Occupational safety and health in Germany pre European law reform – status and shortcomings

Germany's long-standing tradition of occupational safety and health is reflected in the country's mature, firmly established institutions and structures.

The figure below gives a simplified explanation of the system devised to guarantee occupational safety and health both within and outside companies.

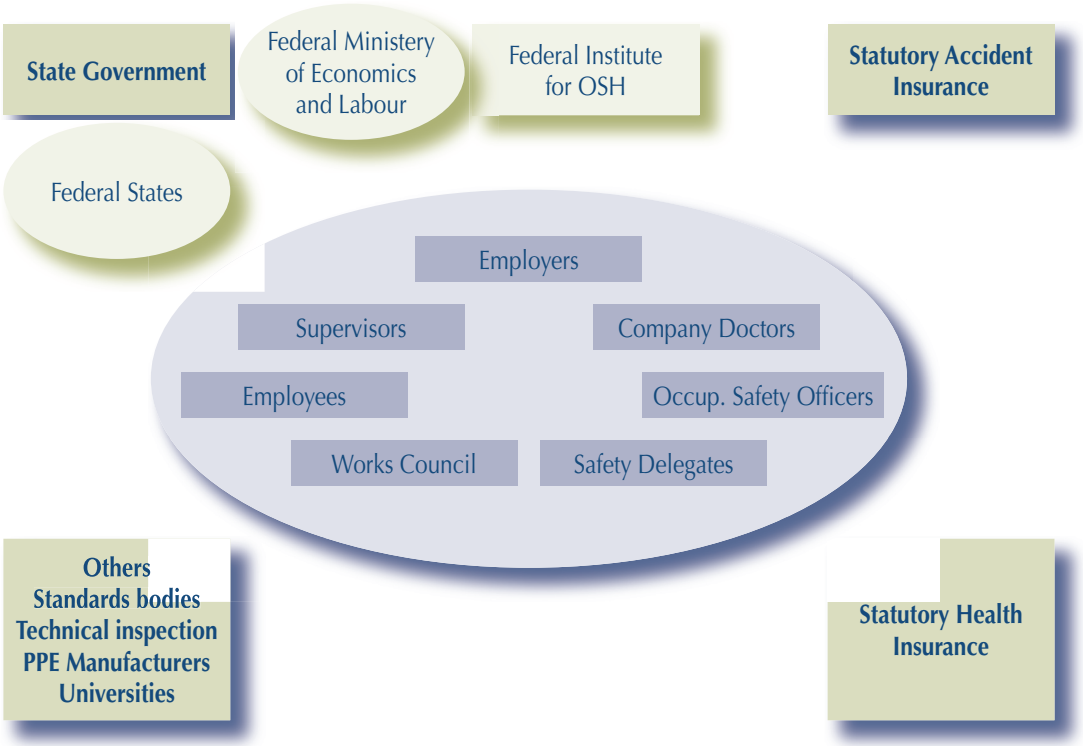
The key players in Germany's dual OSH system are the government and statutory accident insurers. Statutory health insurance organisations and a wide range of other agencies, standards bodies and technical surveillance also play a role along with other bodies like PPE producers and universities.

The federal government – or more accurately the Federal Ministry of Economics and Labour – has legislative powers and is supported by an authority that is answerable to the Federal Ministry for OSH. Whilst only the federal government has the power to introduce legislation, the individual federal states are responsible for checking that government regulations are being implemented.

Employers have a duty to provide their employees with statutory accident insurance cover. This has two aims : prevention, and the organisation and funding of medical, occupational and social rehabilitation for victims of occupational accidents and diseases, as well as providing compensation through pension payments to beneficiaries. Statutory accident insurers also act in a legislative and monitoring capacity, run their own training and research institutions, and have enjoyed considerable success, particularly with respect to sector-specific prevention.

While statutory accident insurance is funded solely from employers' contributions, the key policy decisions are reached by way of joint self-management (equal voting rights for employers and the representatives of insured parties).

Statutory accident insurance underwriters must work closely together with the statutory health insurance provider in sharing information on working conditions and occupational diseases. Statutory health insurance providers have a similar legislative duty to devise comprehensive measures aimed at promoting health within companies. In areas that are not governed by laws and ordinances, standards bodies continue to play a major role, as do technical inspection agencies, particularly those responsible for dangerous plants and installations. PPE producers, e.g. protective clothing manufacturers, have also come to play a role in external OSH provision, and universities have various faculties dedicated to safety technology, ergonomics or OSH-related matters in the natural sciences.



