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EDITORIAL

Strategy 2007–2012: Commission short on vision

Since 1978, the European Commission has been regularly publishing guidelines for Community policy on health and safety at work through programmes and strategies – usually for a period of five or six years. They point to the priorities and spell out practical measures.

All the programmes put out between 1978 and 2002 were always discussed beforehand with the trade unions, employers' organisations, EU governments and specialised agencies. The Commission would send out the first drafts of its Communication, get back the reactions, and take them into account in the final version.

It did none of that for the strategy 2007-2012. The Communication was only publicly unveiled at a press conference on 21 February 2007, catching all the organisations and governments whose role the Commission recognises as crucial on the hop.

The upshot is something of a mishmash. The Commission Communication seems to set its sights high, targeting a 25% cut in the incidence rate of work accidents in the EU. And yet in terms of practical measures, it is the thinnest gruel since the first-ever Community HSW action programme.

The Commission press release talks about bringing down work-related accidents and occupational diseases by 25% by 2012. But the Communication links this figure only to work-related accidents. It is a big difference. Occupational accidents account for only a small part of work-related health damage. Past Community strategy has always favoured a broad approach that takes in all health problems. But the Communication does not spell out exactly how occupational diseases will be brought down.

A preventive strategy is based on specific mechanisms that act to drive practical measures in workplaces. The three core mechanisms of any preventive system are: workers' representation, health and safety inspection and preventive services.

On workers' representation, the Communication shuns the participatory approach called for by the framework directive. It all-but airbrushes workers' representation right out of the picture, dismissing it in a single unclear sentence, and offering no practical measures. And yet practice shows there to be a very close connection between active safety representation and truly effective preventive measures in a workplace. In most, that representation is what makes the difference between a tick-box application of the law and a proactive policy of effective risk elimination. The Communication skates around this fact. It glosses over the problem that many workers in Europe are denied any form of representation in health and safety.

Where health and safety inspection is concerned, the Communication distorts its essential role. It sees health and safety inspectors mainly as a network of consultants working for business, and seriously underestimates the importance of policing and enforcement against offending employers.

On preventive services, the Communication offers only the odd suggestion on external service provision. This is a blinkered approach at odds with the framework directive, which rightly gives priority to establishing company preventive services.

The Commission appears to have forgotten that the Treaty calls for the working environment to be harmonized through Community directives. It favours recommendations, which we know have failed in practice, and other non-binding instruments.

If work-related illnesses are to be brought down, two policy areas must be given top priority: preventing musculoskeletal disorders, and tackling chemical hazards, and especially work-related cancers. Here, the Communication offers only the vaguest of statements that "the Commission will continue its work, through the ongoing consultations with the social partners, to find ways" in these areas. The Commission no longer dares even utter the word "directive", despite it featuring in its strategy for 2002-2006! After five years of fudging the issue, the Commission could have given a clearer statement of what "ways" it plans to "find"!

The lack of anything that could be called a prevention strategy for chemical risks in workplaces is particularly disgraceful considering that the implementation of the new REACH regulation gives a major opportunity for improving workplace prevention. But that opportunity must be grasped. The Commission should engage with the Member States in an ambitious programme for replacing the most dangerous chemicals used in workplaces. It should develop a framework by adopting exposure limits for the most-used dangerous substances.

Getting any kind of fresh impetus for Community health and safety at work policies probably depends on how much the trade unions can step up their HSW activities to hammer home the full importance of health and safety at work in our societies. ■

Marc Sapir,
Director of the Health and Safety Department, ETUI-REHS

REACH and the role of trade unions

Joël Decaillon,
ETUC Confederal Secretary

After nearly 10 years of intense debate at EU level, the reform of the EU legislation on chemicals was finally adopted by the European Parliament and Council in December 2006. This new regulation called REACH sets up a comprehensive system for the Registration, Evaluation, Authorisation of Chemicals. Under REACH, companies manufacturing or importing chemical substances in quantities of one tonne or more per year will be required to register them to show that they can be used safely. In addition, producers of substances of very high concern (like carcinogens or toxins that accumulate in the environment) will need to obtain authorisation before using or placing them on the market. A new European Agency based in Helsinki will be set up to manage the REACH regulation which will enter into force in the 27 EU countries in June 2007.

ETUC welcomes the adoption of REACH and its fundamental principle of shifting the burden of proof onto industry. The REACH reform enables Europe to adopt a more socially responsible approach to managing chemical risks. It sets Europe firmly on the road to sustainable development with an economy that takes greater account of the health and environmental impacts of the chemicals industry. The text as finally approved meets some of ETUC's key demands, like measures to ensure the quality of the data provided by producers and measures in favour of SMEs (e.g., the One substance, One Registration, OSOR, principle which aims to share data and registration costs, or the setting-up of REACH national help desks).

On the other hand, ETUC regrets that the final text falls short in its ability to significantly improve the protection of workers' health. Some of the important improvements demanded by the ETUC in its Common Declaration and also supported by the Parliament up to the final weeks of the co-decision procedure, have been lost in response to pressure from the chemical industry.

- **Authorisation and Substitution principle:** Despite companies being encouraged to phase out hazardous chemicals, they will be able to go on using certain extremely dangerous substances even if safer alternatives are available, which is at odds with the substitution principle laid down in existing worker protection legislation.
- **Chemical Safety Report:** crucial information to ensure workers' safety will only be available for one-third of the 30 000 substances covered by REACH. The 20 000 substances produced in low volume (below 10 tonnes per year) will not need a Chemical Safety Report, which is the tool to improve workers' safety.
- **Duty of Care:** this general principle intended to cover all chemicals on the market (including the under-1 tpa chemicals that fall outside the REACH system) has been reduced to an expression of intent (a recital).

Nevertheless, ETUC has been present throughout the REACH debate and has proven to be an important and compelling player in the political discussions. The ETUC common position adopted by its March and December 2004 Executive Committees has been widely circulated to policy makers and continuously promoted by trade union representatives across Europe.

ETUC has organised two successful conferences on REACH involving EU institutions and the major stakeholders (March 2005 and September 2006). In addition to the numerous publications to explain both the REACH system and the issues in the reform (leaflet in 12 EU languages, newsletters, etc.), ETUC and its Research Institute have also released an important impact assessment study on the benefits of REACH for workers' health, showing that REACH would help avoid 50 000 cases of occupational respiratory diseases and 40 000 cases of occupational skin diseases from exposure to dangerous chemicals in Europe each year. This study was praised and used by the Commission, Parliament and Council.

ETUC has also been actively involved with other stakeholders in the Commission Working Group on the Further Impact Assessment on REACH to investigate the microeconomic aspects of the reform, and since 2004, in the Commission Working Group on the preparation for REACH. Today, ETUC is still involved in different REACH Implementation Projects. ETUC will continue working at European and national levels through its members to see that the reform is properly implemented and keep talking to the European authorities and employers about ways of improving it.

The REACH reform was the focus of the highest-pressure lobbying campaign ever mounted by industry towards the European institutions. The ETUC's balanced position proved resistant to the usual blackmail that progress in health, safety and environmental protection equals job losses.

In releasing its impact assessment study on benefits, ETUC showed that industry will avoid production losses if REACH reduces chemically-induced occupational diseases, and that replacing hazardous chemicals will boost innovation and employment in the chemical sector (good quality jobs).

Through its ongoing involvement in the REACH debate, the trade union movement has reminded policy makers and employers that the future of European industry cannot be driven just by chasing competitiveness, and that economic growth must not be achieved at the cost of public, occupational and environmental health. This message is crucial for trade unions' credibility with European citizens and the future of trade unionism. ■

The Health and Safety Department publications on REACH

The impact of REACH on occupational health with a focus on skin and respiratory diseases

Simon Pickvance et al., *University of Sheffield*

ETUC/ETUI-REHS co-publication, 2005
76 p., 21 x 29.5 cm, ISBN : 2-87452-008-x

"90 000 occupational disease cases will be avoided in Europe, saving 3.5 billion euros over 10 years for the EU-25." These are the mind-boggling figures to come out of this ETUC/ETUI-REHS report. The study on how REACH will benefit workers' health was done by researchers from the University of Sheffield, looking chiefly at respiratory and skin diseases. Adopting an ambitious REACH should help bring down the numbers of these diseases that have been steadily rising for half a century. Everyone will win out – social security systems, through reduced costs; workers, through a better quality of life; and not least employers, who will avoid productivity losses from sickness-related absences.

REACHing the workplace

How workers stand to benefit from the new European policy on chemical agents

Tony Musu

ETUI-REHS, 2004, 36 p., 17 x 24 cm, ISBN: 2-930003-44-8
This brochure is also available in French and many other languages.

The Health and Safety Department has decided to focus in this brochure on the health and safety benefits inherent in the REACH legislative reform for the millions of European workers who are exposed to chemicals in the workplace on a daily basis. In order to better understand in what way the REACH reform represents a real opportunity to reduce the number of occupational diseases related to exposure to dangerous substances, this publication begins by examining the reasons why a reform is needed; it then describes the content of the REACH reform and the changes it will make to the existing legislation. It concludes by explaining the state of play in the legislative process underway at the European Parliament and the Council, which should result in the adoption of the REACH Regulation.

REACHing the workplace. Trade unions call for a more ambitious European policy on chemicals

HESA Newsletter, Special issue, No. 28, October 2005

Report on the ETUC conference on REACH held in March 2005.

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"The making of..." A new Working Conditions Act in the Netherlands

Wim van Veelen,
Health and Safety Policy Advisor, the Netherlands Confederation of Dutch Trade Unions, FNV

A new Working Conditions Act came into effect in the Netherlands on 1 January 2007. At the start of the debate, the Dutch trade union confederation FNV called for a new public system with specific, enforceable and unambiguous targets set on the basis of clear and scientifically-supported health and safety exposure limits for all categories of risk. The system proposed by the FNV, and later backed by all social partners, is aimed at achieving a Europe-wide "level playing field" in which all employees across Europe enjoy the same level of protection. The new Dutch Act certainly contains such targets, but only those already set by European legislation. So the battle for more of these enforceable targets goes on. Unions in other countries where similar deregulation drives are going on or impending may derive valuable lessons from the processes described in this article.

