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The Position and Function of Executive Staff Members in Italian Labour Law

1. Introduction

As in many other national legal systems, executive staff in Italy are classified as salaried employees (*lavoratori dipendenti*). In this respect executive staff member are covered, at least in principle, by the protection offered by labour law. This principle is regulated at the highest level of the hierarchy among the law sources by art. 35 of the Italian Constitution 1948: "The Republic protects work in all its forms and applications". In the same way, art. 2060 of the Italian Civil Code of 1942 states that: "work is protected under all its forms organisational and executive, intellectual, technical and manual". However, in practical terms, as in many other countries, the legal and contractual protection for this category of employees is attenuated and varies greatly depending on the legal definitions used for directors or managers and their role in the undertaking. Executive staff members are covered by specific legal and/or contractual provisions resulting from a complex historical process, and theoretical and practical implications of this process are the examined in this study.

With regard to the specificity of the Italian case, the legal paradigm plays a central and decisive role. An analysis of collective bargaining and business practice clearly shows that the vague notion of "executive staff" encompasses at least two groups of employees governed by divergent legal and contractual provisions: top managers *(dirigenti)* on the one hand, and middle management or cadres *(quadri* or *quadri intermedi)* on the other. The historical evolution of Italian labour law confirms that the concept of executive staff needs to be clarified and established, not only in terms of status but also in determining the discipline that applies. The degeneration of the concept of top-level manager *(dirigente)*, that has been extended to include roles quite distinct from the traditional concept of manager as the employer's *alter ego,* has ended up watering down the concept of middle management or cadre *(quadro* or *quadro intermedio),* which now differs only slightly from that of white-collar employee *(impiegato)*. This is also due to the egalitarian pressure of national industry-wide bargaining, and to the failure of the attempt to launch autonomous or craft unions for middle management.

2. Historical and Sociological Background

As is the case of several other national legal systems, in Italy workers in the category of executive staff are classified as salaried employees (*lavoratori dipendenti*). In this respect these workers are covered, at least in principle, by the protection offered by labour law. This principle is ruled – at the highest level of the hierarchy among the law sources – by article 35 of the Italian Constitution 1948: "The Republic protects work in all its forms and applications". In the same way, article 2060 of the Italian Civil Code of 1942[1] states that: "work is protected in all its forms: organisational and executive, intellectual, technical and manual".
However, as in many other countries, the legal and contractual provisions for this category of workers are attenuated and vary greatly, depending on the different legal definitions of directors or managers (*see* 3.) and their specific role in the undertaking. The specific legal and contractual provisions applicable to executive staff (*see* 4. and 5.) are the result of a complex historical evolution, and the theoretical and practical implications (*see* 2.3.) are examined in the following section (*see* 2.I.).

2.1. Historical Background

Starting our analysis from the main legal classifications of work, alongside the traditional distinction between self-employment and salaried employment (which is in the process of being broken down)[2] the most prominent distinction in an historical perspective is between intellectual and physical work. This distinction clearly cannot be presented in absolute terms, but nevertheless enabled the first scholars in the area of labour law to differentiate between work based of a predominantly physical kind on the one hand, and work that primarily requires the use of the intellect on the other. It is clear that the historical origins of the category of executive staff are to be found in the second group.
In this connection, it is well known that in the ancient world there was a general contempt for work – above all for physical labour. Primitive societies were organised on the basis of a division of duties with the assignment of manual tasks to the lowest classes, primarily to slaves. This form of social organisation had a direct influence on the labour discipline of Roman Law, and subsequently, also on the law of continental European countries, where the distinction between manual and intellectual work was totally unquestionable. Manual labour could only be the object of a *locatio operarum,* while intellectual work was the object of a *locatio operis*.
It is equally well known that this distinction (albeit in different forms) in the context of today's information and knowledge economy as a distinction between "good" and "bad" jobs has been gradually disappearing from a legal point of view.

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[1] The text of the Italian Civil Code is available on the website of the School for Advanced Studies in Industrial and Labour Relations and ADAPT (*www.adapt.it*), A-Z Index, under the heading "Diritto private elementi di" (Elements of Private Law).
[2] With reference to the evolution of labour law, it is worth mentioning, also for the significance that it could have on the legal classification of executive staff, that the distinction between autonomy and subordination is becoming more and more inadequate to interpret modern ways of working. See infra, paragraph 2.3. of this introductory section.

In cultural terms, the initial stage of this evolution was the ennoblement of labour brought about by Christianity, which considered profit from personal work as justifiable, without any further distinction.
The final stage of this evolution was the adoption of Fordist and Taylorist models of production and labour organisation in large-scale production. The organisational models of large factories strengthened the position of all categories of workers, while underscoring the distinction between physical work on the one hand and intellectual work on the other.
This historical evolution and shift in values is to be seen, as already pointed out, in article 2060 of the Italian Civil Code (1942) subsequently restated (though in a different political context) in art. 35 of the Republican Constitution of 1948, which provides that: "work is protected in all its forms, whether organisational and operational, intellectual, technical and manual". Art. 2094 of the Civil Code containing the notion of employment, fundamental but hard to define, describes the salaried employee as someone who cooperates with a business and provides either physical or intellectual labour under the direction of the employer.
Despite this undeniable cultural advancement, it cannot be claimed, at least in legal terms, that the distinction between physical and intellectual work is entirely irrelevant today. Rather, when considering the legislation on salaried employment, most of the provisions (especially the older ones) relate to predominantly physical work. This is because manual labour was considered to be worthy of particular legal and contractual protection, due to the extensive supply of labour, and due to the fact that it is generally provided by individuals for whom it is their only means of support.
This may be seen as a legalistic approach (*Verrechtlichung*) to employment relations, without considering the response of the social partners, focusing on the formal concept of legal subordination, rather than on economic dependence, as the rationale for the protective measures provided by labour law.
A different approach would have been adopted if labour law had not been founded the concept of subordination, but on other conceptual categories promoting a high level of professionalism (activities not deserving a specific legal protection) instead of the concept of subordination (in terms of the applicability of the traditional categories of contract law).
The first legislative interventions on labour in the early industrial period regulated only certain specific matters regarding manual labour – with a particular focus on women and children – and aimed not only to protect the weaker party against the excessive power of the employer, but also to preserve other fundamental values of society in those days: public order, racial integrity and, through the determination of the "common rule", business competition.
In the Italian legal system – as in many others – the adoption of different models and forms of protection for the distinct categories of blue- and white-collar workers is closely related to the concept of the employment contract (largely constructed by legal scholars) as a tool for the regulation of employment relations and as a technique for legitimating the employer's appropriation of the product of someone else's labour (by means of *locatio operarum* or *operis*).
The general category of subordinate or salaried employment allowed for a unitary representation of different types of salaried labour (from the top-level manager to the worker in the lowest employment grade), regardless of the characteristics of the employees to be protected. It also took into consideration the different degrees of subordi-

nation, not only based on the characteristics of the business (vertical distinctions) but also, for the purpose of our analysis, on the different forms of work (horizontal distinctions). This made it possible to move forward from the initial stage of labour law, which was limited to the protection of blue-collar workers performing manual labour in industrial concerns.

As a reaction against the original approach (aimed not at regulating employment, but at economic and social conditions), professional and managerial employment was regulated only at a later stage, with a different and – compared to blue-collar workers – more favourable set of rules on issues such as wages and the normative framework regulating the terms and conditions of employment.

There appears to have been an attempt to provide a privileged status in contrast with the class-based legal provisions regulating blue-collar labour. An historical and legal analysis confirms this impression, though it should not be interpreted simply as a legislative strategy of *divide et impera*. Rather, it was meant to promote the development of large-scale production, where white collar workers (at least in management) started to perform duties of an entrepreneurial nature. It is significant that, in cases brought by blue-collar workers before the board of arbitrators (*probiviri*) at the beginning of the twentieth century, white collars were entitled – pursuant to Act no. 295, 15 June 1893 – to be called as defendants on behalf of the employer.

In this perspective, Royal Decree no. 1825, 13 November 1924[3] appears to be fundamental: in confirming the principles worked out at the beginning of the twentieth century in the case law of the arbitrators, it excludes manual labour from its field of application. According to art.1 of the aforementioned Royal Decree, a private employment contract is a contract on the basis of which an enterprise or a private party as its manager hires professionals to cooperate with the enterprise, as qualified or unqualified office workers, normally for an unlimited period, to the exclusion of unskilled or manual labour.

In line with this definition, the white collar worker's duties were defined in negative terms by the exclusion of purely manual tasks, and in affirmative terms by the presence of three elements: subordination, continuity and collaboration. Subordination in this formulation represents a factor common to both blue-collar and white-collar contracts, while the elements of continuity and above all of professional performance were the main features of the paradigm.

In this perspective, as stated in the introductory report to the draft leading to the Legislative Royal Decree of 1924[4], blue-collar labour is a mere factor of production, and thus just a commodity, whereas employment contracts for white-collar employees aim at integrating the employer's personal activity. The employer cannot directly attend to this activity due to his many duties. On the contrary, in the case of large enterprises, blue collars are assigned very specific tasks, thus excluding the possibility for blue-collar work to become an entrepreneurial activity.

In this connection, alongside the generic requirements laid down by law and present in a number of manual activities as well, a distinction between the two categories – blue collars and white collars – established itself in legal opinion and in case law: it is cen-

[3] The Royal Decree was converted into Act no. 562, 18 March 1926.

[4] Cf. the report of *V.E. Orlando* on the "Luttazzi draft", submitted to the Chamber, 24 April 1913, converted into decree no. 112, 9 February 1919 and subsequently replaced by Royal Decree no. 1825, 13 November 1924.

tred on the form of "collaboration". With regard to white collars workers, collaboration is intended as work carried out in the business, requiring a contribution to the organisation of production, whereas for blue collar workers collaboration is seen as labour, as a mere factor of production within the business designed and managed by others.
Based on this formulation, the Codification of 1942, which used the term subordinate work to refer to workers collaborating with a business (art. 2094), according to the collective regulation in force at the time (art. 2095), listed three basic categories: blue-collar workers, white-collar workers, and technical or administrative staff and top management (who were considered employees with managerial functions in the legislation of 1924). Special laws or collective agreements were to perform the task of identifying the criteria of affiliation to each category "with reference to each production department and the specific business structure".
However, in order to ensure objectivity, the Decree of Enactment – art. 95 – of the Civil Code established that, in the absence of special provisions and/or collective agreements, "affiliation to the category either of blue collars or of white collars is determined by Royal Decree no. 1825, 13 November 1924". In this context, the functions of executive staff were placed at the top of the white-collar category close to and often in the managerial category, due to the clarification provided by case law.
With the end of the fascist corporatist regime and with the return of freedom of organisation, the picture outlined above (to which the banking sector was already an exception)[5] underwent drastic change due to the intervention of collective bargaining and later legal intervention providing the same type of regulation for blue-collar and white-collar workers.
A fundamental step in this change – that was to have a significant impact not only on normative aspects but also on wages – was the collective agreement of 1973 (for metalworkers) introducing a unified system of classification for blue- and white-collar workers. This was a revolutionary agreement at the time, and it provided that: "all workers are covered by a single system of classification, with seven professional categories and eight levels or remuneration, with identical minimum wage standards."
Thanks to this new classification – soon adopted by all of the other collective agreements – several adjustments were made for the highest blue-collar workers, the intermediate employment grades and the lowest white-collar grades, removing the normative and economic discrepancies (method of payment, annual leave, workplace protection in case of absence due to sickness or injury, severance pay) that could no longer be justified on social or technical grounds. However, this assimilation resulted in an equal and opposite reaction from the top white-collar grades – almost equivalent to the concept of executive staff, to the point that a new professional category – middle management – emerged. This category was acknowledged by special legislation in the classification laid down in art. 2095 of the Civil Code.
The emergence of a new group, in between white collar workers and top-level managers strictly speaking, may be explained as a response to the lack of growth in pay – and above all to the lack of social status – of the highest level professionals due to the unified provisions and the egalitarian policy pursued, starting from the 1960s, by the confederal unions (CGIL, CISL and UIL).

[5] In the banking sector an intermediate category between top-level managers and white collars, "officials", had been adopted since 1940; until 1982 this category had a separate collective agreement, but since then they have been combined with top managers in a single agreement for "management".

In a context of considerable political pressure[6], there then ensued the enactment – rushed through in the face of opposition from bodies of constitutional significance[7] – of Act no. 190, 13 May 1985, subsequently modified by Act no.106, 2 April 1986, that[8] supplemented the classification laid down in art. 2095 of the Civil Code and introduced specific legal regulation for a new category of middle management or intermediate cadres.

Whereas the Civil Code of 1942 identified the different categories of the workforce (blue-collar workers, white-collar workers and management) by reference to the definitions in the respective collective agreements, the law of 1985 returned to the technique of Royal Decree no. 1825, 13 November 1924, designating the new group of workers *ex lege*. Art. 2, Act no. 190, 13 May 1985, though referring to the national or company-level collective agreement for the determination of the prerequisites (paragraph 2) determines the *sine qua non* requirements *ex ante*. The first paragraph of art. 2, in particular, states that: "intermediate cadres are subordinate workers who, though not belonging to the category of top-level managers, perform functions in a continuous manner and of considerable significance to the development of the enterprise and the achievement of its goals".

On the basis of this definition, middle management consists of highly qualified professionals who perform functions of considerable significance within the undertaking. In other words, a restricted category of workers, in between white-collar workers and top-level managers strictly speaking, emerged, characterised by a specific professional status and by their level of responsibility, power and autonomy (heads of department, specialists, and so on). However, it was clear from the beginning that this classification was to be remarkable in terms of status.