A number of players are involved in in-company OSH, which is based on and legitimised by legislation. Generally, all OSH provisions are aimed at employers, and it is they who are responsible for the safety and health of their employees in the workplace. Employers may delegate some of this responsibility to supervisors, but ultimately, they bear the overall responsibility.

Also, employers have been required by law since the mid-1970s to take advice on OSH-related matters from company doctors and occupational safety officers. The requirements of both company doctors and occupational safety officers, their job descriptions, and their duty to cooperate with various other parties are also laid down by law. Furthermore, employers must appoint safety delegates with responsibility for monitoring OSH in their company unit or department, and supporting employers in fulfilling their OSH obligations.

Company workforces elect a works council every four years. The works council is responsible for dealing with all company-related problems. Depending on its size, one or more works council members may be responsible for OSH, i.e., making sure that OSH regulations are observed and putting forward proposals on how to improve OSH. They even have a direct right of co-determination in some areas. Naturally, employees also form part of the in-company OSH system.

Union tasks and responsibilities

The German Confederation of Trade Unions (DGB) and its affiliates operate at various levels of both the in-company and external OSH system, participating in a wide range of different committees and advisory bodies set up by the Ministry of Economics and Labour. The main emphasis here is on establishing a comprehensive body of technical regulations. The unions are also represented on the Advisory Council of the Federal Institute for Occupational Safety and Health (FIOSH), helping to plan work programmes and design research programmes. Such cooperation is generally governed by ordinances, while cooperation with the respective OSH authorities in the federal states usually runs along informal lines. Almost all federal states have working groups that include representatives from the relevant federal state agencies, and deal primarily with issues specific to that state.

Well over 1,000 union affiliates are involved in the self-governing bodies that form part of the statutory accident insurance system. The practice-oriented OSH committees comprise active, experienced members of works councils. The Boards of the individual accident insurers are likewise made up of committed, full-time union officials, whereas the bodies within the umbrella organisations also include Executive Board members from individual unions and designated social policy specialists. The same applies to the bodies set up for statutory health insurance.

By and large, cooperation with standards bodies, technical inspection agencies and PPE producers is not legislated for. Instead, there is a wide range of voluntary forms of reasonably close cooperation and projects, e.g. joint OSH fairs and conferences.

At company level of course, unions are mostly involved in informing and training union members and, to some extent, those works council members with OSH responsibilities. The same applies to safety delegates, who are very often also union members. At institutional level, cooperation is nurtured between professional associations of company doctors and of OSH specialists, who often have common interests and engage in positive cooperation.

Compared with the international situation, significant successes have been scored, especially as a result of trade union efforts on the safety of machinery, equipment and workplaces, the expanded scope of chemicals and hazardous substance legislation, workplace design and companies' safety regulations and the occupational health care they provide. This has led to steadily falling accident statistics.

However, the German system was characterised by serious failings in occupational safety and health legislation and its application in the workplace, and badly under-resourced company and public law provision for the investigation, identification and assessment of health risks in the workplace and the broader working environment. Germany's safety and health at work legislation was outdated, fragmentary in its protective provisions, piecemeal, hedged around with enforcement exceptions that eroded the underlying protective aim, and was often unfathomable and user-unfriendly for company and external experts alike. German occupational safety and health legislation was constructed on a paragraph in the 1869 Industrial Code (*GewO*) that subordinated health to economic interests, whereby employers had only to protect the life and health of their workers to the extent "permitted by the nature of the respective business activities". This allowed employers to take on workers for work that was harmful to their health.

In 1995, the DGB highlighted the following particular shortcomings after the first attempt to transpose the European directives into national law had failed :

- Millions of workers, especially in the public sector, remain outside key provisions of occupational safety and health legislation.
- There are no - or only inadequate - safety regulations covering many well-known health risks (like the handling of loads, mental and informational stresses, exposure to heat and especially multiple stressors in the workplace).

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- Workers are expected to put up with much higher health risks than the population generally. Furthermore, legal provisions to tackle health risks stemming from the interactions between the general and working environments are fragmented.
- Catch-all occupational safety and health provisions are hard to implement because they are too non-specific. This often prevents the necessary protective measures from being taken within the company, leaving the supervisory bodies unable to issue orders.
- The enforcement of occupational safety and health legislation is usually not well coordinated, is not done jointly due to the lack of a corresponding statutory obligation, and responsibility for it is split between the federal states (*Länder*) and German accident insurers.
- All in all, occupational safety and health has no solid, legally binding footing in all aspects of company business, especially in management and decision-making processes.
- Small and medium-sized firms receive hardly any assistance or advice on preventive work organisation, and in the past there has been virtually no systematic or comprehensive support policy.