The Fourth European Working Conditions Survey gave the Netherlands a very clean bill of health. And it is true that many workplaces are of quite a high standard. But the physical workplace is not the only factor involved. Risks like harassment, bullying and violence are rising in the Netherlands, and among the highest in Europe. Stress and pressure at work from reorganisations are also important causative factors in occupational diseases[1]. Lower back pain and RSI (Repetitive Strain Injury) are at epidemic proportions. In short, perfection is still a very elusive goal, even for the Dutch.

The Netherlands has approximately 7.1 million workers, and over 1 million companies (> 98% SMEs). It has 270 operational health and safety inspectors, who handed out 2500 administrative penalties in 2005 under the Working Conditions Act, amounting to 6 972 277 in fines in 2005.

Exposure to chemicals resulted in 1853 premature deaths among workers in the Netherlands last year (see table), while up to 700 workers die prematurely each year from long-term exposure to stress and related burn-out syndrome.

Illness / Diseases	Deaths from exposure to chemicals
Asthma/COPD	568
Mesothelioma, asbestosis	778
Lung cancer	464
Rhinitis and sinusitis	2
Cardiovascular disease	29
Skin cancer	12
Total	**1853**

Source : Dekkers, S., *et al., Belangrijkste beroepsgroepen en stoffen bij het ontstaan van ziektelast door blootstelling aan stoffen op het werk*, RIVM, Bilthoven, November 2006

Up to 25 000 workers "catch" an occupational disease each year, but only 6000 are officially registered. Obviously, not all these diseases prevent these workers from doing their jobs, but they do cause most of them daily health problems. Most company doctors do not report occupational diseases to the official authorities, despite having a statutory duty to do so. Company doctors and occupational health services operate in the private sector, so reporting (too many) occupational diseases may risk losing a contract with the employer.

The main conclusions of the Netherlands Center for Occupational Diseases set out in its Alert report 2005:

- most-frequently reported occupational diseases: RSI (2200 cases), followed by psychological disorders (1600 cases) and deafness (1500);
- 40% of workers over 20 years of age suffer back pain;
- special alerts were given for the rise in violence and intimidation at work, risks related to nanotechnology and fine dust, risks from heavy workloads for pregnant women, and the need for action on preventable needlestick and sharps incidents.

Workers, employers and the cabinet agreed that the National Working Conditions Act gave too little effective protection against health and safety risks. So the "old" Act was reviewed. A long process of lobbying, talks and negotiations between social partners, politicians and the government was set going in 2004, culminating in a new Working Conditions Act which came into force on the first of January 2007.

[1] Spreeuwers, D., *et al., Signaleringsrapport Beroepsziekten 2005*, Netherlands Center for Occupational Diseases – Coronel Institute, Division Clinical Methods and Public Health Academic Medical Center, University of Amsterdam. See: www.occupationaldiseases.nl

Government withdrawal and Expanding social partner responsibility

On 29 October 2004, Deputy Minister for Social Affairs and Employment Henk van Hoof asked the Social and Economic Council (SER) for an opinion on the review of the Working Conditions Act 1998. The role of the SER is to give the government and parliament advice on the broad lines of national and international social and economic policy, and on key pieces of social and economic legislation. Employers, employees and independent experts are equally represented in the SER.

The SER approved its report at its meeting of 17 June 2005[2]. It had been a long drawn-out process.

Deputy Minister van Hoof had sought the Council's advice on four things:

1. A number of proposals for changes in the statutory working conditions system that are designed to encourage employers and employees to assume greater responsibility for ensuring safe and healthy working conditions;
2. The suggestion that the State should focus more specifically on serious risks in the working environment and on reinforcing the active role played by employers and employees in companies, especially SMEs;
3. Reducing the amount of red tape; and
4. Developing further facilities for companies to manage their own working conditions independently.

The Working Conditions Act review got under way in the midst of a media war between the different parties. The unions were against deregulation and less State intervention. It was not a bigger rulebook, they were seeking but more concrete and comprehensive rules & regulations. Even so, the unions were accused by employers of merely wanting more red tape.

The employers' refrain was that the EU (Framework) Directives were more than enough and no specific national rules were needed. They argued that national rules seriously undermined Dutch competitiveness. Good practices and so-called "soft law" (which is no more than voluntary agreements between industry social partners) would do the job.

Deputy Minister van Hoof sided with the employers, arguing for a bonfire of national regulations, since EU directives were sufficient, and low risks required no statutory protection since they could be dealt with by the social partners. He also advocated a "made-to-measure", case-by-case approach instead of the "one-size-fits-all" regulation approach.

Outside the public "war", the social partners worked jointly in the SER on a new Dutch framework for a new Working Conditions Act. The FNV spearheaded a new structure, on the basis of which, the SER came to the following conclusions:

1. The Cabinet wishes to devolve more responsibility for working conditions to employers and employees, and to drastically reduce government involvement;
2. This would be in line with a general trend towards an increase in responsibility borne by employers and employees at company level and by the social partners at sector and central level. A good working conditions policy depends on responsibility being assumed by those most directly concerned;
3. Still, the government should maintain a clear and visible role in this area, especially in setting appropriate levels of protection by defining specific and unambiguous prescribed targets relevant to the level of protection in question, and by ensuring that such prescribed targets are enforced;
4. The SER also emphasises the importance of adopting a case-by-case approach, based on agreements reached between employees and employers at sector or company level;
5. The SER does not consider practicable the Cabinet's suggestion of creating a distinction between low and other (i.e., high) risks nor the suggested withdrawal of government from legislation and enforcement;
6. The Cabinet's proposals presented in the request for advice are not the best way to reform the complex legislation on working conditions. The SER therefore proposes its own model for a new working conditions system.

The social partners' proposal for a new working conditions system

The SER's proposals for a new working conditions system should be seen in the context of a situation to be worked towards in the longer term. The system proposed is based on its wish that a Europe-wide "level playing field" will ultimately be achieved, in which all employees across Europe enjoy the same level of protection.

The purpose of the new system is to help create adequate working conditions such that employees stay both healthy and motivated. As in the present system, the basis of any new system should be that employees receive an adequate level of protection while performing their work. The new system should also help prevent or reduce sickness absence and work incapacity rates, and expand opportunities for employers and employees to take responsibility for their own working conditions policy, thereby considerably reducing red tape and simplifying legislation. As such, the new system can be seen as an intermediate step on the way to a uniform, Europe-wide system of regulation.

At the heart of the new system is a clearer separation of the public and private domains. Only the

[2] Advisory report, SER, Evaluation of the Working Conditions Act 1998.

Working Conditions Act, the Working Conditions Decree and the Working Conditions Regulations should remain in the public domain: the government should remain responsible for monitoring and enforcing these regulations.

The SER deems it to be essential that central employers' and employees' organisations should be involved in extending and filling-in the finer details of the proposed system.

Public domain

In the proposed new system, the public domain contains specific and unambiguous prescribed targets, based on clear and scientifically-supported health and safety exposure limits. These prescribed targets set the level of protection employees should receive while performing their work. The new system will entail a restructuring of public regulation. This is because prescribed targets or process norms currently contained in policy guidelines will (insofar as is necessary) be transferred to the working conditions regulations, while prescribed methods, explanations and non-essential specifications currently in the public domain will be transferred to the private domain. Prescribed methods will thereby lose their official, prescriptive status.

Unenforceable prescribed targets that are in the public domain will, as far as possible, need to be reformulated so that they become enforceable, while any unclear prescribed targets will have to be reformulated into clear, easily accessible regulations.

Situations may arise in which it is not (or not yet) possible to meet one or more prescribed targets. In such cases, a one-off or permanent exemption may be granted, or a reasonableness clause applied. Where enforceable prescribed targets cannot (or not yet) be formulated, process norms should be used (these stipulate that a given risk requires further regulation).

Private domain

In the private domain, employers and employees agree on ways of working that allow prescribed targets to be achieved. At sector or central level, this may be done through agreements between employers' associations and unions. The ways of working established may be recorded in a Working Conditions Catalogue, which contains descriptions of methods recognised by employers and employees, and from which a choice can be made in order to meet the prescribed targets. At company level, employers and employees may agree on ways of working using the plan of action that accompanies the obligatory working conditions risk assessment and evaluation.

The present working conditions policy regulations, information newsletters *(AI-bladen*[3]*)*, NEN[4] standards and working conditions covenants[5] can all play an important part in the creation and development of the Working Conditions Catalogue. All this makes the Working Conditions Catalogue a practical, accessible tool and roadmap by which to deliver the prescribed targets.

Besides descriptions of particular methods, the Working Conditions Catalogue may also include examples of best practices that will also help in meeting prescribed targets. It may also contain documentation on standards, practical manuals and agreements that are binding on parties to a collective agreement (CAO). In the future, the Working Conditions Catalogue may also contain parts of the present covenants on working conditions, most of which will expire around 2007.

The Working Conditions Catalogue is not intended by the SER as an exhaustive list of ways of meeting prescribed targets, which may also be met by other methods.

Enforcement

The SER's proposed new working conditions system implies that the Health and Safety Inspectorate will need to enforce the following: the prescribed targets, the OELs (Occupational Exposure Limits) and the process norms falling within the public domain.

The inspections carried out by the Health and Safety Inspectorate should not be restricted to punitive enforcement. By providing practical suggestions or giving praise where appropriate, the Health and Safety Inspectorate can encourage compliance with the regulations and give itself a more positive image. The proposal to double the maximum fines in the case of serious breaches of working conditions regulations is a new element in the proposed system.

Government misuse of the social partners' report

The SER approved its report at its meeting of 17 June 2005. After their intensive labours, the social partners were convinced that the Cabinet would take up the SER's framework. They were to be disabused. Mr van Hoof, as a representative of the right-wing cabinet, hijacked the SER report for his own agenda.

Only a handful of health-based limits came into the new Dutch Act; specifically, only the actual OELs for noise, radiation and vibrations already laid down in European legislation plus one "home grown" Dutch target formulated by Mr van Hoof – the so called "falling from height" limit.

