

The application of the Framework Directive and five individual directives Comments on the Commission report

Laurent Vogel, lvogel@etuc.org

The Commission has finally published its report on the application of the Framework Directive and five individual directives. This note does not set out to go point-by-point through all the matters addressed in the report, but rather to act as groundwork for a Workers' Group-ETUC position on the key policy issues raised by it, especially likely future Community action in the occupational health sphere.

A more comprehensive and detailed response will be drafted in the form of a TUTB report in 2004. The special report on preventive services already published in the June 2003 TUTB Newsletter will be one input to that more detailed analysis (in French, <http://www.etuc.org/tutb/fr/newsletter.html>; in English, <http://www.etuc.org/tutb/uk/newsletter.html>). The materials for the conference on health and safety in an enlarged Europe (30 and 31 January 2004, much of which have been posted on the TUTB website) will also help inform the debate. The survey on workers' health and safety representatives will be another prism of our assessment (see <http://www.etuc.org/tutb/fr/rts.html>, in French and <http://www.etuc.org/tutb/uk/safetyreps.html>, in English). The final deadline for reactions may have already gone by, but trade unions who want to add further information about the situation in their country are still at liberty to do so.

The Commission report is very belated. The directives concerned were set to come into force on 31 December 1992, with a first national report on application due in 1997. It would have been reasonable to expect at least a Commission summary around 1998-1999. The report was repeatedly said to be in the offing, then put back to later. The Workers' Group can only welcome the fact that the report has been published, while taking issue with the time lost and asking the Commission to stick to a firmer timetable in future.

The main plus point about the Commission report is that it attempts to assess how the directives are being applied in the workplace rather than stopping short at just a general description of the transposing legislation. It is unquestionably a useful and positive approach. Broadly-speaking, we can go along with the report's description of the situation, barring some reservations and differences of opinion on particular aspects. The Commission has made a real effort to see how the directives in question are being implemented in practice.

Two big failings in the general approach

That said, the report is impaired by two flaws in the general approach taken by the Commission:

- 1) While it is right to focus most of the report on practical application, it would be wrong to assume that compliance of transposing legislation no longer needs to be monitored.

- 2) The fundamentals of the Commission's analysis do not lead onto a serious consideration of the prospects for Community action. The report reproduces the failings of the Communication on the strategy for 2002-2006. It contains much of interest in the way of analysis, but has too little to say about concrete prospects, and inconsistency made all the worse by the fact that the analysis highlights a string of failings, and so ought to be accompanied by proposals for action.

To consider each of these two elements in more detail.

Arguably, the report suggests that the Commission sees monitoring of transposing legislation as being now completed, for the Framework Directive at least. There are no grounds to support that view. Certainly, infringement proceedings have been taken against a number of Member States for incorrect transposition of certain aspects of the Framework Directive. The five cases in which the Court has given rulings relate to Italy (judgement of 15 November 2001 on the competencies of preventive service personnel, among other things), Germany (7 February 2002, including on the need for a risk assessment in all firms regardless of size), the Netherlands (22 May 2003 on the requirement to set up an in-company preventive service in preference to using external services); Luxembourg (22 May 2003, on the capabilities and aptitudes of preventive service personnel) and Portugal (12 June 2003, on workers' representatives). In four of the five cases, the Court largely sided with the Commission to find that the states concerned had failed to meet their obligations. The fact is, however, that the Framework Directive is still nowhere near having been fully carried over into law in all states. A case in point is the capabilities and aptitudes of preventive service personnel, still not defined by several other states (United Kingdom, Ireland, Sweden, in particular, and France as regards non-medical personnel). Elsewhere, there are glaring omissions, not least in relation to the definition of the employer's safety obligation and workers' representatives. Furthermore, in her reply of 28 March 2000 to a parliamentary question, Commissioner Diamantopoulou upheld an approach to infringement proceedings which went beyond implementation by simply copying out the wording of the Framework Directive, and indicated that the Commission could institute proceedings for incorrect transposition if the Member States failed to exercise proper monitoring and surveillance that ensured compliance with the Framework Directive. The ruling of 12 June 2003 against Portugal may very much follow a "box-ticking" approach to the requirements for proper transposition, but it would be wrong to assume that the phase of checking on transposition of the Framework Directive is basically over and done. Many failings still remain, and it would be helpful if the Commission were to institute infringement proceedings with a greater concern for transparency and equity, checking for any failings in all States with equal draconian vigour, and not bowing to political pressure designed to prevent it from playing the role assigned to it by the Treaty. As regards the other directives (individual directives under the Framework Directive: Fixed-duration and Temporary Employment Relationships Directive 1991, Working Time Directive 1993-2003), there is still a big job to do. Infringement proceedings have been thin on the ground, and references for preliminary rulings show that the Commission has failed to take action on some major omissions.