In terms of the regulation of this new category, art. 2, paragraph 3 simply stated that, in the absence of an explicit provision stating otherwise, middle management is governed by the regulations applicable to white-collar workers.

Art. 3, Act no. 190, 13 May 1985 stated that, when first applying the new provisions, it was up to the enterprises to designate middle management by collective bargaining and according to the procedure laid down by the new provisions. This meant recognition, in the national or company-level collective agreements, of the general prerequisites to belong to the category of middle management. Where the enterprise did not specify the general prerequisites necessary to belong to middle management by collective bargaining, this function could be performed by the courts[9].

In connection with the reference to the law for white-collar workers (article 2, paragraph 3), and apart from specific exceptions, the most significant innovation in Act no.190, 13 May 1985, is the amendment of article 2103 of the Civil Code. This provision states that, if asked to perform duties at a higher level of responsibility, the worker

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[6] In this connection mention should be made of the threat by this group of workers to boycott the local elections of 1985.

[7] With reference, in particular, to the unanimous opinion to the contrary expressed by the Consiglio Nazionale dell'Economia e del Lavoro (CNEL), Meeting no. 197/1, 10-11 July 1984 observations and proposals on article 2095 of the Civil Code, a document prepared by *Gino Giugni* and, subsequently, *Luigi Mengoni*.

[8] Article 1 of Act no. 190, 13 May 1985 expressly states: The first paragraph of article 2095 of the Civil Code is replaced by the following: "subordinate workers are classified as top-level managers, middle management, white-collar employees and blue-collar workers".

[9] See, for example, Pret. Milan, 10 December 1986 in Giust. Civ., 1987, I, p. 434.

is entitled to promotion at the end of the period laid down by collective agreement and, in any case after "not more than three months", except in the case of the temporary substitution in the case of the absence of a worker with employment protection.
With reference to this provision, article 6, Act no.190, 13 May 1985, states that: "by way of derogation from the provisions of subparagraph 1, article 2103 of the Civil Code, as modified by art. 13 of Act no. 300, 20 May 1970, if a worker is asked to perform managerial functions or duties at a higher level of responsibility pursuant to article 2 of this law, provided it is not a temporary replacement for a worker who is absent and entitled to employment protection, after three months or a longer period laid down by collective agreement, the promotion shall be definitive".
The meaning of this norm is clear: for the purposes of promotion to a higher category – middle or top management – in derogation from the general provisions, the legislator allows for a longer period for the performance of the managerial function than the maximum set for other categories of worker (blue-collar and white-collar).
For the purposes of this study, and in relation to the definition of executive staff, this provision is significant in methodological and conceptual terms. According to art. 6, Act no. 190, 13 May 1985, the category of middle management is contiguous with top management, despite the provisions of art. 2, paragraph 3 which are subject to the general provisions for white-collar workers in relation to any aspect not explicitly dealt with therein. In collective bargaining, middle managers are classified as the highest grade of employees below top management.
As we shall see in the section on terminological clarification (3.2.), this is particularly significant considering the fact that Italian case law has intervened repeatedly in relation to top management, establishing a clear distinction, in terms of the applicable provisions, between top managers strictly speaking (such as chief executive officers) who are excluded from many of the protections laid down by labour law (starting with protection against dismissal without just cause), subordinate top managers and quasi top managers.
On the basis of the opinion expressed by the *Consiglio Nazionale dell'Economia e del Lavoro* (CNEL), prior to the enactment of the 1985 law[10], it may be said that middle management is characterised by a high level of technical qualification, due to the technical expertise required as a result of technological progress, changes in employment organisation, and the decline of authoritarian methods in personnel management. This concept of middle managers as technicians covers at least two different functions, "managers" and "professionals". "Managers" are line managers or production managers, highly qualified workers with responsibility for staff and programmes, controlling production and the workforce. They tend to perform management functions: they are not a mere transmission belt for orders and instructions handed down by top management, but they interpret decisions from above and adapt them to the production process. "Professionals" (in the sense of specialists) are the intermediate heads of production, and although they are highly skilled workers, they are not necessarily responsible for staff or programmes. They are in charge of processes and products, or they design new products or new manufacturing techniques. The two functions are different not only in terms of tasks, but also in terms of variables such as age, seniority in the company, professional experience, and qualifications. The number of professionals seems des-

[10] CNEL, Meeting, no. 197/1, 10-11 July 1984, observations and proposals on art. 2095 of the Civil Code, cit. supra, note 7.

tined to increase, whereas the number of managers appears to be declining: in a context characterised by growing technical expertise, technological progress, development in work organisation, and the decline of authoritarian methods of management, middle managers becomes more and more specialists and less and less coordinators.
Moreover, as we shall see (*infra*, esp. 4.), the legal provisions relating to middle management pursuant to Act no. 190, 13 May 1985, are minimal, as they deal with third-party insurance, to be taken out by the employer on behalf of the employee, for civil liability for damage to third parties resulting from negligence at work.
As already mentioned, Act no. 190, 13 May 1985, states that the provisions on white-collar workers are applicable to middle management. The law therefore fails to clarify the issues of classification and the normative framework for executive staff, which is left to collective bargaining – or rather, the excessive power of the confederate unions in comparison to craft or independent unions – that, for this category of workers, does not provide normative distinctions of any value.
Unlike top management, that is regulated by specific contractual provisions, middle management is regulated by the collective agreements for blue-collar and white-collar workers, containing one or two higher employment grades for white-collar workers with managerial functions and other groups specified in some collective agreements (*e.g.* banking).
Historical developments confirm that further clarification and specification of the concept of executive staff, in relation to middle and top management, is needed, also with regard to the identification of the applicable provisions. This is to be the focus of the next section (*infra*, 2.1.). The evolution of collective bargaining, influenced by a paradigm dating back to the law on trade unions of 1926, in the corporatist era, will be discussed in the section dealing with collective issues (*infra* 5.). Suffice it to note at this stage that the professional representation of middle management is still a controversial issue within the unions, divided between craft and independent organisations on the one hand and *ad hoc* bodies within the traditional confederate unions (CGIL, CISL, UIL) on the other.

2.2. Sociological Background

It is difficult to estimate the number of workers covered by the concept of executive staff because, as we have already pointed out, the Italian legal system lacks a precise definition for this group of workers, who fall into a grey area between middle management and the lower ranks of top management. Apart from this, it should be noted that Italy does not have an objective and reliable instrument to adequately monitor the labour market.
The Italian Statistics Office (ISTAT) disregards this issue and provides general survey data. The same may be said of the *Istituto Nazionale della Previdenza Sociale* (Social Security Institute), which could easily provide a much more complete and detailed analysis of the characteristics of this group of workers, for example by providing a summary of the monthly insurance contributions paid by employers, listing the employment grades and casting light on this professional category.
Since 1995, ISTAT has published data using a new system of classification which categorises employment status taking account of the following groups:

- top management or *dirigenti*: "a person who has a role characterised by a high degree of expertise, independence and decision-making powers, and who undertakes his job in order to promote, co-ordinate and manage the achievement of the goals of the enterprise or body";
- middle management or *quadri*: "a person who, in the technical and administrative field, undertakes, with different degrees of responsibility, discretionary and independent powers, management and/or co-ordination functions in a service or office".

With regard to middle management, it is estimated that in Italy there are 1.25 million workers in this category (considering both the public and private sectors), out of a labour force of some 23.5 million, of which some 16 million are salaried workers. In this connection it is important to consider that the resident population of Italy is some 59 million, so the overall employment rate is low.

According to these estimates, which seem to be the most reliable available and are confirmed by the middle management organisations[11], Italy has some 500,000 middle managers in the industrial sector, 500,000 in services and just under 250,000 in other sectors, including agriculture, banking and the public sector.

Top management, including some workers who could be defined as executive staff, is estimated to account for just under 500,000 workers.

These figures seem to match the data provided by the international sources and in particular by the European association of middle management[12] that refers, more specifically, to professional and managerial staff (*see* 3.2.).

Eurocadres provides an overview that confirms the estimates for middle and top management, while pointing out that it is difficult to identity this particular group of workers, as the statistical systems vary from one country to another.

For the past few years, EUROSTAT, the statistical office of the European Communities, has been using a job classification scheme that facilitates comparison between countries. Known as ISCO 88 (International Standard Classification of Occupations), this system consists of 10 groups. Professional and managerial staff are placed in ISCO groups 1 and 2 (*see* Table 1).

Table 1. Professional and Managerial Staff per Country

Country	**Total employees (in thousands)**	**Managers & Professionals (ISCO 1 & 2)**	**%**
Belgium	3427	878	25.6
Denmark	2497	468	18.7
Germany	32252	5111	15.8
Greece	2377	417	17.5
Spain	13095	2012	15.4
France	21312	3391	15.9
Ireland	1440	396	27.5

[11] www.noiquadri.it.
[12] www.eurocadres.org.

Italy	15785	1987	12.6
Luxembourg	173	34	19.6
Netherlands	7220	1801	24.9
Austria	3232	491	15.2
Portugal	3733	364	9.8
Finland	2097	493	23.5
Sweden	3883	849	21.9
UK	24978	6523	26.1
Total EU 15	**137501**	**25214**	**18.3**

Source: EUROCADRES 2003 – EUROSTAT figures: Labour force survey 2002.

The proportion of professional and managerial staff varies considerably from one country to another. While the EU average is 18.3%, rates of over 25% are reported in countries such as Belgium, Finland, the Netherlands, Ireland and the United Kingdom, whereas the figure for Italy is only 12%.
According to these figures, professional and managerial staff make up a smaller proportion of the workforce in Italy than in the rest of Europe. This may reflect the predominance of small and medium businesses, where executive staff play a smaller role, particularly top management (in small and micro enterprises, the employers often manages the company themselves). A further factor is the lack of a clear definition for professional and managerial workers in the Italian system. Unlike other countries, such as France, Italy does not provide *ad hoc* vocational and educational training for top and middle management, except in the case of local agreements between universities and local associations for setting up master's courses.
There is a growing attention on the part of top and middle management associations towards the provision of employment services for executives who are made redundant, at times with specialised placement services run by the associations themselves (*infra* 4.1.).

2.3. Future Developments

Before addressing key aspects of the concept of "executive staff" and before analysing the economic and normative implications of the paradigm under examination, it seems appropriate to consider the future developments of this category of employees.
The Civil Code of 1942, referring to the distinction in Royal Decree no.1825, 13 November 1926 on private employment, classified the labour force as top management (administrative or technical), white-collar and blue-collar workers (art. 2095), on the basis of an overall division of salaried employees that in the words of the introductory report to the code "would never be overcome" since it reflected the different functions performed in the undertaking.
However, as noted above (2.1.), the legislator later intervened, with Act no. 1985 regulating middle management, changing the classification in order to respond to the needs

for differentiating (especially with regard to status) between the middle and higher professional levels as a result of organisational changes. Today these changes continue to be evident with the progressive shift from an industrial economy to the information and knowledge society, leading to an increase in the responsibility and autonomy of more and more workers, due to the changes taking place in organisations, even though, in the light of present-day legal and/or contractual definitions, they cannot be said to be top managers in a strict sense.
The most recent thinking in organisation theory underlines the importance of professionalism, but at the same time there is a need to define the status of those performing managerial and executive functions. Business today demands increased professional mobility and multi-tasking, especially for highly qualified jobs, along with a greater individualisation of employment relations.
With regard to the development of labour law, it is important to take into account, considering the impact that it could have on the classification of executive staff, of the traditional distinction between autonomy and subordination. This is the basis of the juridification (*Verrechtlichung* or legal formalism) of employment relations, but it is becoming more and more inadequate as a way of dealing with modern ways of working. The modern economy is characterised by a progressive fragmentation of traditional roles into a plurality of models in which autonomy and subordination intersect. This is especially true for the professional employees under consideration in this study, who require above all recognition of their status, along with adequate economic and normative conditions. This does not mean turning the clock back in terms of the development of labour law, by reducing the importance of contracts (individual and collective), but there is a trend towards a greater emphasis on status. This is the case also in normative terms, as in the Italian debate a proposal has been put forward, albeit not yet feasible, to abolish the traditional division of labour into separate categories of worker and to introduce either a special discipline for managerial work, perhaps differentiated according to the various management roles, or a form of employment protection conceived as a system of concentric circles, with increasing levels of protection at the various stages of working life (*see* Statuto dei Lavori*,* draft version devised by *Marco Biagi* and *Tiziano Treu* in 1997)[13].
Regardless of any legislative reform it is clear that what is essential for executive staff is change in the industrial relations system. Executive staff need a union that will be their sole representative at the negotiating table, rather than being represented by a negotiator representing all categories of workers.
In connection with the proposal for a reform of Italian labour law in the form of a *Statuto dei lavori* (Work Statute), mention should be made of the unitary position of the three professional associations for top and middle management (Confail, Confedir, Italquadri) whose members intend to advance their professional status as specialised managers[14].

[13] For the project on the "Statuto dei Lavori" drawn up by *Marco Biagi*, resumed in 2004 with the setting up of a special Committee of Ministerial Study, see www.adapt.it, A-Z index, under the heading "Statuto dei lavori" (Work Statute).
[14] The document, drawn up in 2005, is available at www.adapt.it, A-Z index, under the heading "Statuto dei lavori" (Work Statute).

3. Terminology

3.1. Executive Staff: A Concept between Middle and Top-Level Management

The historical reconstruction above (*supra*, 2.1.) shows that, apart from the formal definitions provided by law and/or collective bargaining, the concept of executive staff concerns the area between the categories of top and middle management. After an overview of middle management, it is now necessary to clarify the notion of top management. It will then be possible to attempt a definition of the concept of executive staff, in the light of the guidelines for the comparative research project of which this study is part.

