weaker approach with regard to the practical value of the work, but we felt that a look at the roots and the knowledge that our Community is a system that continues to evolve and improve in order to establish closer and more efficient relationships among Member States, could be of help to the reader of these few pages, and could give this simple judicial dissertation more depth.

CHAPTER I SINGLE MARKET AND EUROPEAN SOCIAL POLICY

1. The social aspect of the Common Market

The elimination of frontiers within the European Union, which started in 1985, is by now a reality. With the realisation of a Common Market, it became necessary to eliminate all types of boundaries - bureaucratic, fiscal, physical, and technical – something that could only be done through the enactment of conspicuous and detailed Community legislation.

One of the fundamental principles of the Common Market is that all citizens of the Union are free to hold a job, or to carry out their own professional activities, as well as to live in any of the Member States.

The concept of the common area is not purely capitalistic however as is proven by the fact that the right to move and live in any Member State also applies to subjects who are no longer, or are not yet, productive, such as retirees and students.

There is no one European social model, but rather a European social policy founded on subsidiarity. According to this principle, when national legislations are lacking or insufficient, Community authorities may intervene in order to realise minimum and necessary protections to workers and citizens in general.

At the beginning of the European experience, a broad discussion began regarding the possibility of unifying social policies in Europe. The decision was to gradually bring legislations closer together, starting from those which might create distortions to competition. The Treaty protected those workers who changed their country of residence during their working life, allowing them to add together the periods of work and social benefits accumulated in each State, thus putting the situation of migrant workers on equal terms with that of national workers.

The Member States, however, were still responsible for their social policies in the strict sense. The situation began to change in the 1970s with the adoption of the first concrete programs based on the European Social Fund. During this phase, three different directions of Community intervention were identified: improvement of life and work conditions, involvement of workers in the life of enterprises, and realisation of full employment. The result of the Community's commitment was the adoption of directives on collective dismissals and on business transferral and finally a directive on employer insolvency.

During the 1980s the role of the “social dimension” became more and more important for the authorities in Brussels. This resulted in a massive legislation that regulates all aspects of work with the clear intention of introducing minimum standards which guarantee safety at work, sexual equality and other social rights.

At the end of this phase, on December 9, 1989, the EEC Member countries (except for the United Kingdom), undersigned the Community Charter on the Fundamental Social Rights of Workers.

2. The European Social Dialogue

The first initiatives regarding European collective activities go back almost to the beginning of the Community experience. The main actors at this stage, which cannot even be called “social dialogue” at this time, were the sectoral trade unions present in the various countries and at European level. Their activities, however, were aimed at finding convergent policies on well defined themes and were carried out within different types of *sectoral*

advisory committees (iron and steel industry, road transport, etc.). The purpose was to provide advice to the Commission on the formulation of specific policies. As it is easy to see, the tripartite consultation method (“government” authority plus various opposing social partners) was deemed a necessary element of community policies from the very start. There are currently six such committees.

From the 1970s, the main tripartite European bodies for the harmonisation of social policies are the Standing Committee on Employment and, equally important, the Economic and Social Committee.

The expression “social dialogue” was born with particular reference to the tripartite agreements which started in 1985 in Val Duchesse (Brussels). It involved different forms of confrontation and exchange of opinion amongst social partners, promoted by Community authorities, with the aim of reaching convergent positions on matters of common interest. Such meetings were attended by the largest European interprofessional organisations, UNICE, for the private industry, CEEP for public participation concerns and ETUC as the confederation of worker trade unions.

The first meeting in Val Duchesse turned out to be rather disappointing. Nevertheless, it should be mentioned that during this initial phase, the agreement reached between CEEP and ETUC, whilst not a collective agreement in a traditional sense, represented a more binding result than a simple common opinion.

Up until now, these types of meetings have resulted in 15 common opinions on economic growth, introduction of new technologies, education, vocational training, etc.

The importance of the method based on the dialogue of social partners is also evidenced by the text of art. 118 B(now Art. 139) introduced in the EC Treaty by the Single Act of 1987, which entrusts to the Commission the task of promoting dialogue between European social partners, dialogue which may lead, with the consent of the different parties, as far as real collective agreements. This expression was then taken up again in the new art. 118 B of the Maastricht agreement, which is dealt with below.

3. The innovations brought with the Maastricht protocol

A) ART. 118 A AND THE ROLE OF THE SOCIAL PARTNERS

The Maastricht agreement on Social Policy (contained in an attachment to the text of the Agreement on the European Union and also introduced in the EC Treaty through the Amsterdam Treaty) has conferred a particularly important role on the activities of the social partners relative to the European dimension.

The first innovation is in regard to the Commission’s duty to promote social dialogue between the parties and to consult with them when taking Community decisions.

According to Art. 118 a of the Protocol – now Art. 138 of the EC Treaty - consultation of the social partners may occur a) before the Commission presents proposals regarding social matters, so as to have a “possible orientation” about Community intervention, or b) after the (possible) decision of the Commission to formulate, by itself, a proposal to be submitted to the social partners. In the latter case, the parts provide the Commission with their opinions or even with recommendations.

The regulation is put down in general terms, and must therefore refer to all types of community initiatives: directives, recommendations, and decisions. The opinions of the parties may be joint or separate.

It is then a general procedure relative to Community initiatives regarding social matters, which includes a phase of mandatory consultation, although not binding, of the social partners.

The second innovation is even more important: the social partners may respond to a consultation request by expressing their willingness to try to directly reach, among themselves, an agreement on the subject matter of the consultation.

Therefore, an initiative for an agreement between social partners may take the place of the Commission's intervention. The decision of the parts regarding the use of the contractual instrument to discipline matters has the power to stop the Commission's initiative for nine months, a period which the parties and the Commission may agree to extend.

This is a very significant innovation, because this article sanctions the supremacy of a judicial source (i.e. collective agreements) with respect to a heterogeneous source of Community law, even if only for a limited period of time.

The first concrete results of these new competencies were the adoption of framework agreements on parental leave (directive 96/34), on part-time work (directive 97/81), as well as on fixed-term work (directive 99/70).

Such methodology has led to modifications and has generated repercussions for the interpretation of industrial relations within Member States.

The pressure experienced by the "Italian bargaining system" is of considerable significance. In fact, with regard to labour, the adoption of an EEC directive is first preceded by negotiations between the social partners who, upon the request of the ministry, try to reach an agreement on the subject matter of the directive, so as to give the legislator a clear guideline.

Such a method gives the confederation representing the Italian Small and Medium enterprises the possibility of proposing or indicating legislative measures "aimed" at a market segment whose needs and requirements are often fundamentally different from those of large enterprises.

B) ART. 118 B AND EUROPEAN COLLECTIVE BARGAINING

We have mentioned the fact that Art. 118 B (now Art. 139 of the EC Treaty) foresees that social dialogue may lead to the stipulation of collective (European) agreements.

A European collective agreement, still according to the same article, can be put into effect in two ways: either according to procedures and practices of the social partners in each single State, or on the basis of a decision by the Council upon proposal by the Commission.

The problem of the first solution is the different relevance of the "collective agreement" judicial instrument to the various Member States. This problematic is addressed in the Social Protocol, according to which the contents of European agreements must be developed according to the rules in force in each Member State, and therefore should not imply any obligation by a Member State, either to directly apply a European agreement (in other words in an authoritative way) or to modify domestic legislation to make its application easier (as would happen in Italy, where the attribution of an *erga omnes* efficacy to a collective agreement would mean modifying the constitution).

So, our hypothetical European collective agreement, could at most constitute the basis for an agreement, to be adapted and applied by each Country through domestic collective agreements.

The second way indicated by Art. 118, in other words application of European agreements through a Council decision, well overcomes the obstacles represented by the various juridical collective agreement configurations of the various legislations. The regulation in fact foresees the possibility that a European collective agreement, in matters involving the Community, and upon request of the partners, becomes a direct source of Community law, independently from the judicial origin.

Insofar as the relationship between the judicial source and the Council's decision, the contents of the collective agreement cannot be modified by the Council which, in turn, can only accept it or *completely* reject it.

According to Art. 118 B, the Council deliberates on matters regarding the Community through a qualified majority (art. 137 EC Treaty: worker safety and health, work conditions, worker information and consultation, integration of people excluded from the work market, equal treatment of men and women in regards to work access and treatment). For certain matters, indicated in paragraph 3 of the same article (social security, worker protection in case of dismissal and others) the deliberation must be by unanimous consent.