The other big failing relates to the future outlook. To be blunt, the Communication gives the impression of a Commission utterly on the defensive, trying to justify the existence of occupational safety and health directives against continuing deregulatory pressure from employers and governments. The horizontal approach floated in the report's conclusions seems to downplay the importance of occupational health as a core objective in and of itself. By rolling workplace health issues all into one with aims like improved employability and

new business creation, there is a risk of the Community policy getting watered down in much too wide a scheme of things.

The Commission seems to want to focus on two approaches: mainstreaming occupational health across all Community policy spheres, and simplification and rationalization of the legal framework.

We are obviously in favour of mainstreaming occupational health more across the other Community policy spheres, but that will not of itself solve the problems. Current experiences with the REACH project show the limitations to the exercise. Enormous pressures are being brought to bear both within the Commission and from the outside (employers, joint Blair-Chirac-Schroeder letter, etc.) to get occupational health seen as a sideline issue and even expendable if that best serves the interests of keeping the chemicals industry competitive. The Commission appears to believe in mainstreaming as a push-button solution, but fails to say in practical terms how it will be achieved, in which spheres the priorities lie, what forms of cooperation between different sectors need to be put in place. On two key issues - REACH and the Seveso major industrial hazard directive - practical experience shows the daunting obstacles that still lie in the way of bringing occupational health aims more coherently into the frame.

“Rationalization and simplification” of the legal framework continue to be so vaguely defined as to be open to countless interpretations. Is it just a euphemism for deregulation, or a simple educational tidying-up (“make the existing directives more comprehensible”)? Does it mean consolidation with improvements to make good a number of failings? There is no clarification of the vague wording in which the Commission Communication on strategy for 2002-2006 was couched. No concrete initiatives are put forward, despite the fact that we are approaching the halfway point.

The only tangible thing that gets our unconditional support is the prospect of a single report on application similar to that already produced on the environmental directives. It is important that the Advisory Committee should be fully involved not just in the preparation of the single report, but also the debate on the constituent reports. Likewise, the Commission absolutely must ensure that the national reports are written up as the result of tripartite consultations, which does not necessarily always happen at present.

Finally, it is regrettable that the Commission failed to take the opportunity to reaffirm the need for Community guidelines to be drawn up on various provisions of the directives that are couched in too-general terms. The track record with the Manual Handling and VDUs Directives shows the vital need for such guidelines. And while some countries have gone a long way down this road, a pooling of the most advanced experiences would do much to ease the implementation of these directives in practice.

A major rift

The issue of worker participation is probably where European trade unionism and the Commission most part company. We agree with the assessment that the present levels of participation are far from satisfactory in terms of the Framework Directive’s objectives and prevention needs. But it is a shame that the Commission failed to put a bigger focus on the matter. Its description is very cursory and its analysis superficial. The major point of difference lies in our contention that organized forms of worker representation in health and

safety are an essential precondition for active and effective participation. The existence of specific bodies is certainly never sufficient by itself. Other factors - like information, training, ability of trade unions to support the daily activities of workers' representatives, etc. - also play into it. The Commission, by contrast, seems to be against organized bodies and participation. The following passage gives a flavour of its viewpoint:

“In Member States with a clearly defined culture in co-management, a negative trend has been observed concerning the institutionalised representation of interests. The more clearly defined employment relationships and the higher the number of institutions and committees dealing with occupational safety and health, the less likely workers themselves actively participate in the definition of the prevention policy in the enterprise”.

What makes it such a surprising stance to take is that it is not backed up by a shred of empirical evidence. In point of fact, the shopfloor evidence is that the situation in firms that have no institutional form of representation for workers in health and safety is markedly worse than in firms that do.

We believe that such an irresponsible claim by the Commission may be used as an excuse for doing nothing by states where worker representation in health and safety is not really ensured. In a number of countries, the thresholds (e.g., no worker representation in firms with fewer than 50 or 35 workers) or other conditions applied (recognition of a trade union by the employer in the United Kingdom) deny large numbers of workers any effective form of representation in occupational health. Some States (Belgium, United Kingdom in particular) have brought in purely cosmetic regulations which provide for direct participation in some instances, but are hardly applied, if at all.