Top managers are the highest category among salaried employees. The legal provisions governing the employment relation of top managers are characterised by the absence of a number of important forms of employment protection, relating to working hours and rest days and above all provisions against unjustified dismissal. There is also some doubt as to whether they can be subjected to disciplinary procedures[15].

Pursuant to art. 2095 (2) of the Civil Code, top managers are identified according to the criteria laid down in collective agreements. These criteria have to refer to objective duties, resulting in the invalidity of collective formal classification clauses[16], stating that top managers cannot be classified as such unless appointed by the employer. The only normative text dealing with this matter is art. 6 of Royal Decree no. 1139, 1 July 1926, that provides an ambiguous and generic definition of top managers, as "technical and administrative directors and other supervisors with similar functions, procurators in general and employees with power of attorney".

The *Corte di Cassazione* has repeatedly stated that the courts cannot impose an abstract notion of top management to replace the definitions adopted in collective agreements[17], which can classify as top managers employees who are in a position partly different from the traditional one. In the tradition view the manager is the *alter ego* of the employer within the enterprise or within an autonomous branch, with considerable autonomy to take decisions, and power to act as a representative, subject only to the general guidelines laid down by the employer. According to judgment no. 47, 5 January 1983 by the *Corte di Cassazione*[18], the assignment of the status of top management needs to be carried out on the basis of objective criteria of classification of duties laid down by the collective agreements, even based on common law, whereas the use of the definition of top management derived from case law is allowed only when the contractual provision is lacking. This principle was later reaffirmed by the *Cassazione*[19],

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[15] The Supreme Court (Corte di Cassazione a Sezioni Unite) ruled in a negative sense, with consequent inapplicability of the procedural guardianship in the event of disciplinary dismissal, settling a dispute in case law, with judgment no. 6041, 29 May 1995, in Foro It., 1995, I, p. 1778.

[16] Cf. Cass. no. 1497, 18 April 1975, in Mass. Giur. Lav., 1976, p. 113; Cass. no. 47, 5 January 1983, in Giust. Civ., 1983, I, p. 1520, Cass. no. 6981, 27 July 1994 in Mass. Giur. Lav., 1994, suppl., p. 60.

[17] Cf. Cass. no. 2637, 29 April 1981 in Foro It., I, c. 1557; Cass. n. 47, 5 January 1983 in Giust. Civ., 1983, I, p. 1520; Cass. no. 4926, 5 June 1987, in Giust. Civ., 1988, I, p. 478; Cass. no. 1899, 25 February 1994, in Dir. Prat. Lav., 1994, p. 1610. In the absence of a collective agreement, it is necessary to make reference to the legal concept: Cass. no. 3056, 23 March 1998, in Mass. Giur. Lav., 1998, suppl., p. 48.

[18] C. Cass. no. 47, 5 January 1983 in Foro it. 1983, I,31.

[19] C. Cass. no. 5620, 15 October 1988, in Giust. civ. Mass. 1988, fasc. 10.

with judgment no. 56 handed down on 15 October 1988, ruling that the assessment of the employee's duties as those of top management – defined by case law only in the absence of a collective agreement regulating the matter – is a matter solely for the courts to decide[20].
As a result, and this is particularly significant for the present study, even subordinate top managers (coordinated by others), are to be considered top managers to all intents and purposes, as they belong to this category. The need to refer to top management in order to define the notion of executive staff can be explained by the progressive enlargement of the category of the top management, resulting from the increasing complexity and size of undertakings and the expansion of duties, that has not been reflected in new legislation, either by extending the notion of middle management (from a normative point of view), or by the restriction and more detailed specification of the concept of top management as the employer's *alter ego* in a strict sense.
In this connection any doubts are left to case law and collective bargaining, regarding the need to extend to top managers (at least salaried managers) certain measures providing protection for salaried employees that are at present not applicable to this category of employees. In particular, consideration could be given to the regulation of working hours and weekly rest days (4.3.), and to protection against unfair dismissal (4.5.). The failure to adopt these forms of protection for top management has had repercussions on the definition of this category.
In the absence of a legal and/or contractual reform of the professional category for the system of employee classification, an intervention by the courts, aimed at drawing distinctions within a category that had become too large, has become inevitable. In this connection, a distinction is made between top management, acting in concert with the employer and thus excluded from certain types of protection, and subordinate top managers, who do not have wide-ranging powers and do not have such a high level of responsibility, who are therefore to be treated no differently from white-collar workers (of the highest employment grade) and middle management.
As a result, from a definitional and conceptual point of view, there has been a significant development in labour law provisions for top management (and at the same time a lack of development in provisions for middle management).
Another matter is the question of agreements between the parties relating to individual employment contracts, with the intention of adopting more favourable provisions in line with case law rulings. If an employer favours an employee who – under the terms of the collective agreement – does not perform managerial duties, by classifying him as a top manager, he becomes a quasi-top manager, for whom the legal provisions for this category are not applicable, in particular concerning the lower level of protection compared to white-collar workers and middle management. The problem has arisen, in particular, with reference to the legal protection against unfair dismissal for blue-collar workers, white-collar employees and middle management, but not top managers.
According to case law, as discussed below (4.5.), an agreement to waive mandatory legal protection – such as protection against unfair dismissal – in exchange for better terms and conditions, in particular higher remuneration, is not allowed for quasi-top management (although it is for subordinate top management). As a result, having outlined the notions of middle management (that never actually established itself) and top-

[20] In the same sense also C. Cass. no. 1963, 11 March 1996, in Giust. civ. Mass. 1996, 329.

level management (clearly in transition), it is now possible to attempt a terminological clarification and definition of the category of executive staff.
The editors of this international survey expressly stated that they did not have "a general notion of the executive staff member in mind underlying our research project. Hence, neither the *cadre* according to the French law nor the *leitende Angestellte* of German labour law are our point of reference. Our point of departure is the observation that various labour law systems in the world have established specific rules for employees exercising certain directive or managerial functions in the enterprise. These labour law systems make distinctions according to the functions exercised by employees and exempt them in part from labour law protection. It is clear that the way these countries determine the circle of those who are covered by this specific labour law regimen can differ considerably. The notion of the *cadre* in French law, for instance, is much wider than that of the *leitende Angestellte* in German law. Having said this, we essentially are interested in employees exercising managerial powers but also in those known as 'directive' employees".
In light of this clarification, it is evident that our research will have to cover all those employees "exercising certain directive or managerial functions in the enterprise". Our attention needs to be directed to those normative measures – consisting of legal or collective bargaining provisions – differentiated according to the "functions exercised by employees and exempting them in part from labour law protection".
The concept of executive staff therefore needs to comprise not only those workers in the category of middle management but, given the interpretation provided by case law in terms of applicable provisions (*infra*, 4.), but also a significant proportion of top management.
This means the inclusion not only of quasi-top managers, who are no different from middle management in technical and legal terms, but also all those subordinate top managers who do not play a leading role in the organisation (as the *alter ego* of the employer). Indeed, Italian case law has ruled that subordinate top managers are covered by provisions against unfair dismissal, so they are covered in the same way as middle management. Changes over the years of the notion of top management have watered down the notion of the professional *cadre,* that can hardly be distinguished, from a normative and economic point of view, from the white-collar employee, undoubtedly also because of the egalitarian pressure of collective industry-wide bargaining, combined with the failure of autonomous or craft unionism for middle management. However, in the Italian legal system, the category of white-collar workers does not seem to correspond to the concept of "executive staff". The editors of the research project stated that: "the point of departure of our project is the idea that executive staff members bring together elements of both employee status as well as employer status. Except that those employees belong to the executive staff, exercising the functions of an employer".
However, although the law on private employment of 1924 defined the white-collar worker as someone who performs functions pertaining to the employer, it is nevertheless the case that subsequent normative changes, expressly acknowledging the category of middle management, rendered this interpretation unfeasible. Executive staff members now correspond to the *cadre*, as already noted, in the lower grades of top management.

Practical and operational doubts still remain with regard to the exact definition of middle management. As specified during our historical survey, the law assigns to collective bargaining the task of defining middle management[21]. It has already been noted (*supra*, 2.1.) that initially the employer is required to identify the category. This raises a matter of concern on the right of the employee (to be ascertained by the courts) to be classified as middle management based on the legal notion alone, even in the absence of a collective agreement[22].

In order to provide a clearer definition of the concept of "executive staff" it should be noted that in France, staff performing functions corresponding in Italy to *dirigenti* (top managers) are just a subset of a wider category of *cadres* consisting of all the employees with powers of control over other workers, by virtue of which they perform *per procurationem* functions on behalf of the employer and take on his responsibilities, a category that is subdivided into *cadres supérieurs* and *cadres inférieurs*. It is an extraordinarily wide-ranging category that oversteps the traditional area of labour law: indeed, the *cadres* at the highest levels of company management, such as the general directors of public limited companies, are not even employed on employment contracts.

German law, on the other hand, does not adopt the notion of *cadre* but a strict notion of top-level manager (*leitender Angestellte*), comparable to the Italian case. These are not all the employees to whom some of the employer's authority has been delegated, but only those who, by virtue of their managerial functions, have a major influence on the economic, technical, commercial or scientific management of the enterprise. The top manager, based on this concept, is characterised by a delegation of powers, the exercise of which influences the general running of the enterprise, thus giving rise to liability on the part of the employee. In the same way, middle managers do not belong to the category of top management, as they have subordinate and executive power, with a level of discretion proportionate to their functions of mediation of management decision-making.

If, in the present study, the concept of executive staff is – regardless of any specific legal definition – interpreted in a broad sense, it is only because the classification of workers contained in art. 2095 of the Civil Code of 1942, as amended by the law on middle employment of 1995, does not have any binding value, since it delegates to collective bargaining and to business practice the task of defining the different professional functions and identifying the employees exercising policy-making or management functions in the enterprise.

3.2. The Notions of Top Management and Middle Management in Collective Bargaining

In the light of these considerations, a more satisfactory definition of the notion of executive staff requires an analysis of collective bargaining and business practice, by which the notion is continually redefined. This is due to the fact that the formal sources and,

[21] It should be noted that the legislator has expressly established the possibility of derogation, for company-level collective agreements, from the definitions contained in industry-wide collective agreements. See: Cass no. 8060, 17 August 1998, in Riv. It. Dir. Lav., 1999, II, p. 525.

[22] For a favourable opinion cf. Cass. no. 2246, 27 May 1995 in Mass. Giur. Lav., no. 192, 1995. Contra: Cass no. 275, 12 January 1999 in Mass. Giur. Lav., p. 234.

in particular legal provisions, do not provide a sufficiently stringent definition when identifying the distinctive features and confines of the notion of executive staff.
The wide-ranging nature of the definitions of top and middle management, in one case referring to the definitions laid down by collective bargaining by the legislator, call for an analysis of the most recent results of collective bargaining, thus confirming, as we shall see in the next section (3.3.), the failure to reflect changes in business organisation models, and then the ineffectiveness (if not the irrelevance) of classifications based on strict categories, such as those in art. 2095 of the Civil Code.
The extremely wide-ranging nature of the legal definition of the category of top management leaves considerable scope for collective bargaining, that has resulted in the expansion of this category. Highlighting the artificial nature of the notion of *alter ego,* characterised by the fiduciary bond with the employer, collective bargaining (in line with present-day business organisation) has ended up including high-level white-collar employees (*superimpiegati*) and highly qualified technicians (*tecnici*) in the category of top management.
One significant factor in the definition and regulation of top management is the tendency of Italian collective bargaining to lay down provisions for management by economic macro-sector, rather than, as in the case of blue-collar and white-collar workers, by type of business (in other words, by market sector).
This tendency was confirmed in the early years after the fall of fascism, with the abrogation of the corporatist law of 1926 (*supra*, 2.1.), thus restoring the freedom of association (*libertà sindacale*) and collective bargaining (*libertà di contrattazione collettiva*). Article 1 of the National Agreement, C*ontratto Collettivo Nazionale di Lavoro,* 31 December 1948 concerning top-level managers in the industrial sector states that: "the agreement applies to procurators, administrative and technical directors and co-directors, to heads of major departments and divisions exercising ample managerial powers, to procurators with a continuous delegation of powers to represent all or a significant part of the enterprise; provided they are members of the Federation of top-level managers (Federmanager i.e. *Federazione Nazionale Dirigenti Aziende Industriali*), and provided they are formally recognised as top managers by enterprises belonging to the Confederation of Italian Industry (*Confindustria*)".
The above-mentioned requirements were not restated in the subsequent renewals, due to case law rulings[23] stating that union membership and the assignment of managerial status by the employer are not sufficient to show that a managerial function is actually performed. Furthermore, in the national agreement of 4 April 1975, the function of top-level management is described in even more specific terms, containing a reference to the fact that management is a form of subordinate or salaried employment. Article 1 of this agreement states that: "top-level managers are those workers for whom the conditions of subordination laid down in art. 2094 of the Civil Code are fulfilled and who play a role within the enterprise characterised by a high degree of professionalism, autonomy and decision-making capacity and who perform their functions in order to promote, coordinate and manage the accomplishment of the company goals". The third sub-paragraph, in line with case law rulings, stated that: "the *de facto* existence of the above conditions determines the assignment of management status and therefore the applicability of the present agreement".

[23] Cf. Cass. no. 3886, 18 June 1980 in Giust. civ. Mass., 1980, fasc. 6.