Even if Art. 118 B makes reference to a "decision", it is regarded as a general use of the term. In fact, up until now, collective agreements have been transformed into sources of Community law through the instrument of directives.

The European Work Councils fall into this category. These in fact constitute a liaison with labour union representatives within single production units and, despite the fact that they are present only inside considerable realities which globally employ more than 1000 people, may represent the first step in harmonising, "from the bottom up", contract regulations which differ from country to country. These regulations will move towards a collective European contract, which, starting from local needs will constitute a point of reference for regulations of common interest. ?????

CHAPTER II FREE MOVEMENT OF WORKERS

1. *Fundamental notions*

The worker's right to free movement within the European Community is sanctioned by art. 38 of the EEC Treaty.

Essentially, this right implies the abolition of any type of discrimination, based on nationality, among workers of Member states with particular reference to:

- Access to a job;
- Working conditions;

and includes the worker's right to move from his own country to a Member State in order to respond to a job offer; to live in this State, as well as the right remain resident after having obtained the job.

The worker's right to free movement was obtained gradually, as set forth by art. 39 (now Art. 40) of the Treaty. The first phase was executed with Regulation n. 15 of the year 1961 which abolished the need for a visa to enter a country, but only required presentation of a valid identity card or passport issued by the country of origin. On the basis of this regulation, a citizen of another Member state could be hired for a job only if no domestic manpower was found within a short time (three weeks) from the moment the job vacancy was registered with the competent authority.

The second step was accomplished with regulation Nr. 38 of the year 1964. It asserted the right of the worker to seek a salaried job in the territory of another Member state, if the job vacancy was communicated to the competent labour office, as well as to answer any new job offer in any region or for any profession. On the basis of a *safeguard clause* that continued to exist, each Member state could exclude the above stated principle in case of an excess of manpower for a certain profession or in a certain region.

The process was completed in 1968, with the adoption of regulation n. 1612 and of directive n. 360. Still today, the latter constitute the core of effective community law in regards to free movement of workers. Full reference numbers for Regulations and Directives

2. *Application realm*

Free movement regulations undoubtedly only refer to *salaried work*. Naturally, the most relevant definition of subordinate work considered here is that of the *European community* as specified by Court of Justice jurisprudence, because in fact no such definition is to be found either in the Treaty or in the laws relating to it.

Hence, the essential characteristic of such relationship lies in the circumstances in which a person provides a service, for a certain period of time, in favour of and under the direction of another, in return for a wage or salary¹.

It is not necessary that this worker be qualified as “salaried” in his country of origin, since he could be self-employed or unemployed. What is important is that the worker enters another state in order to seek a subordinate job.

It should be noted that regulations regarding free movement of workers must also be applied to *part timers* even when these workers’ pay is lower than the real minimum wage, calculated according to criteria existing in the country where the service is being rendered.

With regard to the maximum period of time during which the worker may stay in the other Member country, the court has recognised the right of this same worker to continue to stay for a certain period of time, established by local legislation, if the worker can prove that he is continuing to look for a job and that he does have actual possibilities of being hired¹.

The basic requirement to exercise this right, is to be a *citizen* of a Member State, it being understood that the attribution of citizenship depends on domestic laws of each single State, and cannot construe the basis for verification by the Court.

Regulations regarding free movement of workers are also extended to family members: particularly regulation n. 1612 grants the migrating workers’ family members the right to live in the territory of the State where the worker carries out his/her activity. The worker’s spouse and children also have the right to undertake any subordinate activity throughout the State’s territory, even if they are not citizens of a Member State.

3. Contents of the free movement right

According to Art. 7 of the European Community’s institutional Treaty “any discrimination on grounds of nationality is forbidden”. This principle is then defined in a set of regulatory standards.

3.1 Access to jobs

Art. 1 of Regulation n. 1612 specifies that a community worker has the right to take up an activity as an employed person within the territory of another Member State, different from his country of origin, in accordance with the State’s legislative, regulatory and administrative dispositions governing domestic employment.

Furthermore, throughout the territory of a Member State, the said worker will also have the right to take up available employment with the same priority as nationals of the State. Art. 3 of regulation 1612 rules that domestic regulations contrary to this principle are not applicable, while art. 7.4 puts the same limitations also on private, individual and collective autonomy, thus making discriminatory clauses contained in private law agreements null and void.

¹ Court of Justice, July 3 1986, lawsuit 66/85, *Lawrie-Blum v. Land Baden-Wurttemberg*.

² Court of Justice, February 26, 1991, lawsuit 292/89, *The Queen v. Immigration Appeal Tribunal, ex parte Antonissen*.

3.1.1 Compensation mechanisms between job supply and demand.

The principle of free movement of workers implies that the system must allow circulation and exchange of information among Member States regarding job supply and demand. According to this assumption, job positions available in a specific Member State, and which cannot be filled by local manpower, must be communicated to the Employment offices of Member States who have communicated availability of manpower in the same field of work.

Regulation n. 2434 of July 27, 1992 has made this procedure easier and has also abolished that rule of Regulation 1612 (art. 20) which allowed Member States to request the Commission to suspend compensation mechanisms in case of disturbances in one's own job market.

Lastly, it ought to be remembered that after approval of Regulation n. 2434, the European Commission set up the EURES (European Employment Services) network, whose purpose is to improve co-operation and exchange of information as provided by the foregoing regulation.

3.1.2. Mutual recognition of qualifications

An obstacle to free movement of workers could be whether or not the person seeking employment has certain diplomas. Since the rules for obtaining such certificates may vary from country to country, this could mean lack of mutual recognition of diplomas issued by the various Member States, which can only translate into an obstacle to intra-community employment. This argument will be dealt with later on, in chapter II.

3.2 Equal work conditions

Art. 39.2 of the Treaty, which forbids any type of discrimination not only insofar as access to jobs, but also in regards to compensation and other work conditions, has been further detailed by Art. 7.1 of regulation n. 1612 which also gives an illustrative list of the "work conditions" and compensation arrangements, regulations regarding dismissal from employment, professional reintegration and outplacement in case of unemployment. To this end, the Court has declared that the elements related to compensation, such as indemnity, as well as rules regarding length of service calculations, also fall within the scope of "work conditions".

Moreover, the principle of equal treatment of workers must be observed not only with regard to legal or regulatory standards, but also to collective or individual contracts, as already mentioned with reference to the equal job access right.

It should also be noted that regulations forbid both direct and indirect discrimination. The latter means attributing a specific right on a condition required from all workers without distinction, but which practically entails a particularly unfavourable impact on migrating workers: for example the residence permit.

Lastly, it is necessary to acknowledge the fact that Community discipline does make at least one distinction between a domestic and a migrating worker, since the

latter may be excluded from management of public service institutions and from holding public service positions.

3.3 Equal treatment in regards to social and tax advantages

According to the provisions of Art. 7.2 of regulation n. 1612, the migrating worker enjoys the same social and fiscal advantages as the domestic worker.

According to the Court, social advantages are those which, whether or not connected to a specific labour contract, are generally attributed to domestic workers proportionally to their objective status as worker or simply in virtue of the fact that they reside in the domestic territory².

So, for example, the social advantage concept has also been applied to loans granted without interest to low income families that fall within the ambit of a government policy that encourages births.

With regard to fiscal advantages instead, the Court has asserted that the equal wage principle would become ineffective if it could be violated by discriminatory domestic income tax regulations.

3.4 Treatment of the migrating worker's family

Art. 11 of regulation 1612 extends the right of access to a job, in the welcoming State, to the worker's spouse, to his children younger than 21 or dependent on him; under the same conditions as the citizens of such State, the children also have access to education in general, apprenticeships and vocational training (art. 12).

The Court has extended the application of regulations regarding social and fiscal advantages also to this category, according to the concept that "the advantage which a family member may benefit from is actually a social advantage for the worker himself."

3.5 Entrance and residence right

According to Art. 39.3 of the Treaty, the principle of the free movement of workers consists of the right to move freely within the territory of Member States, to answer to job offers, as well as to sojourn in one of the Member States in order to work.

Directive n. 68/360 explains the meaning of these rights, and art. 3 establishes that Member States may allow entry in their territory simply on production of a valid identity card or passport, but cannot demand entry visas or other equivalent documents.

