

Occupational Health and Safety: a European and Comparative Legal Perspective*

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1. Introduction.

'There is nothing in the wording of Article 118a [TEC] to indicate that the concepts of "working environment", "safety" and "health" as used in that provision should, in the absence of other indications, be interpreted restrictively, and not as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organization of working time. On the contrary, the words "especially in the working environment" militate in favour of a broad interpretation of the powers which Article 118a confers upon the Council for the protection of the health and safety of workers. Moreover, such an interpretation of the words "safety" and "health" derives support in particular from the preamble to the Constitution of the World Health Organization to which all the Member States belong. Health is there defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity.'¹⁴⁶⁹

So, in its landmark decision of 1996, dismissing the British Government's arguments against the Working Time Directive,¹⁴⁷⁰ the Court of Justice of European Union (hereafter also CJEU) has provided a clear-cut answer to the crucial question of what does occupational health and safety (hereinafter OHS) mean in the community legal and political discourse.

By doing so, the Court confirms, on the one hand, the recognition of unregulated working time as a major source of risk.¹⁴⁷¹

On the other, by adopting the notion of health as defined into the WHO Constitution, the CJEU broadens the concept of risk from mere physical to psychical and psychosocial¹⁴⁷², thus emphasising the relevance of the workplace as 'environment' where the worker has the right to reach a state of complete physical, mental and social well-being.

¹⁴⁶⁹ Case C-84/94 *United Kingdom v Council* [1996] ECR I-5793, point 15.

¹⁴⁷⁰ Council Directive (EC) 93/104 concerning certain aspects of the organisation of working time [1993] OJ L307/18.

¹⁴⁷¹ On the 1996 decision of the CJEU and on the follow up of that regulation also in an HSO perspective see Evelyn Ellis, 'Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v. Council* [1996]', (1997) 34 CML Rev. 1049; Barry Fitzpatrick, 'Straining the Definition of Health and Safety?', (1997) 26 ILJ 115; Stephen Hardy, 'Harmonising European Working Time in an Enlarged EU: A Case of Failed 'Humanisation'?', (2006) 22 IJCLIR 563; Jeff Kenner, 'Re-evaluating the concept of working time: an analysis of recent case law', (2004) 35 IRJ 588; Jeff Kenner, 'Working Time, Jaeger and the Seven-Year Itch', (2005) 11 Colum.J.Eur.L. 53; Tobias Nowak, 'The Working Time Directive and the European Court of Justice' (2008) 15 Maastricht J. Eur. & Comp. L. 447; Piet Van Nuffel, 'Working Time Directive (UK v Council)', (1997) 3 Colum.J.Eur.L. 298; Lisa Waddington, 'Towards a Healthier and More Secure European Social Policy?', (1997) 4 Maastricht J. Eur. & Comp. L. 83.

¹⁴⁷² On psychosocial risks see, at least, Gian Guido Balandi and others, *Organisational and Psychosocial Risks in Labour Law. A Comparative Analysis*, (2012) I WORKING PAPERS DI OLYMPUS No. 14/2012 <<http://ojs.uniurb.it/index.php/WP-olympus/article/view/31>> accessed 25 September 2014; Stavroula Leka and Evelyn Kortum, 'A European framework to address psychosocial hazards', (2008) 50 J Occ Health 228; Stavroula Leka and Tom Cox (ed), *The European Framework for Psychosocial Risk Management: PRIMA-EF* (I-WHO Publications, Nottingham 2008); Stavroula Leka and others, 'The development of the European Framework for Psychosocial Risk Management: PRIMA-EF', (2011) 53 J Occ Health 137; Stavroula Leka and others, 'The role of policy for the management of psychosocial risks at the workplace in the European Union', (2011) 49 Safety Sci 558; Stavroula Leka and others, 'Developing a standard for psychosocial risk management: PAS 1010', (2011) 49 Safety Sci 1047; Katherine Lippel, 'Regulation of psychosocial risk factors at work: An international overview', (2011) 49 Safety Sci 543; David Walters, 'Worker representation and psycho-social risks: A problematic relationship?', (2011) 49 Safety Sci 599.

Although one has to bear in mind that *physical* health (and safety) remain 'the' focus of any OHS protection and management system, one has to point out that the interest for mental and social well-being at work has grown steadily in the last fifty years.

This was mainly due to the joint effort profuse by two UN agencies operating in this field, the International Labour Organisation (hereinafter ILO)¹⁴⁷³ and the World Health Organisation (hereinafter WHO) in researching on the role psychosocial factors play at work, effort that has been formalised into the 1984 Report of the Joint ILO/WHO Committee on Occupational Health¹⁴⁷⁴.

According to this:

'The concept of psychosocial factors at work is difficult to grasp, since it represents worker perceptions and experience, and reflects many considerations. Some of these considerations relate to the individual worker, while others relate to the conditions of work and the work environment. Still others refer to social and economic influences, which are outside the workplace but which have repercussions within it. (...) Fundamental individual factors include the worker's capacities and limitations relative to job demands, and the fulfilment of needs and expectations. Working conditions and the work environment include the task itself, physical conditions at the jobsite, worker/co-worker/supervisor relations, and management practices. Factors external to the workplace but relevant to psychosocial concerns at work include familial or private-life concerns, cultural elements, nutrition, ease of transport, and housing.'

'Worker's limitations relative to job demands and the fulfilment of needs and expectations' may lead to stress at work. In fact, according to the European Social Partner, which signed an Autonomous Framework Agreement on 8 October 2004, stress can be described (not defined) as 'a state, which is accompanied by physical, psychological or social complaints or dysfunctions and which results from individuals feeling unable to bridge a gap with the requirements or expectations placed on them. The individual is well adapted to cope with short-term exposure to pressure, which can be considered as positive, but has greater difficulty in coping with prolonged exposure to intensive pressure. Moreover, different individuals can react differently to similar situations and the same individual can react differently to similar situations at different times of his/her life. Stress is not a disease but prolonged exposure to it may reduce effectiveness at work and may cause ill health.'

¹⁴⁷³ Even though the ILO does not regard OHS as a Core Labour Standard (CLS). On CLS and their controversial role see, with opposite views, Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15 EJIL 457 and Brian A Langille, 'Core Labour Rights – The True Story (Reply to Alston)' (2005) 16 EJIL 409. The right to healthy and safe working conditions is seen as a human right by Jeffrey Hilgertt, 'The Future of Workplace Health and Safety as a Fundamental Human Right' (2013) 34 Comp.Lab.L. & Pol'y J. 715.

¹⁴⁷⁴ 'Psychosocial factor at work. Recognition and control. Report of the Joint ILO/WHO Committee on Occupational Health Ninth Session Geneva, 18-24 September 1984'.

¹⁴⁷⁵ On the European Social Dialogue, also with reference to the Framework Agreement referred to in the text see at least Ann Branch, 'The Evolution of the European Social Dialogue Towards Greater Autonomy: Challenges and Potential Benefits', (2005) 21 IJCLIR 321; Michael Ertel and others, 'European social dialogue on psychosocial risks at work: Benefits and challenges' (2010) 16 EJIR 169; Berndt Keller, 'Social Dialogue – The Specific Case of the European Union' (2008) 24 IJCLIR 201; Berndt Keller and Sabrina Weber, 'Sectoral social dialogue at EU level: Problems and prospects of implementation' (2011) 17 EJIR 227; Evelyne Léonard, 'European Sectoral Social Dialogue: An Analytical Framework' (2008) 14 EJIR 401; Marco Peruzzi, 'Autonomy in European Social Dialogue' (2011) 27 IJCLIR 3;

On the other hand, *harassment*¹⁴⁷⁶ may be regarded as being referable to and as deriving from 'bad worker/co-worker/supervisor relations, and bad management practices'. Not surprisingly already in 1991, the European Commission (the Commission hereinafter), in its recommendation of 29 May 1990 on the protection of the *dignity* of women and men at work,¹⁴⁷⁷ affirms that conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, constitutes an intolerable violation of the dignity of workers or trainees, and calls on the Member States and other EU institutions to develop positive measures designed to create a climate at work in which women and men respect one another's human integrity.

A factor external to the workplace but relevant to psychosocial concerns at work, which has risen (labour) lawyers' interest, is the so-called work/life balance,¹⁴⁷⁸ i.e. to what extent work organisation facilitates workers (hopefully not only female) with care responsibilities (not only towards children, but also disable and/or elderly relatives), helping them in finding a sustainable combination between work on the market and care work at home.

2. The Legal Framework¹⁴⁷⁹.

OHS is, together with equal treatment between man and women and free movement of workers, the oldest social commitment of the Community Institutions,¹⁴⁸⁰ as confirmed by the setting up of the Mines Safety Commission (MSC) in September 1956¹⁴⁸¹, already under the aegis of the European Coal and Steel Community (ECSC).

Thomas Prosser, 'The implementation of the Telework and Work-related Stress Agreements: European social dialogue through 'soft' law?' (2011) 17 *EJIR* 245.

¹⁴⁷⁶ On sexual and moral harassment see at least Gabrielle S. Friedman and James Q. Whitman, 'The European Transformation of Harassment Law: Discrimination versus Dignity', (2003) 9 *Colum.J.Eur.L.* 241; Loic Lerouge, 'Moral Harassment in the Workplace: French Law and European Perspectives' (2010) 32 *Comp.Lab.L. & Pol'y J.* 109; Loic Lerouge and L. Camille Hebert, 'The Law of Workplace Harassment of the United States, France, and the European Union: Comparative Analysis After the Adoption of France's New Sexual Harassment Law' (2013) 35 *Comp.Lab.L. & Pol'y J.* 93; Eoin Quill, 'Employers' Liability for Bullying and Harassment' (2005) 21 *IJCLIR* 645. Specifically on bullying, see Katherine Lippelt, 'The Law of Workplace Bullying: an International Overview' (2010) 32 *Comp.Lab.L. & Pol'y J.* 1; Manuel Velazquez, 'The Spanish Code of Practice on Work-Related Bullying: Reflections on European Law and Its Impact on a National Strategy for Labor Inspectors', (2010) 32 *Comp.Lab.L. & Pol'y J.* 185.

¹⁴⁷⁷ European Commission, Recommendation 27 November 1991 on the protection of the dignity of women and men at work [1992] OJ C27/04.

¹⁴⁷⁸ See on it Eugenia Caracciolo and Annick Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan, London 2010).

¹⁴⁷⁹ This chapter, do not provide either a description of all the legal instruments or an article-by-article comment of those selected. This is due to the enormous number of legal instruments that characterizes OHS and to the high degree of technicality typical of such regulations, respectively. We would rather select the most relevant legal instruments and sum up, in a reasoned way, their main features, in order to provide the reader with an overall knowledge of the subject matter.

¹⁴⁸⁰ On the general structure of EU OHS Law see, at least, Catherine Barnard, *European Employment Law* (4th edn OUP, Oxford 2013); Brian Bercusson, 'The Conceptualization of European Labour Law', (1995) 24 *IJL* 3; R. F. Eberlie, 'The New Health and Safety Legislation of the European Community', (1990) 19 *IJL* 81; Diana Gagliardi and others, 'Occupational safety and health in Europe: lessons from the past, challenges and opportunities for the future', (2012) 50 *Ind Health* 7; Jeff Kenner, *EU employment law. From Rome to Amsterdam and beyond* (Hart, Oxford – Portland, Oregon 2003); Alan C. Neal, 'The European Framework Directive on the Health and Safety of Workers: Challenges for the United Kingdom?' (1990) 6 *IJCLIR* 80; Berta Valdés de la Vega, 'Occupational Health and Safety: An EU Perspective' in Edoardo Ales (ed), *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn 2013); Manfred Weiss, 'European Labour Law in Transition from 1985 to 2010' (2010) 26 *IJCLIR* 3; Frank B. Wright, 'The Development of Occupational Health and Safety Regulation in the European Communities' (1992) 8 *IJCLIR* 32.

