

The transposition of the Framework Directive in Germany

by Klaus LÖRCHER*

** Legal adviser to the Deutsche Postgewerkschaft (German post and telecom workers' union) and ETUC representative to the Governmental Committee of the Council of Europe's European Social Charter.*

The Act transposing the Framework Directive and several other Health and Safety At Work Directives¹ into German law finally came into force on 21 August 1996 - three and a half years late.

Section 1 of this Act - called the Health at Work Act (*Arbeitsschutzgesetz*²) for short - transposed Framework Directive 89/391/EEC which should, strictly speaking, have been transposed by 31 December 1992.

Hitherto, health and safety legislation had been very piecemeal and somewhat limited. Previous attempts at a more comprehensive, wider-ranging transposition through an outline bill covering the entire field of occupational health had been politically blocked by the liberals (FDP) who found the bill "too bureaucratic". They were especially opposed to the obligations on the supply of written information, which they found too demanding. Notwithstanding its limited scope, this new Act is a major advance on the previous legislation in that employers now have a duty to take significant steps to provide a healthy and safe workplace, including for practically all public sector employees.

The good...

The main plus points of the Health at Work Act are:

- it applies to all categories of workers, including public servants;
- it places new, wider-ranging obligations on employers, although they still fall short of the requirements of article 6 of the Framework Directive;
- it requires employers to carry out an assessment of working conditions, and to provide written information on the results. These provisions will not come into force until 21 August 1997, however;
- it lets workers themselves act to eliminate risks (the right to take appropriate measures and the right to stop work and withdraw to safety);
- it allows expertise to be enlisted from outside the firm.

.... and the not-so-good

Significant and welcome though these innovations are, the fact remains that the new legislation is basically a "minimum transposition", and even these minimum aims are not always met. In other words, the Act does not transpose the full scope of the Framework Directive. The main failings are:

- a restrictive definition of the safety and health protection measures. There is, for instance, no reference to the *elimination of risk and accident factors* required in the Framework Directive;

- as drafted, the Act reflects old-established concepts of safety and health protection at work rather than embracing the new idea of improvements to the working environment;
- limitations on the general obligations on employers - the obligation to adapt the work to the individual is omitted, for example;
- exemptions for the public services;
- inadequate penalties.

The transposition of the individual directives

The Health at Work Act is an enabling statute - regulations can be enacted under it to transpose the individual directives. Regulations have been enacted for the first five individual directives (notably VDU Directive 90/270/EEC and Manual Handling of Loads Directive 90/296/EEC). These regulations should normally have been enacted before 31 December 1992. While they have helped plug major loopholes in the transposition of the Framework Directive, it has to be said that they also provide a series of exceptions to the provisions of the individual directives. For example, transitional periods will be allowed in which to adapt existing workstations equipped with display screen equipment to the new regulatory requirements - there is no mention of this in Directive 90/270/EEC. Also, the transposition of almost all the other individual directives has been deferred.

Germany's highest labour tribunal, the Federal Labour Court, has handed down a key judgment on the directives which have not yet been transposed entirely or at all. So, even before the Display Screen Equipment Regulations have been enacted, the Court gave works councils a right of co-decision to set breaks for those working on VDUs (under s. 87 of the German Companies Acts) based on a reading of s. 120a (since repealed) of the Code of Industrial Regulations consonant with the Community directive. Under the new Health at Work Act, works councils will now be able to rely on the general objective stated in s. 1 of the Act.

The new Act also transposes Directive 91/383/EEC on the health and safety of temporary and fixed-duration workers, which is not an individual directive within the meaning of article 16 of the Framework Directive but was adopted under article 118A of the Treaty. The supplementary provisions on temporary workers are included in s. 5, which amends the German Temporary Employment Act. Sadly, here again the opportunity was missed to harmonize supplementary protective measures for temporary workers.

Improvements needed

This new Act heralds a new era for the safety and health protection of German workers based on the fundamental objective of improving the work environment (article 118A of the Treaty). With the Directive now transposed - however partially - the next important steps are:

- the competent authorities must, as far as possible, make glaring omissions good on the basis of court readings in compliance with the directive;
- if that cannot be done, appropriate legal action must be taken to ensure that the provisions of the Directive and national implementing regulations are applied. This could be a job for works councils or public employees;

- the competent authorities and especially firms must accept the new rules and apply them in the spirit of the Directive.

Thanks to the consensus reached by trade unions and employers - which allowed the Liberals' political obstacles to be overcome - the German Act passed into law. Now that the Act has been adopted, one also should use this consensus to ensure its implementation.

¹ Gesetz zur Umsetzung der EG-Rahmenrichtlinie Arbeitsschutz und weiterer Arbeitsschutz-Richtlinien, Bundesgesetzblatt 1996, I., p. 1246.

² Gesetz über die Durchführung von Maßnahmen des Arbeitsschutzes zur Verbesserung der Sicherheit und des Gesundheitsschutzes des Beschäftigten bei der Arbeit (Act introducing occupational health measures to encourage improvements in the health and safety of workers at work).