The most relevant innovation introduced by directive n. 360 however entails the residence right: Art. 4 eliminates the need of a residence permit, and institutes a document called "residence paper". To issue it, Member States may only require:

- a) The valid document with which the worker entered the country;

³ Court of Justice, May 31, 1979, lawsuit 207/78, *Prosecutor v. Even e Office national des pensions pour travailleurs salariés*.

- b) A confirmation of engagement from the employer or a certificate of employment.

The “residence paper” must include a statement that it has been issued pursuant to Regulation n. 1612/68, as already mentioned. It must be valid throughout the territory of the Member State that issued it for at least five years from the date of issue and must be automatically renewable.

The above document cannot be withdrawn the worker simply on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed, this being duly confirmed by the competent employment office. However, in regards to the latter, directive n. 68/360 allows for a restriction of the period of residence when the permit is renewed for the first time.

According to the interpretation of regulations regarding the residence right by the the Court of Justice, it has firstly decreed that the residence paper can in no way be assimilated to a permit granted at the discretion of domestic authorities. As a matter of fact, the document must be issued to anyone who can prove he has a right to have it by simply producing the necessary documents.

The consequence of this statement is that the lack of necessary procedural documentation to obtain the paper can in no way justify deportation measures. The Court has later specified that the penalties for non-fulfilment of formalities are in principle compatible with Community law, as long as “reasonable” terms to fulfil the same are established and as long as the penalty does not appear to be disproportionate to the gravity of the violation, to the point of turning out to be an obstacle to the free movement of people.

Workers’ family members, for which regulation n. 1612 ensures the residence right, consist of the spouse, the descendants younger than 21 or dependent from the worker, as well as dependant relatives in the ascending line of the worker and his spouse.

The residence right of a family member cannot be exercised if the worker cannot afford housing considered as *normal* for national workers. The Court has had the opportunity to point out, in this regard, that the appropriateness of housing must pertain to the time at which the family is reunited but need not apply to the entire duration of their residence. Consequently, the domestic regulation which subordinates the renewal of the paper to the residence of family members on the condition that they continue to live in adequate housing has been considered incompatible with Community law.

Still under the residence right, the Treaty attributes to the migrating worker the right to remain in the territory of the Member State after termination of his working activities under certain conditions. Regulation n. 1251/70 singles out such conditions in the duration of the activity itself and of the residence, recognising the rights of retired people, of workers who are permanently disabled and of those who have become cross-border workers. Family members have the same rights and these can be exercised even after the death of the worker.

With three further directives³ the residence right has also been recognised to other *non active* categories and more precisely pension holders who during their working life did not exercise their free movement right, students, as well as every single citizen, in general, of a Member state who were unable to exercise their free movement right because of other dispositions set forth by Community law. In this cases it is necessary for the person who claims this right to have stipulated an health insurance contract and have sufficient means so as to avoid being a social burden during his stay in the Country giving hospitality.

4. The limits of the free movement right

4.1 For reasons of law and order

Art. 39.3 of the Treaty states that the free movement right may be limited because of matters regarding law and order, public security and public health. In regards to the latter, the attachment to Art. 4 of directive n. 64/221 indicates the only diseases which may justify refusal of entry in the territory of a Member State. However, if the onset of such diseases should occur after the residence paper has been issued, it cannot be cause of deportation or refusal to renew residence papers.

With regard to public policy, public security or public health - considering that such grounds cannot be invoked to service economic ends (Art. 2.2) - the directive clearly states that measures taken no grounds of public policy or public security must be based “exclusively on the personal conduct of the individual concerned.” According to the Court, this means that the adoption of measures cannot be justified by reasons of “general prevention”; furthermore, that such conduct must not turn out to be a general law infringement, but must consists in “an actual serious threat to the fundamental interests of the society.” Still according to the Court, such seriousness does not exist when this conduct, if manifested by a national of the State giving hospitality, would not be restrained by concrete measures.

Lastly, in regards to procedural guarantees, the Court has also considered the right to defence of a foreigner: it has therefore established that the reasons for a sanction must be communicated at the same time that the same is notified; that such reasons must be sufficiently detailed and precise to allow the subject to defend his own interests; that deportation measures cannot become executive before the receiver of the same has had a chance to submit an appeal as indicated in Art. 8 of the directive.

4.2 No employment in public administrations

According to Art. 39.4 of the Treaty, the regulations regarding free movement “are not applicable to employment in the public administration.”

It should be mentioned that such article, in its literal context, no longer finds application. The Court, in fact, in view of the continuous interferences by the Public

³ Directives 90/364, 90/365, 90/366. With a sentence of 7/7/92 (action 295/90) the Court of Justice declared the latter null because it was erroneously based on Art. 235 instead of 7.1 (now respectively Art. 308 and 6). It was then substituted by Directive 93/96 of Oct. 29, 1993

Administration in the most diverse activities, especially of an economic nature, has deemed it necessary to interpret the foregoing regulations in a restrictive way, also considering the fact that it limits the fundamental freedom guaranteed by the Treaty.

Therefore, the requirement for citizenship can be legitimately enforced only with regard to those positions which imply exercising public powers and whose duty is to protect the interests of the State and of other public organisms.

Consequently, the restrictive interpretation has allowed employment of citizens from other Community States in positions such as nursing in public hospitals or teaching in public schools.

The fact that the foreigner employed by the Public Administration, because of later promotions, could cover roles which, even according to a more restrictive interpretation, should be reserved to citizens does not create problems in the application of this principle. If on one hand Art. 39 of the Treaty, does not allow discrimination insofar as employment, on the other hand it is compatible with differentiated career paths for foreign workers.

CHAPTER III

THE EUROPEAN COMMUNITY EMPLOYMENT POLICY

1. Introduction

One of the objectives of the Member States abiding by Treaty of Rome, is to promote a high employment level (Art. 2). This is certainly a laudable, yet rather ambitious objective, because in order to reach it, the Community should be able to avail itself of the instruments and powers necessary for the development of an active employment policy, and able to use them.

Unfortunately, this does not seem realistic, since up to now decisions with regard to employment policies have mostly fallen under the Member States' competence.

The aim of the present regulations regarding atypical work relations (part-time, fixed-time, interim work) is to harmonise certain aspects of the rules governing such types of relations, whilst at the same time to refrain from impinging upon those types of work relations which in Europe have mostly been used for the purpose of implementing policies aimed at creating employment (particularly, "training and work" relations).

As regards working hours, directive n. 104 of the year 1993 covers the problem of time organisation (shifts, maximum working hours, breaks, etc.) but does not cover the problem of flexibility or of the reduction of normal working hours, a problem which most directly concerns the subject of employment.

Community initiatives seem to be completely lacking in terms of determining working life (meaning length of time between starting work and retirement), economic support in case of unemployment, and economic incentives for the creation of jobs.

These issues are left to the discretion of each Member State and therefore there is a lack of homogeneity in terms of regulations and initiatives within the community.

What has been said up to now must not lead one to believe that on the basis of the European Treaties it is not possible to adopt any concrete policy to support employment. It is useful to remember the power of intervention granted to the Community, by Art. 56 par. 2 of the CECA Treaty, to meet downturns in employment in the process of reconverting production in the coal and steel industry. On the other hand, the new art. 139 of the Treaty of Rome, has reinforced collective bargaining at a European level, through which it should be possible to tackle issues, such as that of reduction/flexibility of working hours, that certainly better lend themselves to the bargaining method, which is more appropriate to formulating flexible solutions, with a gradual approach, than the legislative method.

All this aside, the Community employment policy, originally inspired by the Treaty of Rome, is essentially based on one principle and one instrument: the principle is that of free movement of workers within the Community, already discussed in the previous chapter, and the instrument is the European Social Fund.

2. *The European Social Fund – origins and development*

The institution of a European Social Fund is based on the regulations contained in the Chapter two of Title III (art. 146-148) of the Treaty on European Union.

Art. 146 provides for the creation of a Fund with specific employment aims: its task is in fact to promote, within the Community, possible job opportunities and worker geographic and professional mobility.

During more than forty years of the Community's existence, the Fund's operative methods have been revised several times, the last of which being the reforms of 1998, introduced according to the provisions of the Single European Act relative to economic and social cohesion, and the simplification of 1999.

During the first phase (1960-1972), the support of the Fund was aimed at two distinct worker categories: the unemployed and those involved in industrial change. The Fund's aim was to co-finance actions which would retrain these workers professionally, in co-operation with the interested Member state, and to promote the mobility of the workers.