Transposing EU directives into German law

European directives, especially the EU Framework Directive on health and safety of 12 June 1989, were supposed to be transposed into German law by 31 December 1992 at the latest. The German federal government of the time long seemed reluctant even to make a start. It was only enormous pressure from those clamouring for reform, especially also at European level, and the threat of being taken to the European Court of Justice, that prompted the federal government to start the legislative process rolling.

A detailed recital of the years of confrontation over this issue is outside the scope of this paper, but a brief word about the protagonists' respective positions may be in order :

- The advocates of reform – trade unions, federal state policymakers, employers' liability funds and other occupational safety and health institutions – as well as the Social Democratic Party (SDP), were agreed on the need for a comprehensive reform of occupational safety and health measures and on the great importance of the European Union taking a lead in it. But the pro-reform camp pinned too much faith in the federal government's readiness to comply with European legislation, and futile infighting stopped them from developing sufficient forceful outwardly directed arguments.
- Those opposed to reform, namely industry, the craft sector, segments of the Christian Democrats and Christian Socialist Unionists (CDU/CSU) and Liberals (FDP) were far more united and worked together to secure the smallest possible, non-binding reform, put the focus on the employers' cost burden, and ensure the lightest possible government hand on the tiller. Fuelled by ideology, ignorance and polemics, a campaign against the law turned into a veritable "crusade" against alleged red tape and in favour of deregulation, privatisation and radical market reform. This camp even went so far as to spread false reports in the tabloid press to discredit allegedly "excessive" EU regulatory interference.

Against the backdrop of the ongoing *Bundestag* (i.e. general) elections, and to prevent the conflict within the coalition from escalating further, the legislative procedure to transpose the European OSH directives was suspended in mid-1994. This put Germany at the bottom of the class in transposition terms, and the German government had to "play" the European Commission to gain time. For example, the federal government did not shrink from trying to throw dust in the Commission's eyes with what we consider to be misrepresentations in its correspondence with the European executive.

As a result, the DGB called on the European Commission in July 1994 to take Germany to the European Court of Justice for treaty violation. The federal government quickly realised that 1996 would be the Commission's final deadline for filing the complaint. Decisive momentum was also given by a joint appeal from the DGB and the Union of German Employers' Federations (BDA) to the *Bundestag* and the prime ministers of the federal states to implement the core objectives of occupational safety and health reform, endorsed by a consensus between the social partners, by transposing the various European directives.

The European Framework Directive was finally transposed in mid-1996, therefore, via a brand new Health and Safety at Work Act (*ArbSchG*) and amendments to the laws governing preventive health and safety measures in Social Code VII.

Most of the separate sets of guidelines fleshing out the general provisions duly followed after a further delay of several months following the adoption of the Health and Safety at Work Act :

- Decree on safety and health protection when using personal protective equipment at work (4 December 1996).
- Decree on safety and health protection when using working substances at work (11 March 1997).
- Decree on safety and health protection when working with visual display units (4 December 1996).
- Decree on safety and health protection when manually handling loads at work (4 December 1996).
- Decree on places of employment (4 December 1996).

At the time, the DGB criticised a number of shortcomings in this implementation, which prevented a complete, all points transposition of EU provisions

into German law. The criticisms centred on the tendency to interpret the EU Framework Directive restrictively, but also applied to the implementation of the individual directives, especially the deeply vexed issues of work with visual display units and load handling. As with the Health and Safety at Work Act, where the decrees it had enacted were concerned the federal government could not bring itself to put more detail on the arrangements set out in its framework guidelines.

Nevertheless, these new legal bases did constitute progress.

The main core provisions of the Health and Safety at Work Act (ArbSchG) are :

- For the first time ever, Germany has a uniform legal basis applying to all areas of activity and all groups of workers, including therefore public sector workers.
- For the first time ever in German occupational safety and health legislation, all employers have the same high level of obligations. So, Article 3.1 of the Health and Safety at Work Act requires employers "to adopt the necessary occupational safety and health measures taking account of any circumstances affecting the safety and health of employees in the workplace. The employer must assess the effectiveness of such measures and, if need be, adjust to changing circumstances. In so doing, his goal must be to improve employees' safety and health protection".
- The benchmark is now a modern understanding of occupational safety and health, namely one involving measures to prevent industrial accidents and occupational health risks, including socially-acceptable work organisation.
- Occupational safety and health must be integrated into companies' decision-making processes, and this must be done systematically on the basis of risk assessments, the planning, implementation and evaluation of measures. Assessment must take account of the kind of activity involved, and any plans must consider and create appropriate linkages between all relevant company-related factors, specifically technology, work organisation, other working conditions, social relations and the influence of the environment on the workplace.
- There is a general duty on all employers to seek advice. The range of duties of company doctors and occupational safety officers was expanded with respect to the duty to support employers in performing risk assessments.
- When they have specific grounds of complaint, workers now have a right of appeal to the competent authority where measures taken and resources provided by the employer are insufficient to guarantee safety and health protection at work, and the employer fails to take remedial action following such complaints.
- Government inspectors and employers' liability funds must work together on enforcement.