¹⁴⁸¹ The MSC has been merged into the Advisory Committee on Safety and Health at Work in 2003 (Council Decision (EU) 22.07.2003 [2003] OJ C 218/01), which, at its turn has substituted the Advisory Committee on Safety, Hygiene and Health Protection at work

On the other hand, the Treaty establishing the European Economic Community (hereinafter also TEC), signed in Rome in 1957, did not recognise either a general or a specific regulatory competence to the Community Institutions in the social and in the OHS field, respectively. In fact, article 118 TEC only emphasized that “[w]ithout prejudice to the other provisions of this Treaty and in conformity with its general objectives, it shall be the aim of the Commission to promote close collaboration between Member States in the social field, particularly in matters relating to (...) protection against occupational accidents and diseases, industrial hygiene. (...) For this purpose, the Commission shall act in close contact with Member States by means of studies, the issuing of opinions, and the organising of consultations both on problems arising at the national level and on those of concern to international organisations.”.

2.1 Before the Single European Act (1974 – 1986).

Notwithstanding the lack of regulatory competences, in the early Seventies Member States and Community Institutions have decided to activate themselves in the social domain. 1974 has represented one of the most significant turning points in the history of the social commitment of the EEC. The Social Action Programme¹⁴⁸² adopted in that year indicated various objectives to be achieved in order to increase that commitment. Among those objectives, crucial for the topic we are dealing with, the harmonization of working conditions while the improvement is being maintained, which, indeed should have been and should still be one of the main driver of Community/Union action according to article 117 TEC (now article 151 TFEU).

More specifically, the idea was “to establish an action programme for workers aimed at the humanization of their living and working conditions, with particular reference to: [a] the improvement in safety and health conditions at work and, [b] to the gradual elimination of physical and psychological stress which exists in the place of work and on the job, especially through improving the environment and seeking ways of increasing job satisfaction.”.

From the Social Action Programme 1974 has derived the Action Programme on Safety and Health at Work 1978¹⁴⁸³ based on actions such as (a) research on accident and disease aetiology connected with work; (b) protection against dangerous substances; (c) prevention of the dangers and harmful effects of machines; (d) monitoring and inspection - improvement of human attitudes.

Those actions were accompanied by six concrete initiatives to be taken by the Commission: (i) the incorporation of safety aspects into the various stages of design, production and operation;

established in 1974 by Council Decision (EC) 74/325/EEC [1974] OJ L185/15. The Advisory Committee on Safety and Health at Work has “the task of assisting the Commission in the preparation, implementation and evaluation of activities in the fields of safety and health at work” (article 2(1)). In order to accomplish the above tasks, the Committee shall cooperate with the other Committees, which are competent for safety and health at work within the EU, inter alia with the Senior Labour Inspectors Committee and the Scientific Committee for Occupational Exposure Limits to Chemical Agents, mainly by exchanging information (article 2(3)). The Committee is a tripartite body, which consists of three full members for each Member State, there being one representative for each of the national governments, trade unions and employers’ organisations (article 3). Within the Committee, there are three interest groups, made up of representatives of national governments, trade unions and employers’ organisations respectively (article 5(1)). It is apparent that, by the Committee, the EU is trying to replicate, as far as OHS is concerned, the same ILO environment.

¹⁴⁸² Council Resolution (EC) 21.01.1974 [1974] OJ C13/1.

¹⁴⁸³ Council Resolution (EC) 29.06.1978 [1978] OJ C165/1.

(ii) the determination of exposure limits for workers with regard to pollution and harmful substances present or likely to be present at the workplace; (iii) more extensive monitoring of workers' safety and health; (iv) research on accident and disease etiology and assessment of the risks connected with work; (v) coordination and promotion of research on occupational safety and health; (vi) development of safety and health consciousness by education and training.

The main product of the 1978 OHS Action Programme is represented by the adoption of Directive 80/1107/EEC¹⁴⁸⁴ on the protection of workers from the risks related to exposure to chemical¹⁴⁸⁵, physical and biological agents at work. What is interesting to stress from a juridical point of view, is that in order to overcome the lack of a specific Treaty provision allowing the Council to act within the social domain, it was decided to recur to article 100 TEC, which has to do with the approximation of national legislations in case their differences are likely to hamper the functioning of the common market.

In fact, according to the Preamble of the Directive "(...) certain differences are revealed by an examination of the measures taken by Member States to protect workers from the risks related to exposure to chemical, physical and biological agents at work; (...) therefore, in the interests of balanced development, these measures, which directly affect the functioning of the common market, should be approximated and improved [in accordance with article 117 TEC]; (...) this approximation and improvement should be based on common principles".

Making reference to article 117 TEC, the Directive excludes that approximation will entail a race to the bottom or a negative integration¹⁴⁸⁶, since it shall have, on the contrary, the highest standard provided by national legislation as benchmark. This, unfortunately, does not mean that such a standard will be necessarily adopted as common one. Nevertheless, such a reference allows Member States with higher standards of protection to carry on, within the Council, a political bargain from a strength position.

Furthermore, anticipating a solution which would have been generalized by the Single European Act (hereinafter SEA), the directive "shall not prejudice the right of Member States to apply or introduce laws, regulations or administrative provisions ensuring greater protection for workers."

According to Directive 80/1107/EEC, OHS should, as far as possible, be ensured by measures preventing exposure to chemical, physical and biological agents or keep it at as low a level *as is reasonably practicable*. In such a perspective, the Directive provides for (individual and collective) protective measures only in case prevention is not made possible by the need of using the relevant agent. Preventive and protective measures, at their turn, divide themselves into *basic* and *additional*, the latter applying where agents appear in the initial list provided by Annex I of the Directive, meaning that they are more dangerous.

¹⁴⁸⁴ Council Directive (EC) 80/1107/EEC [1980] OJ L327/8.

¹⁴⁸⁵ On chemical agents, see also Regulation (EC) 1907/2006 concerning (among the others) the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), analysed in this book by William Onzivu. On the relationship between REACH and OHS see Tony Musu, *REACHing the workplace. How workers stand to benefit from the new European policy on chemical agents* (TUTB, Brussels 2006).

¹⁴⁸⁶ See Catherine Barnard and Simon Deakin, 'Negative' and 'Positive' Harmonization of Labour Law in the European Union, (2002) 8 Colum.J.Eur.L. 389.

Among *Basic measures*, one has to emphasize the crucial role of preventive risk assessment carried out by the entrepreneur. Furthermore, the entrepreneur shall make limited use of (or even ban) dangerous agents at workplace, reducing, in any case, to the minimum the number of workers exposed or likely to be exposed. Moreover, workers and/or their representatives shall receive information and training on all the measures adopted (basic or additional). Warning and safety signs shall be used and surveillance of the health of workers provided.

Among *Additional measures*, emphasis has to be put on the medical surveillance of workers prior to exposure and thereafter at regular intervals and on the access by workers and/or their representatives to appropriate information in order to improve their knowledge of the dangers to which they are exposed.

More in general, workers' representatives have the right to check that prevention and protection provisions are applied and can be involved in their application.

One may say that Directive 80/1107/EEC, as the others that have followed, echoes the recommendations of the famous Robens Report¹⁴⁸⁷. However, "[i]t is (...) debatable how much credit can actually be attributed to the Committee of Inquiry on Safety and Health at Work for the originality of much the ideas and recommendations contained in its report and arguably (...) Nordic approaches both predated and were more advanced in many respects than the Robens recommendations."¹⁴⁸⁸

2.2 The Single European Act.

OHS has been at the very centre stage of the second, crucial turning point in the history of the social commitment of the EEC.

In fact, according to Article 118a TEC, introduced by the SEA in 1986,¹⁴⁸⁹ Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards OHS, and shall set as their objective the harmonization of condition in this field, while improvement has been maintained (par. 1).

In order to help to achieve that objective, the Council, acting by a qualified majority, shall adopt, by means of directives, minimum requirements to be gradually implemented, having regard to the conditions and technical rules present in each Member State. Such directives shall avoid imposing administrative, financial and legal constraints in a way that would hamper the creation and development of small and medium-sized undertakings (par. 2).

¹⁴⁸⁷ On the Robens Report, delivered in 1972 to the British Parliament by the Committee of Inquiry on Safety and Health at Work chaired by Lord Robens, see at least Brenda Barrett, 'Safety Representatives, Industrial Relations and Hard Times', (1977) 6 ILJ 165; R. C. Browne, 'Safety and health at work: The Robens Report', (1973) 30 Br J Ind Med 87; R. W. L. Howells, 'The Robens Report', (1972) 1 ILJ 185; Phil James, 'Reforming British Health and Safety Law: a framework for discussion', (1992) 21 ILJ 83; Anthony D. Woolf, 'Robens Report-The Wrong Approach?', (1973) 2 ILJ 88.

¹⁴⁸⁸ David Walters, *Workplace Arrangements for Worker Participation in OHS. In OHS Regulation for a Changing World of Work* (Bluff, Gunningham and Johnstone Eds), (Federation Press, Sydney 2004), 68.

¹⁴⁸⁹ On the SEA, the first aborted attempt to create something very close to a political union, see George A. Bermann, 'The Single European Act: A New Constitution for the Community?', (1989) 27 Colum.J.Transnat'l L. 529; Maximilian Fuchs, 'The Bottom Line of European Labour Law (PART II)', (2004) 20 IJCLIR 423; Juliet Lodge, 'The Single European Act: Towards a New Euro-Dynamism?', (1986) 3 JCMS 203; Majone, 'The European Community Between Social Policy and Social Regulation', (1993) 31 JCMS 153.

The provisions adopted pursuant to article 118a shall not prevent Member States from maintaining or introducing more stringent measures for the protection of working conditions whether compatible with the Treaty (par. 3).

Some aspects of article 118a TEC deserve to be emphasised:

- OHS has been chosen as the first subject on which Community Institutions have been allowed to exercise regulatory competences within the social field. This has happened both because its social relevance both for its economic impact as cost factor for companies. Too extensive differences among national regulations would have provided huge competitive advantages to companies established in member States with lower levels of OHS protection;
- community legislation shall respect the principle of vertical subsidiarity, in the sense that Member State remain the first to be committed to the achievement of the goals set in article 118a(1) TEC;
- Member States are also called to implement community legislation which is going to be adopted through directives, approved, if needed, by making recourse to qualified majority voting (so called QMV);
- directives will impose minimum requirements to Member States;
- in any case, implementation of directives shall not represent a ground for regression in the level of protection already provided by Member States;
- on the other hand, directives shall avoid imposing administrative, financial and legal constraints in a way that would hamper the creation and development of small and medium-sized undertakings;
- last but not least, Member States are allowed to maintain or introduce measures more stringent than that one provided as minimum requirements by the directives, under condition that they are compatible with the Treaty, even though, of course, higher level of protection will condemn national companies to a competitive disadvantage¹⁴⁹⁰.

Referred to OHS within the SEA, such conditions have been extended to the action of Community Institutions within the social domain as a whole by the Maastricht Social Policy Agreement & Protocol (1991) and by the Amsterdam Treaty (1997). Enriched by several competences, not all to be exercised by QMV, being some subjected to unanimity, article 118a is now numbered 153 by the Treaty on the Functioning of the European Union (TFEU).

The end of the Eighties has been also characterized by the solemn proclamation in Strasbourg of the Community Charter of Fundamental Social Rights of workers (hereafter Community Social

¹⁴⁹⁰ "A national provision which requires the employer to reduce workers' exposure to a carcinogen irrespective of the assessment of risks is not contrary to that directive where it constitutes a more stringent measure for the protection of working conditions authorised by Article 118a(3) of the EC Treaty (...)": Case C-2/97 *Borsana* [1998] ECR I-08597. On the contrary, directives adopted on the basis of Article 100a TEC such as the directive 89/686/EEC, aiming to attain the objective of ensuring the free movement of personal protection equipment between the Member States, preclude them from prohibiting, restraining or interfering with the putting on the market of such equipment, which satisfies its provisions and which bears the EC marking, by evoking the more stringent protection argument: Case C-103/01 *Commission v Germany* [2003] ECR I-05369.

Charter)¹⁴⁹¹, in 1989. Although not provided with *legal effect*, as pointed out by Kenner, the Community Social Charter has produced relevant *legal consequences*, “often serving to reinforce an otherwise shaky legal foundation. For example the trinity of directives on pregnancy and maternity, the organisation of working time and young workers – all based on the health and safety imperative (..) – each contains references in their Preambles to the Community Social Charter as source of inspiration.”.¹⁴⁹²

In fact, point 19 provides that: “Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made. These measures shall take account, in particular, of the need for the training, information, consultation and balanced participation of workers as regards the risks incurred and the steps taken to eliminate or reduce them. The provisions regarding implementation of the internal market shall help to ensure such protection.”.