The first revision came about because of certain faults in the system (primarily the fact that the funds were assigned *indirectly*, in other words to the Member States and not directly to the workers, and *a posteriori*, in other words after the State had already executed, and paid in advance for, all the operations for which the Fund's aid was requested; and this was done *automatically*, that is to say without granting the aid according to identified priorities). The previous text of Art. 126, said that at the end of a transitory period, the Fund could be assigned new duties, by virtue of the aims indicated in art. 146.

The characteristics of this new Fund (1972-1983) were quite different from the previous ones. First of all, its financing came from the attribution of its own resources, allocated from the Community's general budget. Secondly, public bodies as well as private concerns could have access to the funding. Lastly, the automatic nature of its interventions was considerably lessened.

At the beginning of the 80's, all Member States were hit by a severe unemployment crisis (some less seriously, some more seriously) which led to a new reform.

The objective of the new reform (1983-1988) was stated in the opening regulations of the Council's decision n. 83/516: the Fund must favour implementation of policies aimed at, on one hand, giving people the vocational training needed for stable employment and, on the other hand, creating employment opportunities particularly for youth and disadvantaged workers, as well as reducing the regional imbalance of the employment market.

With regard to the recipients, contributions must first of all be allotted with a view to favouring employment of young people below 25 years of age, especially those lacking or with inadequate vocational training, and those who have been unemployed for a long period of time (in other words, those who have not had a job in the last 12 months). 75% of the total available funds are dedicated to this purpose. The Fund, however, may also do something to favour employment of people older than 25 years, as indicated in the aforementioned decision n. 516 (particularly those who have been unemployed for a long time, women who would like to start working again, disabled people, employees of small and medium enterprises whose retraining becomes necessary because of the introduction of new technologies).

Territorial application of funding requires identification of top-priority and priority areas within the Community, characterised by a high number of long-term unemployed and / or industrial or sectoral restructuring.

The contributions made by the Fund, which as already said may be attributed to both public and private subjects, as a rule are granted for 50% of the amount of the cost of the operation for which such contribution was requested.

With regulation n. 2950 of 1983 the Council has indicated the types of expenditures which are eligible for contributions from the Fund.

Essentially the aim of such expenditures is to cover the costs of: vocational training, travel expenses and subsistence costs of those undertaking vocational training; adaptation of work sites when hiring the disabled; services aimed at making it easier for migrating workers, and their families, to move into a new area and become integrated into it; payment of incentives, for a maximum period of 12 months, to favour employment of: people younger than 25 years of age, or long-term unemployed in jobs of an additional or stable nature, or anyway such as to allow the worker to acquire a professional qualification which will help him to find a stable job. Such incentives are granted on the basis of 15% of the average gross salary of industry workers in the State concerned.

3. The European Social Fund and the Single European Act

With the introduction of art. 130 A and 130 C (presently 158 and 160) of the EC Treaty, the Single European Act has established the objective of reinforcing economic and social cohesion in the Community by reducing the different levels of development of various regions, “recuperating” late-developing regions, and adapting declining industrial regions.

To reach this objective, art. 130 D (presently 161) of the Treaty provides for the reorganisation of Funds (one of which being the European Social Fund) for structural purposes. The fund was greatly modified as a result. On the basis of this provision the Commission proposed and the Council adopted regulation n. 2052/88, which defines the objectives and methods of structural interventions:

The regulation indicates five priority objectives:

- 1) Promote the development and structural adjustment of late developing regions;
- 2) Rehabilitate regions or parts of regions badly hit by industrial decline;
- 3) Fight against long-term unemployment;
- 4) Facilitate introduction of youth into working life;
- 5) Speed up adjustment of agricultural structures and promote development of rural areas.

The European Social Fund, which together with two other Funds (The European Agricultural Fund and the European Fund for regional development) is involved in the accomplishment of these five objectives, is the only fund that may be put into motion in regards to objectives 3 and 4. After all, these were the same objectives that had previously characterised all of the Fund’s actions.

The method of intervention, indicated by regulation n. 2052 itself, is strongly characterised by its complementary nature with respect to other domestic interventions, an idea to be developed through close work between the Commission, the Member State and the domestic authorities assigned by the latter. The States concerned will therefore have to submit to the Commission the programs for which they are requesting Community support.

If the Commission gives a positive evaluation of these programs, it establishes a *Community support plan*, which may last from three to five years (art. 3, reg. n. 4253/88). The Community support plan must indicate the methods and duration of the interventions

and the relative financing program. The same regulation n. 4523 also sets down the rules on how to present the requests for the contribution coming from structural funds, and on the measures each Member State must adopt in order to verify that the Community funds are being correctly used.

Another 1988 regulation, the n. 4255, sets down specific rules for the European Social Fund. It establishes that the fund may help to finance actions aimed at vocational training, at incentivising the creation of stable and/or new jobs, at initiating new autonomous activities.

The beneficiaries of this contribution may be those unemployed for more than 12 months and older than 25 years of age, and people under 25 years old who have fulfilled educational obligations. When the fund is used to pursue the development of Community areas as per objectives 1, 2 and 5, then its intervention may also be aimed at other categories of subjects (i.e.: employees of small and medium concerns).

The types of expenditure for which the Fund may be used, are the same as those already envisaged in the Fund's previous period of existence (vocational training and incentives for hiring).

It is clear that in this phase, the function of the European Social Fund has remained practically the same as that of 1983. What is new is the method of action which is characterised by a closer co-operation between domestic and Community authorities.

Following this, regulations 2081, 2082 and 2084 of 1993 modified those of 1988, whilst leaving the basic spirit of the Fund unchanged.

The principle of "close consultation" between the Commission and the Member State, as well as the basic rules about the organising, decision-making and financing process of the programs, have been maintained in the successive phase.

After the promulgation of regulation n. 1260/99, which revoked the previous regulations 2052/88 and 4253/88, the European Structural Funds were once again reorganised. The new regulation n. 1260 now includes, in one single text, all regulations regarding structural funds.

The reform starts from the consideration of reducing the number of priority objectives set out by regulation n. 2052/88.

Consequently the number of objectives were reduced from five to three:

- 1) Promote the development and structural adjustment of late developing regions (objective 1);
- 2) Favour economic and social adaptation of the areas experiencing structural difficulties (objective 2);
- 3) Favour adjustment and modernisation of educational, training and occupational policies and systems (objective 3).

Objective 1 concerns those regions in particular whose gross national product per capita is less than 75% of the Community average.

The regions to which objective 2 is applied particularly include those areas in which industries and services are undergoing a socio-economic change, declining rural areas, urban areas experiencing difficulties, and those areas dependent on fishing which are now faced with a crisis.

The funding for objective n. 3 concerns those regions which do not fall within the scope of objective n. 1.

Contributions of the European Social Fund are destined to all of the above objectives.

The regulation n. 1784 of 1999, which revoked the previous regulation n. 4255, aims to redefine the scope of the Social Fund and the other structural funds after the last reform

and simplification of the objectives. It reaffirms once again, however, that “the Fund shall support measures to prevent and combat unemployment and to develop human resources and social integration into the labour market in order to promote a high level of employment, equality between men and women, sustainable development, and economic and social cohesion”.

The financial support of the Fund takes the form of assistance to persons (with particular attention for young people, women and disadvantaged groups) and is devoted to education and vocational training and employment aids and aids for self-employment and re-employment.

As we can see, training and the fight against unemployment are still the principal objectives of the Fund.

With regard to vocational training, the new European Social Fund will assist in financing projects presented by:

- Regions, Local organisations
- Public institutions
- Training institutions
- Research bodies
- Enterprises

On the basis of the institutional decentralisation process happening in Italy, entitlement of the majority of training interventions is transferred to the Regions. A flow diagram at the end of the chapter synthesises the methods of gaining access to European Social Fund financing for training projects.

4. *Vocational training*

In addition to what is already included in the regulations for the European Social Fund, the Treaty of Rome also deals with vocational training with two other regulations, art. 140 and art. 151 of the Chapter dedicated to social policies.

The second one of these is certainly the most important. In fact, it entrusts the Council with the task of establishing, upon the initiative of the Commission, the general principles for enacting a common vocational training policy which may contribute to the development of national economies as well as the common market.