These collective agreements regulated the employment of top-level managers in the industrial sector only with regard to certain provisions, that were regulated separately. For all matters not regulated by the employment contract, reference was made to the provisions of the law and the collective agreement for white-collar employees in the highest employment grade within the enterprise to which the top-level manager belonged "without prejudice to the preservation of individual conditions that may be laid down in more favourable individual and company-level agreements".
The most recent collective agreements for the industrial sector continue along the same lines, stating that: "top managers are those workers for whom the conditions of subordination laid down in art. 2094 of the Civil Code are fulfilled and who within the enterprise play a role characterised by a high degree of professionalism, autonomy and capacity to take decisions, and perform their functions in order to promote, coordinate and manage the accomplishment of the company goals. This definition covers directors and co-directors, heads of major departments and divisions exercising ample managerial powers, procurators with a continuous delegation of powers, or the power to represent all or a significant part of the enterprise. The *de facto* existence of the above conditions gives rise to the assignment of management status and therefore the applicability of the present agreement. Disputes regarding the recognition of management status shall be dealt with by appropriate procedures (provided in collective agreements) and the subsequent recognition determines the application of the agreement with effect from the date of the attribution of the duties in relation to the dispute"[24]. Collective bargaining for top managers in the commercial sector[25] and also in other sectors[26] is based on similar criteria, with the sole exception of the banking sector, which presents specific characteristics[27].
Change has mainly taken place in relation to the normative aspects applicable to top-level management, dealing with the following aspects:

- economic terms (determination of the minimum wage, length of time for a step increment, etc.);
- employment relation (vacation, leave, vocational training and retraining, business travel and transfers, maternity leave and sick pay, accidents at work and occupational sickness and related insurance, transfer of ownership, transfer of the top manager, civil or criminal liability in performing work-related duties, change of status, etc.);
- welfare and national insurance (retirement provisions, etc.);
- union protection (arbitration board for out-of-court dispute resolution, union representative bodies, settlement of disputes, etc.);
- termination of the employment contract (regulation, notice of termination, severance pay, death benefit, length of service).

For middle management the picture is different. The unsuccessful attempt to launch craft unionism for middle management (*infra*, 5.1.) explains why only one sector has

[24] CCNL (National Agreement): Dirigenti-Aziende industriali, agreement signed on 23 May 2000 between Confindustria and Federmanager (last renewal 24 November 2004).
[25] CCNL Dirigenti-Aziende terziario: 27 May 2004.
[26] CCNL Dirigenti delle piccole e medie aziende industriali, 21 December 2004; CCNL Dirigenti-Aziende agricole, 11 May 2005; CCNL per i dirigenti delle aziende di autotrasporto e spedizione, 16 April 2004.
[27] CCNL Dirigenti per il personale direttivo delle aziende di credito e finanziarie, 1 December 2000.

concluded a separate agreement for middle management (banking). One particular industry-wide agreement has made provision for a specific job description (*declaratoria*) for middle management, whereas several others have regulated middle management together with the category of white-collar employees (metalworking industry, construction industry, chemical industry, etc.). The general tendency has been to assign a higher status (*superqualifica*) within a single classification.
The agreements renewed after the law of 1985 granted formal recognition to the category of middle management, while imposing stringent selection conditions. The distinction between middle management and high-ranking white-collar employees seems to consist in a different level of commitment to company goals: a "decisive" (private-sector chemical companies)[28] or a "qualified" (private-sector metalworking companies) contribution, or a contribution of "strategic interest" [29] (state-sector metalworking companies)[30] to the decision-making process and to the elaboration and management of plans and projects concerning key markets for the enterprise. The traditional characteristics of management – autonomy, responsibility, coordination of departments and divisions, representation – go hand-in-hand with the originality and creativeness of the contribution, from the organisational point of view (planning, optimisation of human, technical and financial resources) and from the point of view of specialised knowledge (research, design, testing and projects). Apart from these particular cases, middle management tends to identify with top-level management, as the *alter ego* of the employer at the top of the hierarchy. In the absence of a contractual redefinition of top management, the overlap between the two categories is evident, and is becoming even more evident because of the widening of the category of management.

3.3. The Italian Case in the International and Comparative Framework

Confirmation of this view is to be found not only in an historical analysis (*supra*, 2.1.), but also in the international and comparative framework. Mention should be made in this connection of the international definition of professional and managerial staff in the *Compendium of Principles and Good Practices relating to the Employment of Professional Workers* adopted in March 1978 by the International Labour Organisation Governing Body, following a tripartite conference held in 1977[31] that supports the findings of the previous section (3.1.). According to this definition, "a professional or managerial worker is a person (1) who has completed a higher level of education and vocational training or possesses recognized equivalent experience in a scientific, technical or administrative field: and (2) who performs, as a salaried employee, functions of a predominantly intellectual character involving the exercise of a high degree of judgement and initiative and implying a relatively high level of responsibility. The term also covers any person who meets criteria (1) and (2) above, and is responsible, under the general di-

[28] CCNL 10 May 2006 for the employees of the "industria chimica, chimico-farmaceutica, delle fibre chimiche, dei settori ceramica e abrasivi, cere e lumini, detergenza, dielettrici, dattilografici, elettrodi di carbone, dei lubrificanti e del GPL".
[29] CCNL 7 May 2003 for the empoyees of "industrie metalmeccaniche private e della installazione di impianti".
[30] CCNL 7 July 1999 for the employees of "aziende metalmeccaniche a partecipazione statale".
[31] See Supreme Court (Corte di Cassazione a Sezioni Unite) judgement no. 6041, 29 May 1995, in Foro It., 1995, I, p. 1778.

rection of the employer, for planning, managing, controlling and co-ordinating the activities of part of an undertaking or organisation, with corresponding authority over other persons. The term does not cover top-level managers who have a significant delegation of authority from their employers".
The distinctive traits of this definition certainly reflect the notion of middle management and, without doubt, also the notion of subordinate top-level management. As expressly stated, this definition does not include top management in a strict sense, meaning an employee who, even though legally classified as a salaried employee, enjoys considerable autonomy and responsibility within the undertaking or within an autonomous branch, with considerable powers to take decisions and act as a representative *per procurationem* of the employer, to the point that he can be described as his *alter ego*.
This international definition appears to be much more reliable than the one provided in the International Standard Classification of Occupations (ISCO) used at European level by the European Union office of statistics – EUROSTAT, mentioned above (supra. 3.2.). ISCO-88 (COM) places professional and managerial staff in groups 1 and 2 in the following classification: 1. Legislators, senior officials and managers; 2. Professionals; 3. Technicians and associate professionals; 4. Clerks; 5. Service workers and shop and market sales workers; 6. Skilled agricultural and fishery workers; 7. Craft and related trades workers; 8. Plant and machine operators and assemblers; 9. Elementary occupations; 10. Armed forces.
Based on the International Standard Classification of Occupations (ISCO 1 and 2), in recent years the ETUC amd Eurocradres have carried out one of the few comparative studies of the matter[32]. According to the study, professional and managerial staff (P&MS) are defined as "staff belonging to the higher category of employees within an enterprise". This definition appears to be rather vague and imprecise. However, definitions apart, the concept of professional and managerial staff covers a number of different cases. First, professional and managerial staff exercise responsibilities in various technical and managerial areas associated with finance, human resources or corporate affairs. The geography and economic and political circumstances of different countries, as well as their business cultures, have led to varied approaches to the organisation of professional and managerial staff, in trade unions or professional associations. They may be covered by and involved in collective bargaining, or they may be excluded. Individualised arrangements, whether or not set out in employment contracts, have also developed. These different aspects, organisational modes, collective bargaining and individualised arrangements, are changing in line with the transformations in the economy and corporate affairs.
It may therefore be argued that executive staff are generally defined in relation to their autonomous decision-making and management powers in some vital area of the enterprise. It is therefore the delegation of powers from the top which distinguishes them from other employees. Other factors may also enter the equation when defining professional and managerial staff, such as their level of educational attainment.

[32] Cf. *E. Mermet*, Professional and Managerial Staff in Europe, ETUI. EUROCADRES. 2000 – 1st edition, subsequent edition 2002, last updated (as far as we are aware) 2005.

4. Individual Labour Law

4.1. The Hiring Process

With regard to the stipulation of the employment contract with executive staff, the information duties of applicants deserve particular attention. In general, collective agreements applying to top-level managers require[33] the employment contract promotion to the rank of top management to be in writing or and also determine the content of the contract. In this sense, for example, the national agreement for top-level managers in the industrial sector states that: "the hiring of top-level managers or the promotion to top management must be carried out in writing and must list the duties, the salary and any conditions that are more favourable than the ones resulting from the clauses of the present agreement"[34]. A similar provision is contained in the national agreement for top-level managers in small and medium-sized enterprises. Moreover, the national agreement for top-level managers in the tertiary sector states that the following matters must be listed in the employment contract for managers or in the case of promotion to top management (both to be signed for acknowledgement by the worker):

- starting date of the employment contract: the date when the employment relation begins or the date when the appointment to top management takes effect;
- probationary period: a trial period can be specified for the top-level manager with the option of a short period of notice at the end of the trial period;
- place of work;
- recognition of the national agreement in force and any changes;
- job description: specification of duties and powers;
- salary;
- conditions of transfer, where applicable;
- other useful information specifying the position of the manager within the enterprise.

Any changes in the conditions taking place during the employment contract must be set down in writing. The specification of the duties of the top-level manager – with reference to the organisation chart if it provides details of each function – is particularly important to avoid disputes over the area of competence and the responsibilities of the top-level manager, as well as with regard to any behaviour that might result in the termination of the employment contract[35]. It is sometimes the case that in the termination of a contract for alleged inefficiency of the top-level manager, problems arise in the courts if it is not easy to define the duties performed by the worker because the individual employment contract[36] lacks a clear description of these duties. With reference to the functions assigned to the manager, it is routine procedure to specify in the hiring

[33] By way of example, two exceptions are the national agreement for managers of enterprises in the banking sector, and the national agreement for the managers of insurance companies.
[34] Case law requires the employment contract to be in writing (Cass. no. 4746, 27 May 1987, in Orient. Giur. Lav. 1987, 590).
[35] Cf. *A. Di Francesco*, La dirigenza privata, Naples, 2006, 34.
[36] Cf. Cass. no. 1869, 24 March 1982, in Dir. lav. 1982, II, 422, according to which: "just causes for dismissal of the manager pursuant to art. 2119 c.c. can also be found in misconduct of the manager in carrying out his functions as managing director of an associated enterprise, where the manager performed activities (in the form of collusion with a competitor and false statements) undermining the element of trust in the relationship.".

letter the delegation of powers and responsibilities for that position, occasionally with a cross-reference to a separate document. Details are required of the powers to be conferred, their modification and their annulment, pursuant to the norms laid down in the Civil Code on the powers of representation and attorney.
Once a job description has been agreed on, remuneration is a key matter in negotiations between the employer and the employee. It is standard practice to specify not the total amount of pay, but each item that it consists of, specifying the criteria to be applied in calculating the various amounts. For items that are not determined by the collective agreement but are a matter of individual agreement between the employer and the employee, it is up to the parties to determine them, with the obvious exception of salary components laid down by the law[37]. In negotiating an individual contract, particular attention is given to the more favourable clauses, especially with regard to fringe benefits (also known as benefits in kind, perquisites or perks), which are various non-wage benefits provided in addition to the normal salary; in this case the parties tend to list not only the benefits but also the applicable norms, above all with regard to severance pay, bearing in mind the lack of clear and coherent guidelines laid down by case law[38].
In the same way the job location takes on particular importance, especially in enterprises with a number of manufacturing units and when the top-level manager performs his or her duties at different plants. A particular case is that of a top-level manager hired by an enterprise belonging to a group who performs functions concerning all the enterprises in the group: in this case it is standard practice to specify in the letter of hiring how the activity of the manager will be performed in relation to group structure.
Finally, the Civil Code requires the probationary period agreed with the top-level manager to be specified in writing, listing the specific duties during the period of probation[39]: in the absence of written provisions, the agreement on the probationary period is void and any dismissal during the period of probation is unlawful. The employer will be liable to pay the severance package and an additional compensatory award for unfair dismissal as determined by the national agreement.
With regard to job-matching, mention should be made of the important role played by Federmanager (*Federazione Nazionale Dirigenti Aziende Industriali*)[40].
Among its functions – providing professional advice to its members on issues such as contracts, social security, taxation, laws, promotion of cultural events – Federmanager has recently undertaken the task of matching supply and demand on the labour market for managers who are unemployed or employed by a company that has gone into liquidation.

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[37] *Di Francesco*, cit.See Cass. no. 1608, 3 April 1989, in Dir. Prat. Lav., 1989, Cass. no. 1786, 13 February 1992, in Orient. Giur. Lav., 1992, 315.
[38] See Cass. no. 16129, 15 November 2002, in Giust. Civ. Mass. 2002 and Cass. no. 11448, 19 June 2004, in Giust. Civ. Mass., 2004.
[39] See, among many, Trib. Rome 14 July 2005, in Boll. ADAPT, 2006, n. 9.
[40] Founded in 1945, Federmanager is the organisation that represents and protects 82,000 industrial managers and 63,000 retired managers. The members are managers of small, medium-sized and large enterprises, newly appointed managers, general managers, managing directors who operate in all the sectors of private-sector and state-sector industry, as well as in the auxiliary and complementary activities of the industry. In representing the industrial managers, Federmanager stipulates and negotiates national agreements with Confindustria, Confapi, Confservizi, Confitarma, Fedarlinea and Fieg and supplementary agreements with large industrial groups; it promotes initiatives at political and parliamentary level for the promotion of the managerial role and for safeguarding the interests of the category.