2.3 The Framework Directive.

The fact that the time was right for Community Institutions to act again in the field of OHS is confirmed by the adoption, only some months before the declaration of the Community Social Charter, of Directive 89/391/EEC¹⁴⁹³ (hereinafter the Framework Directive).

The Framework Directive is still the major instrument within EU OHS Law and has deeply influenced OHS legislations of Member States¹⁴⁹⁴. It provides a comprehensive - in principle regulation of the subject matter, leaving to the Member States the task to identify the nature of employer’s liability and, as usually happens to directives insisting on the social field, to define sanctions to be applied in case of their violation.

Therefore, at least the main features of the Framework Directive shall be recalled.

The Framework Directive covers all sectors of activity and all employers, both public and private, except certain specific public service activities, such as the armed forces, the police, or certain specific activities in the civil protection services¹⁴⁹⁵. However, in those domains too, OHS must be ensured, as far as possible, in the light of the objectives of the Framework Directive.

¹⁴⁹¹ See on it Brian Bercusson, ‘The European Community’s Charter of Fundamental Social Rights of Workers’, (1990) 53 MLR 624; Bob Hepple, ‘The Implementation of the Community Charter of Fundamental Social Rights’, (1990) 53 MLR 643.

¹⁴⁹² Jeffrey Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’, in Tamara K. Hervey, Jeffrey Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective* (Hart, Oxford – Portland, Oregon 2003) 10.

¹⁴⁹³ Directive (EC) 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

¹⁴⁹⁴ See Edoardo Ales, ‘Occupational Health and Safety: A Comparative Perspective’, in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013); Marco Biagi, ‘From Conflict to Participation in Safety: Industrial Relations and the Working Environment in Europe 1992’ (1990) 6 IJCLIR 67; Victoria Howes, ‘Health and Safety Regulatory Framework – A Comparative Perspective’ (2003) 19 IJCLIR 85.

¹⁴⁹⁵ This is not the case of “the activity of primary care teams” and of “activities of emergency workers in attendance in an ambulance or emergency medical vehicle in the framework of an emergency service for the injured or sick” to which, on the contrary, the Framework Directive and, therefore, the Working Time Directive (see below) apply: Case C-303/98 SIMAP [2000] ECR I-07963; Joined Cases C-397/01 to C-403/01 Pfeiffer [2004] ECR I-08835, respectively.

As for the contents, the employer shall take any necessary measure for OHS,¹⁴⁹⁶ shaping them according to some general principles of prevention. They are worth to be recalled in details since they apply to OHS EU Law as a whole.

They are: (i) avoiding risks; (ii) evaluating all¹⁴⁹⁷ the risks which cannot be avoided (the so called risk assessment); (iii) combating the risks at source; (iv) adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health; (v) adapting to technical progress and to changing circumstances; (vi) replacing the dangerous by the non-dangerous or the less dangerous; (vii) developing a coherent overall prevention policy which covers technology, organization of work, working conditions, social relationships and the influence of factors related to the working environment¹⁴⁹⁸; (viii) giving collective protective measures priority over individual protective measures; (ix) giving appropriate instructions to the workers; (x) being in possession of an assessment of the risks to OHS, including those facing groups of workers exposed to particular risks¹⁴⁹⁹.

Furthermore, the employer shall designate one or more workers capable¹⁵⁰⁰ to carry out activities related to OHS within the company. Designated workers may not be placed at any disadvantage because of their activities related to OHS and they shall be allowed adequate time to fulfil their obligations. If such protective and preventive measures cannot be organized for lack of competent personnel within the company, the employer shall enlist competent external services or persons¹⁵⁰¹. By doing that, the employer does not discharge herself from her responsibilities in this

¹⁴⁹⁶ However, the respect the objective of Directive 89/391, consisting in 'the introduction of measures to encourage improvements in the safety and health of workers at work', can be attained by means other than the setting up of a no-fault liability regime for employers, i.e., as for Section 2(1) of the British Health and Safety at Work etc. Act 1974 "so far as is reasonably practicable": Case C-127/05 *Commission v United Kingdom* [2007] ECR I-04619.

¹⁴⁹⁷ Case C-49/00 *Commission v Italy* [2001] ECR I-08575.

¹⁴⁹⁸ On the impact of a changing work environment on OHS see Theoni Koukoulaki, 'New trends in work environment – New effects on safety', (2010) 48 *Safety Sci* 936; Gerasimos Papadopoulos and others, 'Occupational and public health and safety in a changing work environment: An integrated approach for risk assessment and prevention', (2010) 48 *Safety Sci* 963.

¹⁴⁹⁹ "By failing to ensure that the obligation to be in possession of an assessment in documentary form of the risks to safety and health at work, as laid down by Council Directive 89/391/EEC (...), applies to employers of 10 or fewer workers in all circumstances, the Federal Republic of Germany has failed to fulfil its obligations under Articles 9(1)(a) and 10(3)(a) of that directive": Case C-5/00 *Commission v Germany* [2002] ECR I-01350.

¹⁵⁰⁰ "It must be noted that (...) it is for the Member State to define the capabilities and aptitudes necessary for the persons or services covered by paragraph 5 of that provision, who are responsible for protection from and prevention of occupational risks in undertakings. (...) In order to implement that obligation, Member States must adopt laws or regulations which comply with the requirements of the directive and which are brought to the attention of the undertakings concerned by appropriate means, so as to enable them to be aware of their obligations in the matter and the competent national authorities to check that those measures are complied with. (...) The approach consisting of entrusting the employer with the responsibility to determine the capabilities and aptitudes necessary to ensure protection from and prevention of occupational risks, obviously does not satisfy the requirements of Article 7(5) and (8) of the directive": Case C-49/00 *Commission v Italy* [2001] ECR I-08575.

¹⁵⁰¹ "The decision, given expression in Article 7 of the Directive, to favour, where there is sufficient competent personnel within the undertaking, participation of the workers in the activities related to protection against and prevention of occupational risks over the enlistment of external competent persons or services is an organisational measure consistent with the aim of participation of workers in their own safety. (...) Employers thus [do not] enjoy a freedom of choice between internal and external organisation of activities related to protection against and prevention of occupational risks, whereas the Directive does not provide them with such a choice but rather lays down an order of precedence between the two alternatives by reference to an objective criterion, namely the existence or absence within the undertaking and/or establishment of staff possessing the appropriate competence to carry out those activities": Case C-441/01 *Commission v The Netherlands* [2003] ECR I-05463.

area. In the same way, workers' obligations in the field of OHS shall not affect the principle of the responsibility of the employer.

More in general, where the employer entrusts tasks to a worker, she shall take into consideration the worker's capabilities as regards OHS. In such a perspective, the employer shall take appropriate steps to ensure that only workers who have received adequate instructions may have access to areas where there is serious and specific danger. Workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any armful and unjustified consequences by national legislations. OHS measures, in no circumstances, may involve the workers in financial cost.

Where several undertakings share a workplace, the employers shall cooperate in implementing the OHS provisions and, taking into account the nature of the activities, shall coordinate their actions in matters of the protection and prevention of occupational risks, and shall inform one another and their respective workers and/or workers' representatives of these risks.

The employer shall take appropriate measures so that workers and/or their representatives within the company receive all the necessary information concerning OHS. Moreover, employers shall consult, in advance and in good time, workers and/or their representatives and allow them to take part in discussions on all questions relating OHS (so called *balanced participation*). Workers' representatives with specific responsibility for OHS shall have the right to ask the employer to take appropriate measures and to submit proposals to him or her to that end to mitigate hazards for workers and/or to remove sources of danger. Workers and workers' representatives with specific responsibility for OHS may not be placed at a disadvantage because of their respective activities. Employers must allow workers' representatives with specific responsibility for OHS adequate time off work, without loss of pay, and provide them with the necessary means to enable such representatives to exercise their rights and functions deriving from the Framework Directive. Workers and/or their representatives are entitled to appeal, in accordance with national law and/or practice, to the authority responsible for OHS if they consider that the measures taken and the means employed by the employer are inadequate for the purposes of ensuring OHS. Workers' representatives must be given the opportunity to submit their observations during inspection visits by the competent authority.

According to the Framework Directive, particularly sensitive risk groups must be protected against the dangers, which specifically affect them. In the same perspective, individual Directives shall be adopted, *inter alia*, within the specific areas listed in the Annex of the Framework Directive.

2.4 The Individual Directives in two examples: temporary or mobile construction sites and pregnancy, maternity and breastfeeding.

For a matter of space, it would be impossible even to list the Individual Directive adopted under the provision of article 16(1) of the Framework Directive. Rather, it will be interesting to highlight

the main feature of two of the most significant, i.e. Directive 92/57/EEC¹⁵⁰² on temporary or mobile construction sites (eighth individual directive), that covers one of the work environment in which OHS is more at risk; and Directive 92/85/EEC¹⁵⁰³ on pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual directive), that has finally recognised protection to motherhood within EU Labour Law.¹⁵⁰⁴

A feature common to all Individual Directives, is that the provisions of the Framework Directive remain applicable to the specific sector covered by the Individual Directive without prejudice to more stringent and/or specific provisions contained in the Individual Directive. One could say that Individual Directives complement the Framework Directive.

2.4.1 Temporary or mobile construction sites.

Directive 92/57/EEC refers to any construction site at which building or civil engineering works are carried out.

As first and foremost protection measure, the client, meaning any natural or legal person for whom a project is carried out, or the project supervisor, meaning any natural or legal person responsible for the design and/or execution and/or supervision of the execution of a project, acting on behalf of the client, shall¹⁵⁰⁵ appoint an OHS coordinator at the project preparations stage and an OHS coordinator at the project execution stage, for any construction site on which more than one contractor is present¹⁵⁰⁶. However, the appointment of the OHS coordinators does not relieve the client or project supervisor of her responsibilities as far as the tasks of the coordinators are concerned.

As second prevention measure, the client or the project supervisor shall ensure that prior to the setting up of a construction site, an OHS plan is drawn up, defining the rules applicable to the

¹⁵⁰² Council Directive (EC) 92/57 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L245/6.

¹⁵⁰³ Council Directive (EC) 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L348/1.

¹⁵⁰⁴ Of course, relevant for the subject of well-being at work, in the perspective of a commitment towards care shared between parents, would be also be Council Directive (EU) implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L68/13. See on it Eugenia Caracciolo di Torella, 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union' (2014) 20 ELJ 88 and Mijke Houwerzijl, '2010/18/EU: Parental Leave' in Monika Schlachter (ed), EU Labour Law. A Commentary (Kluwer Law International, Alphen aan den Rijn, 2014).

¹⁵⁰⁵ Article 3(1) of Directive 92/57 precludes national legislation under which, for private works not subject to planning permission on a construction site, on which more than one contractor is to be present, it is possible to derogate from the requirement imposed on the client or project supervisor to appoint a coordinator for safety and health matters at the project preparation stage or, in any event, before the works commence. Furthermore, article 3(2) of Directive 92/57, precludes national legislation under which the requirement for the coordinator responsible for the execution stage of the works to draw up a safety and health plan is confined to the situation in which more than one contractor is engaged on a construction site involving private works that are not subject to that obligation and which does not use the particular risks such as those listed in Annex II to the directive as criteria for that requirement: Case C-224/09 *Commission v Italy* [2010] ECR I-09295.

¹⁵⁰⁶ On the crucial issue of subcontracting see Phil James and others, 'Regulating Supply Chains to Improve Health and Safety', (2007) 36 ILJ 163; David Walters and Phil James, 'What motivates employers to establish preventive management arrangements within supply chains?' (2011) 49 Safety Sci 988.

construction site concerned, taking into account, where necessary, the industrial activities performed on the site and including specific measures concerning work involving particular risks for OHS (Annex II of the Directive).

Furthermore, in the case of constructions sites (i) on which work is scheduled to last longer than 30 working days and on which more than 20 workers are occupied simultaneously, or (ii) on which the volume of work is scheduled to exceed 500 person-days, the client or the project supervisor shall communicate a prior notice to the competent authorities before work starts.

When the work is being carried out, the employers operating within the site, under coordination and supervision of the OHS coordinator at the project execution stage, are, among the others, responsible of: (i) keeping the construction site in good order and in a satisfactory state of cleanliness; (ii) verifying the conditions under which the dangerous materials used are removed; (iii) providing for the storage and disposal or removal of waste and debris; (iv) stimulating cooperation between employers and self-employed operating on the site; (v) taking into account the interaction with industrial activities at the place within which or in the vicinity of which the construction site is located (so called interference risks).