Mr van Hoof slashed all the specific national rules. For example, the old Working Conditions Act contained rules on temperature, the right to have seating facilities during working hours, the amount of natural and artificial light in the workplace, and a duty to write a report on the progress made by the company

[3] Besides the legal framework, the Government also publishes so called *AI-bladen*; Health & Safety Information Brochures for a number of health & safety risks at work. These brochures contain information on how to deal with the legislation in practice and how to implement the Working Conditions Act. In other words, they are purely informative and not statutory instruments as such.

[4] NEN is the Dutch standardisation institute which develops standards and regulations for interested parties like manufacturers, retailers and public authorities.

[5] These agreements are concluded by the government with the social partners. They are officially promoted – the Dutch government helps to fund them – and have mushroomed in different sectors in recent years. They are non-binding and enforcement is left to the employers' discretion.

in implementing the plan of action that accompanies the obligatory working conditions risk assessment and evaluation. All these specific national rules were cut back. And despite Mr van Hoof's claims to be following SER advice, and the social partners pressing for a concrete health-based upper limit for all health and safety risks, only five made it into the new legislation. The new Working Conditions Act was nodded through parliament. Only one resolution was accepted and must be implemented by cabinet. This requires the government to make a plan to formulate more concrete, health-based, upper limits in the future made by an internationally recognized scientific institute. So, there is a glimmer of hope for the unions…

The FNV will nevertheless continue to work for more concrete health-based and scientifically-proven upper limits (concrete OELs), and to have them enshrined in EU legislation for the most serious risks. Examples might include:

- for the manual handling of loads, the NIOSH-formula could be used to devise limits not just for lifting, but also for pulling and pushing;
- lighting and illumination in the workplace expressed in a LUX limit;
- working in extreme temperatures;
- minimum work space per employee;
- limits for working in seated positions, standing positions, etc.

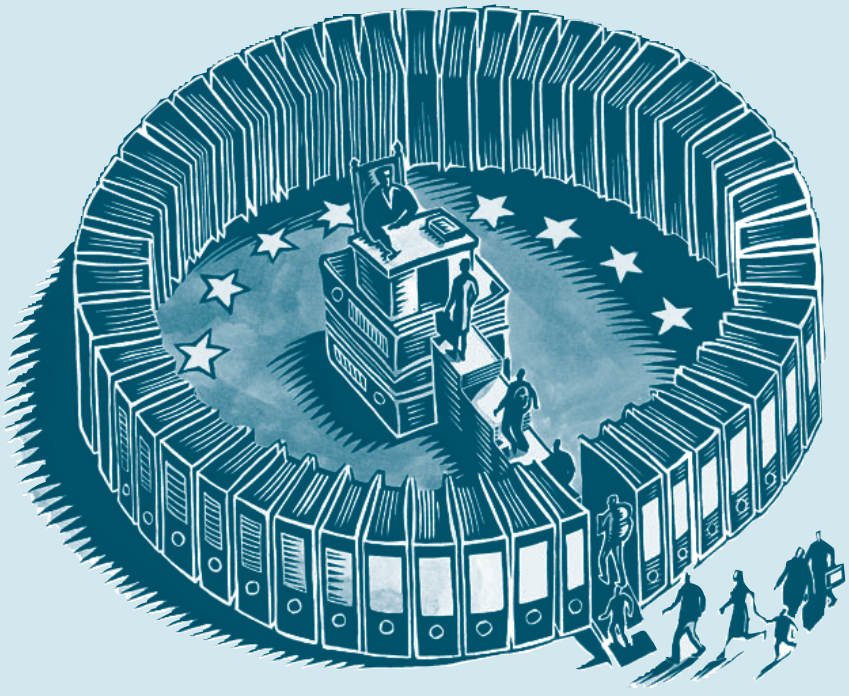
What is needed is a European scientific institute (like NIOSH or the Health Council of the Netherlands and the Dutch Expert Committee on Occupational Standards) that will provide scientifically-proven health-based OELs for health and safety risks. These OELs (or upper limits in most cases) must be enshrined in EU directives after a reasonable period of time so that employers can work to these new standards. By acting as an independent referee, the Institute would forestall disputes between the social partners over what can and cannot be done. Ultimately, more transparent and enforceable regulations that are clear and the same for all workers and employers will make Europe healthier and a better place to work in. ■

SPECIAL REPORT

The "reasonably praticable" clause

Reasonable workforce management or elimination of risks?

Consider a machine with a minor defect that produces the odd substandard part. A manager can reason in fairly basic economic terms that if the cost of improving the machine is grossly disproportionate to the costs of the faulty parts, tinkering with the production system would be more trouble than it was worth. A more sophisticated logic might bring other factors into play: hidden or long-term costs, the company image, the time invested in quality controls, the risk of major damage to the machinery over time. But the fundamental reasoning remains the same – a balance between two sets of things reduced to a common equivalent: their cash value. Can this managerial logic apply to human beings in employment relations? More specifically, can an employer decide not to take measures to prevent a health risk if the cost far outweighs the expected benefit? Merely asking this assumes that a price tag can be put on a human life, and that above a certain cost, that life is no longer worth the trouble of protecting. That is the issue at stake in a pivotal case for the enforcement of Community health and safety directives.



It involves infringement proceedings brought by the European Commission against the United Kingdom for limiting an employer's health and safety obligations to what is "reasonably practicable" when transposing the 1989 framework directive (and the other HSW Directives).

The expression "reasonably practicable" as used in Britain implies an economic equation. It means weighing the costs of a preventive measure in time, money or trouble against its expected benefits. If the cost is grossly disproportionate, the employer is allowed to escape his duty of prevention.

The political agenda in this case is obvious (see article p.11). The backcloth is the British government's adamant opposition to any Community social/labour legislation that might go further than the rules in force in Britain. It is a hostility directed both towards health and safety matters (e.g., the Working Time Directive) and other aspects of social policy. The case is also a major litmus test of the credibility of Community social/employment law in the broader context of enlargement.

The legal aspects are many and complex. This report attempts to pick apart the strands in order to clarify the issues at stake (see article p.16).

The case illustrates the British government's determination to call into question gains established nigh on 20 years ago. A political battle raged around the "so far as is reasonably practicable" (SFAIRP) clause between 1987 and 1989. It was a battle the Conservative government lost when its veto powers were swept away in institutional changes, as the inclusion of article 118A into the Treaty in 1986 made it possible to adopt work environment directives by a qualified majority.

The British authorities yielded to this political defeat at the time, but decided to continue the fight on another battleground. They transposed the framework directive in a restricted and qualified way that deprived British workers of its most ground-breaking provisions. The transposing regulations were at odds with the directive's minimum requirements on several points. This was pointed out by several trade unions and the Commission did its duty. Solutions

were worked out to some of these infringements. But, even with a new political party in power, the British government would not budge on the SFAIRP clause. Alternatives were mooted for a change in the law, but the government decided to take the battle into the courts. This is a very different approach to other countries' authorities, which changed their laws so as to comply with the framework directive.

The ECJ appears to disregard the debates of 1987-1989 in the Advocate General's Opinion and in the publicly-held oral proceedings. At the time, both the Commission and a big majority of the Member States and the European Parliament categorically chose to drop this clause, which had been a feature of the earliest Community health and safety directives. The issue was discussed in the open and in plain terms. The British government and Advocate General's arguments skate around this fact. For the Court to endorse them would be to arrogate to itself a right to revise legislation adopted in compliance with the Treaty.

Beyond the technical complexity of the case lies a substantive issue. Since the emergence of capitalism, workers have struggled to prevent their life and health being seen as the subject-matter of the employment contract. They refuse to be treated – and managed! – like just another commodity. They demand that employers should bear the full responsibility for potentially health-damaging working conditions. The framework directive is a legal mechanism that reflects important established gains in this fight. To throw it into question would be an intolerable reversal of social gains.

The SFAIRP clause is obviously not the only impediment to prevention. A conjunction of other factors may produce the same if not worse results in other European Union countries that do not have this clause. That in no way diminishes the importance of the case before the ECJ. Any court ruling is necessarily limited to the facts in the case before it. For this reason, it may seem a minor issue. But the legal aspect and the political aspect are linked in ways which go far beyond the immediate issues directly involved. The Court's judgement will have a considerable symbolic importance. It will form part of a much wider-ranging debate on the future of labour law which, in European societies, bears the deep imprint of nearly two centuries of organized labour struggle. There is mounting pressure to reduce labour law to nothing more than a collection of rules for managing the specific commodity of human labour. Such rolling-back of labour law reforms is generally touted in the name of competitiveness, flexibility and economic realism. To borrow a metaphor from chaos theory: the flap of a butterfly's wings on what is "reasonably practicable" may unleash a tornado in the employers' obligations to ensure health and safety which is the bedrock of our preventive systems. ■

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An inspector will not come knocking at midnight...

The political backcloth to the case up before the European Court of Justice (ECJ) on the transposition of the framework directive in the United Kingdom lends credence to the theory that ever since Margaret Thatcher swept to power in 1979, successive UK governments have been waging a war of attrition against the social directives.

Up to 1987, the British strategy was able to exploit the right of veto exercised by each Member State, as EU Council of Ministers' decisions had to be taken unanimously. Obviously, there was nothing to be done about pre-1979 social directives adopted in fields like collective redundancies, business closures and gender equality. But all Community health and safety at work legislation dates from after 1979, barring two directives of limited scope dating from 1977 and 1978.

Between 1980 and 1988, each directive was adopted in the midst of an all-out war that enabled the UK government to lower the level of protection originally proposed by the Commission. The "reasonably practicable" (SFAIRP) clause was written into the pre-1989 directives. The Community directives on lead (1982), asbestos (1983) and noise (1986) were watered down by a raft of amendments put up by the British government, sometimes in alliance with other governments. The breaking point was reached in 1988 when Britain's refusal to budge on its demands for an exposure limit wholly inadequate to protect workers exposed to benzene torpedoed the proposal for a Directive on that carcinogen.