During the national agreement renewals in 2004-2008, Confindustria and Federmanager made available a support package ranging from income support for unemployed managers, by means of a separate fund set up within the healthcare fund known as the *Fondo per Assistenza Sanitaria Integrativa*, to redeployment measures. They set up an ad hoc agency (Manager at Work) within the Fondirigenti foundation, that was subsequently authorised by the Ministry of Labour as a bilateral body providing job placement services for managers.
The Fondirigenti-Manager at Work offices are located in Rome, but perform their work through branches in five regions, at Unimpiego-Confindustria in Turin, Bergamo, Padua, Bologna and Rome, and at the Federmanagers' associations in Turin, Milan, Padua, Bologna and Rome. The Manager at Work agency has set up an on-line database with the personal data and the professional profiles of the managers with a view to improving their skills and promoting their career development. The managers can make use of services provided by specialists and receive assistance in writing their CV and entering their data into the national employment database, and they are given vocational guidance. Job matching takes place by examining the professional qualifications of the candidates and the vacancies posted by employers.
Employers are then in a position:

- to examine the profiles of the managers registered with the database by specifying the skills required and obtaining the profiles of candidates, though at this stage their names are not revealed; full details of the candidates may then be obtained from the Manager at Work agency or the offices of *Unimpiego* or *Confindustria*;
- to select managerial staff through one of the branches of Manager at Work, at the offices of *Unimpiego-Confindustria* and *Federmanager* mentioned above, obtaining the details of the candidates matching their requests as defined by the search parameters.

Provided they are members of the Fondirigenti fund for the continuous training of managers in manufacturing or services, they can receive support from the Vocational Training Fund to finance the training of the newly hired manager or to improve the skills of the managers at risk of losing their jobs.
A recent addition to Federmanager is the new National Association of Middle Managers known as *Federmanager Quadri*. The objectives of this association are:

- to protect the professional, moral, economic, social, and legal interests of middle management and to enhance their role;
- to promote legal and legislative action in favour of middle management;
- to promote policies favourable for middle management by building relationships and collaborating with employers, political parties, the social partners, trade unions, and national and international bodies;
- to promote actions to enhance the professional qualifications and status of middle management and to organise social events in their favour.

Membership of *Federmanager Quadri* is open to salaried employees recognised as middle management pursuant to Act no. 190/85 or recognised as such by collective agreements in force (as well as workers in similar high-ranking positions with a high level of responsibility) even after the termination of the employment relationship due to retirement or for any other reason. Membership is also open to middle managers who

belong to associations set up within an enterprise, or groups of middle managers organised at company level.
The association promotes job placement programmes also for middle managers. In this connection, *Federmanager Quadri* has concluded an agreement with the professional section of the temporary employment agency, Manpower, to improve employment opportunities for middle management.
According to recent estimates some 52,000 middle managers (16.5% of the total) have left mainly medium-sized and large enterprises in which restructuring/rationalisation is taking place, especially in the transport sector, in telecommunications and postal services, and in the energy sector. They are mainly between the age of 40 and 52, with a significant proportion of women executives (more than 20% of the total) looking for a new position. This trend is becoming increasingly widespread and is expected to continue over the next two years.
Starting from these initial findings, in collaboration with the regional coordinating body, the Ministry of Labour has designed an experimental project that is to be implemented with the collaboration of *Italia Lavoro*, with the aim of providing a response to the increase in unemployment of this particular group of knowledge workers by means of support services aimed at facilitating their redeployment, in particular:

- providing support for unemployed managers and assisting their return to the labour market;
- reducing the social costs for the community and helping employers to benefit from the experiences and skills acquired by middle management during their career.

This experimental programme is aimed at 900 unemployed workers over the age of 40 in the middle management category in the following Regions: Abruzzo, Lazio, Lombardy and Sicily. Since May 2008, the programme has been extended to Veneto.
The methods adopted and the allocated resources are intended to provide:

- an effective service, responding to the individual needs of middle managers;
- inter-operability with and among regional and local systems;
- the integration, transferability and dissemination of good practices;
- the implementation of an integrated system of services tailored to the specific needs of the users;
- assistance to Regions and Provinces in the definition of good practice and of effective and shared standards of service.

The programme consists of activities relating to:

- labour supply: through reception, vocational guidance, counselling, support for retraining support, work programmes for unemployed persons, information and promotion for the start-up of self-employed activities;
- demand for labour: through research into the potential needs of employers, assistance for the enterprises involved for the use of the available skills, support for the use of national and local incentives.

The programme will be in place initially for one year. The development of these activities will involve, at different operational levels, all the institutional and representative bodies with an interest in the successful outcome of the project: Regional Employment Offices, Regions, Provinces, employers associations and representative bodies.

4.2. Determination and Payment of Wages

The salaries of top-level managers are not determined on an hourly basis (as we shall see in detail in examining working time) but are structured on the basis of a minimum monthly salary and a variable component (performance-related pay). The national agreement for top managers in enterprises in the industrial sector provides for a basic minimum monthly wage and a variable component. In particular, the national agreement provides for a "guaranteed minimum package" reflecting the seniority of the manager in the company, and this is the gross annual income parameter to which actual annual income is compared. A comparison is made at the end of December each year between gross annual income and the guaranteed minimum, taking into account certain specific components of the manager's income. In cases in which the manager has received less than the guaranteed minimum, the difference is paid by the employer in the form of a lump sum with the December pay cheque and is considered for severance pay purposes. Furthermore, starting from January of the following year, the annual income of the manager, divided by the numbers of pay-cheques, will be increased by the monthly amount necessary to ensure payment of the guaranteed minimum on an annual basis.

For newly hired or recently appointed top-level managers, or for those whose employment contract has been terminated during the year, the guaranteed minimum in the year in which the employment relationship starts or is terminated is recalculated in relation to the months of service in the year of reference with payment, if due, of a lump sum that is considered also for the purposes of severance pay. Starting from 1 January 2005 several income components have been brought together under a single heading known as *Trattamento Economico Individuale* (individual emolument) that for top-level managers hired or appointed after 24 November 2004 corresponds to the difference between the actual gross income of the manager and all forms of remuneration.

However, during the renewal of the national agreement for top managers in small and medium-sized enterprises in the industrial sector, the model based on the guaranteed minimum was considered too burdensome, and not suitable for the enterprises belonging to CONFAPI, the confederation of small employers: the parties preferred to negotiate a minimum monthly wage. Managers were also granted the right to make an agreement with the employer on variable items of remuneration linked to company objectives specified in writing. The national agreement provides for annual or biannual increments to be replaced by variable amounts regulated by an agreement between the employer and the employee, on a monthly, yearly or otherwise agreed basis, conditional on the fulfilment of agreed company objectives. In the absence of a specific agreement, the manager is entitled to an allowance regulated by the national agreement.

Remuneration for top-level managers in the commercial sector comes consists of the following items, as regulated by the national agreement: a) a minimum monthly salary b) annual or biannual increments, if any c) supplementary amounts in the form of remuneration consisting of commissions, production bonuses, shares. However, in cases in which the *de facto* remuneration after the deduction of the supplementary amount (provided for by the collective agreements) is found to be lower than the monthly minimum relating to the seniority level, the difference will be paid as a supplement to the minimum amount.

For tax purposes, it should be noted that even the additional pay exceeding the minimum in the collective agreement and negotiated by the individual worker in relation to his or her performance is added to the other wage components, to calculate the gross income of the employee: these amounts therefore count in terms of taxes and contributions, as well as for the determination of the annual allowance for severance pay.
One point that is not clear is how to calculate the value of fringe benefits, that usually include company cars (also for private use), mobile phones, computers, subsidised rents, complementary insurance, loans at favourable rates, medical check-ups, stock options, private school fees and so forth. According to the Italian Civil Code (art 2099 paragraph 3), "the employee can be remunerated entirely or partially with profit sharing, with commissions or in kind". The provisions do not appear to leave any doubt about the nature of fringe benefits as a form of remuneration. However, it is not easy to calculate their overall value, especially in the case of materials and equipment used for professional purposes, that would not normally be calculated as part of remuneration. Where an employee exchanges wages for some other form of benefit, this is generally referred to as a "wage waiver". In most cases, fringe benefits are considered to be part of remuneration also for tax assessment purposes and most kinds of employee benefits are taxable at least to some extent, pursuant to art. 51 of the Income Tax Act (*Testo Unico delle imposte sul reddito*), and are taken into account in the computation of contributions (see in case law *ex multis*, Cass. no. 15813, 11 November 2002: "In the subordinate relationship, income for pension computation purposes consists not only of the amount paid for the work performed, but of all forms of remuneration (total remuneration in cash or in kind) received by the worker […] arising from the employment relationship, regardless of the definition adopted by the parties, with the sole exception of payments expressly excluded for pension computation purposes pursuant to art 12, Act no. 153, 30 April 1969".
In connection with income tax, mention should be made of a fringe benefit paid to managers, and to salaried employees in general, consisting of stock options, i.e. the right to buy or take out an option on shares in the company at a given price (strike price), at a certain date (due date). This means that part of the remuneration is conditional on company performance, as a means to promote staff loyalty. This is an advantage from a fiscal point of view because, on certain conditions[41], the difference between the value of the shares at the time of the stock option and the amount paid by the employee is not subject to income tax since from a fiscal point of view it is not considered to be income from salaried employment.

4.3. Working Time

Article 36 of the Italian Constitution states that the law sets the maximum number of working hours, whereas the Civil Code regulates the limits on working hours in special overtime laws, providing that, in the case of extension of normal working hours, the worker must be duly compensated for the additional time at a higher hourly rate for overtime work.
However, the legal provisions so far in force in Italy (legislative decree no. 692, 15 March 1923) and the present regulations introduced by legislative decree no. 66, 8

[41] See legislative decree no. 223, 4 July 2006, and enactment Act no. 248, 4 August 2006.

April 2003, (enacting directives 93/104/CC and 2000/34/CC on working time) expressly exclude top-level managers from their field of application. Art. 17, paragraph 5, of legislative decree no. 66, 8 April 2003, states that the norms regulating normal working hours, the maximum number of hours, overtime, day rest, breaks and night work, even with regard to the general principles of health and safety, are not applicable to employees whose working hours cannot be measured or established in advance, due to the characteristics of the work performed, or in cases in which they can be determined by the employees themselves, and this means top-level managers, managerial staff or other workers with decision-making autonomy.
Commenting on the normative provisions, and on the basis of case law rulings, the Ministry of Labour has stated that: "the wide-ranging nature of the norm also covers professional employees who, although without exercising hierarchical powers, perform their functions with a considerable degree of discretion and autonomous determination of their working time. More in general, it is believed that the derogation from the limit of 48 hours a week also concerns those activities whose duration cannot be predetermined. These are activities where the professional qualification of the workers, with special skills, is an essential condition, so that the work, sometimes due to the continuity of the services provided outside the enterprise, consists of a series of actions which cannot be scheduled in terms of working hours"[42].
The issue of the inapplicability of working hours regulations to top-level managers under the previous law was examined by the Constitutional Court, sentence no.101, 24 March 1975, which upheld the constitutionality of the norm, considering the type of work performed by managers, that cannot be carried out within set time limits. However, the Court has also ruled that: "a limit to global working time, although not set by law or in the contract in terms of a maximum number of hours, continues to exist, even for managerial staff, first of all with regard to the protection of health and safety, safeguarded by the Constitution for all workers and, always in compliance with this principle, with reference to the objective needs and characteristics of the activity of the different categories of managers or employees with managerial duties: to the point that the courts can certainly ascertain a reasonable duration of working time required by the employer, considering the nature of the functions performed and the operational requirements of the employer, according to the different types of enterprises."
This principle laid down by the Constitutional Court has been upheld in subsequent rulings, and the right of top-level managers to remuneration for overtime has been acknowledged if the work performed exceeds the limits laid down by the collective agreement, the individual employment contract or business practice, or if it exceeds the reasonable limits in relation to the protection of health and safety[43].
It is clear that in spite of the inapplicability of the legal discipline of the working hours to top-level managers, who are thus exempt from overtime provisions, they are not without protection: on the basis of the principles upheld by the Constitutional Court, case law has recognised the need to respect reasonable working hours even for top-level managers.
With regard to collective bargaining, the provisions relating to working hours – if any – are quite generic. For example, given the difficulties of quantifying managerial work,

[42] Circ. Min. Lav. no. 8, 3 March 2005.
[43] See, among the most recent judgments, Trib. Ivrea February 8, 2006; Cass. July 23, 2004, no. 13882; Cass. June 16, 2003, no. 9650; Cass. May 15, 2003, no. 7577; Cass. August 21, 2003, no. 12301.

the national agreement for top-level managers in the tertiary sector states that the working hours of the operational unit where the manager is employed are to be followed, with a margin of discretion, whereas the national agreement for top-level managers in industry makes no provisions at all in this respect.