Consequences for German social policy

The new section VII of the Social Code (SGB) on preventive legislation is the biggest advance in authority for statutory accident insurance since Bismarck's social legislation.

Article 14 states :
"(1) Accident insurers must take any appropriate measures to prevent industrial accidents, occupational diseases and work-related health risks and ensure that effective first aid is available. At the same time, they should investigate the causes of work-related hazards to life and health.
(2) Accident insurers shall work together with health insurance funds to prevent work-related health risks."

Further passages of section VII of the Social Code contain provisions that flesh out these fundamentally new rules, in particular with regard to prevention :

- The scope of accident prevention regulations is expanded to the prevention of all work-related health risks. In performing their new, more extensive range of duties, accident insurance funds must monitor companies and provide advice to employers and the insured workers alike.
- The powers and duties of supervisors are expanded in the same way.
- Accident insurers and the *Länder* occupational safety and health authorities have a duty to work closely together in supervising companies and encourage exchanges of experience.
- Insured workers must comply with all measures to prevent industrial accidents, occupational diseases and work-related health risks that they are able to, and follow any instructions to that effect issued by the employer.
- Safety delegates should go beyond their traditional duties and also call the employer's attention to accident risks and health hazards to which workers are exposed.
- Accident insurers must ensure that the necessary basic and advanced training is provided.
- Either through their own research or participation in research by others, they should help to clarify the causal link between incidences of illness and unhealthy work-related factors.

The practical implementation of the new Safety and Health at Work Act was the policy priority in subsequent years.

Back in 1997, the DGB summed up the main strategic issues as follows :

1. Creating an efficient occupational safety and health system operating on a multidisciplinary basis and geared towards participation and cooperation, which uses all appropriate means to maintain, protect and promote the health of workers and also organises work in a socially acceptable manner.

2. Bringing the full force of law and political means to bear on companies that flout basic provisions of the law.
3. Developing effective mechanisms, especially at company level, that also help to strengthen companies economically.
4. Initiating and promoting innovative technical, organisational and social solutions and cooperation with policy on technological development and innovation.
5. Using occupational safety and health as an instrument of preventive social policy to avert health risks and reduce social costs both within and outside companies.
6. Developing occupational safety and health as a cornerstone of general environmental protection.
7. Integrating occupational safety and health into basic, continuing and advanced vocational training.
8. Occupational safety and health must become a fixed component of employment policy.
9. Occupational safety and health must be emphasised and further developed as part of a humane work culture.
10. It must contribute to harmonising working conditions worldwide in accordance with basic humane issues of occupational safety and health and in line with the state of development of our economy.

These points are still valid today !

As well as these underlying conditions of occupational safety and health policy and social policy, trade union activities focused on the new core element of in-company occupational safety and health : risk assessment, including the adoption, further development and documentation of occupational safety and health measures.

The new occupational safety and health legislation and its underlying modern concept of occupational safety and health protection also affects all areas and levels of trade union and workforce representation.

- The new legal bases have provided works councils and staff councils with a firmer footing on which to monitor and enforce occupational safety and health measures. In many respects, the scope of workforce representation has extended to include such things as taking up workers' individual health-related complaints, integrating occupational safety and health into broader company life and management concepts, cooperating with occupational safety and health authorities and institutions, as well as accident insurers, and helping individual workers to look after their own health concerns within the company. This means that workforce representatives must have more extensive support from their trade unions, especially in the form of training, advice and their integration into company, multi-company or regional networks.
- The same also applies to their trade union colleagues and members of the self-administering bodies of accident insurers. The task here was for our colleagues to take the initiative in creating and further developing health and safety committees. Short-, medium- and longer-term prevention principles had to be framed and developed, while another key task was to promote correct and appropriate further development of employers' liability funds and their staff to bring them in line with the new requirements.
- Support for colleagues was initiated by local or inter-regional trade union working groups, while consultancies and training agencies were set up either within or in conjunction with trade unions, or their function as multipliers was exploited.

