18.7.2011

# NOTICE TO MEMBERS

**Subject: Petition 1919/2009 by M.B (Italian), on the compliance of the Italian transposition (Legislative Decree 106/09) of EU Directives 89/391/EEC and 2002/14/EC concerning health and safety for the use of work equipment and the general framework for informing and consulting employees in the Italian legal order**

## 1. Summary of petition

The petitioner alleges that the Italian transposition of EU Directives 89/391/EEC and 2002/14/EC is not in compliance, mostly with respect to the evaluation of stress in the work place. He also consistently alleges that the Italian legislation is not in compliance with the Italian Constitution, an aspect which does not fall under the competence of the Committee on Petitions.

## 2. Admissibility

Declared admissible on 30 March 2010. Information requested from Commission under Rule 202(6).

## 3. **Commission reply**, received on 24 June 2010.

The petitioner states that certain provisions of the new Italian Legislative Decree 106/09 may not be in compliance with 'framework' Directive 89/391/EEC[1]and, to a lesser degree, Directive 2002/14/EC[2](mentioned once). Furthermore, the complainant also seeks to show

[1] Directive 89/391/EEC of the Council of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work *(OJ L 183, 29.6.1989, p. 1.).*

[2] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation *(OJ L 80, 23.3.2002, p. 29).*

that said Italian Legislative Decree violates certain provisions of the Italian Constitution.

The text of the petition is identical to the earlier complaint sent by the petitioner to the Commission in October 2009.

By letter of 9 April 2010, the complainant was informed that after analysing the complaint the Commission would be contacting the Italian authorities via the EU Pilot project to request information pertaining to the allegations made in his complaint. That request for information was sent to the Italian authorities on 26 April 2010, without mentioning the complainant's identity, as he did not wish it to be revealed.

The Commission will keep Parliament informed of the outcome of its investigation.

**4. Further Commission reply**, received on 13 January 2011.

On the basis of information provided by the petitioner/complainant and other information, including that supplied by the Italian authorities in response to a Commission request, it is proposed that, at a subsequent 'infringements' meeting of the Commission, infringement proceedings be opened regarding the non-compliance of Italian transposition measures with certain provisions of Directive 89/391/EEC (hereafter referred to as 'the Directive').

*The Commission intends to recommend inclusion of the following points raised by the complaint/petition in the letter of formal notice to be sent to the Italian authorities as part of the infringement proceedings: exoneration of employer from responsibility; delays regarding mandatory work-related stress risk assessment; extension of deadlines for drafting of risk assessment report in respect of a new undertaking or in respect of substantial modifications to an existing undertaking.*

*On the other hand, the Commission does not, for the reasons set out below, intend to include in the letter of formal notice the following points raised in the complaint/petition:*

- *Risk assessment in respect of procurement or invitations to tender – not applicable to certain categories of workers/activities*

According to the Commission's findings, Article 6(4) of the Directive (concerning the requirement for employers to cooperate and coordinate their actions in matters of the protection and prevention of occupational risks where several undertakings share a workplace) is transposed into Italian law by Article 26 of Legislative Decree 81 of 9 April 2008 concerning obligations regarding procurement, works or supply contracts, as modified by Legislative Decree No 106 of 2009, also known as the 'Single Document regarding health and safety at work'.

The Commission agrees with the petitioner/complainant that, following the addition of paragraph 3 to Article 26 of Decree-Law No 81/08 regarding certain categories of workers and certain types of activity in the context of procurement or invitations to tender, the employer is not subject to the obligation referred to in Article 26(3) of Decree-Law No 81/08, to draft a single interference risk assessment document (*Documento Unico di Valutazione dei Rischi da Interferenze*) analysing risks of interference between different undertakings and protective measures to be taken with a view to eliminating such risks.

It should be noted that paragraph 3a (new) indicates that it is without prejudice to the implementation of the provisions of Article 26(1) and (2), which effectively transpose Article 6(4) of the Directive, requiring employers to cooperate in implementing prevention and protection measures and to coordinate their actions in matters of protection and prevention of occupational risks and keep one another informed with a view to eliminating risks of interference.

Furthermore, penalties for non-compliance by employers with their obligations under these provisions are set out in Article 55 of the Single Document.

It should be noted that the requirement for an employer to draw up a specific written document formally recognising his obligations regarding cooperation, coordination and mutual information contained in Article 26(3) of the Single Document goes beyond the requirements of the Directive, which does not contain such a specific provision.

Under these circumstances Article 26(3a) cannot be considered to infringe the Directive.

- *Health surveillance – possibility of medical checks before recruitment and following prolonged absence for health reasons*

While on the one hand the Directive requires appropriate worker health surveillance and states that this must be provided on a regular basis if workers so wish, on the other hand it allows a considerable margin of manoeuvre for Member States regarding the nature of the actual measures, which are established in accordance with national legislation and/or practices. Furthermore, according to the Directive, health surveillance may be provided as part of a national health system.

Under the above provisions of the Directive therefore, it is the responsibility of the Italian authorities to introduce into its national legislation the necessary measures contained in the Single Document to ensure suitable health surveillance for workers, including medical checks prior to recruitment and following prolonged absence for health reasons.

For the same reason, the question of compliance of these measures with previous Italian legislation, such as Law No 300 of 1970, does not arise.

Furthermore, on the basis of the information at its disposal the Commission has no grounds to suspect any infringement of EU non-discrimination rules. In fact, there has been no direct discrimination under EU legislation (based on gender, race, religion, age, disability or sexual orientation). Furthermore, the contested provisions of the Single Document do not appear to constitute indirect discrimination in any of these respects.