4.4. Liability

Various issues need to be considered in relation to the liability of top-level managers. One significant issue is the liability of managers against third parties for damage caused in the performance of their work. On the basis of art 2049 of the Civil Code, employers ("owners and principals" in the words of the Civil Code) are liable for damage caused by unlawful actions of their employees in the performance of their work.
This provision, applicable to top-level managers, grants the injured party the right to take direct action for liability against the person who is materially responsible for the damage, and indirect action against the employer. Case law rulings have recently made clear that the liability pursuant to art 2049 of the Civil Code does not exclude the liability of the person responsible for the damage (pursuant to art 2043 of the Civil Code), but aims to reinforce the protection of the injured party, by allowing action to be taken for the entire damage settlement, even against the person directly responsible.
In the case of settlement by the employer of damages to a third party, action is still allowed by the employer against the employee: however, if the unlawful action was committed while following the instructions of the employer, the employer does not have any right of retaliation.[44]
With reference to civil liability toward third parties, the law (art. 5 Act no. 190, 13 May 1985) requires the employer to take out insurance for middle or top managers if they are assigned to duties at risk of damage claims by a third party. According to art. 1917 of the Civil Code, paragraph 1, such insurance is mandatory only for civil liability due to culpable negligence and for actions committed in the performance of work. An employer who fails to comply with this obligation is not entitled to act in retaliation against the worker[45], even if a settlement for damages has been made. Mention should be made of the additional safeguards laid down in collective agreements. In particular, for top-level managers of small and medium-sized enterprises in the industrial sector, the national agreement states that: "civil liability against third parties for actions taken by the top-level manager in performing his functions is an obligation of the enterprise […]. The manager who terminates his employment relation because of commitment to trial is entitled to severance pay, remuneration in lieu of notice, and an additional compensation award for want of notice. The manager is entitled to the amounts listed above only upon notice to the employer of the action taken against him for an indictable offence. If criminal proceedings are instituted against the manager for actions directly linked to duties assigned to the manager, the enterprise shall meet all legal costs. The manager shall have the right to appoint a lawyer of his own choosing, and the enterprise shall meet all legal costs. The fact that the manager has been committed for trial for an indictable offence directly relating to the performance of his duties does not pro-

[44] *A. Vallebona*, Istituzioni di diritto del lavoro, Vol II, Il rapporto di lavoro, 2003.
[45] *O. Mazzotta*, La responsabilità civile del lavoratore tra legge e contratto collettivo, in Lav. e dir., 1987, 3.

vide grounds for dismissal; in case of commitment, the manager shall have the right to the protection of his post and his salary. The guarantees and protections […] are applicable to the manager even after termination of the employment relation, on condition that the actions took place during the employment relationship. The guarantees and protections […] do not apply in the case of fraud or gross negligence of the manager, confirmed with a definitive sentence".
Along similar lines, the national agreement for managers in the tertiary sector states that: "if the manager has civil or criminal responsibilities confirmed by the law or by a statute, he shall be entitled to the necessary powers and to act in an autonomous manner according to the prescriptions of these norms. The liability and the civil consequences against a third party, caused by breach of them, for acts taking place while the manager was performing his functions, rest on the employer. In the case of criminal proceedings at any level against a manager for actions relating to his functions and responsibilities, all the costs (including legal expenses) shall be met by the employer. In the absence of an agreement between the parties, a defence lawyer shall be appointed by the employer, but the manager has the right to a lawyer of his own choosing and the costs will be met by the employer. The fact that the manager has been committed for trial does not provide grounds for dismissal *per se*. The protections mentioned above are applicable also after the termination of the employment contract. In case of commitment to trial, the manager shall have the right to his salary and the protection of his post. The guarantees and protections […] are applicable to the manager even after termination of the employment relation, on condition that the acts took place during the employment relationship. The guarantees and protections […] shall not apply in case of fraud or gross negligence of the manager, confirmed with a definitive sentence". A similar provision applies to insurance company managers.
Managerial staff are typically responsible for the protection of the health and safety of workers in the workplace (legislative decree no. 626/1994). Even in cases in which a safety representative is appointed, the employer and the manager in charge of safety are liable in the case of industrial accidents: case law rulings have stated that the legislator's aim was to place managers and staff in charge of the prevention of accidents in a position of *iure proprio*, disregarding any delegation of powers[46].
In some cases the manager of a company is appointed to be managing director or a member of the board of directors[47]. In such cases, the legal foundations for the liability of the managing directors can be many. In particular, mention should be made of:

- liability against the company (art. 2392 and 2393 cc)
- liability against creditors of the company (art. 2394 cc)
- liability against third parties and against the partners or associates of the company.

Art. 2392 cc deals with liability in the case of breach of legal obligations, breach of the deed of partnership, negligence in the supervision of the company, and failure to take steps to deal with events of a prejudicial nature.
An action for liability by the creditors (pursuant to art. 2394) is based on the principle of negligence in preserving the capital. It follows that there is a fundamental distinction between liability against the company (art. 2393 cc) and liability against the company

[46] Cass. Crim., sec. IV, no. 6277, 6 December 2007; Cass.Crim., sec. IV, no. 11351, 20 April 2005.
[47] On the liability of the de facto managing director cf. Cass., sec. I, no. 9595, 14 September 1999, in Società 2001, 807.

creditors. The basis for the action of the creditors is to be sought in the fact that the assets of the company are insufficient to cover the credits, but in the case of insolvency if the assets are sufficient to meet the demands of the creditors, the action pursuant to art. 2394 is not exercisable (therefore, this action follows or completes the adjudication of bankruptcy). The action at issue is of a non-contractual nature (not specified in the contract), since there is no obligation of a contractual nature between the managing directors and the creditors. An action pursuant to art. 2395 cc is taken by individuals or by a third party and is not specified in the contract. Many insurance companies offer policies to insure against these risks.

4.5. Termination of the Employment Contract

As in the majority of employment contracts, the contract of a manager can be terminated at the request of the employee (by resignation) or of the employer (by dismissal) or by mutual agreement. Moreover, in the case of fixed-term employment, the contract expires on a given date. In this connection it should be pointed out that the law allows for the stipulation of fixed-term contracts for a period of up to five years with top-level managers. In the case of top management, the conclusion of fixed-term employment contracts is not conditional on the existence of technical, production, organisational reasons, or for the substitution of another employee, as it is for the majority of workers (legislative decree no. 368/2001). In the event of resignation, the manager is required to give proper notice pursuant to the conditions laid down in the collective agreement. The terms of notice depend on the seniority of the manager. If the manager is not willing to continue working during the period of notice, he is required to pay the employer an indemnity in lieu of notice, equal to the amount of the salary to which he would have been entitled during the period of notice. However, this cuts both ways: if the manager is willing to carry on working, but the employer prefers to release him, it is the employer who is required to pay the employer indemnity in lieu of notice.
A period of notice is not required if the manager resigns for just cause, i.e. if there is a reason that prevents the continuation, on a temporary basis, of the employment relationship. Collective agreements make provision for various kinds of resignation for just cause, but case law rulings are steadfast in considering the provisions merely as providing examples[48]. Except in the case of resignation with notice, the reasons underlying the manager's decision are required to be stated in writing: in this connnection, the national agreement for top-level managers in the tertiary sector expressly requires the reason to be "formally specified". The agreement also states that, in the case of resignation by a manager for a justified reason, in addition to pay in lieu of notice, the employer has to pay an additional compensation award equal to one third of the remuneration for the period of notice.

[48] Case law rulings relating to the just cause of resignation include cases in which the company in in arrears in the payment of the manager's salary (Cass. no. 648, 26 November 1988), cases in which the manager has been insulted in official communications (Cass. no. 1542, 11 February 2000), or other circumstances (Trib. Milan, 16 June 1999), and cases in which the employer refuses to recognise the work performed by the manager without valid justification.

However, the national agreement for the industrial sector does not contain any provisions of this kind: managers are only entitled to pay in lieu of notice, unless they can provide evidence in support of a claim for additional damages.
In general, apart from unfair dismissal measures, the Italian legal system excludes management in the private sector from the legal protection on dismissals, that are allowed only for a just cause or reason. The national agreement for top-level managers in the industrial sector provides for compensation varying from a minimum of eight months' to a maximum of 12 months' pay, whereas the national agreement for top-level managers in the tertiary sector provides a period of notice ranging from six months for four years of service, up to 12 months for more than 12 years of service.
The principle of full withdrawal *ad nutum* means that in the event of dismissal, the employer has to specify the reason, and in the absence of a specification at the time of notice, or if the manager objects to the reason given, he or she will be entitled to appeal to the arbitration board specified in the contract. In the event that the arbitration board delivers a reasoned judgment for unfair dismissal and upholds the appeal by the manager, the employer will be liable to pay compensation in addition to the amounts due at the end of the employment relationship. The amount of compensation is decided by the arbitration board with respect to the facts of the case and will range from:

- a minimum, equal to the compensation for the period of notice worked, increased by an amount equal to two months' compensation in lieu of notice, to
- a maximum of 22 months' compensation in lieu of notice

The additional compensation is automatically increased in cases in which the dismissed manager is between the ages of 46 and 56. Similar provisions are contained in other collective agreements.
The notion of justification for dismissal, in the absence of which the manager is entitled to additional compensation as provided in collective agreements, has given rise to various interpretations in the sentences handed down by the labour courts. Many of the most recent judgments have confirmed the following principle, that is now fairly generally accepted: "The employment relationship of the manager is not subject to the norms on the limitation of individual dismissals as per art. 1 and 3 Act no. 604, 15 July 1966 and the notion of 'justification' required by collective agreements does not correspond to the notion of 'just cause' laid down in art. 3 of Act no. 604, 1966. It follows that, with regard to the additional compensation provided in collective agreements in the event of the dismissal of a manager, the 'justification' does not need to depend on the impossibility of continuing the employment relation or a serious crisis resulting in the impossibility of continuing the employment contract or too heavy a burden for the enterprise, providing that the principles of good faith and proper behaviour, that are necessary for the legitimacy of dismissal, are conciliated with the principle of entrepreneurial action laid down in art. 41 of the Constitution, which would be infringed, were the employer denied the possibility, in relation to rational and non-arbitrary redundancies, to choose at his discretion the employees suitable for working with him at the highest levels of the undertaking. In any case, the dismissal cannot be devoid of any social justification simply because it objectively damages only the manager"[49]. It can be con-

[49] See Cass., no. 27197, 20 December 2006; Cass., no. 13719, 14 June 2006. In case law, ex multis, Court of Turin, 7 February 2005 ("the notion of justification of the dismissal as per the national agreement for the managers, by virtue of the special nature of their position within the undertaking, is to be distinguished from that of just reason pursuant to Act no. 604, 15 July 1966"); Court of Appeal, Florence,

cluded then, from an analysis of the most recent judgments, that the contractual notion of justification has to be interpreted in the light of the principles of good faith and appropriateness of the dismissal, without infringing on the discretion of the employer.
Finally, mention should be made of the protection granted by the *Statuto dei Lavoratori* or Workers' Statute (Act no. 300, 20 May 1970) with regard to disciplinary dismissals, i.e. the use by the employer of disciplinary power, in its strongest form, in relation to a breach of the contractual obligations by the worker. In particular, art. 7 of the *Statuto dei Lavoratori* forbids the employer from taking disciplinary action against the worker in the absence of a formal letter of reprimand. As a result the manager cannot be fired without having the chance to defend himself against the charges made against him. It also lays down the right of the worker to be assisted by a union representative. In case law rulings, there has been a long debate on the applicability of these measures in the case of the dismissal of a manager for disciplinary reasons. Recently, the *Cassazione* has ruled, in judgment no.7889, 30 March 2007, that: "the procedural measures laid down in art. 7, paragraphs 2 and 3, Act no. 300, 20 May 1970, are applicable to the dismissal of a manager – regardless of the specific position in the enterprise – either due to misconduct of the manager or because of loss of trust due to the behaviour of the manager."

4.6. Restraints on Competition

One important issue in many countries relating to the termination of the employment contract is the question of restraint on competition for executive staff. By means of these agreements, employers try to protect their proprietary interests against a transfer of knowledge to other companies to which their employees intend to move.
In Italy the Civil Code (art. 2125) allows the parties (the employer and employee) to agree on limitations of the activity of the employee, for a period following the termination of the employment contract. This agreement is required to be in writing and compensation must be paid to the employee.
In the case of managers, the duration of any restraint on competition cannot be greater than five years. This provision applies to the prohibition of competition in the period after the termination of the employment contract: it does not relate to misconduct in relation to unfair competition by the manager in the course of the employment relationship, that is prohibited under art. 2598 c.c., nor to criminal offences pursuant to art. 622 cp and 623 c.p. prohibiting the disclosure of professional, scientific or industrial secrets. In other words, the restraint on competition is an agreement aimed at preventing the manager from harming the enterprise once the employment contract has come to an end. The law does not provide any guidelines with regard to the value of the compensation

23 November 2005 ("the requisite of justification of the dismissal of the manager does not apply in cases in which the notice refers only to a possible and potential, not effective, elimination of the post, in relation to the approval of a restructuring and business reorganisation process concerning which the timing and method of implementation are not specified"); Court of Bergamo, 25 July 2006 ("the justification of the dismissal of the manager by the employer, which does not coincide with the concept of justified reason pursuant to art. 3 Act no. 604, 15 July 1966, is exclusively measured on a fiduciary level and does not include facts or behaviour of the manager affecting the principle of trust inherent to the specific employment relationship… [The] dismissal cannot be considered justified if it is not related to the loss of trust that underlies the employment relationship between employer and employee)."

for the non-competition clause, except that it has to be "reasonable" and proportionate to the potential loss for the manager[50].
Whereas the duration of the restraint on competition agreement is not an issue, since the law states the maximum duration (five years), the object and the scope of the limitations have led to different interpretations: in many cases the courts have ruled that the restraint on competition agreement limiting the activity of the manager should not jeopardise his right to earn a living and maintain his or her standard of living. The court dealing with the case has to pass judgment on the "reasonable" nature of the restraint and on the "reasonable" value agreed for the compensation[51]. Failure to comply with a restraint on competition agreement results in civil liability for damages.