The European Single Act brought in qualified majority decision-making on health and safety issues, forcing the UK government to find a new negotiating tactic. But past practises made it harder to build alliances and thrash out potential compromises, and the British government repeatedly found itself in a minority of one rejecting rules backed by a majority of States. This unyielding stance brought it many setbacks. The dropping of the "reasonably practicable" clause from the original proposal for the framework directive is a case in point. A document compiled at a point before the Commission had examined and taken any decision on the United Kingdom's non-compliance on this matter, is informative. It is an official UK government report published in July 1993 on the implementation and enforcement of EC law in the UK which describes in detail the fight put up by the British government for the "reasonably practicable" clause. It concludes with the blunt assessment that, "Despite all of this intense lobbying, including a number of meetings with the EC Commission and Council Legal Services, the UK lost the battle" (DTI, 1993, p. 91).

Political showdowns and keeping faith with the Community

Until a directive is adopted, political wrangling is a normal negotiating tactic between States. However hard the bargaining, it is perfectly consistent with Community rules. The Treaty spelled out the Council's powers and aimed to ensure that each State was able to fight its own corner in the process of adopting Community legislation.

But once a directive has been adopted, it is a different ball-game. Trying to prevent an unwanted directive from being fully enforced is a classic example of breach of faith with the Community. Any State can complain about directives that it does not like and whose consequences it may fear for whatever reason. But it still has to enforce them. It is a fundamental precept of the European project that Community legislation takes precedence over national legal rules.

Community law may be grossly flouted by a failure to transpose, or improper transposition of, a directive. It may be less overt where the directive's words have been written into national law, but full enforcement is obstructed by things such as a failure to provide penalties for breach of the provisions, or the failure to police proper enforcement, etc.

It is the Commission's job to ensure that all Community legislation is properly enforced. In practice, its policing powers are limited, and it does not always have the political will. This has enabled some Member States to consistently prevent directives from being properly enforced while avoiding direct confrontation over gross illegalities in the transposition. The UK case demonstrates a wide array of techniques that can be used against Community social directives.

A war of attrition

A research study based on a detailed analysis of the enforcement of six social directives in the Europe of Fifteen (Falkner *et al.*, 2005) includes three health and safety directives: protection of young workers, protection of pregnant workers, and working time. The authors trace the history of these directives from the first negotiations through to implementation in the different countries. Their aim was to identify whether relatively consistent patterns could be picked out by which to typify States' attitudes. They therefore defined "worlds of compliance" to classify States by

the strategies pursued. The United Kingdom is typified as a country where compliance with EU law is driven mainly by domestic political factors (belonging to "the world of domestic politics"). The authors argue that, "For ideological reasons, the Conservative government fought hard against the directives at the EU level. The transposition process was then often used as a 'continuation of decision-making by other means', *i.e.*, as an opportunity to continue combating directives that were already adopted against the will of the UK government". They contend that Labour acted very little differently, albeit with somewhat different motives to the Tories.

The validity of this analysis can be tested by looking at the transposition of three HSW Directives that were most fiercely opposed by the British government, and for each of which a full-on war of attrition was engaged to minimise its impact by all means fair and foul.

"Employers are not required to make sure…"

The Working Time Directive's transposition in the United Kingdom could be used as an object lesson for States resolved not to apply Community legislation fairly. The British government first tried to get the Directive quashed by the European Court of Justice. When this ploy failed, every opportunity offered by the directive's ambiguities and failings was seized on with creative enthusiasm.

The use of individual opt-outs opened the door to widespread abuse, leaving millions of British workers with no choice but to sign a consent document or be put out of work. Such practises go unpunished. The Health and Safety Executive (HSE) inspectors were stripped of the ability to police a large part of the rules on working time, despite that being an established crucial area for workers' safety[1]. The amendments forced through by the Labour government in 1999 further worsened the situation by severely narrowing the scope of the obligation to keep a record of workers subject to individual opt-outs. The situation was described by Lisa Mayhew thus, "Currently, UK law requires employers to only keep records of the names of workers who have opted out, but not the terms under which the workers have agreed that the limit should not apply, nor the number of hours actually worked by them. These provisions of national law have led to a paradoxical situation where there may be records on hours actually worked by workers subject to the 48 hour limit, but not for those who have opted to work for longer hours, who are significantly more exposed to risks to their health and safety" (Mayhew, 2005).

Elsewhere, minimum Community rules were flagrantly flouted. In particular, the right to annual leave was restricted to workers with thirteen weeks continuous employment with the same firm[2].

The ECJ recently had to adjudicate on a kind of breach unprecedented in Community case law. A guidance note had been published to inform and advise employers about the contents of and how best to comply with British regulations. The guidance specified that "employers must make sure that workers can take their rest, but are not required to make sure they do take their rest". The ECJ followed the Commission's argument that these guidelines endorse and encourage a practise of non-compliance with the directive's obligations. The Court emphasized that by requiring employers only to give workers the opportunity to take the prescribed minimum rest periods, but no obligation to ensure that those rest periods are actually taken, the guidelines are clearly liable to render the rights enshrined in the directive meaningless and are incompatible with its objective[3].

"I don't think you'll find an inspector knocking on your door…"

The VDU Directive met with stiff opposition from the British government[4]. There is a link between that resistance and the "reasonably practicable" clause that is the focus of current debate. Broadly-speaking, work with VDUs does not involve evident serious health risks. The British government saw no point in regulating what it regarded as a relatively minor risk. Also, the Health and Safety Commission's (HSC) cost-benefit assessment of the directive concluded that the costs probably outweighed the benefits. The methods of calculation used may be open to question, but it would be credulous to do so, for the assessment's main purpose is the supremely political one of dressing up political opposition in the cloak of numbers. The then Director General of the HSC, Mr Cullen, claimed in regard to the VDU Directive that, "This was a simple problem that could have been handled without any need for a directive". Once the directive had been adopted despite the British government's abstention, it should have been properly transposed. It was transposed, but in line with the HSE's general philosophy on the matter: the absolute minimum needed to avoid overtly flouting Community law, but no more. The transposition tried to exploit the directive's vague definitions to narrow down its scope as much as possible. British lawyers argued that the transposition fell short of the directive's minimum requirements on three points (Smith *et al.*, 1993, p. 66-67). In 2002, new British regulations had to widen the scope of the equipment covered to satisfy the directive's minimum requirements[5].

The regulations carrying the directive into UK law were laid out to a 1992 conference organised by the British employers' association, the CBI. The tone was set by British Telecom's Chief Medical Officer, Dr Gwilym Hughes, who described the

[1] The public inquiry into the Ladbroke Grove rail accident (1999, 31 dead) concluded that train drivers' over-long working hours were partly to blame for the incident.
[2] Judgement of 26 June 2001, BECTU, Case C-173/99.
[3] Judgement of 7 September 2006, Commission v United Kingdom, Case C484/04.
[4] The information in this section on the VDU Directive is taken from the articles "Safe in Europe?", *Hazards*, No. 39, 1992, p. 2 and "Union cries foul over new VDU Regulations", *Hazards*, No. 42, 1993, p. 5.
[5] The Health and Safety (Miscellaneous Amendments) Regulations 2002.

new regulations as "a costly procedure for health hazards that do not exist". The HSE representative was also keen to distance himself from the new rules, saying, "I don't think you'll find that at five minutes past midnight on 1 January 1993 an HSE inspector will be knocking on your door asking about workstation assessments". That was something of an understatement!

There was clearly no question of hordes of health and safety inspectors berating hapless employers the second the clock ticked over. It was a different message being given out. One to make employers understand that flouting the rules would meet only with benign indifference from the inspectorate. The message was taken on board: the regulations went unapplied in countless firms. And the HSE was as good as its word: a study of the first four years of enforcement of the regulations (Pearce, 2000) found that not a single prosecution had been brought for flouting the directive. Six enforcement notices were issued in four years, but not a single prohibition notice. This laissez-faire approach smacks of a deliberate policy. In fact, the VDU regulations were part of a "six pack" of regulations transposing Community health and safety at work Directives. But the inspectorate's attitude towards the other five sets of regulations was very different – up to the end of 1996, more than 1000 enforcement notices were issued and over 100 prosecutions were brought.

The HSE's reluctance to enforce all the directive's provisions is also reflected in its policy on health surveillance in the form of eye tests. The guidance booklet plays down the importance of such checks. And in practise, workers are sometimes encouraged to forego them by employers who refuse to treat the time taken for vision checks as working time and offer only to pay for the cost of the test. This clashes with a fundamental principle of the framework directive that workers should not be financially disadvantaged by preventive measures. The HSE, by contrast, sees it as a permitted practise with which it does not mean to interfere[6].

"Not seeking 100% cast iron conformity..."

The war of attrition on the framework directive itself went through several phases. The UK authorities made their position disarmingly clear in documents not intended for public consumption. An HSE internal memo says, "We agree that we should not seek 100% cast iron conformity with the [framework] Directive, and would indeed be unable to claim that the proposals to be put to the Health and Safety Commission would achieve this. In fact, they represent very much a minimalist approach. (...) We are prepared to take a risk over several parts of the Directive"[7].

The first transposing regulations were relatively toothless. There was no provision for an employer who flouted his obligations to be sued in the civil courts, and only limited scope for prosecuting public sector employers. Another failing was the lack of protection for workers and their representatives from reprisals by their employer. Article 7 (preventive services) received a lip-service transposition limited to requiring employers only to appoint competent persons to assist them when necessary, without specifying either the aptitudes required nor the specific conditions in which preventive services should be established. Consultation of workers' reps was required only where an employer-recognised trade union was present, and recognition was entirely discretionary, so that to avoid having to consult workers' reps, an employer need only de-recognise the union. A risk assessment in a written document was not required for firms with fewer than five workers. Most UK lawyers who analysed these initial transposing regulations voiced serious doubts about their compliance one with the directive's minimum requirements (Smith *et al.*, 1993, p. 38-40).

A 1998 report by the Institute of Employment Rights summarised the situation thus, "The most significant influence on the architecture of law on health and safety in Britain during the last twenty five years has been the European Union. However, not only is the UK at odds with the requirements of a number of EU Directives, but there are many examples to illustrate how it is at odds with the broader requirements of the legal frameworks for health and safety in other member states. It is within these broader requirements that the meaning of EU directives is often best understood (for example, measures on worker representation or preventive services) and the extent to which workers in the UK are denied the rights and protection becomes more fully apparent" (Walters and James, 1998, p. 18).