It would be far more effective to spell out:

1. the basic conditions allowing representative bodies to work properly (especially as regards information, training, participation in risk assessments, rights of co-decision on important decisions, etc.);
2. the means for extending representation to all workers, including in traditionally excluded categories of firms. The report's omission of any mention of the experiences of territorial safety representatives is cause for concern in this regard.

Two largely disregarded issues

Finally, a word must be said about two points that the report deals with too patchily but which we see as fundamental to an assessment of the situation.

The first is the growth of contingent employment. All the available evidence points to a link between contingent employment and injuries to health, in particular work accident rates. The report fails to consider this in depth. It merely skates quickly over it, holding out no real prospects for Community action. The benefits of the OSH directives are to some extent offset if not cancelled out by contingent employment. That finding should be a starting point for a comprehensive examination of how to get to more effective prevention mechanisms. This is no place to recite the full list of ways of tackling contingent employment. To name only some, however, they include: extending the employer's safety obligation to all workers whose working conditions are in some way determined by him even if not employed by him (temporary agency staff, subcontractors, self-employer workers, etc.); setting limits on casual work either in absolute (making exposure to certain hazards or working in certain sectors

illegal) or procedural terms (prior agreement of the workers' representatives, labour inspectorate checks, etc.). But the fundamental issue goes even beyond contingent employment; it is that if all workers have the same guaranteed protection, the risks of unchecked competition based on undercutting working conditions will decrease. But conversely, if things go on as they are, the gap between different sections of workers can only widen, increasing the scope for getting around the health at work rules by the use of contingent employment.

The second is about framing coherent national prevention policies based on an overall strategy. This is among the key lessons to be learned from the transposition of the Framework Directive. The precondition for effective application of the Directive is for the public authorities to frame an overall policy on occupational health and allocate the resources with which to implement it.

Where to go from here

- * This paper sets out to inform the discussions in the Luxembourg Committee's Workers' Group, which could decide on 10 March 2004 whether to adopt a statement on the Commission report.
- In 2004, the TUTB will publish a report giving a trade union assessment of the state of play on the practical application of the OSH directives. The Framework Directive will be the central focus of that assessment. It is vital that all national trade unions help inform the report by sending in information about the position in their country. A list of key issues is attached.
- The Luxembourg Advisory Committee could set up an ad hoc group to examine the Commission report and make recommendations on how both Member States' national reports and the Commission overall report should be written in future.
- The joint discussion of the evaluation of the application of the directives should help trade unions in the new Member States to frame a strategy on the transposition and application of the OSH directives.
- It should also make it easier for trade unions to step into the debates held in each Member State (new and old) on the state of play in prevention and the need to review or improve national strategies on occupational health.
- The European Parliament should be a specific focus of attention. As co-legislator, it should be giving its judgement of the evaluation put forward by the Commission, voicing any criticisms it may have, and giving a push to spelling out a real strategy and work programme.

ANNEX: Non-exhaustive list of factors for evaluating the application of the health and safety directives

Existence/non-existence of a national policy on occupational health, framed through tripartite consultations, adequately funded, evaluated at regular intervals, and joined up with other policies like public health, environmental protection, employment and equality policies, etc.

Operation of the labour inspectorate, ability to cope with the increased workload that is resulting from labour market fragmentation and the expansion in preventive tasks.

Existence/non-existence of public bodies to collectivize experiences in research, training, occupational health information. Indicators for occupational health that are more than bald figures on reported work injuries and recognized occupational diseases.

Coverage of workers by multidisciplinary preventive services, linkages between internal services and external services, operational monitoring of these services so as to ensure that they carry out prevention activities.

Organization of health surveillance (actual coverage of workers, existence of surveillance specific to working conditions, health surveillance integrated into an overall prevention strategy whose primary aim is to transform collective working conditions).

Coverage of workers by representation bodies. Training and information support given to these bodies. Exercisable right to have a say in company decisions that may impact on occupational health.

Precisely-defined employer's safety obligation. Effective and deterrent policing and penalties. Coverage of subcontracting chains and use of contingent employment.

Effective application of occupational health rules in the civil service, in SMEs, among self-employed workers, among home workers, among temporary agency workers, etc.

For each of these points, it would be helpful to have indicators and other information available in the different countries, as well as a trade union assessment of how the situation is developing (getting better, no change, getting worse, mixed picture, etc.).