Last but not least, consultation and participation of workers and/or of their representatives shall take place ensuring whenever necessary proper coordination between workers and/or workers' representatives in undertakings carrying out their activities at the workplace, having regard to the degree of risk and the size of the work site.

2.4.2 Maternity.

As to Directive 92/85/EEC¹⁵⁰⁷, in general, it has to be stressed that it is strictly intertwined with EU Antidiscrimination Law, mainly but not exclusively, on the ground of sex. The link is of course self-evident but it has been strengthened by the fact that the delay in introducing a EU legislation on maternity has pushed the CJEU to elaborate a protection of the pregnant women referring to the anti-discrimination directives,¹⁵⁰⁸ relying, above all, on the fact that pregnancy is an event which occurs only to women. However, as we will see below, also after the adoption of Directive 92/85/EEC, the CJEU has kept on assessing national legislation and/or practice in that field referring also to EU Antidiscrimination Law.

Directive 92/85/EEC has been adopted based on Article 15 of the Framework Directive, which provides that particularly sensitive risk groups must be protected against the dangers specifically affecting their OHS.

Pregnant workers, workers who have recently given birth or who are breastfeeding must be looked at as a specific risk group in many respects, and measures must be taken with regard to

¹⁵⁰⁷ On which see Erika Kovács and Christina Hießl, '92/85/EEC: Maternity Protection' in Monika Schlachter (ed), *EU Labour Law. A Commentary* (Kluwer Law International, Alphen aan den Rijn, 2014).

¹⁵⁰⁸ Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC and consolidated by Directive 2006/54/EC. See on it Catherine Barnard, *European Employment Law* (4th edn OUP, Oxford 2013).

their OHS, avoiding to treat women on the labour market unfavourably or to work to the detriment of EU Antidiscrimination Law.

For the purpose of the Directive, pregnant workers, workers who have recently given birth or who are breastfeeding are regarded as those one who have informed¹⁵⁰⁹ their employer about their status. Furthermore, as worker shall also be understood someone who provides services to the company as an integral part of it if her activity is carried out (i) for certain period of time, (ii) under the direction or supervision of another body of that company, (iii) against a remuneration.¹⁵¹⁰

For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in the Annexes of the Directive, the employer shall assess the nature, degree and duration of exposure of workers belonging to the above mentioned risk group and decide what measures should be taken.

As first and foremost prevention measure, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to the above mentioned risks is avoided. If the adjustment of her 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.¹⁵¹¹ If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice¹⁵¹² for the whole of the period necessary to protect her OHS.

Secondly, Member States shall take the necessary measures (such as day work or leave from work or extension of maternity leave) to ensure that, subject to submission of a medical certificate stating that this is necessary for their OHS, workers belonging to the above mentioned risk group are not obliged to perform night work during their pregnancy and for a period following childbirth to be determined by the national authority competent for OHS.

¹⁵⁰⁹ However, "Article 2(1) of Council Directive 76/207/EEC is to be interpreted as precluding a requirement that an employee who, with the consent of her employer, wishes to return to work before the end of her parental leave must inform her employer that she is pregnant in the event that, because of certain legislative prohibitions, she will be unable to carry out all of her duties": Case C-320/01 *Busch* [2003] ECR I-2041 and already Case C-421/92 *Habermann-Beltermann* [1994] ECR I-01657, the latter with reference to night work. Moreover, "Article 2(1) of Directive 76/207/EEC is to be interpreted as precluding an employer from contesting under national law the consent it gave to the reinstatement of an employee to return before the end of her parental leave on the grounds that it was in error as to her being pregnant": Case C-320/01 *Busch* [2003] ECR I-2041.

¹⁵¹⁰ Case C-232/09 *Danosa* [2010] ECR I-11405.

¹⁵¹¹ "A pregnant worker who (...) has been temporarily transferred on account of her pregnancy to a job in which she performs tasks other than those she performed prior to that transfer is not entitled to the pay she received on average prior to that transfer. In addition to the maintenance of her basic salary, such a worker is entitled (...) to pay components or supplementary allowances relating to her professional status, such as allowances relating to her seniority, her length of service and her professional qualifications": Case C-471/08 *Parviainen* [2010] ECR I-06533.

¹⁵¹² "It is contrary to Council Directive 76/207/EEC and to Council Directive 92/85/EEC for national legislation to provide that an employer may send home a woman who is pregnant, although not unfit for work, without paying her salary in full when he considers that he cannot provide work for her": Case C-66/96 *Høj Pedersen* [1998] ECR I-07327.

Thirdly, Member States shall ensure that workers belonging to the above mentioned risk group¹⁵¹³ are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement, including a compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice. Employment rights, including the maintenance of a payment and/or entitlement to an allowance which guarantees an income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with their state of health must be ensured in accordance with national legislation and/or national practice to workers belonging to the above mentioned risk group. Member States may make entitlement to pay or the allowance conditional upon the worker concerned fulfilling conditions of eligibility which may under no circumstances provide for periods of previous employment exceeding 12 months immediately prior to the presumed date of confinement.

Last but not least, Member States¹⁵¹⁴ shall prohibit¹⁵¹⁵ the dismissal of workers during the period from the beginning of their pregnancy¹⁵¹⁶ to the end of the maternity leave, save in exceptional cases based on substantiated grounds which (i) the employer shall duly cite in writing, (ii) are not connected with their condition, (iii) are explicitly permitted under national legislation and/or practice, provided that, if any¹⁵¹⁷, the competent authority has given its consent.

According to the CJEU, “where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave,

¹⁵¹³ But not “a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby”. Furthermore, “Article 14 of Directive 2006/54/EC, read in conjunction with Article 2(1)(a) and (b) and (2)(c) of that directive, must be interpreted as meaning that an employer’s refusal to provide maternity leave to a commissioning mother who has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex.”: Case C-167/12 *C. D.* [2014] not reported. The same applies to the “refusal to provide paid leave equivalent to maternity leave”. Nor that refusal constitutes discrimination on the ground of disability because the CJEU does not regard “a women who is unable to bear a child and who has availed of a surrogacy arrangement”: Case C-363/12 *Z.* [2014] not reported.

¹⁵¹⁴ It has to be stressed, that even in the absence of transposition measures taken by a Member State within the period prescribed, the Directive “confers on individuals rights on which they may rely before a national court against the authorities of that State”: Case C-438/99 *Jiménez Melgar* [2001] ECR I-6915.

¹⁵¹⁵ That prohibition refers not only to the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection but also to the taking of preparatory steps for such a decision before the end of that period: Case C-460/06 *Paquay* [2007] ECR I-08511.

¹⁵¹⁶ According to the CJEU, “Directive 92/85/EEC and, in particular, the prohibition of dismissal of pregnant workers provided for in Article 10(1) of that directive must be interpreted as not extending to a female worker who is undergoing *in vitro* fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner’s sperm cells, so that *in vitro* fertilised ova exist, but they have not yet been transferred into her uterus.”. On the other hand, “Article 2(1) and 5(1) of Council Directive 76/207/EEC preclude the dismissal of a female worker who is at an advanced stage of *in vitro* fertilisation treatment, that is, between the follicular puncture and the immediate transfer of the *in vitro* fertilised ova into her uterus, inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment”: Case C-506/06 *Mayr* [2008] ECR I-01017.

¹⁵¹⁷ Directive 92/85 is not to be interpreted as imposing on Member States any obligation to have a national authority giving its consent prior to the employer’s decision to dismiss the worker: Case C-438/99 *Jiménez Melgar* [2001] ECR I-6915.

this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work."¹⁵¹⁸

2.5 Fixed-term and temporary employment relationships.

Another crucial piece of legislation within EU OHS Law is Directive 91/383/EEC¹⁵¹⁹. According to its Preamble, "the specific situation of workers with a fixed-duration employment relationship [fixed-term workers] or a temporary employment relationship [agency workers] and the special nature of the risks they face in certain sectors calls for special additional rules, particularly as regards the provision of information, the training and the medical surveillance of the workers concerned".

Although the Directive does not explicitly refer to Article 15 of the Framework Directive, it is clear that those workers are regarded as a risk group within the meaning of that article.

Furthermore, even though Directive 91/383/EEC cannot technically be seen as an Individual Directive within the meaning of Article 16(1) of the Framework Directive, the latter remains applicable to the specific sector covered by the former, without prejudice to more stringent and/or specific provisions contained within it. In such a perspective, Directive 91/383/EEC supplements the Framework Directive.

Directive 91/383/EEC applies to fixed-term¹⁵²⁰ and temporary agency workers¹⁵²¹, i.e. workers who does not belong to the core workforce being rather contingent to the undertaking, therefore needing to be made specifically acquainted of the environment in which they are going to operate. the existence of employment relationships of those kinds shall not justify different treatment with respect to working conditions inasmuch as far as OHS is concerned, especially as regards access to personal protective equipment.

Before a worker with an employment relationship of those kinds takes up any activity, she is informed (and trained) by her employer (if fixed-term) or by the user undertaking (if temporary agency worker) about the risks which she faces. Such information covers, in particular, any special occupational qualifications or skills or special medical surveillance required and states clearly any increased specific risks that the job may entail. Workers or external services or persons designated to take care of OHS within the undertaking shall be informed of the assignment of workers with an employment relationship of those kinds to the extent necessary for them to be able to carry out adequately their protection and prevention activities for all the workers in the undertaking.

¹⁵¹⁸ Case C-394/96 Brown [1998] ECR I-04185 par. 27, reverting the shameful Court's ruling in Case C-400/95 *Larsson v Føtex Supermarked* [1997] ECR I-2757 and, to a certain extent, Case C-179/88 *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR I-3979 ('Hertz').

¹⁵¹⁹ Council Directive (EC) 91/383 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship [1991] OJ L206/19.

¹⁵²⁰ See now also Directive (EC) 2008/104 on temporary agency work [2008] OJ L327/9.

¹⁵²¹ See now also Directive (EC) 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/43.

In case of agency work, before workers with an employment relationship of those kinds are supplied, a user undertaking shall specify to the temporary work agency and this to the agency workers, the occupational qualifications required and the specific features of the job to be filled. Without prejudice to the responsibility of the temporary work agency as laid down in national legislation, the user undertaking is responsible, for the duration of the assignment, for OHS of agency workers.

2.6 Young people at work.

Worth to mention is Directive 94/33/EC¹⁵²² dealing with the very sensitive issue of children's, adolescents' and generally speaking, young people's physical, psychical and psychosocial well-being at work, taking also into account their cultural development.

Directive 94/33/EC¹⁵²³ applies, in general, to *young people*, meaning any person under 18 years of age having an employment contract or an employment relationship as defined by each Member State. However, it pays particular attention to *children*¹⁵²⁴, meaning any young person of less than 15 years of age or who is still subject to compulsory full-time schooling under national law, and to *adolescents*, meaning 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 fact, children and adolescent are both regarded as specific risk groups¹⁵²⁵ within the meaning of Article 15 of the Framework Directive.

First, Member States shall prohibit work by *children*. However, they may make legislative or regulatory provision for the prohibition of work by children not applicable to (i) children performing in cultural or similar activities, (ii) children of at least 14 years of age working under a combined work/training scheme or an in-plant work-experience scheme, provided that such work is done in accordance with the conditions laid down by the competent authority; (iii) children of at least 14 years of age performing *light work* other than that performed in cultural or similar activities.

Light work means all work which, on account of the inherent nature of the tasks which it involves and the particular conditions under which it is performed (i) is not likely to be harmful to the safety, health or development of children, and (ii) is not such as to be harmful to their attendance at school, their participation in vocational guidance or training programmes approved by the competent authority or their capacity to benefit from the instruction received. However, *light work* other than that in cultural or similar activities may be performed by children of 13 years of age for a limited number of hours per week in the case of categories of work determined by national legislation.

Secondly, the employer shall adopt the measures necessary to protect OHS of *young people*, taking particular account of the *specific risks* to their safety, health and development which are a consequence of their lack of experience, of the absence of awareness of existing or potential risks

¹⁵²² Directive (EC) 94/33 on the protection of young people at work [1994] OJ L216/12.

¹⁵²³ See on it Polonca Končar, '94/33/EC: Protection of Young People at Work' in Monika Schlachter (ed), EU Labour Law. A Commentary (Kluwer Law International, Alphen aan den Rijn, 2014).