Under pressure both from British trade unions and the European Commission, some of these failings were put right between 1999 and 2003. In some cases substantively and in others as a more questionable paper compliance. The 1995 regulations[8] on consulting workers where there was no recognised union were enacted only under the pressure of Community case law[9]. So vague are their provisions that they nowhere near deliver the directive's objectives. According to Walters (2006, p. 100), "The 1995 regulations added nothing of practical substance to the existing legal framework for worker representation and consultation, and they allowed employers so much discretion in their application that they were (and remain) both ineffective and unenforceable".

The same tactic of "purely cosmetic transposition" was applied to the provisions on preventive services. The provisions on protection for workers who

[6] Information on this issue and the HSE's policy was supplied by the Labour Research Department in February 2007.
[7] Cited by Walters, 2002, p. 260.
[8] Health and Safety (Consultation with Employees) Regulations 1995.
[9] Judgement of 8 June 1994, Commission v United Kingdom 1994, Case C382/92 and C383/92.

stop work in the event of serious immediate danger also undershoot the framework directive's objectives[10]. Other shortcomings were never put right ("reasonably practicable"). Even where omissions actually were made good, as with the ability to bring a tort action against an employer who flouted the regulations transposing the framework directive, the HSE proved very diffident about the changes. They were made reluctantly, purely to avoid Commission infringement proceedings. In a departure from the traditional transparency of HSE actions, they were given no publicity (Buchan, 2006, p. 6-7). To go by the case law, few individuals were able to use the new procedure.

HSE's divided loyalties

The political ends pursued by the British government ultimately put the HSE on the spot. Picking a fight with the European Commission over the "reasonably practicable" issue meant making alliances with strange bedfellows. An often tub-thumping press campaign has been trying to weaken the HSE and the health and safety regulations for several years. Fuelled by sketchy anecdotal evidence and countless urban legends circulating in employers' circles, the campaign vilifies existing legislation and health and safety inspectorate activities as an intolerable burden that threatens to run business into the ground.

The Blair government is in two minds about the campaign. As a matter of principle, it shares the central beliefs: British society is threatened by a too risk-averse population[11]. This smacks somewhat of the rhetoric about the decline of the white man, the loss of the spirit of enterprise that is claimed to undermine capitalism in countries where the labour movement has managed to impose social protection systems. On the other hand, the Blair administration knows that even the Tory government trod warily in the field of health and safety, and that pressures for all-out deregulation produced only very limited results. It also knows that a string of disasters in the showcase sector for self-regulation and privatisation – the railways – has made the task of deregulators harder. Pro-risk promotion campaigns could easily alienate large swathes of public opinion were it to realise that the burden of risks is very unequally distributed between different social classes. The Conservatives themselves had been forced to revise their aims downwards following the sinking of the "Herald of Free Enterprise" off Zeebrugge (1987) and the "Piper Alpha" oil rig fire (1988). There then emerged a sort of schizophrenic rhetoric where calls for more deregulation were coupled with threats to tighten up some penalties on the employers to blame for these disasters.

There is a huge political risk for the Blair government if the pro-risk campaigners should join forces with Eurosceptics. To put it bluntly, were this to come about, the Blair team would have a rude awakening on finding that they had run a propaganda campaign that benefited the Tories and far-right.

That explains a certain twitchiness of the British government in the "reasonably practicable" affair, which it wants to exploit to burnish its image as a no-nonsense champion of business without pushing the showdown too far. It knows that a section of the press will seize the opportunity to portray the European Commission as a band of narrow-minded "big government" bureaucrats fixated on running the economy into the ground through pettifogging and absurd red tape.

The current conflict put the HSE under increased pressure. In 2003, an HSE prosecution of London's metropolitan police force following the death of two police officers failed. The case threw up an apoplectic press campaign against a backcloth of obsessive security fears which justified whatever policy police chiefs pursued.

The HSE has experienced some bitter upsets in attempts to prosecute employers. Several employers have succeeded in gaining acquittals despite having committed flagrant breaches of the directive's provisions as transposed into UK law. In at least one case, the "reasonably practicable" clause was the clincher[12]. Similarly, some employers managed to get enforcement measures issued by a health and safety inspector cancelled[13]. On examination, these cases reveal the striking fact that the HSE seems to operate under a self-imposed restraint that has stopped it making an effective case. It has refrained from arguing that UK law may be at odds with Community directives. Had it done so, the courts may well have acknowledged the inconsistency and ruled that Community law prevails. Such a scenario is borne out by the fact that in a number of cases, the courts have themselves pointed to just such a conflict. This is particularly so in a recent case where the victim's lawyer argued in so many words that the "reasonably practicable" clause as applied in the United Kingdom was inconsistent with provisions of Community law[14].

The issue is not one of court case strategy. There is no question but that the HSE has first-class legal expertise that is perfectly capable of arguing these points. The problem lies elsewhere: it is political. An effective legal defence striving to tighten up the employers' health and safety obligations based on the net additions made by Community directives would set the government at loggerheads with the employers. In the long run, such a situation can only undermine the HSE's credibility. Its political loyalties could water down its fundamental mission: protecting the lives and health of UK workers. ■

[10] Balfour Kilpatrick Ltd v Acheson 2003 IRLR 683 EAT illustrates the lack of proper protection for workers who stop work in the event of a serious and imminent danger. See the comment by Lewis, 2004.

[11] See, for instance, the report of the Better Regulation Committee (a government-sponsored body run by the head of a private equity firm) and the government's highly complaisant reply to it. Significantly, the report starts with a collection of press headlines expressing concern about risk aversion. The most usual accusation is that of becoming a "Nanny State" (BRC, 2006).

[12] Htm. The full reference to the case law is in the bibliography, p. 32.

[13] Langridge v. Howletts and Port Lympne Estates.

[14] Robb v. Salamis Ltd.

British government's "High Noon"

The United Kingdom has not been the only EU country to curtail the employer's duty to ensure safety by the SFAIRP clause, just as it is not the European Union's only common law country.

A look at how the law has changed in the other countries where the clause operates shows how the UK government was pushing for this showdown to water down the Community social directives and effectively renegotiate their contents after adoption.

Irish law also has a SFAIRP clause, interpreted in the same way as the United Kingdom's. Of the States that joined the EU after the framework directive was adopted, similar problems existed in Finland and two other common law countries: Cyprus and Malta.

Each of these four countries found ways to make their legislation comply with the Community directive. Ruin and devastation did not ensue. No businesses went to the wall, and prevention levels went up.

Ireland kept the words "reasonably practicable" in its health and safety at work legislation, but an amendment passed in 2005[a] redefines them in a much more restrictive way that fits in with the "force majeure" limitation as expressed in article 5.4 of the framework directive.

One of Ireland's leading law firms, Arthur Cox, described the changes in these words, "It will only be the most exceptional circumstances which will relieve an employer of liability. As a consequence, the new definition will significantly raise the threshold of what is required to be done for an employer to show that he has discharged his statutory obligations".

Malta changed its legislation even before joining the European Union to remove any reference to the SFAIRP clause.

Cyprus repealed the clause in 2002 by an amendment to the health and safety at work Act. Mr Nicos Andreou of the trade union confederation PEO said of the change, "We believe that the protection of employees is not a matter of how much the measures cost. H&S should be independent of any cost or other troubles and the first thing to be consider must be the protection of persons at work"[b].

In Finland, the duty to ensure safety was qualified by what was "reasonably necessary". That definition was changed in 2001, and the employer must now take all the measures necessary to protect health and safety.

These examples show that it is misguided to claim that a framework directive-style definition of the duty to ensure safety would have disastrous consequences in a common law country. Indeed, examples of strict liability without any qualification are to be found in UK law, some of them due to the harmonization brought about by Community directives. Product Liability Directive 85/374 is a case in point. When it was under negotiation, the UK authorities also played up issues with their legal tradition. Really, it was a political ploy to limit Community harmonization in favour of a decentralised approach. Some legal authors have pointed out that English case law on defective product was not that far removed from the directive's idea of strict liability (Stoppa, 1992). Transposition of the directive[c] was not a recipe for disaster. The flood of litigation predicted by some did not happen. The courts did not have to resort to unfair judgements to enforce the Act.

Others stem from developments in domestic law, in particular that of the liability of owners of dangerous animals (Samuels, 1971).

It is interesting to note that in a non-EU common law country - Australia - lawyers have called for the SFAIRP clause to be dropped from the legislation (Bluff and Johnstone, 2004), mainly on the grounds of its ambiguity. Inconsistent decisions mean that case law affords no clear definition of what the employer's duty to ensure safety consists of. Advocates of the reform argue for the development of a system of risk management rules with an order of priority.

The current dispute was avoidable. The British government chose to raise it as a standard in its war of attrition against social Europe.

[a] Safety, Health and Welfare at Work Act 2005.
[b] Email from Mr. Nicos Andreou to the HESA Department, 7 February 2007.
[c] Consumer Protection Act 1987.

"Reasonably practicable" clause flouts the framework directive

Introduction: a foreseeable "unforeseeability"

Mr Cook and Mr Crimmins worked for HTM, a subcontractor engaged in resurfacing work on the A66 trunk road. The roadworks were lit by mobile telescopic towers which extended to a height of 9.1 metres, higher than overhead power cables running 7.5 metres above ground. The two workers were instructed to move one of the towers. The tower came into contact with the cables, electrocuting and fatally injuring them. The Health and Safety Executive (HSE) argued that the employer was in breach of his duty to ensure safety. The case went to trial, then to appeal[1]. Each time, the employer was acquitted. It was found that the employer had done what was "reasonably practicable" and could not be held criminally liable under UK law. Looking at the facts of this case, as cited in other judgements acquitting employers, it is clear how far removed UK law is from the minimum rules laid down by the framework directive. The employer seemingly had no duty to organise his work site so as to avoid an obvious electrocution hazard. The cost of prevention does not even enter into the equation. The mere fact of employing a trained worker and putting instructions at the base of the telescopic tower made the risk "unforeseeable".