5. Collective Labour Law

5.1. Collective Bargaining

The implementation of the provisions in the 1985 law on middle management *(quadri intermedi)* has shown the limits of this regulation and its intrinsic weakness in protecting the interests of executive staff, a group that has been absorbed to a significant extent into the category of top-level managers *(dirigenti)* thus contributing, as noted above (*supra*, 3.), to its enlargement. This was facilitated by the system of representation of top managers clearly influenced by the regulation of the corporatist period. The law on trade unions of 1926, in acknowledging the emergence of top management as a category, and then the separation of the new category of technical and administrative professionals from the employees' organisations, called for distinct representative associations for top-level managers, which ended up under the influence of the employers' federations.
The corporatist vision of business provides for the creation of an élite group of employees, with not only a technical but also and above all a political role, closer to the employers than to the other salaried employees. This trend, evident in the trade-union legislation of the corporatist era, was to be confirmed by case law that promoted the notion of top-level management as the *alter ego* of the employer.
The category of top-level managers was strengthened by the law of 1926, setting up a separate trade union association. Later, collective bargaining was to play a key role in defining the category. Act no. 190, 13 May 1985, on middle management, assigned collective bargaining the task of defining criteria for the classification of middle managers. Even though the law allowed enterprises, through collective bargaining, to identify those entitled to qualify as middle management, this was not done at company level but by collective bargaining at national level. In this way representation for the new category was performed by the national trade unions, thus limiting the development of the potential of this category. The referendum of June 1995, partially abrogating art. 19 of the *Statuto dei lavoratori*, Act no. 300, 1970, assigned "representative status" to the trade union confederations that were parties to the national agreements, thus further reinforcing the role of the confederations that were not in favour of separate provisions for middle management.

[50] Cf. Trib. Milan 16 June 1999.
[51] Cf., ex multis, Cass. no. 7835, 4 April 2006.

This helps to explain why only one sector, banking, opted for a separate agreement for middle management. Another national agreement (for the commercial sector) includes specific provisions for middle management, whereas many other agreements regulate middle management together with the category of white-collar employees (metalworking sector, construction, chemical industry, etc.). There has been a general tendency towards the introduction of a higher employment grade within one overall classification, thus neutralising the potential of the law of 1985.
In the immediate post-war years, separate union organisation representing white-collar employees was rejected in favour of a unitary organisation of blue-collar and white-collar workers, and then of joint collective bargaining, no longer along craft lines, but by affiliation to a certain productive activity. As a result, there is a need for legal recognition of the category of middle management (as was the case in 1985) and a more precise legal definition of top-level managers in order to allow executive staff to organise autonomously in their own trade union associations, both at territorial and company level. In this connection, the relevant provisions are art. 39 of the Constitution and art. 14 of the *Statuto dei lavoratori* (Act no. 300/1970).
At present, the majority of unionised workers are affiliated through their sectoral organisations (*organiszazioni di categoria*) to the three historical organisations:

- CGIL: Confederazione Generale Italiana del Lavoro
- CISL: Confederazione Italiana Sindacati Lavori
- UIL: Unione Italiana del Lavoro.

Each of the three major Italian trade union confederations has its own internal association for professional and managerial staff:

- AgenQuadri – CGIL;
- Progetto Quadri – Alte Professionalità – CISL ;
- Confederazione Italiana Quadri – UIL.

The three major confederations played an important role in drawing up the 1985 law. The executive staff associations introduced special provisions for middle management into all the national agreements, or at least provisions for recognising the category and the professional status of middle managers, while at the same time promoting joint bargaining for all employees. These associations are independent from confederal unions in organisational terms. They also adopt a policy aimed at protecting the professional category while maintaining close links with the sectoral unions which in Italy are empowered to take part in collective bargaining. However, the professional and managerial staff associations do not have direct bargaining powers. Their purpose is to promote the role of middle managers and highly skilled workers and to obtain professional and career recognition in national and company-level bargaining.
In this connection, mention should be made of the fact that in Italy there are no criteria or rules governing the recognition of the representative status of trade unions. As a result, there are no valid data available but only estimates of the level of representation, and the rate of unionisation among executive staff is uncertain. According to recent estimates, about 20-25 per cent of professional and managerial staff are unionised, which is less than other categories of employee.
According to union sources, about 360,000 members of the CGIL, CISL and UIL are executive staff, accounting for about 6 per cent of the total number of employees affiliated to the three confederations. However, unionisation of this category of employees is still influenced by trends that began in the 1970s and 1980s when a variety of organisations

sought unsuccessfully to achieve separate negotiation and bargaining for middle management.
As far as company-level representation is concerned, there is no specific body for executive staff. They participate in the *Rappresentanze Sindacali Unitarie* (RSU) or unitary representative bodies, together with other groups of workers. In order to guarantee an adequate composition of representation, the inter-confederal agreement for the setting up unitary representative bodies of 20 December 1993 provided that, in the event of their forming a significant share of employees in the production unit, professional and managerial staff may also be taken into account for the setting up of branches. A subsequent agreement between CGIL, CISL and UIL provided for the setting up specific branches for professional and managerial staff.
The CGIL, CISL and UIL favour the development of a category of managers and highly skilled workers, in connection with the debate currently under way in the Italian Parliament, in order to make sure middle managers continue to take part in company-level representative bodies. The executive staff associations in the three major trade unions provide both individual and collective services. For instance:

- representation of interests (for example, participation in the drafting of bargaining demands);
- information on issues pertaining to the role of professional and managerial staff within the company (for instance, through newsletters, websites, workshops, etc.);
- training (information on courses, training courses organised by the various associations);
- legal and tax assistance;
- outplacement and skills assessment information;
- arrangements relating to specific services.

In a framework of trade union freedom, Italy has numerous executive staff organisations, purporting to be professional associations but historically reflecting a desire to antagonise the confederal trade unions based on principles of solidarity among workers. There are about such 24 organisations, mostly related to companies or sectors, the most prominent of which are *UnionQuadri*, *Confederazione Unitaria Quadri* and *ConfederQuadri*. There are also engineers' associations such as CNI (*Consiglio Nazionale degli Ingegneri*).
Traditionally top managers or *dirigenti* have had their own representative union organisations: these are considered as professional associations and organised in macro-sectors (for instance: the CIDA for industry, FENDAI for commerce and services, DIRSTAT and CONFEDIR for public-sector employment, and so on.). The services provided range from the representation of interests during collective bargaining to supplementary pension schemes, out-of-court dispute resolution, and outplacement and training services.
To deal with the problem of small membership, union organisations for top managers or *dirigenti* have extended their membership criteria to include middle managers or *quadri*, a move that may cause competition among the executive staff of CGIL, CISL and UIL, which aspire, in the future, to represent all top professionals, *dirigenti* included.
In the Italian system, collective bargaining takes place at two levels, national and decentralised. The decentralised level includes company-wide bargaining (for medium-

sized and large enterprises) or local/regional bargaining (for small and medium-sized enterprises). Similar issues may be dealt with at both levels of bargaining but an issue that has been agreed on at the national level may not be subject to decentralised bargaining. Decentralised bargaining is used to regulate detailed matters as opposed to those regulated by the national agreement. In terms of pay, for instance, each level has its own authority. Whereas the national level is concerned with protecting the purchasing power of wages, the company or local/regional level deals with wage increases reflecting productivity gains calculated on the basis of parameters set by the social partners.

The organisations that represent professional and managerial staff are not entitled to take part in collective bargaining. This is the task of the sectoral union organisations. However, professional and managerial staff take part in union delegations during bargaining in order to better represent the interests of executive staff in each sector or company.

Collective bargaining for top managers or *dirigenti* is separate from that of other workers. There is only one collective agreement covering *dirigenti* in all industrial sectors, with separate agreements for the other macro-sectors, i.e. agriculture, commerce, banking, insurance and the public sector.

In Italy, the right to information and consultation is assigned to sectoral unions at national level, and to the unitary representative bodies at company level. There are no specific requirements or procedures for professional and managerial staff. They enjoy these rights in as much as they are members of the bodies that are entitled to them.

The three main executive staff associations have proposed a joint plan to the trade union organisations regarding bargaining priorities:

- unitary bargaining and specific second-level bargaining;
- rules for variable and performance-related pay, definition of the number of hours worked, codetermination of work goals;
- setting-up a time bank under national and second-level bargaining;
- development of an extensive range of training and retraining facilities;
- skills audit and career planning by joint career and training assessment panels.

During discussions leading to sectoral national agreements, proposals for executive staff concern *quadri* and cover:

- training, entailing a periodic company-level survey of needs and skills, the development of procedures and programmes and the provision of a minimum number of annual hours of training;
- legal assistance in civil or criminal proceedings for acts committed in the performance of work, with a legal representative chosen by the *quadri* themselves, and legal costs met by the company;
- transparency in the management of international mobility for middle managers;
- working-time initiatives aimed at reducing the amount of overtime worked by *quadri*.

The most recent results concern the chemical industry agreement which provides for:

a time-bank (or time-account) with the individual calculation of overtime worked which is periodically remunerated (not exceeding 50% of the total number of hours worked) or, alternatively, with vacation or rest periods, training or parental leave. A further purpose of the time-bank is to enable the company union representatives to verify how much overtime has been worked in order to negotiate additional employment; a

national observatory for the development of training activities, linked with a periodic survey of training needs at the company and sector levels.
More specifically, Italian executive staff associations have proposed a reform of Act no. 190 according to the following guidelines:

- redefinition of highly skilled professional functions in keeping with new developments in public and private enterprises;
- extension of the rules concerning the public sector;
- protection of the right of representation;
- ensuring that law enforcement, with the application of sanctions where it is not;
- the setting up of a national observatory to cover executive staff with the task of undertaking research and policy-making as well as verifying the application of the law.

5.2. Industrial Action

In Italy, the right to strike is constitutionally recognised (art. 40) and the established view (though with an important exception in the public services, where the key players are the trade unions) is that it pertains to the individual worker. Trade unions merely have the power to call a strike. Restrictions on those enjoying this right concern only military personnel, national police and the staff of nuclear power stations. There is no general legislation restricting the right to strike, although the Constitution provides that restrictions of this kind may be imposed by law. Despite the legislative prerogative, strike action may also be regulated by agreement, either unilaterally (union self-regulatory codes) or by rules laid down in collective agreements.
Art. 40 of the Italian Constitution recognises the right of workers to withdraw their labour in support of their interests, but there is no right to organise a lockout. In the absence of detailed legislative provisions, the right to strike is interpreted by case law.
In the case of executive staff (as in the case of other groups of workers), to be legitimate, a strike must: 1) protect the direct and legitimate interests of the participants; 2) aim at the conclusion of a collective agreement; 3) not violate the rights and interests of others, such as private property rights or the right to work; 4) be decided upon freely and voluntarily by the employees as a group, acting on their own or through a trade union; 5) not aim at the overthrow of the Italian Constitution or the abolition of a democratic form of government.
As regards trade union attitudes towards strikes, there are different positions. The general confederation supports the right to strike of all categories of workers, while autonomous executive staff unions generally refrain from industrial action (this is the case, in particular, for managers).

5.3. Institutionalised Systems of Worker Participation

In Italy there is no system of institutionalised worker representation. There is no board-level employee representation in Italy, other than in a handful of companies. Only in a few cases have companies signed collective agreements that allow employee representatives to sit on the board.

6. Social Protection

6.1. Pension Schemes

Since 2003 top-level managers in industrial undertakings have paid contributions to the National Social Security Institute (INPS), under a separate account in the pension fund for salaried workers. As a result the pension scheme for managers is now part of the pension fund for salaried employees managed by INPS. Prior to 2003, top-level industrial managers had their own autonomous pension scheme, regulated by Act no. 967/1953, and administered by the National Welfare Institution for Supervisory Staff in Industry (INPDAI) a public body established to run an autonomous pension scheme for industrial managers.

As a result of the 2003 reform, managers previously insured with INPDAI now contribute to the general compulsory invalidity insurance scheme, the national pension fund and the social security system, whereas workers hired since 1 January 2003 are insured directly with the pension fund for salaried workers. These provisions cover new managers (following hiring or promotion) and those previously registered with INPDAI whose existing employment contract has been terminated and who have taken up a new one in the same enterprise or with a new employer. The transfer to the general compulsory insurance scheme gives rise to entitlement to a combined pension, considering all the contributions paid, the amount of the pension being calculated on the basis of the final period of contributions.

The pension scheme for managers in industrial enterprises is governed in the same way as the pension fund for subordinate workers administered by INPS, in compliance with the pro rata principle. On the basis of this principle, the amount of the pension is calculated by adding up different amounts:

- the amount relating to pension rights accrued with INPDAI prior to 31 December 2002, inclusive of transfers or contribution adjustments/increments following an application submitted prior to that date;
- the amount relating to pension rights accrued with the pension fund for salaried workers starting from 1 January 2003.

For the calculation of pensions, a number of factors are taken into account:

- for pensions paid after 1 January 2003, in order to determine the system of calculation to be used, based on salary, contributions or on combination of the two, reference is made to pension rights accrued up to 31 December 1995 under the now-defunct INPDAI and under the general compulsory insurance scheme administered by INPS;
- contribution-based pensions are calculated as a single amount;
- mixed pensions are calculated for the period up to 31 December 1995 on the basis of wage criteria; for the period after 1 January 1996 the criteria for the contribution-based pensions are applied, both for contributions to the pension fund managed by INPDAI and to the one administered by INPS;
- pensions based on actual salary after January 2003, in keeping with the pro-rata principle, are determined on the basis of accrued pension rights.