This provision was followed up by the Council’s decision n. 63/266 of 1963. The decision stems from the premise that vocational training is *every person’s fundamental right* as well from the realisation that a link exists amongst vocational training, occupational development and implementation of the principle of free movement of workers by establishing ten principles in order to inspire a common policy on this matter.

Many of these principles essentially have a pragmatic value (for example, the second principle establishes that the aim of the common policy should be that of creating conditions for extending to everyone the right to receive an adequate vocational training; of favouring, during a person’s working life, appropriate training and specialisation, and, when needed, professional retraining and readjustment); others instead specify the role of the Commission in terms of favouring the exchange of information amongst Member States relative to training and to the organisation of seminars and studies.

The fourth and tenth of these principles, however, contradict the purely pragmatic tendency of decision 63/266, affirming the legitimacy of concrete initiatives of Community authorities insofar as vocational training is concerned. This approach, and the interpretation of Art. 151 of the Treaty, have been object of long controversies so it is not until the beginning of the '80's that a noticeable improvement began which led to the birth and proliferation of the first concrete Community training projects.

In this case we can remember several programs such as *Eurotecnet*, relative to vocational training of employees of industrial businesses due to the introduction of new technologies; *Iris*, relating to vocational training for women; *Force*, programme for the development of a permanent vocational training; *Erasmus*, on the intra-community movement of university students.

With the Maastricht Treaty, the theme of vocational training was reviewed with partially innovative contents. Art. 146 of the Treaty of Rome was modified, and the present formulation gives the European Social Fund the further objective of facilitating worker adjustment to industrial transformations and to the modification of production systems, "particularly through vocational training and retraining".

The new Art. 150 of the Treaty is even more significant. As a result, the Community is now explicitly authorised to implement a vocational training policy, even if this competence competes with that of Member States, and must therefore fully respect the responsibilities of the latter insofar as the contents and the organisation of vocational training. The same article establishes the objectives of the Community policy on the subject in matter, with particular attention to permanent training initiatives, and confers to the Council the power to adopt all necessary measures for their development.

To conclude, it seems useful to mention the interpretation that the Court of Justice has given with regard to vocational training. The Court's contribution has been particularly significant concerning two aspects: with respect to the breadth of Community competence on the subject and with respect to the definition of the concept of vocational training.

Insofar as the first aspect is concerned, the Court was called to give its opinion on the Council's decisions upon which the *Erasmus* and *Petra* Community projects were adopted (decisions n. 87/327 e n. 87/569). On this matter, the Court felt that a correct interpretation of Art. 128 (presently 151) of the Treaty could only lead to granting the Council power to issue acts regarding community actions for vocational training, with the concomitant obligation to co-operate with Member States.

With this decision it could be said that the Court has ruled decisively with regard to the breadth of Community competencies insofar as vocational training is concerned, interpreting the Treaty's regulations (Art. 128 and Art. 235, now 151 and 308) in the broadest possible way. Nevertheless, the practical relevance of the question is such that the discussions amongst Member States cannot be said to be totally concluded.

As regards the delimitation of the concept of vocational training, the Court's rulings have defined such notion in progressively wider terms. In the *Comett II*⁴ case the Court affirmed that permanent training falls under the concept of vocational training as per Art. 128 (presently 151) of the Treaty. Furthermore, non-university higher education falls under the same concept and, more generally speaking, "any form of education which prepares someone for a qualification for a precise profession, job or activity ... even if the educational program also includes subjects of a general nature"⁵. Lastly, with a specific

⁴ Court of Justice June 11, 1991, united proceedings 51/89, 90/89, 94/89.

⁵ Court of Justice February 13, 1985, proceedings 293/83, *Gravier vs. City of Liege*.

reference to university education, the Court has declared that the Treaty's regulations do not allow for the exclusion of these types of education from the community notion of vocational training, unless they are not intended as "particular study cycles ... destined to those who wish to improve their general knowledge rather than undertake a working activity"⁶.

Finally, it should be pointed out that before directive 90/366 on the student's residence right was issued, the Court of Justice had already ruled that articles. 7 and 128 (now 6 and 151) of the Treaty of Rome implicitly included the principle of equal treatment of citizens of different member States with regard to access to vocational training. For the Court, this principle implies that a citizen of a Member State, who is accepted to follow a vocational training course in another Member State, should be able to enjoy the right of residence there for the duration of the training.

Such a right however, may be subject to conditions connected to the Member State's higher interests, such as covering living expenses and health insurance⁷.

⁶ Court of Justice, February 1 1988, proceedings 24/86, *Blaizot vs. Université de Liège*

⁷ Court of Justice, February 26, 1992, proceedings 357/89.

CHAPTER IV

REGULATION FOR INDIVIDUAL EMPLOYMENT RELATIONSHIPS

1. Information on labour contract

Directive 91/533 concerns the employer's obligation to inform employees of the conditions applicable to a contract or employment relationship.

This obligation of the employer concerns what the directive calls the "essential elements" of the employer-employee relationship, in other words a) the identities of the parties b) the place of work; c) title, grade, nature or category of the work; d) starting date of the relationship; e) the expected duration in case of a temporary relationship; f) methods for allocating and determining paid leave; g) the length of periods of notice should the employment relationship be terminated; h) the initial basic amount, the components and frequency of payment of the remuneration; i) the length of the employee's normal working day or week.

The information may be given to the employee no later than two months after the start of employment in the form of a written contract of employment and/or a letter of engagement, in other words a written declaration from the employer which contains all required elements.

Any change of the conditions which regulate the relationship that might come about during the relationship itself, must be communicated in writing no later than one month after the date of these changes entering into effect.

It is certainly not sure if this directive really concerns the *proof of the existence of a labour contract* which was surely the initial intention of the directive proposal, whose preamble at first talked about a "proof", but which was later modified with the expression "document containing information". The most reliable hypothesis is that the Community legislator wanted a precise "obligation to inform", leaving regulations regarding proof of the existence of a contract to each single Member State, thus accepting that it is possible to prove it by other means.

The requirement for "homogeneous information" which the company must communicate to the worker in writing, has generated a greater transparency in the individual relationship between the parties, thus reducing the number of disputes within each single Member State. Today the EEC migrating worker receives the same information throughout the Union, which allows him to completely evaluate different offers from different countries.

2. Gender equality

The first intervention of the Community on this subject concerned equal pay and was derived from art. 119 of the Treaty. Despite the precise nature of this regulation, during the '60's the application of this principle encountered much resistance from Member States' jurisprudence.

From the following decade onwards, however, the Community initiative, supported by Court of Justice jurisprudence, became more pressing through a set of directives concerning all aspects of the matter. Directive 75/117 concerns equal pay, directive 76/207 equal treatment for men and women as regards access to employment, vocational training and working conditions; directive 79/7 equal treatment with regard to mandatory social security.

Insofar as equal pay is concerned, Art. 119 of the Treaty defines: a) the concept of wage, including any remuneration paid directly or indirectly, in money or in kind, by the employer to the employee, *as a consequence of the employment relationship*; b) the term of reference for equal pay, sanctioned by “the same type of work”; c) criteria for calculating the remuneration - when the wage is on an hourly basis it must be equal for the same type of work, whereas when it is calculated by piece-work (results), for men and women it must use the same measurement units for the final result as a reference.

This regulation is particularly important because the Court has ruled that it gives rise to real judicial cases which can be immediately defended in front of the national magistrates of the country in which the job is held, and can therefore be considered a *self-executing* rule.

The Court has excluded from the concept of pay, remuneration paid by the employer to social security concerns for their services, since they do not constitute a payment for the employee, but refer to social policy requirements. On the other hand, the Court has recognised the remunerative nature of services and contributions paid by the employer in the case of pension funds, both when as a substitute for mandatory social security and in the case of complementary pensions.

Directives 75/117 and 76/207 integrate the contents of Art. 119. The first in particular specifies that the principle of equal pay is applicable not only for the same type of work but also for work to which *equal value* is attributed; in other words, equal pay must be evaluated on the basis of the same type of professional qualifications and cannot be denied by pretending that women do not perform as well as men. Furthermore the directive clearly indicates that all discrimination arising from laws, regulations or agreements is null and void and must be abolished by Member States. With the second directive, the concept of banishing discrimination is further extended to indirect forms (art. 2.1).