This was the unanimous verdict of the three Appeal Court judges given on 22 May 2006, nearly fifteen years after the framework directive came into force. It takes no collective preventive measure, like using telescopic towers of a height lower than the overhead power lines, a different worksite layout, or different working hours arrangements, into contemplation, on the assumption that there was no satisfactory technical means by which to eliminate the electrocution hazard. In fact, the courts' discretion to interpret duty to ensure safety in light of the "so far as is reasonably practicable" (SFAIRP) clause allows them to discount the risks inherent in work site organisation. The design of the work site itself, in the choice and practical siting of the towers, created a serious electrocution hazard. For reasons which the court did not seek to probe, the workers did not follow the work instructions given. This fact alone was sufficient to conclude that the employer did all that was "reasonably practicable" to avoid the accident because he could not foresee how the specific workers would act. This case illustrates the importance of the case before the European Court of Justice (ECJ) on the United Kingdom's implementation of the framework directive.

This article falls into four parts. The first reviews the main elements of the United Kingdom's case, which I argue are red herrings to avoid a fundamental debate on the connection between the SFAIRP clause and the framework directive. The second part looks for a main thread in the Advocate General's labyrinthine Opinion. Part three examines the SFAIRP clause, and the consequences of it that deny British workers some of the benefits of Community health and safety law. The fourth part shows that the debate does not stem from any puritanical zeal by the Commission to foist unworkable solutions on the United Kingdom. The UK's own courts are starting to glimpse the inconsistencies between national law and the framework directive.

A Byzantine case that disregards the facts

The United Kingdom's defence rests on various arguments[2], all of which sacrifice facts to speculative theorising about legal definitions. The British case fosters confusion by exploiting different terminological traditions. The employer's duty to ensure safety is defined as an "absolute duty", for example, which is the English law terminology. But, this absolute duty is "qualified" in practice. For a continental lawyer, it thereby ceases being absolute and becomes conditional as being dependent on an economic calculation. Many more examples could be given of how the UK case plays on words in a bid to sow wholesale confusion.

The aim of a Community directive is not to unify the language of the law, but to secure a number of substantive objectives by harmonizing national legal provisions which remain materially different. So, the real issue is not whether the terminologies used match up. Since the SFAIRP clause makes the courts responsible for delimiting the contents of the employer's duty to ensure safety, whether the framework directive's aims are being secured must be determined through an examination of the case law. The plain fact that a number of cases decided by the highest courts have diverged significantly from the framework directive's criteria is enough to see that the SFAIRP clause is creating uncertainty in the law. All hair-splitting over terminology aside, this in itself constitutes non-compliance.

Debate on the nature of the duty to ensure safety

The UK government argues that the framework directive cannot impose an absolute obligation, since that would not be realistic. While this does raise a real debate, it is not a clinching argument.

[1] R v HTM (2006).
[2] The currently available sources are the Advocate General's Opinion and the hearing report.

Statistics – "reasonably practicable" disinformation

Part of the United Kingdom's case in defence of the "reasonably practicable" clause is that it forms part of a legal system that delivers more effective prevention than in other EU countries. With figures to back up the claim.

Statistics are often the blunt instrument of political debate. Instead of building a rational case for a position, a graph curve, pie chart or table is flourished as the clinching argument, because of course mathematics is about facts and figures, and how can you argue against that? Happily, lawyers by and large eschew statistics. That said, the Advocate General of the European Court of Justice refers uncritically to the British claims (point 46 of the conclusions).

The statistics produced by the United Kingdom to the ECJ as evidence of how much better its preventive system is portray no more than the trend in total fatal work accidents and accidents resulting in at least three days' absence in EU States from 1994 to 2000. These figures are collected by Eurostat from the competent national organisations. They show that the United Kingdom had a per-worker accident rate below the EU average in each of the years concerned.

These statistics relate to only a tiny fraction of either work-related deaths or health damage. International Labour Organisation estimates are much more damning here. Work-related mortality in the United Kingdom is estimated at 20 000 deaths a year (Takala, 2005, p. 33). These figures do not argue in favour of a British preventive system that is overall more efficient than those of other EU States. Some UK authors argue that work-related mortality data is skewed by the failure to factor in the principal causes of mortality (Tombs, 1999). General accident data is fraught with uncertainty because of systematic under-reporting. In fact, a Health and Safety Executive report published in May 2006 stands in sharp contrast to the official optimism of the handful of figures produced to the ECJ (Hodgson *et al.*, 2006). Without going into the minutiae of the survey results, suffice it to say that it produces an estimated number of work accidents resulting in at least three days' incapacity three times higher than that derived from the employers' reports of such accidents (1300 accidents per 100 000 workers against 412 accidents per 100 000 workers, respectively).

The relation between the incomplete data sets put forward by the British government and the implementation of the framework directive could not be more moot. The framework directive is not just about preventing work accidents. It aims to establish planned, systematic prevention, one aspect of which is that all workers should be covered by preventive services and safety reps. In this respect, the UK situation is anything but Europe's finest. Also, a preventive system is a complex set of legal provisions, administrative machinery, actors and institutions. It would be disingenuous to claim a key role for the "reasonably practicable" clause in such a system, either for good, as the British government does, or for ill. The case before the ECJ is not about awarding prizes in a preventive system beauty contest, but determining compliance with Community law on a specific point of the framework directive.

The fundamental issue is the role of legal rules[3]. Are they a mere management tool by which to put realistic order into employer-employee relations? Can they take a purchase on values that are apt to change these relations by steering their development towards ideal objectives? Clearly, different approaches can be taken. One extreme is that the law should not be differentiated from other management techniques. It may be an instrument for reflecting economic and technical rules. At the other extreme, the law can be a delivery system for a blueprint of societal reform in line with ideals supported by the bodies responsible for defining and enforcing it. The history of labour law is one of steering a middle course. Since emerging from the industrial revolution, it has been at once an instrument for managing and controlling employer-employee relations, and a tool for transforming them. The emphasis has shifted one way or the other in different times and countries, in line with the issues addressed. For example, there is nothing to show that the rule requiring equal pay for men and women is most conducive to business competitiveness. It remains an open question. What is clear, by contrast, is that such a rule enunciates a demand for political change.

The same debate has always rumbled on in the health and safety arena. Should the rules be framed to be consonant with perpetuating existing employer-employee relations, or can they rather lay down new non-economic requirements that will force businesses to take up new methods of regulation and management?

This debate is not key to deciding where the framework directive and SFAIRP clause stand in relation to each other. The wording of article 5.1 of the framework directive is clear: the employer has a duty to ensure the safety and health of workers in every aspect related to the work. Article 5.4 allows States to limit the employers' responsibility to cases of "force majeure" (roughly equal to "act of God" or "cause beyond control"), and defines them precisely.

[3] The general context of this debate is analysed by Supiot (2006).

The characteristics of the duty defined in article 5.1 could be analysed at length. Is it an absolute duty? Does it demand that firms put in place an ideal organisation that provides a totally risk-free environment? Does it simply mean that where health damage occurs, the employer will be taken to be in breach of his duty to ensure safety, thereby incurring liability (subject to the "force majeure" provisions of article 5.4)? However characterised, the essential question nevertheless lies elsewhere. It is whether the SFAIRP clause as applied by the United Kingdom allows the directive's objectives to be secured. The plain fact is that this clause does not force the employer to do everything possible to ensure healthy and safe work. It inserts between what is physically possible and what is legally required a condition in the form of a cost-benefit calculation.

As Diana Kloss (2003, p. 180) sums it up, in defining what can reasonably be expected of an employer, "the standard is only that of average, not of pioneer". So, in Latimer[4], the employer had no duty to prevent his workers from entering premises whose floor had become slippery from being covered in a film of oil. In this case, the cost-benefit calculation enabled it to be argued that a simple fracture due to a fall "is not grossly disproportionate" to the economic loss which shutting down the works pending elimination of the risk would have entailed. The ruling specifies that this would not have been the case if instead of a fall injury, the premises had been endangered by fire.

Artificial distinction between duty and liability

The UK government contends that the framework directive only gives the employer a duty to provide safe employment, and does not lay civil or criminal liability on him. The framework directive does not set out to harmonise the different national systems of civil and criminal liability for employers in health and safety at work matters. This is beyond doubt. But nor does it just involve an alternative of either full harmonization or the "silence" claimed by the UK government (quoted in paragraph 41 of the Advocate General's Opinion).

The framework directive affects the national rules on employers' liability in three ways:

1. It expressly addresses the matter in article 5.4, which relates to the employer's "responsibility", not just the duty to ensure safety. This article provides that Member States can limit the employers' responsibility only in cases of "force majeure". It is not readily obvious how the UK government can reconcile this provision with its claim that Community legislation is "silent" on the matter;
2. It spells out what the employer's duty to ensure safety consists in. Article 5 lays down a general duty. More detailed duties are spelled out in article 6. Other provisions also relate to the employer's duties. If the objectives of these provisions are to be achieved, the Member States must necessarily define employers' responsibility/liability in terms that are not at odds with the duties laid down. That does not require full harmonization, as the specific mechanisms may differ from one country to another. For example, a company as a legal entity may be liable to criminal prosecution in some countries, while in others, only individuals can be prosecuted. The framework directive does not impose a specific solution to these problems, provided its objectives can be secured by each legal system's own specific rules. It will be seen below that the SFAIRP clause not only limits the duty to ensure safety as formulated in article 5.1 of the framework directive, it also significantly affects the order of priority of preventive measures laid down in article 6;
3. Community case law is clear that the choice left to Member States in the means of implementing a directive does not leave them an absolutely free hand. Effective, dissuasive and proportional sanctions must be provided. Such sanctions can only be laid down by (civil and criminal) liability systems.

The UK's defence arguments imply that the directive's legal basis does not allow liability systems to be harmonised. The Advocate General seems to concur with this view (paragraph 93 of the Opinion). He offers no specific arguments on this point, and merely expresses an uncertainty couched in negative terms ("it is not clear whether …"). This is not really a new argument from the United Kingdom. It is seeking to curtail the scope of article 118A. In the ruling on the United Kingdom's action to have the Working Time Directive annulled, the ECJ had already clearly refused to entertain a narrow interpretation of article 118A. It held that, "where the principal aim of the measure in question is the protection of the health and safety of workers, Article 118a must be used, albeit such a measure may have ancillary effects on the establishment and functioning of the internal market"[5] (paragraph 22 of the judgement). The same reasoning should apply to the ancillary effects that the framework directive may have on civil and criminal liability. The ECJ also held that in environmental matters, the Community legislature could take "measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective"[6] (paragraph 48 of the judgement). The framework directive does not go that far: it merely draws the minimum consequences for liability from the duty to ensure safety without harmonising national provisions.