Top-level managers in the tertiary sector and agriculture are required to register with INPS: contributions are based on the rates for employees in those sectors, but there is

no payment for parental leave and income support, and in the tertiary sector no provision is made for sick pay.
Mention should be also made of the minor social insurance bodies, supplementing the general compulsory insurance, such as PREVINDAI (pension fund for industrial managers, a voluntary fund starting from January 1996 that is no longer compulsory under the national agreement), the Mario Negri fund and the Antonio Pastore fund for managers in the tertiary sector, and ENPAIA for managers in the agriculture sector.

6.2. Healthcare

With regard to health care, considerations similar to those for the pension system may be made. Although the health care is available to all under the National Health Service, collective agreements provide for supplementary forms of medical insurance for managers. Mention should be made of FASI (health care fund for managers in the industrial sector), with contributions paid both by the employer and the employee, and FASDAC (Besuzzo Fund) providing medical insurance for managers in the tertiary sector.

6.3. Sick Pay

In the case of non job-related sickness and injury, the national agreement for managers in industry lays down the right to employment protection for 12 months, on full salary: if this limit is exceeded, the manager can be granted six-months' leave without pay. Once these limits are reached, in cases in which one of the parties terminates the contract (either due to dismissal or resignation), the manager is entitled to severance pay, included pay in lieu of notice; if however the parties do not seek the termination of the contract, the employment contract is put on stand-by, during which time seniority does not accrue.
In the case of absence due to an accident at work, the enterprise grants the manager job protection, full wages, and supplementary amounts in relation to the allowance paid by the National Institution for Insurance against Accidents at Work (INAIL)[52] until complete recovery or the assessment of permanent invalidity, whether total or partial. In any case, payment of the salary cannot continue for a period of more than two years and six months, calculated from when the manager became ill or when the injury occurred.
The enterprise has to take out insurance on behalf of the manager for injuries not occurring at work and work-related sickness providing for the payment of:

- an amount equal to six years of the *de facto* salary in addition to the normal indemnity for permanent invalidity arising from the causes listed above, such as to reduce the capacity to work by more than two-thirds;
- an amount that in relation to the amount specified in letter A) is proportionate to the degree of invalidity, in the case of permanent partial invalidity arising for the same reasons,

[52] Managers are required to register with INAIL for insurance against accidents at work in performing their duties, as workers exposed to the risks protected by the above insurance due to their presence in the place of work where the activities are performed (art. 4, legislative decree no. 38/2000; delib. Inail no. 7, 13 January 2000; circ. Inail no. 24, 26 August 1994).

– an amount equal to five years of the *de facto* salary in addition to the normal indemnity, in the case of death resulting from one of the above-mentioned causes.

The enterprise also has to take out an insurance policy on behalf of the manager serving as a supplement to the amounts paid out by INAIL in the case of death or permanent invalidity impairing his work capacity by more than two-thirds for causes other than injury or work-related sickness.

Similar provisions are laid down in the national agreement for managers in the tertiary sector: the period of job protection and full pay is again 12 months; at the end of the 12 months, the manager can ask for a six-month period of leave, and at the end the employment contract can be terminated by one of the parties: in any case the manager is entitled to severance pay and pay in lieu of notice.

In the case of accident or injury at work, the right to job protection continues until full recovery or until the assessment of permanent invalidity (partial or total). In any case, the period of full payment of salary cannot be longer than 30 months. In cases in which the manager is covered by the compulsory INAIL insurance scheme, the enterprise has to grant an additional sum bringing the total amount up to 100% of pay as per the normal activity of the manager. Also for managers in the tertiary sector, the employer is required to take out insurance cover against work- and non-work related injuries, permanent invalidity (partial or total) and death.

6.4. Unemployment Insurance

It may be asked whether executive staff members are covered by unemployment insurance in the same way as other workers are. If they are not, it is necessary to consider whether executive staff members dispose of other – statutory or voluntary – forms of protection against unemployment, e.g. private unemployment insurance.

Italy lacks a comprehensive income support scheme for top-level managers and highly qualified professional employees who become unemployed involuntarily. Top-level managers are entitled to hardly any safety-net measures, and are therefore particularly exposed to the risks relating to the loss of employment. They are not entitled to a mobility allowance, even though they are required to pay the related mandatory contributions. In addition, in recent years highly qualified professional employees have been particularly exposed to the risk of unemployment, both in the private and the public sectors, though these staff are not entitled to any form of employment protection. At the same time, especially in the private sector, top-level managers or middle management are not covered by a welfare scheme.

The only real form of income support is unemployment benefit (*indennità di disoccupazione)* and in this case there is a maximum that applies to all salaried workers who become unemployed. As a result, unemployment benefit is meagre, and is not in proportion to the high level of contributions paid by top-level managers. For example, a top-level manager earning a median income (about € 83,000 annual gross income) pays an annual contribution of about € 1600 for unemployment benefit and mobility allowance, in relation to a possible gross monthly benefit in the case of dismissal of € 969.66 for six months; so that, after four years of regular contributions, the remaining contributions are paid only as a form of taxation.

For many years an additional income support measure for corporate managers has been the retirement pension (*pensione d'anzianità)*. The effectiveness of this scheme was severely curtailed by Act no. 243, 23 August 2004 on the general reform of social security: this law reduced the value of the retirement pension for top-level managers, making retirement a less attractive option.
The outplacement of professional staff can be supported only by means of effective training programmes, bearing in mind that managers in both the private and the public sectors are increasingly at risk of unemployment, so that some kind of support is required in the transition from one job to the next.

7. Labour Disputes

Collective agreements provide for specific arbitration boards as an addition form of protection. These arbitration boards are entitled to hear appeals in the event of dismissal, as arbitration is intended as an alternative to judicial proceedings in court[53]. The case law on the legal standing of arbitration has confirmed that a choice must be made between arbitration and the courts, specifying that it is not possible to "take legal action before the courts once the manager has chosen to appeal to the arbitration board"[54].

[53] It should be mentioned that in judicial proceedings, the code of civil procedure provides for a mandatory attempt at conciliation in front of the Provincial Labour Office (DPL). Alternatively, the mandatory attempt at conciliation can be made by means of the conciliation procedures laid down in collective agreements. In this connection, the collective agreement for managers in the tertiary sector, in retail and services, makes the following provision: 1) as from 1 May 2005, in addition to the territorial agreements already in force, it is possible to set up arbitration boards known as Commissioni Paritetiche Territorial or special joint commissions for the settlement of labour disputes pursuant to art. 410 and subject to the Code of Civil Procedure, as modified by legislative decree no. 80, 31 March 1998 and legislative decree no. 387, 29 October 1998; 2) the special joint commissions, that may also be set up at regional level, are composed as follows: a) for the employers: by a representative of the association at local or regional level; b) for the managers: by a representative of the local or regional branch of Manageritalia; 3) the party interested in the settlement of the dispute may request conciliation through the local or regional organisation or association; 4) the enterprise representative or the managers' representative is required to send notification of the dispute to the special joint commission, by registered mail by fax or delivery by hand in two copies or by a different method of notification as long as it is suitable to certify the date of delivery; 5) within 20 days of receipt of the notification, the special joint commission for conciliation will summon the parties and inform them of date and time for the attempt at conciliation. The attempt at conciliation has to be made within the time limits stated in art. 37 of legislative decree no. 80/98; 6) the time limits laid down in art. 37 of the legislative decree 80/98 are calculated from the date of receipt of the request submitted by the representatives of the enterprise or by the assocation which was appointed by the worker; 7) the special joint commission shall attempt a conciliation between the parties pursuant to art. 410, 411 and 412 cpc as amended by Act no. 533/73 and by legislative decrees no. 80/98 and no. 387/98; 8) a record of the conciliation or of the failure to reach an agreement is filed by the special joint commission with the Provincial Labour Office containing: (i) a reference to the contract or collective agreement that regulates the employment relationship; (ii) the names of the representatives whose signatures are deposited with the Provincial Labour Office; (iii) the names or the parties taking part or represented at the hearings; 9) in cases in which the parties have reached an agreement, they can ask to reconcile the dispute pursuant to arts. 2113, paragraph 4 c.c., 410 and 411 c.p.c. as amended by Act no. 533/73 and by legislative decree no. 80/98, and legislative decree no. 387/98 at the special joint commission; 10) the decisions handed down by the special joint commission do not constitute a definitive interpretation of the contract, that is a matter for the national joint commission pursuant to art. 42.
[54] Cass. no. 3023, 10 April 1990; Cass. no. 4014, 20 April 1998; Cass. no. 4566, 28 March 2002; Court of Turin, 22 October 1997.

This means that once the manager has chosen to seek an out-of-court settlement through the arbitration board, he cannot decide to switch to judicial proceedings, unless the arbitration board rules that it does not have powers to hear the case, for example in cases in which the representatives of the employer object to the procedure. The composition of the arbitration board and the relative procedures are governed by collective agreements.

The national agreement for top-level managers in industry, for example, states that the arbitration board is made up of three members, one of whom is chosen by the employers' association, at national level or regional level, one by the managers's assocation for the industrial sector, at national level or regional level, and one, as chair of the arbitration board, by agreement between the two organisations. In the event of a lack of agreement on the chair of the arbitration board, a name shall be drawn from a list containing up to six names drawn up by the two organisation, or in the absence of such a list, at the request of one or both the organisations, the chair will be chosen by the president of the court with territorial jurisdiction.

The case is assigned to the arbitration board by the territorial branch of FNDAI by registered letter notifying the board within 30 days of receipt of the appeal. At the same time a copy of the appeal must be sent by registered mail to the territorial organisation of the enterprise and to the enterprise itself. Jurisdiction, if not otherwise agreed, is determined with reference to the last place of work of the manager. In cases where work was performed in more than one location, it is up to the manager to choose the territorial competence.

The board has to meet within 30 days of receipt of the appeal. In the presence of the parties of their representatives the board will seek a settlement as a preliminary procedure. If a settlement is not reached, even in cases in which one of the parties fails to appear, the board will hand down the arbitration award within 60 days of the date of the hearing, unless the chair allows an extension of up to 30 days if required by the proceedings. The proceedings are based on the principle of cross-examination, verifying the evidence presented orally and in writing, and a summary report of the hearings of the arbitration board is provided. Similar procedures are provided by the collective agreements in other sectors[55].

[55] According to the national agreement for managers in the tertiary sector, the board is made up of three members, two designated by the territorial organisations and a third member, serving as the chair, chosen by mutual agreement by the two territorial organisations. In the case of failure to agree on this point, the third member is drawn from a list of not more than six candidates, or in the absence of this list, he will be designated, at the request of one or both the organisations above mentioned, by the president of the court with jurisdiction to hear the case. The choice of the alternate of the chair is made according to the criteria listed above. The board is appointed to serve for one year and its term of office may be renewed. If the mandatory attempt of conciliation pursuant to art. 410 (1) of the code of civil procedure or the procedure specified in the collective agreement fails or the term has elapsed, pursuant to art. 410-bis of the code of civil procedure, either party can refer the dispute to the arbitration board. The dispute will be assigned to the arbitration board at the request of the territorial organisation of Manageritalia. This organisation will forward the appeal signed by the manager to the board, by registered letter within 30 days of delivery. Unless otherwise agreed between the parties, the territorial competence is established with reference to the last place of work of the manager. The arbitration board must meet within 30 days of receipt of the appeal sent by the organisation representating the employer. In the presence of the interested parties, or their legal representatives, the board will renew the attempt at conciliation and, in cases in which both parties opt at the first hearing to proceed with the arbitration (a decision which is irreversible), the board will start the examination and cross-examination of the parties. The parties will be required to give an account of the dispute and their statements will be recorded in the minutes. At the re-

The procedure followed by arbitration boards specified in the national agreement stands for a procedure of voluntary arbitration (as expressly specified by the national agreement of the tertiary sector), ending with an arbitration award.
Voluntary arbitration[56] implies that the decision of the board can be appealed on procedural grounds or due to incapacity of the arbitrators or the parties.
According to the provisions the Code of Civil Procedure, moreover, an arbitration award handed down in connection with a voluntary arbitration procedure is voidable by the courts for the following reasons:

- if the agreement on the arbitration is invalid or the arbitrators have judged on issues beyond their competence and the relevant plea of inadmissibility has been raised during the arbitration proceedings;
- if the choice of the arbitrators did not comply with the form and the procedure laid down by the arbitration agreement (by the national agreement);
- if the arbitration award was handed down by an incapacitated arbitrator (i.e. in cases in which the arbitrator was under age, facing criminal charges, incapacitated, bankrupt or banned from public office);
- if the arbitrators did not comply with the rules set by the parties as a condition of validity of the arbitration award;
- if, during the arbitration procedure, the principle of cross-examination was not respected.

The competence to rule on an appeal against the arbitration award pertains to the labour court of the district where the arbitration procedure was established.
The time limit for filing an appeal is 30 days from the notification of the arbitration award. With the expiry of this time limit, or if the parties have accepted the arbitration award in writing, or if the appeal has been rejected by the court, the arbitration award is filed with the court registry of the district where the arbitration procedure was established. Following an application by the interested party, after verification of the compliance of the arbitration award with the procedural requirements, the court then enforces the award by decree.

quest of one of the parties, the board has the possibility to collect evidence for the purpose of preliminary enquiries of the dispute, setting deadlines for preliminary comments in writing and for the submission of documentary evidence by the parties. The preliminary inquiries will be recorded in the minutes. Where a conciliation is not reached, the board will hand down the arbitration award within 60 days of the first sitting, with notification to the parties, unless otherwise provided by the chair, who is entitled to extend the term by up to 30 days. The arbitration award is governed by art. 429, paragraph 3 of the Code of Civil Procedure.

[56] Cass. no. 13840, 8 November 2002; Cass. no. 5147, 26 July 1983.