¹⁵²⁴ On the action of ILO against child labour, see Giuseppe Nesi, Luca Nogler and Marco Pertile (eds), Child Labour in a Globalised World. A legal Analysis of ILO Action (Ashgate, London 2008).

¹⁵²⁵ Empirical evidences, even though referring to workers up to 25 years, in Simo Salminen, 'Have young workers more injuries than older ones? An international literature review', (2004) 35 J Safety Research 513.

or of the fact that they have not yet fully matured. Consequently, risk assessment shall be provided paying particular attention to (i) the fitting-out and layout of the workplace and the workstation, (ii) the arrangement of work processes and operations and the way in which these are combined (organization of work); (iii) the level of training and instruction given to young people.

Last but not least, specific provisions apply to children, adolescent and young persons in general, as far as working time, night work, rest periods and breaks are concerned.

2.7 Working time (in the Health Care Sector).

The strong link between working time and OHS has already been emphasised in the above, when defining the very notion of OHS. Indeed, as repeatedly affirmed by the ECJ, “harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of workers”.¹⁵²⁶ Such a statement finds a clear confirmation in Article 1(3) of Directive 2003/88/EC concerning certain aspects of the organization of working time,¹⁵²⁷ (hereinafter also the WTD) according to which “[t]his Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC” i.e. the Framework Directive.

Indeed, the main body of the WTD lays down ‘minimum safety and health requirements for the organisation of working time’, including, as effectively summarized by Kenner,¹⁵²⁸ “(a) minimum daily rest of 11 consecutive hours per 24-hour period; (b) a rest break where the working day is more than six hours. The duration will be determined by a collective agreement or national legislation; (c) weekly rest amounting to a minimum uninterrupted period of 24 hours (in addition to daily rest). This will normally be calculated over a 14-day reference period; (d) maximum average weekly ‘working time’, including overtime, not exceeding 48 hours. This will normally be calculated over a four-month reference period; (e) paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice; and (f) night work not exceeding an average of eight hours in any 24-hour period. National law or collective or other industry agreements will determine the reference period.”.

Among the question risen by the interpretation of the WTD, at least two¹⁵²⁹ are crucial within the OHS perspective. The first refers to the personal scope of application of that directive, which, as already noted in the above, does coincide with that one of the Framework Directive; the second relates to the same definition of working time for the purpose of the directive. What is more, those questions have been both risen with reference to the health care sector. They have been

¹⁵²⁶ Case C-303/98 *SIMAP* [2000] ECR I-07963; Case C-151/02 *Landeshauptstadt Kiel vs Norbert Jaeger* [2003] ECR I-08389; Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-08835.

¹⁵²⁷ Council Directive (EC) 2003/88 concerning certain aspects of the organisation of working time [2003] OJ L299/9, which substituted Council Directive (EC) 93/104 [1993] OJ L307/18.

¹⁵²⁸ Jeff Kenner, ‘Working Time, Jaeger and the Seven-Year Itch’, (2005) 11 *Colum.J.Eur.L.* 57 – 58.

¹⁵²⁹ In an OHS perspective, a further relevant question is that one of the right to paid annual leave: see on it, among the many, Case C-342/01 *Merino Gómez* [2004] ECR I-02605; Joined Cases C-131/04 and C-257/04 *Robinson-Steele* [2006] ECR I-02531; Joined Cases C-350/06 and C-520/06 *Schultz-Hoff* [2009] ECR I-00179.

approached by the CJEU in several decisions¹⁵³⁰, which can, nevertheless, all be traced back to two ground-breaking cases: *SIMAP*¹⁵³¹ and *Landeshauptstadt Kiel vs Norbert Jaeger*¹⁵³² (so called *Kiel Jaeger* case).

SIMAP and *Kiel Jaeger* may be examined jointly since they refer to very similar situations in which medical¹⁵³³ staff were required to spend time 'on call' after their 'normal' working time has expired. Both within the Spanish and the German legislation under scrutiny in those cases, by time 'on call' was meant a period in which "even if the activity actually performed varies according to the circumstances, (...) doctors are obliged to be present and available at the workplace with a view to providing their professional services."¹⁵³⁴

Having clarified that medical doctors (even if operating in primary care teams, as in *SIMAP*) do fall within the personal scope of application of the WTD, the exclusion provided by the same directive having to be interpreted in the most restrictive way, the CJEU emphasised the fact that the "directive defines working time as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. Moreover, in the scheme of the directive, it is placed in opposition to rest periods, the two being mutually exclusive."

According to the Court, "that interpretation is also in conformity with the objective of Directive 93/104, which is to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks (eighth recital in the preamble to the directive). It is clear, as the Advocate General emphasises in (...) his Opinion, that to exclude duty on call from working time if physical presence is required would seriously undermine that objective."

Therefore, "time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104 if they are required to be present at the health centre.". On the contrary, "if they must merely be contactable at all times when on call, only time linked to the actual provision of primary care services must be regarded as working time."

Furthermore, according to the Court, the consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that of the worker himself which is required by Article 18(1)(b)(i) of WTD in order to allow the employer to make that worker work longer than 48 hours over a seven-day period, as required by Article 6 of the WTD.

3. The Legal Analysis.

The big picture of EU OHS Law, as provided by the legal framework sketched in the above, makes

¹⁵³⁰ See, among the many, Case C-241/99 *Confederación Intersindical Galega (CIG)* [2001] ECR I-05139; Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-08835; Case C-14/04 *Dellas* [2005] ECR I-10253; Case C-227/09 *Accardo* [2005] ECR I-10273.

¹⁵³¹ Case C-303/98 *SIMAP* [2000] ECR I-07963.

¹⁵³² Case C-151/02 *Landeshauptstadt Kiel vs Norbert Jaeger* [2003] ECR I-08389.

¹⁵³³ The same conclusions apply to nurses too: Case C-241/99 *Confederación Intersindical Galega (CIG)* [2001] ECR I-05139.

¹⁵³⁴ No matter if the time of effective work does not exceed the 49% of the 'on call' period and if the staff have a room with bed at its disposal to rest when not working: Case C-151/02 *Landeshauptstadt Kiel vs Norbert Jaeger* [2003] ECR I-08389.

the legal analysis easier, allowing to focus it on some specific points.

First, it is clear that according to EU OHS Law, collective preventive measures shall prevail on individual protection measures.¹⁵³⁵ In such a perspective, risk assessment is always needed and a risk assessment document shall be in possession of any employer. The highly debated and uncertainly defined¹⁵³⁶ “precautionary principle” is not taken into account by OHS EU Law. However, according to the CJEU,¹⁵³⁷ the respect of the objective of the Framework Directive, consisting in ‘the introduction of measures to encourage improvements in the safety and health of workers at work’, can be attained by means other than the setting up of a no-fault liability regime for employers, i.e., as for Section 2(1) of the British Health and Safety at Work etc. Act 1974 “so far as is reasonably practicable”.¹⁵³⁸

Second, workers’ active involvement into the OHS system, which is one of the strong point of EU OHS Law, should not entail their juridical responsabilisation, even taking into account their tendency to systematic risks’ underestimation.¹⁵³⁹ In such a perspective, the appointment of workers or external experts as OHS responsible does not relieve the employer, the client, project supervisor of her responsibilities as far as the tasks of the appointees are concerned.¹⁵⁴⁰ On the other hand, workers and their representatives,¹⁵⁴¹ where they exist, shall be integrated within the OHS management system through information, consultation, balanced participation, training and monitoring in order to improve their awareness of the working environment they are part of. Institutionalised workers’ representation and balanced participation to the management of OHS seems to make whistleblowing illegal¹⁵⁴², since, as we have seen in the above, workers’ and/or

¹⁵³⁵ Case C-256/10 *Barcenilla Fernández* [2011] ECR I-04083.

¹⁵³⁶ Peter Dorman, ‘Evolving knowledge and the precautionary principle’, (2005) 53 ISEE 169; David B. Resnik, ‘Is the precautionary principle unscientific?’, (2003) 34 Stud. Hist. Phil. Biol. & Biomed. Sci. 329; Michael D. Rogers, ‘Risk analysis under uncertainty, the Precautionary Principle, and the new EU chemicals strategy’ (2003) 37 IS RTP 370.

¹⁵³⁷ Case C-127/05 *Commission v United Kingdom* [2007] ECR I-4619.

¹⁵³⁸ Nevertheless, some Member States are more incline to employers’ quasi-objective responsibility: see Edoardo Ales, ‘Occupational Health and Safety: A Comparative Perspective’, in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013).

¹⁵³⁹ Stavros A. Drakopoulos and Ioannis Theodossiou, ‘Workers’ risk underestimation and occupational health and safety regulation’ (2012) *Eur J Law Econ.*

¹⁵⁴⁰ Nevertheless, comparative analysis suggests, that at national level, things are progressively moving towards responsabilisation: Garry C. Gray, ‘The Responsabilization Strategy of Health and Safety. Neo-liberalism and the Reconfiguration of Individual Responsibility for Risk’, (2009) 49 *Brit. J. Criminol.* 326; Martijn Rhebergen and others, ‘Can workers answer their questions about occupational safety and health: challenges and solutions’, (2012) 50 *IndHealth* 239.

¹⁵⁴¹ See on this, at least, Brenda Barrett, ‘Safety Representatives, Industrial Relations and Hard Times’, (1977) 6 *ILJ* 165; Phil Beaumont, Robert Coyte and John Leopold, ‘Health, Safety and Industrial Democracy: Some Further Considerations’ (1981) 3 *Emp Rel* 23; David Walters, ‘Trade unions and the training of health and safety representatives in Europe’, (1996) 18 *Emp Rel* 50; David Walters, ‘Employee representation and occupational health and safety: the significance of Europe’, (1995) 8 *J. Loss Prev. Process Ind.* 313; David Walters, ‘Worker representation and health and safety in small enterprises in Europe’, (2004) 35 *IRJ* 169. Empirical evidences on the positive effect of the presence of workers’ representatives on OHS in Kwan Hyung Yi, Hm Hak Cho and Jiyun Kim, ‘An Empirical Analysis on Labor Unions and Occupational Safety and Health Committees’ Activity, and Their Relation to the Changes in Occupational Injury and Illness Rate’ (2011) 2 *Saf Health Work* 321.

¹⁵⁴² However, under the ECHR, with reference to the *Heinrich Case*, see Dirk Voorhoof and Patrick Humblet, ‘The Right to Freedom of Expression in the Workplace under Article 10 ECHR’, in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds) *The European Convention on Human Rights and the Employment Relation* (Hart, Oxford and Portland, Oregon 2013).

their representatives enjoy strong and effective control and denounce powers towards the employer, which should convoy the protest.

Third, the idea of OHS as a subject to be integrated into the management discourse¹⁵⁴³ finds a confirmation within EU OHS Law in mandatory terms, although the former often advocates for a voluntaristic approach¹⁵⁴⁴, based on the economic and marketing convenience of the adoption of an OHS management system for the company. An OHS management system is also crucial in case of interference risk, to be understood as any risk, which may derive from the simultaneous presence of more contractors (employers) on the same site. Consultation and participation of workers and/or of their representatives shall take place ensuring proper coordination between workers and/or workers' representatives in undertakings carrying out their activities within the site having regard to interference risks. Within the view of guaranteeing effectiveness of OHS EU Law, the just issued EU Strategy 2014 – 2020¹⁵⁴⁵ insists on the question of its application to micro and small enterprises¹⁵⁴⁶, indicating among its key strategic objectives that one of facilitating compliance with OSH legislation, particularly by micro and small enterprises.