Misrepresentation of remedies

The UK government claims that the remedies offered by English law are more than adequate to secure the framework directive's objectives. It reviews the social security compensation scheme, and the civil and criminal liability systems. It emphasizes that the Health and Safety at Work Act 1974[7] enacts criminal

[4] Latimer v AEC Ltd (1953).
[5] Judgement of 12 November 1996, United Kingdom v Council.
[6] Judgement of 13 September 2005, Commission v Council.
[7] Referred to subsequently throughout as HSWA 1974.

penalties for breach of its provisions by an employer, and argues that the criminal liability imposed is "automatic" (paragraph 47 of the Opinion).

The system for compensating work accidents and a small number of work-related diseases has no direct connection to the framework directive. Arguably, a social security or insurance-based scheme of compensation is not necessary to the proper transposition of the directive[8]. A compensation scheme is no guarantee of compliance with the duty of prevention. It just grants limited financial compensation to some victims of a breach of that duty. Furthermore – but subsidiarily – the UK's recognised diseases scheme is among the most restrictive in the EU. It is grossly discriminatory: fewer than 10% of the victims compensated for work-related diseases are women, when the available data reveal no significant difference between the proportions of men and women with work-related medical conditions (Vogel, 2003). Not in any circumstances – either in legal principle or practice – can the compensation scheme be regarded as among the provisions that give effect to the framework directive's duties. Not only that, but the United Kingdom is among the very few countries in Europe where the introduction of a social security compensation scheme in no way affected the employers' civil liability rules (Parsons, 2002). It was acknowledged from the outset that social security would compensate only a small part of health damage, and that it was essential to maintain the scope for claiming compensation under ordinary tort law.

Some clarification is required of what is meant by "automatic" criminal liability. As a legal principle, it is limited by the SFAIRP clause, whose precise effect is to allow employers to evade any criminal penalty in a number of cases. Practically, breaches of the duty of prevention that result in prosecutions represent only a negligible proportion of all the breaches found by the enforcement authorities. Diana Kloss (1998, p. 121) notes that, "Research has shown that approximately one per cent of accident investigations by the factory inspectorate lead to prosecutions and, as might be expected, are more likely to follow from the investigation of an accident than from a routine inspection visit"[9]. What is more, the Health and Safety Executive (HSE) is very clear on this point: when inspectors find a contravention, they report it for prosecution only in extreme cases. The enforcement policy guidelines laid down for inspectors' discretionary action (HSC, 2002) show that prosecution is not automatic. This discretion is not necessarily incompatible with the framework directive, if other proportional, dissuasive and effective forms of enforcement exist.

It remains then to consider whether the rules on civil liability adequately supplement the criminal liability provisions. The answer is "no". The SFAIRP clause prevents workers from claiming damages if the employer can prove that the cost of the preventive measures outweighs the expected benefits. It also defines unforeseeable risks by reference to criteria that set the bar markedly above "force majeure". Scientific uncertainty[10] and following established industry practice[11] are factors that employers can adduce to limit or elude their civil liability. In many cases, the employer's liability is limited by factors related to the worker's conduct, like a mistake or carelessness, failure to volunteer information to the employer about a health condition[12], failure to plan his or her own work appropriately[13], acceptance that a certain type of work would inevitably entail a certain level of risk[14]. Each of these criteria is clearly incompatible with the framework directive.

The statistics reflect the failings of the legal provisions. They give the lie to the UK government's claims about the effectiveness of its schemes to compensate for health damage. According to a report put out by the UK's Trade Union Confederation (TUC) in July 2005, each year over 850 000 people are injured or made ill as a result of their job[15]. Over 25 000 people are forced to give up work every year as a result of work-related injuries or illness. Around 60 000 people a year gain compensation from their employer, according to the Association of British Insurers. A further 20 000 make a successful claim under the "no fault" industrial injuries benefit scheme. This means that 9 out of every 10 workers who are injured or made ill through work get no compensation (TUC, 2005, p. 2).

Is "reasonably practicable" the same as "force majeure"?

The UK government argues that, in any event, the SFAIRP clause adequately reflects the "force majeure" requirements of article 5.4. It is on shaky ground here, as is clear from the singular weakness of its defence arguments. It simply says that this is the case, without adducing one iota of evidence to back up its claims. Mindful of this failing, it presents it as an alternative argument to be availed of only as a fallback option should the case argued on civil and criminal liability fail. In point of fact, it is the only relevant argument by which to determine the system's compliance with the framework directive. In other words, only if the SFAIRP clause meets the Community requirements laid down in article 5.4 can it said that the United Kingdom possesses effective sanctions whose legal principles enable the framework directive's objectives to be achieved[16]. Far from being a purely incidental and alternative pleading, it is the linchpin of the liability/responsibility debate. The very catch-all nature of the "unforeseeable risk" concept that prevails in the United Kingdom is a country mile beyond the limits set by article 5.4. The HTM case confirms that an employer can rely on the careless act of a trained and informed worker as sufficient proof that a risk was unforeseeable.

[8] The Netherlands has no specific no-fault compensation scheme for work accidents and occupational diseases, other than a special fund for asbestos victims. This in not inconsistent with the framework directive's requirements.
[9] An assessment confirmed by Hawkins' systematic study (2003).
[10] Armstrong v British Coal Corporation (1996).
[11] Thompson v Smiths Shiprepairers (1984).
[12] Barber v Somerset Country Council (2004).
[13] Pickford v ICI (1998).
[14] Petch v Customs and Excise Commissioners (1992).
[15] Figures based on the official Health and Safety Commission statistics.
[16] Such, indeed, is the case of Irish law, where the SFAIRP clause was kept but defined in the legislation so as to meet the article 5.4 requirements.

The Advocate General's convoluted Opinion

Advocate General Mengozzi's Opinion[17] broadly concurs with the United Kingdom's case. His arguments are redolent of a particular kind of detective novel, but unfortunately without Agatha Christie's limpid prose style. Before the villain is unmasked, many other suspects are brought into play, whose only purpose is to take the reader from one false trail to another. When the denouement finally comes, the exhausted reader accepts the solution to the riddle as a blessed release, and may overlook the weaknesses of the storytelling.

The skill of making simple things complicated

Whatever views may be taken of the SFAIRP clause and the framework directive's provisions, the plain fact is that the clause is anything but straightforward. It does not spell out what makes something "reasonably practicable". Legal authorities in the United Kingdom are unanimous on this point. Proponents and opponents of the clause alike see it as a complex whole which is very difficult to construe. The former welcome this as contributing to flexibility and adaptation. The latter decry the uncertainty in the law that comes from leaving the courts too wide a discretion (see box p.21).

The wording of the framework directive, and especially the articles at issue in this dispute, by contrast, are extremely clear. One may take issue with the forms of words chosen by the Community legislature, but it cannot be denied that they pose few problems of interpretation.

The Advocate General's Opinion arguably works on the principle that the point is to complicate what is put in plain words, and preferably not try to analyse what is complicated. The most obvious failing of this Opinion is that nowhere does it plumb the precise scope of the SFAIRP clause. It erects tier upon tier of negatives in a bid to demonstrate what the framework directive is not. Nowhere does it specify the substantive extent of the employer's duty to ensure safety laid down in it, or how far it may or may not be compatible with the UK legislation.

When he finally does come to the key issue – is the SFAIRP clause compatible with the framework directive duty to ensure safety – the Advocate-General seems to be exhausted by his own digressions. He forgoes a close consideration of the case (paragraphs 138 to 140 of the Opinion), and makes do with contending that the Commission adduced no evidence on this point, but that should the Court rule that it must be considered, then it would have to conclude that a clause which brings a financial calculation into play was incompatible with the framework directive. I would argue that this latter answer is the right one, but should have been developed at more length.

Salami slicing

The Advocate General's method of interpretation could be described as a salami slicing technique. The starting point seems to be: the legislature systematically erected barriers to understanding. So, when a law defines an obligation in clear and unconditional terms, the interpretation must look beneath the surface to winkle out all the obscurities and ambiguities that lurk within it. This means prising out everything in what follows that might indirectly suggest that the legislature did not mean what it said. The Advocate General offers an interpretation whereby every article of the framework directive, other than article 5.1, is used to limit the extent of the employer's duty to ensure safety.

Article 5.1 defines the duty to ensure safety by requiring employers to ensure that working conditions do not affect workers' health and safety. The Advocate General manages to trim this obligation down in successive stages. He argues that the effect of article 5.4 is "to clarify the extent of the duty to ensure safety" (paragraph 96). In fact, all this article does is to allow Member States to choose to exclude precisely-circumscribed cases of "force majeure". This clearly signifies that article 5.4 as such is not calculated to affect or "clarify" the extent of the obligation laid down by the Community legislation. It simply accepts restrictions in the national civil and criminal liability systems.

The argument based on the legislative history is forgetful of the facts. In a Council of Ministers' vote, the United Kingdom and Ireland were in the minority and their arguments dismissed (DTI, 1993). Had the Community legislature wished to keep the SFAIRP clause which it regularly included pre-1988, why take such an unnecessarily roundabout way? Why reject British and Irish governments' proposal to include in an article of the framework directive a reference to the SFAIRP clause that would have allowed Member States whose legal system limits the discretionary interpretation of "absolute legal provisions specified by legislation"? The answer is to be found in the statement by one of the governments in the majority group. The Belgian delegation insisted that it was unacceptable to take the cost-benefit criterion into account[18].

After these first two cuts, the Advocate General reduces the duty to ensure safety to a vague and misshapen duty to "take positive action" (paragraph 102), a duty confined to adopting a set of preventive "measures" (paragraph 103).

Were that to be so, article 5.1 could not be concluded to be other than wholly superfluous. It would be utterly pointless compared to the more detailed rules of other provisions in the framework directive. In fact, the employer's duty to ensure safety stems from his control over work organisation. Positive action and preventive measures may clearly be

[17] Submitted on 18 January 2007. Available on the ECJ website: http://curia.europa.eu

[18] See the minutes of the Council of Ministers' Social Affairs Working Group meeting of 21 and 22 June 1988 (Document 7411/88, restricted, SOC 140).