The Court has had to deal with the concept of indirect discrimination more than once with regard to pay.. This type of discrimination is noticeable in *the effects*, in other words a discrimination which clearly stems from the disproportionately different consequences befalling an employee of either sex because of the application of apparently neutral work evaluation criteria. A typical hypothesis of indirect wage discrimination is work classification criteria based on physical strength. Such criteria are incompatible with the principle of equal treatment; the Court has however specified that, in order for them to be considered legitimate, the employer must prove that, in the specific case, physical strength is a necessary evaluation criteria for work classification.

With directive 76/207 the principle of equal treatment is extended to all aspects of professional life: access to work including conditions governing job offers, career progression, dismissal and termination of the relationship and employment conditions in general.

Violation of the equal treatment principle also includes sexual harassment, especially when the undesired behaviour comes from a superior or from the employer himself, and when decisions relating to the woman’s employment depend on her acceptance or denial of such behaviour (so called sexual blackmail, see recommendation of November 27, 1991).

Directive 76/207, also accepts exclusions and exceptions to the application of the equal treatment principle particularly to safeguard women. The exclusions refers to those occupations in which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a *determining* factor (for example, in the regards to entertainment, art and fashion). Furthermore Article 9.2 says that Member States shall

periodically assess the occupational activities excluded from the application of the principle of equal treatment to examine if the exclusion is congruent with the concrete circumstances.

Insofar as exceptions to safeguard women, the directive particularly deals with those concerning pregnancy and maternity.

Lastly, the possibility of providing for promotional measures specifically aimed at women's work (the so called positive actions) has been justified because it is primarily aimed not so much at equal treatment, but at equal opportunities, an objective which finds implicit endorsement in directive 76/207. Doubts still exist as to the legitimacy of such actions when they are not provided for by domestic legislation on a voluntary or temporary basis, but constitute employment policy measures with a restrictive character with regard to business (for example, possible shares reserved for women with regard to hiring or access to vocational training).

3. *Working time*

The first directive, in chronological order, was the (previous) art. 120 of the Treaty; it was intended to prevent one-sided modifications *in pejus* in the future with regard to paid holidays, taking consideration of the situation which existed at the time at which the Treaty was ratified, a situation which was largely considered to be unanimous amongst Member States.

The question of paid leave was then taken up again in the Council's recommendation of July 22, 1975, which invited Member States to establish, by the end of 1978, a minimum holiday period of four weeks per year; it also contained indications for a normal 40-hour working week (this objective was also recommended for the end of the year 1978).

The most important act regarding working time is however directive 93/104 of 1993; it was initially proposed as a wide ranging measure, circumscribing it to certain fundamental aspects of working time organisation, considered particularly important in so far as health and safety of workers in the workplace is concerned.

As regards the contents, the definition of working time is particularly significant: "any period in which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practices". Just as significant is the definition of "night-time period", which is relevant in relation to the definition of night-work and night-worker: for this purpose the night-time period is "any period of no less than seven hours, as defined by national law, and which must include in any case the period between midnight and 5 a.m.". Consequently a night time worker is "anyone who works at least three hours of his daily working time as a normal course".

The directive also deals with the subject of the maximum weekly working time, which must not exceed 48 hours (including overtime) in a seven day period.

In reality beyond dealing with the maximum weekly working time, the directive talks about average working time: in fact the 48-hour limit must be observed with reference to a period no longer than 4 months, which may be extended to six for certain activities, and up to 12 months through collective bargaining. So, what cannot be exceeded is the average weekly working time during the reference period.

It is clear that, in this way, The European Community law does not establish a maximum daily ceiling for normal daily or weekly work and does not give a basis from which to calculate overtime, and neither does it put limitations on it.

With regard to leave, the directive reaffirmed that paid annual leave must be of at least four weeks, and this period may not be replaced by an allowance in lieu, except where the employment relationship is terminated (art. 7) The same directive gives Member States the option of limiting the annual period of paid leave to three weeks during a transitory period of a maximum of three years, from the date on which the Community regulation is transposed into national law (art. 18).

The directive also deals with daily and weekly rest periods. It prescribes that every worker be entitled to a minimum rest period of 11 consecutive hours per 24-hour period, and respectively, per each seven day period, a minimum uninterrupted rest period of 24 hours in addition to the 11 hours daily rest, whilst indicating that the weekly rest can be determined by considering a reference period of no more than 14 days.

Lastly, it is useful to mention the regulation by which every worker is entitled to a rest break, when the working day is longer than six hours. Details, including duration and terms on which it is granted, must be laid down by collective agreements or, failing that, by national legislation.

The second part of the directive deals with certain aspects of night-work and shift work, considered particularly hazardous to health.

First of all the regulation establishes the criteria for the length of night-work. On the basis of such criteria, normal hours of work for night workers must not exceed an average of eight hours in any 24-hour period based on a wider reference period which may be defined, in each Member State, by collective bargaining or by legislation after consultation with the social partners. Furthermore, night workers whose work involves special hazards or heavy physical or mental strain must not work more than eight hours in any 24-hour period during which they perform night work. Such type of hazardous work must be defined by national legislation or by collective agreements.

Lastly, specifically with regard to the state of health of the night worker, the directive establishes that:

- a) Night workers are entitled to a free health assessment before the start of their assignment and at regular intervals thereafter;
- b) Those suffering from health problems connected to the fact that they work at night must be transferred, whenever possible, to day-time work to which they are better suited;
- c) The employer who regularly uses night workers must bring this information to the competent authorities if requested to do so;
- d) Night workers and shift workers must benefit from safety and health protection appropriate to the nature of their work (evidently, the directive requires the adoption of particular measures which are instead not necessary for workers who do not work at night or in shifts but which perform the same duties).

To conclude, it should be noted that the provisions of this directive are characterised by a high level of flexibility; aside from the regulations strictly connected to health protection, which must be considered mandatory, all the other provisions regarding leave, rests and weekly and night time working hours, may be transposed taking into consideration the particular characteristics of certain activities, and of particular circumstances indicated in Art. 17 of the directive itself.

On the whole, derogations are allowed provided that the workers concerned are afforded equivalent periods of compensatory rest or, in exceptional cases in which, for

objective reasons, it is not possible to grant such compensatory rest periods, the workers concerned are afforded “appropriate protection”.

It is notable that the directive avoids identifying Sunday as the day for the weekly rest, leaving this choice up to Member States.

The directive’s maximum flexibility, however is reflected in Art. 18, which allows for individual agreements in order to derogate from regulations regarding weekly working time. Essentially all that is required is an agreement with the worker.

Lastly it is worthwhile to mention the Court of Justice’s jurisprudence on the subject, with particular reference to the night work of women. In this sense, the Court has chosen a strict application of the equal treatment principles contained in directive 76/207. Particularly the Court recommended that “independently from the inconveniences of night work, it does not seem that, aside from pregnancy or maternity, the risks to which a women is subject during such type of activity, are any different than those to which men are equally subject.”⁸.

4. *Safety and health in the work environment*

A) IN GENERAL

The first Community initiatives on the subject are part of the CECA Treaty. In 1957, following a serious accident which happened in a mine in which 264 Italian workers lost their lives, the *Standing Committee for Safety in Coal Mines* was created and its competencies were later extended to all the mining industry.

From this initial phase, we may also recall the Commission’s recommendations of July 20 and 23, 1962, with regard to occupational medicine and diseases. The resolution of January 21, 1974 is also very important, and recognises the utmost importance of initiatives to be adopted, at a Community level, with regard to worker’s safety and health. With the Council’s decision of June 27, 1974 the *Consultative committee for safety, hygiene and health in the workplace* was created.

After the 1974 resolution, thanks to the consensus achieved throughout the Community, several directives were issued on the basis of the general regulations contained in the previous art. 100 of the Treaty, now art. 94 (with unanimity). Among these, one that is worthwhile remembering is Council Directive n. 80/1107/EEC of November 27, 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work. The law contained in this directive was followed by four other “daughter” directives with particular regulations (relative to exposure to lead, asbestos, noise and prohibition of certain agents and/or activities).

It ought to be noted that this directive is based on the criterion of reasonable feasibility of the safety measures to be adopted: it is an elastic concept, which must, at the same time, take into account the objectives of worker protection and economic considerations, as well as the technological possibilities and needs. This concept differs from the more rigorous one adopted by the Italian legislator who talks about *maximum technologically feasible safety*.