Fourth, EU OHS Law is going beyond the traditional personal scope of application of OHS provisions, abandoning the subordinate worker as ideal-type of worker to protect. In fact, sub-contractors self-employed, self-employed, to be understood as any person whose professional activity contributes to the completion of a project within the site, fall within the personal scope of application of OHS directives. Furthermore, personal features of the worker, such as sex¹⁵⁴⁷ or gender culture,¹⁵⁴⁸ ethnic origins¹⁵⁴⁹ or age are taken into account while shaping EU OHS Law. As we have seen in the above, sex is mainly taken into account within the pregnancy, maternity and

¹⁵⁴³ On it, see, at least, Kaj Frick, Per Langaa Jemsem, Michael Quinlan and Ton Wilthagen (eds), *Systematic Occupational Health and Safety Management. Perspective on an International Development* (Amsterdam, Pergamon, 2000); Clare Gallagher and Elsa Underhill, 'Managing work health and safety: recent developments and future directions', (2012) 50 *APIHR* 227; Neil Gunningham, 'Integrating Management Systems and Occupational Health and Safety Regulation', (1999) 26 *J.L. & Soc.* 192; Peer Hull Kristensen, 'Managing OHS: A route to a new negotiating order in high-performance work organizations?', (2011) 49 *Safety Sci* 964; A.M. Makin and C. Winder, 'A new conceptual framework to improve the application of occupational health and safety management systems', (2008) 46 *Safety Sci* 935; Lynda S. Robson and others, 'The effectiveness of occupational health and safety management system interventions: A systematic review', (2007) 45 *Safety Sci* 329; Michael Zanko and Patrick Dawson, 'Occupational Health and Safety Management in Organizations: A Review', (2012) 14 *IJMR* 328.

¹⁵⁴⁴ Mainly through Corporate Social Responsibility: Susan Margaret Hart, 'Self-regulation, Corporate Social Responsibility, and the Business Case: Do they Work in Achieving Workplace Equality and Safety?' (2010) 92 *J Business Ethics* 585; Aditya Jain, Stavroula Leka and Gerard Zwetsloot, 'Corporate Social Responsibility and Psychosocial Risk Management in Europe', (2011) 101 *J Business Ethics* 619; Marileena Koskela, 'Occupational health and safety in corporate social responsibility reports', (2014) 68 *Safety Sci* 294.

¹⁵⁴⁵ European Commission COM(2014) 332 final.

¹⁵⁴⁶ Ole Henning Sørensen, Peter Hasle and Elsa Bach, 'Working in small enterprises – Is there a special risk?', (2007) 45 *Safety Sci* 1044; Pete Kines and others, 'Improving safety in small enterprises through an integrated safety management intervention', (2013) 44 *J Safety Research* 87.

¹⁵⁴⁷ Sex is not a justification for the exclusion of woman from certain kind of jobs: Case C-203/03 *Commission v Austria* [2005] ECR I-00955.

¹⁵⁴⁸ Douglas J. Myers, James M. Nyce, Sidney W.A. Dekker, 'Setting culture apart: Distinguishing culture from behavior and social structure in safety and injury research', (2014) 68 *AAP* 25.

¹⁵⁴⁹ Annick Starren, Jos Hornikx and Kyra Luijters, 'Occupational safety in multicultural teams and organizations: A research agenda', (2013) 52 *Safety Sci* 43.

breastfeeding¹⁵⁵⁰ perspective while young workers enjoy a special protection on the ground of age. Gender, with particular reference to women' segregation in low quality and highly risky jobs¹⁵⁵¹, and ethnic origins, with particular reference to language, should be taken into account in a more explicit way by EU OHS Law. Within the same perspective, objective features of the work relationship¹⁵⁵² are taken into account while shaping the OHS legal system. In fact, fixed-term and agency workers enjoy a specific protection since their being contingent to the undertaking represents a further source of risk that has to be assessed and counterbalanced. Furthermore, children, adolescents and generally speaking young people are regarded as specific risk groups by EU Law, mainly because of their age, of the fact that they are or may still be in a schooling period and that, at work, they are facing specific risks which are a consequence of their lack of experience, of the absence of awareness of existing or potential risks or of the fact that they have not yet fully matured. By consequence, they need a specific protection in both OHS and working time.

Fifth, in order to enhance the role of Labour Inspection¹⁵⁵³ and its deterrence effect¹⁵⁵⁴ within EU OHS Law, the Committee of Senior Labour Inspectors has been established by the European Commission (the Commission hereinafter) already in 1995¹⁵⁵⁵, with the aim of monitoring the implementation of EU OHS Law within the Member States.

4. OHS in some Member States: a comparative view.

As the reader should be now aware of, for a matter of space, it would be impossible to examine exhaustively even one national OHS legal systems. On the other hand, it can be interesting to provide the reader with some comparative remarks, which stems from a study carried out on 10 Member States among the most significant.¹⁵⁵⁶ Such remarks refer to issues crucial for any OHS system.

4.1 Nature and scope of the OHS obligations.

The law establishes OHS obligations. Therefore, *prima facie*, one may say that they are public law obligations. Nevertheless, they are usually fed into the employment relationship as general and/or specific contractual obligations of the parties. For instance, according to the German

¹⁵⁵⁰ Annick Masselot, 'Jurisprudential Developments in Community Pregnancy and Maternity Rights: the ECJ judgments in cases C-438/99 *Melgar* and C-109/00 *Brandt-Nielsen*', (2002) 9 Maastricht J. Eur. & Comp. L. 57.

¹⁵⁵¹ European Agency for Safety and Health at Work, *New risks and trends in the safety and health of women at work*, 2013.

¹⁵⁵² Being it called atypical/contingent/precarious/casual: see Brenda Barrett and Malcolm Sargeant, 'Health and Safety Issues in New Forms of Employment and Work Organization', (2008) 24 IJCLIR 263; Michael Quinlan, Claire Mayhew and Philip Bohle, 'The global expansion of precarious employment, work disorganization, and consequences for occupational health: a review of recent research', (2001) 31 Int. J. of H&S 335; Marianna Virtanen and others, 'Temporary employment and health: a review', (2005) 34 Int. J. of Epid. 610; Victoria Howes, 'Who Is Responsible for Health and Safety of Temporary Workers? EU and UK Perspectives' (2011) 2 ELLJ 379. As to the effect of job insecurity/precarious employment on health see Il-Ho Kim, 'Welfare states, flexible employment, and health: A critical review', (2012) 104 Health Policy 99.

¹⁵⁵³ Toivo Niskanen, Kyösti Louhelainen and Maria L. Hirvonen, 'An evaluation of the effects of the occupational safety and health inspectors' supervision in workplaces', (2014) 68 AAP 139.

¹⁵⁵⁴ Kevin Purse and Jillian Dorrian, 'Deterrence and Enforcement of Occupational Health and Safety Law' (2011) 27 IJCLIR 23.

¹⁵⁵⁵ European Commission Decision 95/391 setting up a Committee of Senior Labour Inspectors [1995] OJ L 188/11.

¹⁵⁵⁶ Edoardo Ales, 'Occupational Health and Safety: A Comparative Perspective', in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013). The Member States analysed within the book are Austria, Belgium, France, Germany, Hungary, Italy, Spain, Sweden, The Netherlands and United Kingdom.

Transformationslehre, echoed by the Swiss doctrine of the *Rezeptionsklausel*, duties provided under public law can be transformed into (or regarded as) private law/contractual obligations if they can constitute the content of the contract. In the same perspective, according to Italian law, the contract obliges the parties not only to what is explicitly prescribed within it but also to all the consequences the law derives from its conclusion (Article 1374 Civil Code – principle of integration of the contract). By consequence: (a) the worker can bring action in contract against the employer for the fulfilment of the safety obligation(s) before a harmful event occurs; (b) the harmful event gives rise to a right to compensation in contract; (c) being also legal in nature, the action against the violation of safety obligation(s) can be brought by the worker also in tort; (d) compensation can be awarded also in tort.

The adoption of a goal oriented framework legislation in many Member States, has posed the problem of the scope of the safety obligation for the employer. Indeed, being such framework legislation mainly procedural in nature, it is up to the employer to find out the technical solution that suits best to each situation where the safety obligation has to be fulfilled. Therefore, with the exception of the residual but still relevant cases in which specific prevention and protection measures are imposed by the law, one may say that the entrepreneur enjoys a discretionary power in the fulfilment of the safety obligation. Such a power can be traced back to the fact that the entrepreneur is responsible for the work organization. In such a perspective, the safety obligation cannot be seen as an obligation of means: it is rather regarded as a general and, sometimes, unlimited obligation of result (like in France, Italy, Spain and The Netherlands) to keep the worker healthy and safe. This is confirmed by the fact that even if labour and health authorities or bilateral (social insurance) bodies have verified the respect, in a certain moment, of general and detailed health and safety regulations, the entrepreneur's liability for damages derived to the worker from a harmful, work-related event is not excluded per se. This depends both from the fact that the fulfilment of the safety obligation is dynamic in nature, both from the consideration that a harmful event has in any case occurred and a damage has derived to the worker, a damage that is not always covered or covered fully by the social insurance.

As already pointed out in the above, the question is, then, if the entrepreneur bears a no-fault liability or is admitted to prove that what has been done in terms of prevention and protection within the company excludes his or her liability. In all the countries analysed in this book liability is linked to fault (or intent of course). At its turn, fault is recognized in case the entrepreneur has violated precise prevention and protection rules. However, the real point is to find out, which is the level of prevention and protection that has to be realized by the entrepreneur in order to see his or her liability excluded in case of lack of precise prevention or protection rules. This is crucial also in the perspective of criminal liability, which may derive from the mere violation of precise prevention and protection rules, from a violation of those rules that has produced a harmful event to the worker and from the simple fact that a harmful event has occurred to the worker also in absence of violation of specific rules.

Indeed, the lack of specific binding rules comparable to the German *Unfallverhütungsvorschriften*, does not mean that there are no instruments available to help the entrepreneur in the proper fulfilment of the safety obligation(s). This is the case, for instance, of the Technical Notes issued by the Spanish National Institute of Occupational Safety and Health, the self-regulations adopted by employers and employees at sectoral level (The Netherlands: the so-called ARBO

Catalogues), the private standards (The Netherlands) or the Workplace Health and Safety Management Systems certified by bilateral bodies (Italy).

The adoption of all those instruments may succour the entrepreneur when called to prove in court the proper fulfilment of the safety obligation. In fact, case law plays a crucial and ultimate role in defining the scope of the safety obligation(s) although judicial approaches highly differ from country to country.

In the United Kingdom, for instance, judges have adopted a restrictive approach to the safety obligation accepting that it is relevant in assessing the scope of the entrepreneur's liability to take into account the likelihood of a particular risk materializing (the so-called reasonable foreseeability of the harmful event) and that it has to be determined whether the entrepreneur had taken all reasonably practicable steps to avoid the risk (the so-called reasonably practicable test of the preventive or protective measure). On the other hand, it must be borne in mind that the burden of proof when asserting that a certain step was *not* reasonably practicable lies on the defendant, i.e., the entrepreneur. As a matter of fact, section 40 HSWA, adopted under the influence of the above mentioned case law, is an example of a reversed burden of proof in the criminal law: 'it shall be for the accused to prove ... that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement'.¹⁵⁵⁷

In Italy, on the contrary, judges have adopted an extensive approach to the safety obligation according to which the employer has to prove that s/he has used the diligence required in the specific case, i.e., by implementing the most advanced technology available at sectoral level (in some decision even outside the relevant sector) and using his or her experience in the field. On the other hand, it has to be borne in mind that the burden of proof when assessing that more advanced technologies were available to the employer lies on the claimant, i.e., the worker.¹⁵⁵⁸

4.2 Risk: notion and typologies.

By making reference to the notion of health provided by the WHO as 'a state of complete physical, psychical and social well-being', legislators have widened the scenario of the safety obligation from the narrow perspective of the tangible harmful event which produces a physical ill-health to the worker to a more comprehensive view in which also psychical and psychosocial damages which can derive from a tangible harmful event or psychical and psychosocial risks which originate in a bad work organization or in a human misbehaviour are taken into account.

Such a dramatic change is also likely to put into question the very scope of the social insurance protection traditionally limited to occupational accident and diseases. These are defined as such by the fact that an harmful event linked to (in case of occupational accident) or caused by (in case of occupational disease) the working activity has produced the loss or a significant reduction of the working capacity, leading to a permanent (partial or total) or temporary (total) inability, which, at its turn, has produced a reduction or a withdrawn of the earning capacity of the worker, damaging him or her from an economic point of view. It is rather clear that in the view of the new

¹⁵⁵⁷ Mark Bell 'Occupational Health and Safety in the UK: At a Crossroads?' in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013).

¹⁵⁵⁸ Edoardo Ales, Luca Miranda and Alessia Giurini 'Italy: From Occupational Health and Safety to Well-being at Work' in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013).

comprehensive approach described in the above many factors of danger and many harmful events will not be covered by the traditional definition of occupational accident and disease.

