Social partner consultations on safety and health protection at work for self-employed workers

ETUC reaction

1. The ETUC agrees with the Commission that Community legislation is needed on safety and health protection at work for self-employed workers. Current evidence is incomplete and rarely consistent between countries, but it is clear that there are major issues about the occupational health of self-employed workers. In the United Kingdom, for instance, which records work-related deaths for both employed and self-employed workers, fatal accident rates are significantly higher for the latter. The Dublin Foundation's surveys of working conditions, and especially the summary analysis based on the 1996 survey findings, have pointed to the high self-employment rates in accident-prone sectors like farming and forestry, fishing, road transport and construction work, where they are more exposed than elsewhere to physical hazards and dangerous substances.

Self-employment is also widespread, and it would be a dangerous game to condone competition between it and wage employment based on substandard health and safety conditions. Finally, self-employed and employed workers come into contact at many points. So an effective prevention policy needs as level as possible a playing field on safety and health protection standards irrespective of the legal status of the risk-exposed workers.

2. Community action is especially necessary given the wide discrepancies revealed in the evidence submitted by the Commission between Member States' legal provision for health and safety protection of self-employed workers. Generally, they are less well covered by specific health and safety rules than employed workers. That is partly due to the legal techniques used (many rules are based on employers' duties, which are not relevant to self-employment). Even so, the experience of different countries shows that these technical issues can be overcome by more innovative legal approaches. Not forgetting that free movement of workers and services requires some harmonization of rules in the matter.

3. The ETUC utterly rejects the Commission's argument that article 137 is not the right basis for Community legislation on health and safety protection for self-employed workers.

As we have made abundantly clear in meetings of the ACSH ad hoc group on self-employment, article 118A was itself a sufficient basis and has already been used in directives which also cover the self-employed, as the Commission points out. But these precedents are not the most potent argument in the matter. The compelling reason for our interpretation is the aim of article 118A and the effectiveness of measures taken under it. Its aim is to improve the working environment by raising health and safety standards. This implies that legal status (public employees, employees, self-employed workers, apprentices and trainees, etc.) is not a basic requirement for directing Community action. That is dictated by the need to supplement Member States' measures to achieve harmonization while maintaining the improvements made. In its ruling of 12 November 1996 (United Kingdom v Council), the ECJ rightly pointed out that the concept of "working environment" militated in favour of a broad interpretation of the powers conferred upon the Council. The ECJ attached special importance to the adverb "especially" which qualified the expression "working

environment", and the Advocate General's Opinion expressly said that "the working environment is not immutable, but reflects the social and technical evolution of society".
4. Our view is substantially reinforced by the changes made to the Treaty in 1997.

The opening provision of Title XI of the Treaty expressly refers to the 1961 European Social Charter and the 1989 Community Charter of Fundamental Social Rights. Both apply equally to employed and self-employed workers. As regards health and safety protection, a string of rulings under the European Social Charter directly support our interpretation. So, "the wide personal scope of this provision (article 3.1 of the European Social Charter on health and safety) has been defined and clarified by the committee's case law: as for the whole of article 3, governments must ensure that all workers, whether employed or self-employed, are protected by safety and health regulations"[1]. There would be no logic in putting a spin on article 137 which set Community social policy at odds with the provisions of the two instruments on fundamental rights which are now recognized as the basis of it.

The vast array of issues addressed by article 137 shows the pointlessness of locking the adoption of Community directives into the specific legal status of wage employment. In all logic, the provision on "the integration of persons excluded from the labour market" cannot relate only to "employed persons". The provision on equality between men and women provides a new legal basis for a Community policy which has also covered self-employed women workers since 1976.

To treat the scope of Community social policy defined by Title XI as inherently excluding self-employed workers would be a major retreat from the established body of Community laws and regulations, as well as all the social policies of the fifteen Member States which all to varying degrees and in different ways cover self-employed workers. We cannot buy into the Commission's argument that "the very wording of Article 137 of the Treaty, which does not contain any mention of self-employed workers, and its context in the "Social Provisions" Chapter of Title XI, which focuses on the relationship between employers and employees, indicate that a Community instrument exclusively devoted to protection of the health and safety of the self-employed cannot take Article 137 as its legal basis".