- *More lenient sanctions for employers and managers in general with regard to risk assessment*

Article 4 of the Directive, to which the petitioner/complainant refers in his petition/complaint, requires the Member States to ensure that EU legislation is fully implemented in respect of health and safety at work. Under this article, Member States are required to take the necessary steps to ensure that employers, workers and worker representatives are subject to the legal provisions necessary for the implementation of this Directive. Member States are required in particular to ensure 'adequate control and supervision' of the implementation of national provisions transposing the Directive.

Clearly, to ensure the effective implementation of the legislation, the above monitoring arrangements by the Member States must also involve suitable penalties and legal proceedings for non-compliance with health and safety rules.

As the petitioner/complainant points out in his petition/complaint, the Directive does not enter into any detail regarding the nature and severity of the penalties applicable by Member States for infringement by employers (or other operators) of the various national provisions transposing the Directive. «Since the Directive itself contains no specific provisions in this regard, the question of assessing the penalties applicable in Italy does not arise.

However, under the case-law established by the Court of Justice of the European Union in the field of social policy, sanctions must be effective, proportionate and have a deterrent effect.

Hence the Commission, as guardian of the Treaties, is required to establish whether, in accordance with the case-law established by the Court, the monitoring procedures make it possible to apply effectively deterrent and proportional penalties. If it had evidence that, in the absence of effective proportionate and deterrent penalties in a Member State, the national provisions transposing the EU Directive on health and safety at work were not being effectively implemented, it could launch infringement proceedings for failure to implement EU legislation properly. However, in this case it does not have such evidence.

- *Modification regarding the requirement for employers to send a copy of the risk assessment report to worker representatives responsible for safety*

The petitioner/complainant refers to the amendment introduced by Decree Law No 106/09 to Article 18(1)(o) of Decree Law No 81/08 requiring the risk assessment report to be consulted by worker representatives specifically responsible for health and safety at work within the company alone. This would effectively seriously restrict their rights, since they would be required to approve a document to which they had only restricted access.

He indicates that these amendments infringe another Italian law, No 123/07.

Finally, according to the petitioner/complainant, these new provisions infringe Directive 2002/14/EC under which worker representatives may be assisted by advisers.

Firstly, it is not up to the Commission to rule on the compatibility between national legislative measures, in this case Decree Law No 81/08 and Law 123/07.

As regards the alleged infringement of Directive 2002/014/EC, the following comments can be made:

In accordance with Article 7 of Directive 2002/014/EC (Protection of employees' representatives), Member States shall ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them.

It should be stressed that the aforementioned functions and duties of employees' representatives relate to information and consultation on a number of issues set out in Article 4 of Directive 2002/014/EC, which provides for the following:

‘2. Information and consultation shall cover:

(a) information on the recent and probable development of the undertaking's or the

establishment's activities and economic situation;

(b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;

(c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).'

The aforementioned provision does not seem to cover the issue raised in the complaint regarding the document on evaluation of risks at the workplace.

Therefore, there does not seem to be any violation of Directive 2002/014/EC in this specific case.

Furthermore, under Article 10(3)(a) of Directive 89/391/EEC, the employer is required to take appropriate measures so that workers' representatives with specific functions in protecting the safety and health of workers have access to the risk assessment report in accordance with national laws and/or practices.

Therefore, given that Directive 89/391/EEC does not specify precisely where representatives must be given access to the risk assessment report and indicates that access must be given in accordance with national laws and/or practices, no infringement of EU law can be detected in connection with this specific point raised in the complaint/petition.

Finally, in support of his complaint/petition, the complainant/petitioner has also given a detailed analysis of non-compliance of the provisions of the Single Document with the Italian Constitution. The Commission, however, is not empowered to rule on matters concerning compliance of national laws with national constitutional provisions, this being the responsibility of the Member State authorities.

*Conclusions*

The Commission, which is in the process of considering the complaint, has forwarded the above information to the complainant.

The Commission will keep Parliament informed of further developments.

**5. Further Commission reply**, received on 18 July 2011 (REV II)

In its previous communication, the Commission services informed Parliament that, on the basis of information provided by the petitioner/complainant and other information that it had gathered, it was proposed that infringement proceedings against Italy be opened regarding the non-compliance of Italian transposition measures with certain provisions of Directive 89/391/EEC (hereafter referred to as 'the Directive').

Following an analysis of the additional information provided in the meantime by the petitioner/complainant and the further clarifications provided by the Italian authorities in a note dated 21 January 2011, the draft letter of formal notice had to be amended significantly and was supplemented with the following points:

- exoneration of employer from responsibility in the case of delegation and sub-delegation;
- violation of the requirement for employers employing 10 or fewer workers to have risk assessment documentation;
- extension of deadlines for drafting of risk assessment report in respect of a new undertaking or in respect of substantial modifications to an existing undertaking;
- postponement of the mandatory work-related stress risk assessment;
- postponement of application of the legislation on health and safety at work to persons belonging to social cooperatives and to voluntary organisations in the civil protection sector;
- extension of the deadline for implementation of fire prevention provisions with regard to tourism/hotel establishments sleeping more than 25 people.

The draft letter of formal notice, supplemented as above, is due be submitted to the College for a decision in September.

Conclusions

The Commission, which is in the process of considering the complaint, forwarded all of the above information to the complainant in a letter dated 25 May 2011.

The Commission will keep Parliament informed of further developments.