Therefore, alternative solutions have to be found either inside the same social insurance system, by enlarging its scope of application to situations in which the psychophysical and psychosocial well-being of the worker is at stake, or outside it, by recognizing the compensation of damages not related to the loss or the reduction of the working as well as the earning capacity (damages to psychical health, reputation, social life etc.). In such a double labour and social insurance law perspective, case law above all but also legislators and the doctrine have played a decisive role in updating the legal discourse by looking at already existing phenomena in terms of new factors of danger (risk) and of possible sources of harmful events.

As far as non-physical risks are concerned, the most recent OHS debate has focused on the concept of psychosocial risk. Indeed, what happened with 'risk' – a super-concept, which includes the concepts of 'danger' and 'risk', has happened also with 'psychosocial risks' – a super-concept which includes the concepts of 'psychophysical risk' and 'psychosocial risk'.

In fact, comparative analysis shows that a distinction is made in legislation and case law, between risk related to the work organization which are likely to produce negative consequences on the psychophysical sphere of the worker and risks related to behaviour coming either from the employer or from other employees which are likely to produce negative consequences on the emotional and relational sphere of the worker. Therefore, in our view, the first should be defined as 'psychophysical' and the second as 'psychosocial risks'. Indeed, in many countries, the legislature and the judiciary have adopted a very pragmatic approach towards 'psychophysical' and 'psychosocial' risks by regarding as unlawful, often in the name of OHS, the above mentioned organizational solutions and individual or collective behaviour. By consequence, further to the penal and administrative sanctions which usually assist legislative provisions, such misconducts constitute themselves a breach of the safety obligation and as such give rise to the right to compensation in favour of the affected worker.

Such a pragmatic approach to non-physical risks has made also possible to get around the unsolved and perhaps unsolvable problem of the recognition of work-related stress as psychophysical consequence of a bad work organization or of unlawful behaviour. Indeed, since no medical evidence proves the link among the work organization or the behaviour, the unease of the worker and her physical or psychical ill-health, stress is mainly regarded (also by the European Social Dialogue) as the product of a subjectively distorted perception of the work organization or of the behaviour by the worker. In such a perspective, the employer can hardly be held liable for the breach of the safety obligation since the reasons of worker's ill health lie mainly in the worker herself. The fact that already existing phenomena are now regarded as new factors of risk (or sources of danger) has obliged (legislators, above all) to define their very notion in order to make them subject to sanction and/or to compensation.

This has been the case in France with moral harassment (*harcèlement moral*),¹⁵⁵⁹ with sexual har

¹⁵⁵⁹ Defined as a 'repeated behaviour aiming at, or resulting in, a deterioration of their working conditions capable to alter their rights or dignity, their physical or psychical health or to jeopardize their professional future' (Article L 1152-1 Labour Code).

assment¹⁵⁶⁰ and with the above mentioned *pénibilité au travail*, which can be translated as 'hardness at work'.¹⁵⁶¹

4.3 Personal scope of application of the OHS legislation.

Even though still referring to it formally, national legislators have gone beyond the notion of 'employer' in order to indicate who is bound by the OHS legislation. In such a broader perspective, one may say that *anyone who organizes a productive activity and/or exercises managerial prerogatives* falls under the scope of the health and safety legislation in the sense that she will be held responsible for the application of the prescribed preventive and protective measures within the general framework of the safety obligation.

Practically speaking, this means: (a) arrangement of a healthy and safe work environment for anyone who works within his or her premises even outside a traditional employment relationship (like temporary workers, self-employed, students in laboratories, interns, inmates, volunteers); (b) control of the respect of the health and safety regulations by anyone who works within his or her premises even outside a traditional employment relationship; (c) control of the application of the health and safety legislation by contractors and subcontractors, being them companies or self-employed workers; (d) assessment and coordination of the prevention of risk of interference deriving from the simultaneous presence in the same site of various contractors and subcontractors performing different activities.

Therefore, leaving aside the formal references still made by national legislations to the 'employer', the expression 'anyone who organizes a productive activity and/or exercises the managerial prerogatives' seems to be very much closer to 'entrepreneur'. The same can be said with reference to the expression 'anyone who works within the premises of somebody who organizes a productive activity even outside a traditional employment relationship', which seems to be very much closer to 'worker' than to 'employee'. For sure, 'entrepreneur' and 'worker' are more far-reaching than 'employer' and 'employee' in the domain of occupational health and safety law.

The reference to 'anyone who organizes a productive activity and/or exercises the managerial prerogatives' explains also the fact that further to the entrepreneur, being it a legal or natural person, which is the prime responsible for OHS, also the so-called hierarchical structure can be bound by and liable for the application of the health and safety legislation.

4.4 Workers' participation.

As already stressed in the above, workers' participation is a key element of OHS. As far as participation is concerned, legislators have focused on the company level, even if in some countries (Italy and The Netherlands, for instance) trade unions acting as contracting parties or within joint bilateral bodies may exercise a strong influence on the making and the application of health and safety regulations.

¹⁵⁶⁰ Defined as 'any repeated proposal or behaviour related to sex which either endangers workers' dignity due to its humiliating or degrading character or create for the workers an intimidating, hostile or offensive situation'. Beyond sexual, sexual harassment-like facts as 'forms of heavy pressure, also isolated, exercised with the real or apparent goal of obtaining an act of sexual nature in favour of the harasser or of a third person' are prohibited (Article I 1153-1 Labour Code).

¹⁵⁶¹ Defined as a condition that derives from the exposure to a sum of professional risks specified by decree, which can be traced back to strong physical constraints, to an aggressive physical environment, or to certain rhythms of work likely to produce durable, identifiable and irreversible effects for the health of the worker (Article L 4121-1 Labour Code).

In the lack of any indication from EU Law going beyond the generic and equivocal reference to 'balanced' participation, workers' involvement in OHS has been structured according to the different models of workers representation and participation already existing at national level. Therefore, the same problematic questions which have been risen by workers' representation and participation in general refer also to workers' representation and participation in the health and safety domain. These are for instance: (a) the establishment of a representative body as an employees' right, as an employees' duty (like in Austria) or as an entrepreneur's duty (like in Hungary); (b) the nature of workers' representation (unionized or not); (c) the size of the undertaking as a determinant of the presence and the quantity of workers' representatives; (d) the level at which representative bodies has to be established; (e) the protection of workers' representatives and their duty of confidentiality; (f) the role of workers' direct involvement.

The fact that workers' representation and participation in OHS is modelled on the general rules governing representation and participation at national level does not exclude the presence of some distinctive features worth to be highlighted as typical in that domain.

As a first specific feature of OHS, it should be stressed that workers participation and even co-determination rights have the only function to promote compliance and to improve OHS standard. Therefore, these rights are workers' protection rights, which neither limit entrepreneurs' liability nor make workers' representatives jointly and severally liable for the violation of health and safety rules.

A second distinctive feature is that participation rights are recognized to workers' representatives specialized in OHS. However, this cannot be considered as absolute since in some countries the same rights are recognized to general representation bodies. Therefore, the nature and the function of the subject entitled to participation rights influence in decisive way also the very concept of 'participation' in OHS, which finds its specific definition in each country according to the national approach to workers' involvement in general.

4.5 Compliance and control.

It is clear from the previously mentioned that entrepreneurs' compliance with OHS obligation is primarily controlled by workers' representatives whose powers go well beyond participation in the OHS management. An extreme example of this is the power to stop work in case of imminent danger, which is recognized to them by Dutch, Spanish and Swedish law. The single worker too takes part in the compliance and control system through the duty to alert the entrepreneur of danger and risks that may occur at the workplace. Workers may also lodge a claim against the employer in labour courts to get the safety obligation fulfilled.

Nevertheless, a crucial role in the compliance and control system is played by public authorities, due to the (partly) public law nature of the safety obligation. It is not a case that the role of public authorities is particularly developed in Austria where the safety obligation is regarded as a purely public law one.

A first example of public authority dealing with compliance and control is the Labour Inspection, which is usually part of the ministry for labour and social affairs. Generally speaking labour inspectorates have the following rights and duties: (a) assist and offer consultation to entrepreneurs as well as employees in all matters of OHS; (b) enter and inspect plants, workplaces and

construction sites at any time with or without prior notice; (c) interview entrepreneurs and employees (or their representatives) as well as ask entrepreneurs for written information; (d) inspect documents referring to OHS or employment conditions; (e) take pictures and take measurements also by appointing experts in specific fields; (f) take samples and arrange for analyses; (g) obtain information on material and machines from producers and distributors; (h) by all means attend to complaints without disclosing the source; (i) issue order and injunctions even in the view of suspending the activity; (l) request the competent authorities to enforce measures for the protection of employees; (m) impose sanctions or propose competent authorities to do so. Classical form of labour inspection acting also in the OHS domain are to be found in Austria, Belgium, France, Germany, Spain and The Netherlands. In Italy, the Labour Inspectorate is only marginally competent in that domain which is covered by Local Health Authorities inspectors. This results in an undesirable overlapping of competences.¹⁵⁶²

On the other hand, Sweden and United Kingdom have developed specific and dedicated systems of compliance and control in OHS, which go beyond the classical structure of labour inspection, although guaranteeing the same inspection powers.

In Sweden, in 2001 Labour Inspection and the National Board of Occupational Safety and Health (NBOSH) were merged into a single body we have already mentioned – the Work Environment Authority (hereafter WE Authority). One aim of this was bringing implementation by the two organizations into line with each other. The WE Authority's duty is to ensure compliance with the WE Act and the Working Time Act — and, in certain respects with the Tobacco Act and the Environmental Code and the Provisions issued by the WE Authority itself.¹⁵⁶³

In the United Kingdom, under the Health and Safety at Work Act 1974 (as amended) (hereinafter HSWA) the Health and Safety Executive (hereinafter HSE) has been set up in order to support the Government's strategic aims and current targets for health and safety at work. Its main aim is to secure the health, safety and welfare of people at work and protect others from risks to health and safety from work activity. HSE operates as one of the Department of Work and Pensions' (hereinafter DWP) Non Departmental Public Bodies (NDPBs). The Secretary of State has the principal responsibility for HSE. The DWP Minister with responsibility for health and safety will account for HSE's business in Parliament. More specifically HSE main statutory duties are: (a) to propose and set necessary standards for health and safety performance; (b) to secure compliance with those standards; (c) to carry out research and publish the results and provide an information and advisory service; (d) to provide a Minister of the Crown on request with information and expert advice. HSE is the primary delivery agent for DWP's strategic objective of improving health and safety outcomes. HSE's aims should be to continue to deliver its mission of preventing death, injury and ill health to those at work and those affected by work activities; and deliver any targets agreed for OHS. In such a perspective, HSE shall protect OHS and minimize risks from work to

¹⁵⁶² Edoardo Ales, Luca Miranda and Alessia Giurini 'Italy: From Occupational Health and Safety to Well-being at Work' in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013).

¹⁵⁶³ Maria Steinberg 'Occupational Health and Safety in a Diverse, Post-Industrial Society: A Swedish Dilemma' in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013).

members of the public and ensure that the major hazard industries (such as nuclear, petrochemicals and offshore oil and gas) manage and control the risks around their work to a high standard, which enhances assurance and allows these industries to operate with a high degree of public acceptance.¹⁵⁶⁴

Social insurance institutions active in the occupational accident and disease domain play an important role in the control and compliance system. A paramount example comes from Germany, where a dual system of safeguarding and promoting OHS is in place including tasks for public authorities as well as for the autonomous bodies (*Berufsgenossenschaften*) of the Occupational Accident Insurance (hereafter the Insurance). The latter has a longstanding tradition, dating back to the end of the nineteenth century. It took the place of the former *Reichshaftpflichtgesetz*, which had established a strict liability in tort for factory owners. Departing from this idea of liability, the Insurance provides that the employer has to pay contributions being therefore not liable for damages caused by occupational accidents to his or her employees.

Nevertheless, the replacement of liability does not exempt the employer from fulfilment of the security obligation. The employer is liable for OHS from the point of view of contract law as well as from the point of view of public law. On the other hand, it is a substantial interest of the Insurance to prevent occupational accidents. Therefore, the *Sozialgesetzbuch VII* – SGB VII which deals with the Insurance, stipulates in § 14 the priority of prevention. For this purpose the Insurance has the power to adopt *Unfallverhütungsvorschriften* – UVV according to § 15 SGB VII. These are binding to the employers and employees. Complementarily, Insurances have a monitoring and advisory duty. With reference to industrial diseases, they have the further duty to use any possible mean to cope with dangers of appearance or re-appearance or worsening of an illness. If this is not possible they have to try to convince the employee to stop the unhealthy work, according to § 3 section 1 of the *Berufskrankheitenverordnung* – BKV.