Truth to tell, we fail to see how the Commission's consultation of the social partners under article 138 of the Treaty squares with its claim that the proposed measure falls outside the scope of social policy!

5. The ETUC agrees with the general thrust of the Commission document that self-employed workers must be covered by health and safety provisions, but finds the proposed provisions inadequate and over-general. Like the Commission, we want self-employed workers to have easy and affordable access to the different preventive services, especially training and information.

Where the Commission proposals fall short of the mark, however, is on the issues around simultaneous or successive activities and subcontracting, where different national experiences and some principles found in the Mobile and Temporary Construction Sites Directive are useful precedents of innovative approaches. The point is to make work specifiers accountable

[1] Council of Europe, Fundamental social rights. Case law of the European Social Charter, Strasbourg, 1997, p.69. This compilation of law reports provides a host of other examples.

for ensuring that contract terms allow of healthy and safe working conditions. In short, while the Commission's approach may just about do for self-employed workers who work more or less on their own, it disregards the fact that the working conditions of self-employed workers who work with firms who employ salaried staff or in a subcontracting relationship will largely be set by the terms of contracts concluded with these firms. The legal status of independent contractors (from the employment law angle) is at odds with the different levels of economic and organizational dependence which influence health and safety, and must be taken into account.

To cite just one example: as Community law stands, a self-employed worker exposed to asbestos or other carcinogens while working for another firm is not covered by the health protection and prevention rules.

6. To be effective, therefore, we think a three-pronged approach is called for.

a) In some instances, an easy legal solution can be found by extending an employer's duties to his employees to all workers (including self-employed workers) whose working conditions are within his control. What more natural, for example, than for a self-employed welder working in a steel plant to also be covered by the obligations on protection against noise or exposure to hazardous chemicals[2]. Whenever provisions applicable to employed workers (compliance with occupational exposure limits, provision of work equipment which complies with the requirements of directives on the use of that equipment, information, etc.) can be directly applied to self-employed workers operating in a workplace where employed workers are also employed, there is every good reason to do so. Only those provisions referable to collective labour relations would not apply (appointment of workers' safety representatives, for example).

b) Where this is not practicable, there should be general provisions through which to:
• include health and safety for self-employed workers whose use is relatively regular and foreseeable in risk assessments and planning of preventive activities,
• put contractual relations between firms and self-employed workers in a framework of effective provisions governing health and safety in subcontracting relationships. For example, where equipment or work substances are provided, safety rules - including as regards information - would have to be complied with.

c) For prevention policies, which are long-term and not easily accommodated within contractual relations, the Member States must lay down mechanisms to ensure health surveillance for self-employed workers (focussing first on specific risks, like exposure to carcinogens, noise, etc.); giving them essential health and safety information and training opportunities. These mechanisms could be enfolded into public health, occupational health, social security, insurance, professional or industry organization policies, as appropriate. In our view, these policies must be accompanied by information systems to track evolving situations (e.g., work-related accident and disease figures for self-employed workers, national surveys of working conditions, figures on occupational exposure, etc.)

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[2] In its Judgement on criminal proceedings against X of 12 December 1996, in order to render the VDU Directive's provisions effective, the ECJ rightly decouples those of its provisions on work equipment from those relating to workers specifically defined by the Directive for other provisions (eyesight test, etc.). We find this an estimable approach.

7. We share the European Commission’s view that there must be regular evaluations of national experiences and a feedback of experience through Community reports to improve the provisions adopted.

8. A specific directive on health and safety protection for self-employed workers would be the best Community instrument to achieve effectiveness and consistency in the law.

Community Recommendations on health and safety have not been effective - those on company medical services and occupational diseases have gone largely ignored. The Recommendation of 27 May 1998 on the ratification of the ILO Convention on home work has been followed by only two of the fifteen EU Member States.

The established case law of the Court of Justice holds that article 235 of the Treaty (now article 308) “may be used as the legal basis for a measure only where no other Treaty provision confers on the Community institutions the necessary power to adopt it” (judgement of 12 November 1996, cited above). Article 137.2 leaves no room for doubt on this. The right and proper way for the Community to act is through directives. That, indeed, squares with Member States' own extensive experience in the matter, where national provisions have been made binding so as to give equal protection to the workers concerned and assure certainty in the law for all concerned.