B) SINGLE EUROPEAN ACT

The regulations contained in the Single European Act have had a great impact on the Community’s activities for the protection of safety and health conditions of workers and their work environment. It was in fact introduced in the Treaty with art. 118 (which no longer exists as a separate article, but is now incorporated into art. 137) which foresees a

⁸ Court of Justice, July 25, 1991, lawsuit 345/89, *Stoeckel*

different decisional process for the Council. The directives adopted up to 1986, based on the previous art. 100, in fact require a unanimous consent for approval; Art. 118 before and Art. 137 now allow that the decisions made on the subject must be adopted by qualified majority voting. According to this article “the Community supports and completes the action of Member States” in order to “improve the work environment in order to protect the worker’s safety and health”.

The regulation has been subject of lively debate, which started as early as the time at which the previous Act. 118 A was being formulated, particularly with regard to the wide interpretation given to the expression *work environment*, which, if broadly interpreted, could also include organisation of work and working times. What is clearly noticeable is that they are really minimum measures, because each Member State may nevertheless retain or adopt measures which ensure a higher worker protection.

Lastly, it is important to remember the stipulation according to which the directives issued in virtue of Art. 118 A have to avoid placing administrative, financial and judicial obligations which may hinder the development of small and medium enterprises (a regulation maintained in the text of art. 137). This regulation was criticised because of the consideration that it would institute “a two speed safety”, but later regulations did not make allowance for such concerns..

C) FRAMEWORK DIRECTIVE 89/391

After the approval of the Common Act, the most relevant result of the most recent Community action is the second Council directive on the subject, number 89/391 of June 12, 1989 on “measures to encourage improvements in the safety and health of workers at work”.

It is important to note that the preamble to the directive states that the objective of improving safety and health of workers cannot depend on purely economical considerations.

The directive has a particularly wide field of application: it is aimed at all sectors, both private and public, with very few exceptions regarding public employment (armed forces, police, civil defence).

It should also be noticed that it contains no distinctions on the size of businesses: all employers are obliged, in the same way, to observe its prescriptions. This phrase created some doubts because it seemed that it was contravening Art. 118 of the Treaty.

The directive is divided in two sections: the first dedicated to employers’ obligations and the second dedicated to those of employees; obviously the first part represents the fundamental core of Community law.

First of all, the employer has a very general obligation, that is “to ensure the safety and health of workers in every aspect related to work”. The directive stresses the *personal* character of employer’s responsibility in terms of safety requirements. This responsibility can however be excluded or limited for occurrences due to unusual and unforeseeable circumstances, substantially falling under the concept of “acts of God”; whereas responsibility exists even when the harm stems from a violation of safety regulations by the workers themselves, and especially when the employer uses third parties to organise prevention and protection activities.

The directive also gives a list of general prevention principles with which the measures adopted by the employer must comply: avoid risks, evaluate risks which cannot be avoided, combat risks at source, alleviate monotonous or repetitious work, etc.

Art. 6.4 includes an important and innovative provision on the subject of contracting and subcontracting which states “where several undertakings share a work place, the

employers shall co-operate in implementing the safety, health and occupational hygiene provisions and, taking into account the nature of the activities, shall co-ordinate their actions in matters of protection and prevention of occupational risks.”

Another extremely important employer obligation is to provide information and training to workers as well as to let them participate and consult with them when necessary.

The employer must, first of all, provide workers and/or their representatives with all the necessary information regarding safety and health risks, and preventive and protective measures. Furthermore, the employer must provide each worker with sufficient and adequate safety and health training. Such training must be provided in several occasions (on recruitment, in the event of a change of job, in the event of the introduction of new protective devices or new technologies), and, if necessary, must be repeated periodically; it must also be provided to the workers’ safety representatives; it must take place during normal working hours and must be free of charge to the workers, just like all other measures regarding work safety, hygiene and health.

Workers and/or their representative have the right to consult or participate in all matters regarding work, safety and health. The workers’ representatives, in particular, may present their own proposals and must be entitled to adequate time off, without loss of pay, to exercise their functions relative to work safety.

Insofar as worker obligations are concerned, the directive prescribes that each worker must take reasonable care, as far as possible, of his own safety and health and that of other persons affected by his acts or omissions. The directive goes on to define this principle with a certain number of points (make correct use of machinery, dangerous substances and individual protective devices, arbitrarily modify or move safety devices, communicate dangers immediately, etc.).

To conclude, it should be remembered that Art. 16 of directive 89/391 expressly foresees the adoption of particular directives based on the principles contained in the Framework Council directive.

,Currently fifteen “daughter” directives relative to worker safety and health have been issued concerning various types of risks (handling of loads, use of video-terminals, temporary work sites, etc.)

D) PROTECTION OF WORKING MOTHERS

Directive 92/85 is a particular type of directive issued in virtue of art. 16.1 of directive 89/391 which we just discussed. It provides for a number of specific safety and health measures for pregnant workers and workers who are breastfeeding, regarding exposure to certain hazardous agents as well as regarding night-work, absence from work and dismissal.

The directive is the result of difficult compromises between health protection requirements and production needs; this explains why many of the dispositions are ambiguous.

First of all, as regards exposure to hazardous agents, the directive recognises the worker’s right to obtain from the employer temporary adjustment of working conditions and /or working hours. If the adjustment of worker’s working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.

If moving her to another job is not possible, then the worker must be granted leave, in accordance with national legislation and/or practices, for the whole of the period necessary to protect her safety and health.

With regard to night-work, Art. 7 of the directive limits itself to saying that workers are not obliged to carry out night work during pregnancy or in the period following childbirth as indicated by national authorities. The exemption must be substantiated by a medical certificate.

Insofar as maternity leave is concerned, the directive indicates that the period of absence to which the worker is entitled as being at least 14 weeks, allocated partly before and partly after childbirth in accordance with national legislation. During such period the worker must be paid or be granted an allowance at least equivalent to that which the worker would receive in the event of illness. This period, which the worker may enjoy as a right and not an obligation, must include a compulsory maternity leave of at least two weeks, also subdivided between before and after childbirth.

The subtlety of this protection is immediately noticeable - not only is it subtle in quantitative terms (when the directive was issued, only two Member States contemplated shorter maternity leave periods) but also because the leave is depicted as a right rather than as an obligation, with all the imaginable consequences on the effectiveness of the protection.

Lastly, the function of the prohibition of dismissal serves to protect working mothers in the period from the beginning of their pregnancy to the end of the maternity leave. The prohibition does not apply in the event the dismissal occurs because of exceptional events allowed by under national legislation (possibly after having received authorisation from competent authorities) and is justified by circumstances foreign to the worker's conditions.

It should be noted that the directive, including the prohibition of dismissal, is not applied as a consequence of an objective condition of pregnancy but only if the worker concerned has informed the employer about her condition unlike in Italy for example where the same liability applies even if the employer were not aware of the pregnancy.

E) PROTECTION OF YOUNG PEOPLE AT WORK

In the European Charter of Fundamental Social Rights, an entire chapter is dedicated to the "Protection of childhood and adolescents". On the basis of such indications, the Commission elaborated a proposal which then became the approved directive 94/33, of June 22, 1994.

It is also based on Art. 118 A (previous text) of the Treaty, and it assigns to Member States the task of "protecting young people from economic exploitation and against any work likely to harm their safety, health, or physical, mental, moral and social development or to jeopardise their education" (Art. 1.3.).

Protection of young people's work must be ensured through a plurality of measures, which introduce particular limitations such as minimum work age, working time, night work, rest periods and duties.

The directive applies to "any person under 18 years of age having an employment contract or an employment relationship" (art. 2), and distinguishes the *child* ("any young person of less than 15 years of age or who is still subject to compulsory full-time schooling under national law") from the *adolescent* ("any young person of at least 15 years of age but less than 18 years of age who is no longer subject to compulsory full-time schooling under national law").

In principle, work by children is prohibited (art. 4.1.): it then follows that the minimum age for work is at the end of the 15th year or more when national legislation foresees a longer period of compulsory full-time schooling.

Work by children is acceptable only for the performances in cultural, artistic, sports or advertising activities (subject to prior authorisation from the competent authority); or for

those of at least 14 years of age “working under a combined work/training scheme or an in-plant work-experience scheme” or performing light work (in other words jobs which do not compromise their health, safety or development and which allow them to go to school regularly) (art. 4).