This task of the Insurance is complemented by the health promotion duty of the health insurance (*Krankenkasse*) in the plant as described in § 20a SGB V. *Krankenkassen* shall cooperate with the Insurance and support its prevention activities. In such a legal framework, Insurance bodies are obliged to employ inspectors in order to comply with their supervisory tasks (§ 18 SGB VII). These inspectors – although employed by the self-administrated Insurance bodies – have public law powers in OHS (§ 19 SGB VII).¹⁵⁶⁵

Finally yet importantly, bilateral bodies established by collective agreement may play an active role in the compliance and control system. This is the case of Italy where a fundamental role in OHS management is assigned to Joint Committees. These are identified by Article 2(ee) of Legislative Decree no. 81/2008 as bodies founded on the initiative of one or more of the entrepreneurs/workers comparatively most representative organization at national level.

4.6 Civil, administrative and criminal consequences of violation of OHS provisions.

All the parties involved, i.e., the entrepreneur and the worker, shall bear, within the scope of their respective liabilities, the consequences of the violation of OHS provisions. The direct consequence

¹⁵⁶⁴ Mark Bell 'Occupational Health and Safety in the UK: At a Crossroads?' in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013).

¹⁵⁶⁵ Olaf Deinert 'Occupational Health and Safety in Germany: A Dual System in Change' in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013).

of the violation – if detected – are sanctions.

Being the OHS obligation, at the same time, public and private in nature, violations are not only relevant as breaches of law, but also as breaches of (the employment) contract or of the *neminem laedere* principle (action in tort). Therefore, sanctions are provided which are typical of labour law (disciplinary sanctions against the worker) and of public law, being the latter administrative or criminal. Sanctions provided under public law may affect both the entrepreneur and the worker. On the other hand, before any harmful event happens, the worker may lodge a civil (labour law) claim or a criminal complaint against the employer who, in the worker's opinion, does not fulfil his or her safety obligation.

In the same perspective, the violation of OHS provisions is sanctioned in itself under administrative law even if it has not produced a harmful event. In such cases, administrative (pecuniary) sanctions may be avoided or reduced if the entrepreneur, following the prescriptions coming from a supervisory authority, restores a situation of legality. In Sweden, compliance to prescription may be 'stimulated' by contingent fines, which have to be paid by the entrepreneur only in case s/he does not respect the prescription. On the other hand, if the prescription is not respected and a harmful event occurs, this may increase the sanction and will be taken into account in the assessment of entrepreneur's civil liability.

The mere state of danger produced by the violation of OHS obligations does not exclude the application of civil (labour) law remedies such as workers' refusal to perform their tasks. On the other hand, the stop to production can be called by workers' representatives and by the supervisory authority in case of imminent danger or of persistent violation of OHS prescriptions.

In such a perspective, we have to stress the relevance of civil liability as a consequence of the violation of the health and safety provisions which has produced material or immaterial damages to the worker or to a third party. We have also to highlight the link between civil liability and social insurance in the sense that the duty to insure the employee and to pay contribution to the latter exonerates the employer from the former in case the harmful event is classified as occupational accident or disease. The fact that the employee was acting contrary to the instructions of the employer, or any legal requirement, will not prevent eligibility for the benefits provided by the social insurance so long as the act is done for the purposes of and in connection with the employer's trade or business. The social insurance may act in regress against the employer if the harmful event has been produced by the violation of health and safety provisions. Exoneration is excluded or differential damages compensation admitted if the harmful event has been caused by employer's intent or inexcusable fault.

That of inexcusable fault is a very interesting concept elaborated by French case law in order to cope with the problem of the unsatisfactory level of social insurance benefits in case of occupational accident or disease being the recourse to civil liability precluded. The definition of the concept varies depending upon the author of the fault. If the author is the employer, there is an inexcusable fault when she was or should have been aware of the danger existing for the worker and has not taken appropriate protective measures.

According to French case law, it is not necessary that the fault of the employer has been determining as regards the damage. It is enough that her fault has been necessary to cause the damage. In addition, the employer may be held liable even if she has taken measures to eliminate the danger, which have not impeded the harmful event to take place. By recognizing the employer's

inexcusable fault, the judge may decide an increase of the social insurance benefit. The social security institutions, which shall pay the increased benefit to the worker, will act in regress against the employer for the reimbursement of the additional payment. If the worker is recognized as the author of an inexcusable fault, the judge may reduce the amount of the social insurance benefit. Case law defines the inexcusable fault of the worker as a deliberate fault, of an exceptional seriousness, creating without any relevant reason a danger, which the worker should have been aware of. However, the interpretation of the inexcusable fault of the employee is quite restrictive whilst case law provides now a wide interpretation of the inexcusable fault of the employer, which was in the past restrictively defined.¹⁵⁶⁶

An interesting relation between civil liability and social insurance has to be found in Hungary where a specialized insurance against occupational accidents and diseases does not exist. Yet the coverage of such risks is jointly guaranteed by the health insurance and by the pension insurance according to the extent of the incapacity to work. Moreover, Hungary presents a peculiar system of civil liability, which can be activated in case of damages not covered by the combination of the health and the pension insurance.¹⁵⁶⁷

In the United Kingdom, where the employer is not obliged to insure workers against occupational accident and diseases, civil liability comes back at the centre stage as far as damages compensation is concerned. The absence of a compulsory social insurance coverage means also the lack of insurance-based inability or invalidity benefits paid to the worker from the moment in that the accident or the disease occur. Therefore, a major role is played by the protection of sick workers and workers with disabilities.

Actually, while an individual might be successful in claiming damages for an injury or disease sustained at work, this will typically follow a lengthy process of litigation and it will not assist in dealing with the immediate consequences for her. Civil proceedings may take the form of the torts of breach of statutory duty or negligence, or an action in contract law for breach of the employer's implied duty of care. The most common remedy will be damages. These are not subject to a prior maximum limit and the objective is to place the claimant in the position she would have been in, had the wrong not been committed.

In such a perspective, in order to protect victims of health and safety violations, the Employers' Liability (Compulsory Insurance) Act 1969 requires all employers to be insured in respect of personal injury claims by employees. Moreover, the Employers' Liability (Defective Equipment) Act 1969 imposes strict liability on employers in respect of damage caused to employees by defective equipment used at work, even if the defect was due to the actions of the third party. It is notable that both of these Acts only apply in relation to those employed under a 'contract of service'; this means that those with more precarious working arrangements, such as casual workers, are unlikely to be covered. Workers in the construction industry, where there is a high rate of casual

¹⁵⁶⁶ Corinne Sachs-Durand 'Occupational Health and Safety in France: A Good Formal Protection, but a Problematic Efficiency' in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013).

¹⁵⁶⁷ Erika Kovács 'Occupational Health and Safety in Hungary: Changes in the Name of Competitiveness?' in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013).

work and self-employment, may find themselves not covered by these laws. Workers in general can face difficulties in bringing personal injury claims where occupational ill health was caused over time and through working for a range of different employers.¹⁵⁶⁸

As breaches of law, violations of OHS provisions are sanctioned under administrative and/or criminal law. Criminal law applies in case of violations, which produce death or serious ill health to the worker. As far as the applicable criminal law provisions are concerned further to the norms provided by general penal codes for death, injuries or procured disease, national legislators (the Austrian excluded) either (a) provide for specific norms related to the health and safety domain within general penal codes (like in France, Hungary, Italy and Spain) or (b) have issued a criminal social code (like in Belgium) or (c) integrate criminal law provisions directly into health and safety regulations (like in Germany, Sweden, the Netherlands and United Kingdom).

The use of criminal law provisions gives rise to some well-known general problems. First of all, the respect of the principle of legality (no crime without precise law); secondly, the problem of the clear designation of the potential punishable offender which has been solved by referring to any person who has authority, resources and knowledge to take decisions in the health and safety domain (not necessarily the entrepreneur but also a delegated person); thirdly, the problem of the criminal liability of legal persons, which has been approached by imposing fines on companies further to the penalty applied to directly liable physical persons; fourthly, the reluctance of public prosecutors to open criminal proceedings against the entrepreneur in case of violations which have not produced the death or serious injuries to the affected person.

Such difficulties have led legislators to opt, where socially sustainable and advisable, for a transformation of penalties into administrative sanctions with the advantage that administrative authorities or courts can impose the latter without involving the criminal justice system. In some cases, the same violation can be regarded as a breach of law punishable by an administrative sanction and as a crime punishable by a penalty. Therefore, the problem is to know whether the heaviest sanction prevails according to the *ne bis in idem* principle or both sanctions have to be applied according to the *tot crimina tot poenae* principle. Both solutions are alternatively adopted.

5. Conclusions.

One may conclude by saying that OHS is the most comprehensively and better-regulated domain of EU (but also national) Labour Law. Moreover, recently, a “constitutional” provision has been added to that, i.e. Article 31 of the Charter of Fundamental Rights of the European Union (hereafter CFREU), headed “Fair and just working condition”.¹⁵⁶⁹ The CFREU, solemnly proclaimed by Member States in 2000 in Nice, has been provided by the Treaty of Lisbon of the same effects of

¹⁵⁶⁸ Mark Bell ‘Occupational Health and Safety in the UK: At a Crossroads?’ in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Kluwer Law International, Alphen aan den Rijn, 2013).

¹⁵⁶⁹ Alan Bogg, ‘Article 31’, in Steve Peer, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart, Oxford – Portland, Oregon, 2014).

the Treaties.¹⁵⁷⁰ Therefore, notwithstanding the opting out of some Member States and the (effective?) limitations contained in its Explanatory Notes, when sufficiently unconditional, its provisions have already been used by the CJEU to enforce the social rights there recognised.¹⁵⁷¹

In the field of OHS, particularly, Article 31 states that “every worker has the right to working conditions which respect his or her health, safety and dignity” (par. 1) and that “every worker has the right to limitation of maximum working hours, to daily and weekly rests periods and to annual period of paid leave”¹⁵⁷². These are unconditional rights, in the sense that they are not limited, as happens to other social rights¹⁵⁷³, by the reference to EU Law and/or to national legislation and practice.

Therefore, even though it is true that, recently, as far as OHS is concerned, Community Institutions have focused more on political strategies than on new legislative instruments¹⁵⁷⁴, that those strategies are less precise than before¹⁵⁷⁵, that OSH has become the domain of non-regulatory agencies¹⁵⁷⁶, in the light of the legislation analysed in the previous paragraph, the positive conclusion reached in the above does not seem to be put into discussion.

¹⁵⁷⁰ See on it Steve Peer, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart, Oxford – Portland, Oregon, 2014).

¹⁵⁷¹ Case C-555/07 *Kücükdeveci* [2010] ECR I-00365; Case C-617/10 *Fransson* [2013] not reported.

¹⁵⁷² The European Social Charter too, signed by the States members of the Council of Europe in 1961 as revised in 1996 (ESCRev), provides for some political commitment upon the Signatory Parties, within Article 3, towards OHS and, within Article 26, within the view of protecting the dignity of workers, against sexual harassment. On OHS within the ESCRev see Katarzyna Łasak, ‘Health and Safety in the European Social Charter’, (2009) 25 *IJCLIR* 109.

¹⁵⁷³ See, in particular, C-176/12 *Association de médiation sociale* [2014] on Article 27 CFREU dealing with workers’ representation. On it, Edoardo Ales ‘2002/14/EC: Framework Information and Consultation’ in Monika Schlachter (ed) *EU Labour Law. A Commentary* (Kluwer Law International, Alphen aan den Rijn, 2015).

¹⁵⁷⁴ Stijn Smismans, ‘Towards a New Community Strategy on Health and Safety at Work? Caught in the Institutional Web of Soft Procedures’ (2003) 19 *IJCLIR* 55.

¹⁵⁷⁵ If one compares European Commission COM(2002) 118 final and COM(2007) 62 final with COM(2014) 332 final.

¹⁵⁷⁶ Edoardo Chiti, ‘European Agencies’ Rulemaking: Powers, Procedures and Assessment’ (2013) 19 *ELJ* 93.