Assessment of companies' practical implementation

Trade unions were strongly committed to the occupational safety and health reform, but there proved to be major difficulties with the way companies put it into practice.

The DGB pointed out significant shortcomings in a series of assessment reports on the EU directives :

- "All except a few of the small and medium-sized firms that employ most of the German workforce have so far failed to implement the Health and Safety at Work Act in practice" (March 1999).
- "Bearing in mind the mere two years it has taken to transpose the EU Framework Directive into German law and in light of companies' resistance to implementing its provisions in practice, the DGB has to conclude that at present only the rudimentary bases for effective implementation exist" (March 1999).
- In its March 2001 evaluation of the transposition of the VDU Directive, the DGB cited a survey done by the Institute for Industrial and Social Hygiene Foundation (IAS) which found failings in 90% of 14,000 VDU workplaces investigated : in fact, 38% of VDUs were incorrectly set up, and 21% of workplaces displayed organisational failings. The survey also criticised the lack of training in safe working procedures. 13% of workplaces also suffered from problems with inappropriate lighting and glare.
- The implementation report on the German manual handling of loads decree (*LasthandhabV*) found that the failure by smaller firms to implement the decree, incomplete or non-existent risk assessments, inadequate government inspections, and the continued absence of indicators for assessing effectiveness, meant that even greater efforts were needed in future if the decree's substantive provisions and the delivery of its aims were truly to help organise work in a socially acceptable manner.
- Again, in April 2003, the DGB had to report that employers in several sectors were simply not complying with the new provisions. In other areas, the

new laws did help to get occupational safety and health protection increasingly seen as management duties and organisational tasks. So, general awareness of the complexity of prevention-related tasks was most probably heightened. However, work-related health risks have not yet been universally taken on board as new challenges and tackled from a multidisciplinary approach.

Looking at these failings and the continuing scale of work-related health risks, the current situation on occupational safety and health protection cannot by any means be described as satisfactory. Even so, it was - and still is - right, important and indeed imperative that European legislation should create momentum and serve as an important benchmark and target for social organisation, regulation and social policy initiatives.

The occupational safety and health protection situation in Germany

The situation in Germany has changed dramatically over the last few months. The union thrust has shifted away from developing and refining the modern approach to reform and towards fighting what are felt to be defensive battles, at least to some extent defending the foundations of gains made, opposing the deregulatory push and fending off attempts to downgrade conditions. The social policy of the welfare state that has existed up to now is being deflected against the backdrop of economic difficulties and chronic mass unemployment, a crisis in public budgets and an offensive waged by conservative and free market forces. Overall, there is a gradual turning away from the principle of solidarity and equality, and the focus is shifting increasingly towards the so-called "personal responsibility" of the individual, social justice is being redefined as equal opportunity in competition, and there is a loss of social solidarity, not to say a measure of opposition to these values. Occupational safety and health protection is seen as a cost burden that undermines competitiveness.

The pressure on occupational safety and health protection is growing enormously with moves to cut red tape and promote deregulation. This trend is being driven by the opponents of OSH reform.

- The core idea of deregulation is "lean" framework provisions. Detailed rules and regulations are to be eliminated as far as possible, and specific local arrangements are left up to individual employers.
- Safety regulations and occupational health care requirements imposed on small and medium-sized firms are to be relaxed even further, even though that this has been found to be the area with the worst failings. As a result, workers in these companies will be permanently downgraded to the rank of second-class employees.
- Constant staff cuts and austerity measures, as well as restructuring, means that the occupational safety and health authorities in the various federal states will gradually become increasingly less able to perform their statutory advisory and supervisory duties.
- The status and structure of accident insurance will undergo a far-reaching review, possibly with a view to restricting or immediately privatising the legislative and supervisory powers of employers' liability funds, reducing them to pure personal liability insurance providers, with no preventive duties.

The trade unions and the DGB are actively fighting these threats of deterioration, not least with a public relations campaign: "Accident and health protection are no luxury! We must protect ourselves against the dismantling of the OSH system" (text available in English on http://tutb.etuc.org/uk/newsevents/news.asp).

We will be drawing on our political resources at European level in a bid to see that the reform of occupational safety and health and the positive gains made through the EU directives are not reversed.

Part of this effort must also be to promote ILO Conventions, especially Convention 81 (labour inspection) and Convention 155 (health and safety and the work environment), and to support the ILO's drive to establish a worldwide culture of occupational safety and health. ■