In addition to prohibiting work by children, the directive also extends the prohibition to young people in general (including adolescents) for work:

- a) which is objectively beyond their physical or psychological capacity;
- b) which involves harmful exposure to agents which are toxic, carcinogenic, cause heritable genetic damage, or harm to the unborn child or which in any other way chronically affect human health;
- c) which involves harmful exposure to radiations;
- d) which involves the risk of accidents which it may be assumed cannot be recognised or avoided by young persons owing to their insufficient attention to safety or lack of experience or training;
- e) in which there is a risk to health from extreme cold or heat, or from noise or vibration.

The directive however requires that the employer carry out an assessment especially to evaluate the risks to minors, regarding the tasks they are assigned. When this assessment shows that there is a risk to the safety, health or development of young people, the employer must guarantee a preventive and periodical medical examination and must inform the legal representatives of these young people of possible risks and of all measures adopted concerning their safety and health.

With regard to working time, as a rule, it must not exceed seven hours a day and 35 hours a week for children and 8 hours a day for 40 hours a week for adolescents. For each 24-hour period, children are entitled to a minimum rest-period of 14 consecutive hours (adolescents 12 consecutive hours); for each 7-day period, both children and adolescents are entitled to a minimum rest period of two days, consecutive if possible (which, where “justified by technical or organisational reasons”, may be reduced to no less than 36 consecutive hours).

Work by children between the hours of 8 p.m. to 6 a.m. is absolutely forbidden. Adolescents instead must not work between 10 p.m. and 6 a.m. (or between 11 p.m. and 7 a.m.); but in this case the prohibition is also accompanied by a possibility of derogation (see Art. 9.2). When an adolescent is assigned to night-work he must first undergo a free medical examination to determine his state of health, to be repeated at regular intervals.

Member States may, by legislative or regulatory provisions, authorise that the directive need not be applied, within the limits and conditions established by them, to occasional or short lasting jobs, concerning:

- a) housework performed within a family environment;
- b) work performed in family businesses which is considered neither harmful, nor compromising nor dangerous to young people.

CHAPTER V

ATYPICAL JOBS

5. *Part Time work*

Part time work has had an important impact on employment lately. Therefore, the parties who signed the agreement (procedure ex art. 118 B of the social policy Protocol) have given priority attention to this form of work as an instrument of flexibility.

The intention of the signatory parties was to reach a basic agreement on part-time work which included general principles and minimum prescriptions and which was then transformed into directive n. 97/81.

A part-time worker is defined as a worker whose normal hours of work, calculated on weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker employed in the same establishment, who is under the same type of labour contract or employment relationship in the same or similar work/occupation.

Where there is no comparable full-time worker in the same establishment, the comparison must be made by reference to collective agreements or the law.

It is a very generic definition, but precisely because of this, it encompasses the multitude of part-time jobs which have sprung up in the various countries.

The best basis for comparison will be normal working hours identified by collective agreements or by the law.

With regard to the employment relationship, the objective is to make sure that Member States grant part-time workers a set of minimum rights (or proportional to the duration of the work) equal to those of full-time workers. The social partners have in fact expressed their “willingness to establish a general framework for the elimination of discrimination against part-time workers and to assist the development of opportunities for part-time working.” Consequently “in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.”

The principle of equality will therefore extend to access to the vocational training implemented by the employer, access to public services within the enterprise (cafeterias, showers, factory outlets, etc.) and most of all to the right to rest periods and end-of-contract benefits.

This directive takes into consideration the use of the principle of proportional hours worked by a part-time worker (*pro rata temporis*), but does leave Member States free to identify the limits for applying the principle (e.g. direct or indirect salary and social security covered by part-timers within the social number of workers used by an enterprise in order to determine the ceilings above which particular laws apply).

To this end, it is extremely important to underline the criteria according to which part time workers are included in the above mentioned calculation limits and beyond which there must legally be, within the enterprise, a representative body for the workers or an alternative system to safeguard workers against illegitimate dismissals.

With regard to social security for part-time workers, the directive simply limits itself to deferring this issue to Member States’ legislation on the subject.

The directive also decrees that a worker’s refusal to transfer from full-time to part-time work, or vice versa, should not in itself constitute a valid reason for termination of employment.

Furthermore, as far as possible, employers should give consideration to:

a) requests by workers to transfer from full-time to part-time work that becomes available in the establishment;

b) requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise;

c) the provision of timely information on the availability of part-time and full-time positions in the establishment in order to facilitate transfer from full-time to part-time work or vice-versa;

d) measures to facilitate access to part-time work at all levels of the enterprise, including skilled and managerial positions, and where appropriate, to facilitate access by part-time workers to vocational training to enhance career opportunities and occupational mobility.

It should be noted that the directive has established a right to information which cannot be –compared to a true priority right for going from one type of relationship to the other, as exists for instance in Italian legislation.

Practically speaking, the first concrete result of European social dialogue in regards to occupational flexibility, is a regulation whose contents are rather lacking and whose tone is very “timid”. It limits itself to establishing some fundamental rights, such as non-discrimination, a very general definition of a part-timer, leaving ample freedom of movement to Member States and/or social partners in defining the various aspects of the relationship.

2. *Fixed-term work*

The regulations regarding another important instrument of occupational flexibility, fixed-term work, were advocated by the social partners in the framework of the procedure relating to Art. 118 b of the Maastricht Protocol (now art. 139 of the EC Treaty, as seen above), as part of the “European social dialogue”.

The parties to this agreement recognise that work with an indefinite duration is a common form of salaried work, however they also come to the conclusion that fixed-time work can, in certain circumstances, and particularly in certain business activities, respond to both worker’s and the employer’s needs.

In this perspective, the European agreement defines the general legislative framework for fixed-term work, leaving the details of application to domestic legislation, which (exactly as with part-time work) must bear in mind the realities of specific national, sectoral and seasonal situations (such as for example agriculture, tourism, and seasonal activities in general).

Again, in this instance, the judicial instrument adopted by the Council to implement the contents of the European framework agreement, making it binding for Member States, was that of a directive, which must then be transposed into national legislation.

The purpose of the agreement is to improve the quality of fixed-time work ensuring, just as with part-time work, the application of the principle of non-discrimination of fixed-time workers as opposed to indefinite-time workers, and establishing a framework to prevent abuses which may arise from the use of successive fixed-term contracts between the enterprise and the workers themselves. The aim is to prevent the use of a fixed-time contract where a permanent contract could be used, without the stability the latter ensures.

The fixed-term worker is defined as a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the

employment contract is determined by objective conditions, such as reaching a specific date, completion of a specific task or occurrence of a specific event.

Reference to a “direct” contract is necessary because the field of application of the directive does not include that particular form of fixed-time work which is interim work (whose scheme is three-sided, and which the worker does not stipulate directly with the employer, but with the company who provides interim workers).

Also excluded from the directive’s field of application, are relationships with a training purpose and which do not include salaried work (stages). Member States or social partners may decide to also exclude fixed-time contracts structured and finalised for training purposes, such as apprenticeships.

Insofar as the non-discrimination obligation is concerned, the comparison must be made with a “comparable permanent worker”, in other words a person having an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation (objective profile), due regard being given to qualifications/skills (subjective profile). The fixed-time workers must not be treated in a less favourable manner simply because they are working with a fixed-term contract, unless different treatment is justified on objective grounds.

The principle of equality, however, is subject to two exceptions: a) the principle of a treatment proportional to the period of service, or, where applicable b) the possibility of maintaining a work seniority threshold, for both fixed-term and permanent workers, to access certain institutes.

The directive further establishes that Member States and/or the Social partners themselves, must adopt proper measures to prevent abuse of successive fixed-term employment. Particularly one or more of the following measures must be introduced:

- a) objective reasons justifying the renewal of such contracts or relationships;
- b) the maximum total duration of successive fixed-term employment contracts or relationships;
- c) the number of renewals of such contracts or relationships.

Member States, after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term contracts or relationships a) shall be regarded as successive and b) shall be deemed to be contracts or relationships of indefinite duration.

As we have already seen with regard to part-time work, the directive also sets forth an obligation to inform fixed-term workers about available permanent positions “so as to ensure that they have the same opportunities to secure permanent positions as other workers.” Even in this case, the regulation does not talk about a priority right.

Lastly it is notable that despite the pressure from the European Trade Unions, the directive does not make a single generic reference to particular objective reasons that would justify the use of fixed-time contracts (unlike in Italy, for example, where laws and collective bargaining make reference to a wide case history: peaks of intense activity, substitution of absent workers, etc.)

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