"Everyone thinks they know what a unicorn looks like"

Lawyer Helen Walker opines that, "The indefinable task of ensuring health and safety 'so far as is reasonably practicable' is rather like trying to describe a unicorn. Everyone thinks they know what a unicorn looks like, and you can do what you like to create one, but who's to say that you've succeeded?" (Walker, 1999, p. 40). Her comments reflect employers' puzzlement about inconsistent court decisions. From another standpoint, that of defending workers' health, legal specialist Phil James writes, "the test of reasonable practicability ... is itself something of a moving beast given the cost-benefit calculation it incorporates" (James, 1992, p. 86).

The role played by the "so far as is reasonably practicable" clause in the United Kingdom is seen in very different ways. The division between supporters and opponents of the clause does not tally with a dividing line between proponents of a more active role by the authorities in more systematic prevention and the pro-deregulation camp.

Differing perceptions

Generally, many prevention professionals lean in favour of the clause. Three arguments are often advanced. It is flexible and adaptable to changing circumstances. It reflects specific characteristics of common law countries which, if the clause were to be repealed, would deprive the courts of all discretion. And thirdly, on a more defensive note: given the political context, scrapping it could result in even less pro-worker legislation. The argument that it corresponds to Community law, by contrast, is an invention of the British government, and few lawyers or preventive system experts give any credence to it.

TUC senior health and safety policy officer Hugh Robertson thinks it is the wrong target. He said, "For the TUC and the huge majority of UK trade unions, the SFAIRP case does not help to save the main problem: the lack of proper enforcement. In our view, the qualification SFAIRP is not a problem in itself. We consider that it has played a positive role since the new HSWA was adopted in 1974".

Steven Kay, an official with Prospect, the trade union for health and safety inspectors affiliated to the TUC, takes a similar line. "We see the argument over the words 'reasonably practicable' to be a bit of a distraction to be honest. The fact that the duty on employers to ensure safety in our primary legislation is qualified by these words has never in our experience limited our ability to take action against an employer. The same applies to legislation implementing European Directives in which the phrase is repeated. That applies to formal sanctions such as stopping work (prohibition notices), securing change (improvement notices) and prosecutions. We find the wording of the legislation itself to be a sufficiently tough standard. The real obstacle to enforcing the law in England, Wales and Scotland (I cannot speak for the Northern Ireland bit of the UK: they have a different regime) is lack of resources. We are being continually squeezed financially: there are nowhere near enough inspectors, there is a freeze on recruitment and we see no hope of improvement. Very serious accidents go unpunished and there is rarely any investigation of cases of occupational disease. Then when we do get companies into court, the level of fines is still very low: the median fine is somewhere around £7000: many offences carry a maximum fine of only £5000 in the lower courts (such as offences under regulations which implement the Framework Directive into UK law)".

Employers' organisations see the SFAIRP clause as underpinning a legal system that operates mainly on the basis of employer self-regulation of health and safety at work. Repealing it would have disastrous consequences.

The clause's opponents argue on two broad fronts. It creates uncertainty about the exact extent of the employer's duties. This may reflect the concerns of some employers faced with complex case law. It is also advanced by trade unionists from a very different approach. The super-union UNISON, for example, claims in written evidence to a House of Commons inquiry in 2004 that, "the use of the defence that an employer acted 'as far as it was reasonably practical' should be removed, as it is incompatible with the principles of the European framework directive. It has also served as an excuse for many employers to either take no action at all to remove or reduce risks or do as little as possible citing this qualifier as the reason for less or non-action" (WPC, 2004, vol. III, p. 365). Another argument is that the clause as applied denies British workers some of the benefits of Community rules. Hence the active part played by the Scottish TUC (STUC) in preparations for the Commission's infringement proceedings. The STUC wrote several letters to the Commission reporting practical instances where the clause was preventing full implementation of Community law.

Two tiers of self-regulation

Beyond the differing assessments, the evidence is that the clause was relatively little discussed before the Community directives came into force. It broadly reflects the general thrust of the Robens Report (1972) which inspired UK legislation passed in the early 1970s. The report argued that health and safety were not part of an objective conflict of interests between employers seeking to maximise profits, and workers determined to protect their health. It claimed that health damage was mainly the result of widespread apathy on the part of many employers and workers. So the focus was put on self-regulation. The health and safety enforcement authority and criminal penalties were mainly to be a safety net for the most serious situations. The clause effectively adds a second tier of self-regulation into the statutory provisions. The first tier comprises the relatively vague and general nature of many duties that allow employers to decide what preventive measures to adopt. The second tier, offered by the clause, subjects most of the statutory requirements to the test of what would be "reasonable" in the economic interests of an abstract average employer.

necessary, but that is not where his duty to ensure safety stops. If any aspect of the work (not just inadequate preventive measures) is apt to affect health or safety, the duty to ensure safety is not satisfied.

The Advocate General then cuts the duty back further, based on an original (suggested by the UK defence) interpretation of the scope of article 6. Article 6 is not incorporated in, any more than it curtails, article 5. Article 6 deals with the measures to be taken, whereas article 5.1 defines the employer's duty based on objective outcomes ("not affect health or safety"). The two provisions are complementary but quite distinct. One is about means, the other about results. However, even on the narrower basis of article 6, UK law remains incompatible with the framework directive to the extent that it does not wholly comply with the order of priority of preventive measures.

The Advocate General's reading of article 6 disregards its hierarchical structure (paragraphs 110 and 111). Indeed, it is the interpretation put forward in the British defence, and is very much in line with prevailing UK law[19], where the order of priority of preventive measures is qualified by two factors: the cost-benefit analysis, and the concept of unforeseeable risk as developed by the courts. The Community legislation, by contrast, is organized as an order of priorities, the highest of which is the obligation to eliminate risks. The Advocate General concludes from this further curtailment that the duty to ensure safety "does not extend so far as to require the employer to provide a totally risk-free working environment" (paragraph 110).

What substantive content can be given to this negative? Something must be done to reconcile the article 5.1 requirement "to ensure safety and health in every aspect related to the work" with the idea that this does not necessarily require the provision of "a totally risk-free working environment". The Commission's answer to this was: if a risk is not eliminated, occurs and affects health, the employer must assume responsibility for it (subject to Member States' option to limit the liability by cases of "force majeure"). A risk means there is a certain probability of health and safety being affected. The "best efforts" obligations laid down by the framework directive aim to eliminate risks as far as possible. If, notwithstanding the employer's efforts, risks remain, liability attaches to the employer under the absolute obligation laid down in article 5.1. Such an approach may find support both in a legal analysis of employer-employee relations and a sociological and economic analysis.

The Advocate General offers a very different response in paragraph 113, which he manages to frame only in negative terms: "the occurrence of risks that were unforeseeable and/or inevitable and the consequences of events which constitute the realisation of such risks will not be attributable to the employer on that same basis". This interpretation is couched in terms that are vaguely akin in wording to article 5.4, but different in substance. Article 5.4 is confined to occurrences that are beyond the employers' control, due to unusual and unforeseeable circumstances, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care.

Where article 5.4 requires a combination of a series of conditions, the Advocate General very liberally extends the exceptions in four directions:

1. The circumstances need not necessarily be beyond the employers' control;
2. It is enough if they are unforeseeable and/or inevitable, without necessarily being unusual;
3. Any occurrence of such risks will not be attributable to the employer, even though in article 5.4, the only defence against this is proof of having exercised all due care;
4. The Community rule is claimed to be "will not be attributable to the employer", when the framework directive provides only that the Member States may choose not to attribute certain facts to the employer.

It is clear that under such a flexible interpretation of "force majeure", UK law can be regarded as all-points compliant with the framework directive, albeit the Advocate General is not clear on this.

Abstract as the discussion of these legal principles may appear, the issue is a very practical one. If the particular way in which work is organised (e.g., overwork, working hours incompatible with human needs, too fast-paced) entails risks, some of those risks may be classified as unforeseeable and/or inevitable. In the framework directive's approach, the lack of certainty that the work organisation entails risks is not enough to abstract these risks from the employer's duty to ensure safety. It is not unforeseeability that is the decisive criterion here, but the simple fact that these risks arise out of particular aspects of the work and so cannot be regarded as circumstances beyond the employer's control. They clearly amount to what article 5.1 describes as "aspects related to the work". Conversely, the liability rules enacted by Member States may quite legitimately exclude circumstances like an earthquake, terrorist attack or exceptional climatic event from the employer's civil or criminal liability system.

Alice in Wonderland

Up to paragraph 125, the Advocate General does not stray too far from the British case, whose line of argument he more or less follows. It was not enough to hack away at the framework directive. Some words had to be said about UK law. From paragraph 126 onwards, Agatha Christie gives way to Alice in Wonderland. As Angus Stewart (2007) puts it, "With no disrespect to the learned Advocate General, a distinguished Euro-jurist, his Opinion

[19] It was not until 1999 that the United Kingdom implemented the order of priority of preventive measures in binding legislation to prevent the infringement proceedings extending to this point. They are found tucked away in a schedule to the regulations, which the courts tend to ignore when defining what is reasonably practicable.

gives you a sense that truly there is no place more unfamiliar than your own country described by a continental lawyer who gets his information from HM Government".

Paragraph 126 argues that the SFAIRP clause could impose a lesser criminal liability on the employer than is envisaged by the framework directive. Here, the Advocate General seems to refute the British case, but his arguments are not clearly worded. Having so concluded, he goes on that, "while ... United Kingdom legislation provides for a form of civil liability for employers the extent of which is entirely commensurate with the liability regime which the framework directive seeks to achieve". The use of the term "while" after a string of negatives suggests that the Advocate General considers that UK law applies more restrictive criminal liability criteria than those of the framework directive, but that those criteria completely match those of the framework directive when it comes to civil liability. While on the face of it, this line of argument takes its cue from the British defence, it is actually the mirror-image opposite. The British case is that the criteria are more restrictive when applied in civil liability matters, but where criminal liability is concerned, the directive's objectives are secured. In factual terms, the British case is closer to the truth, but introduces some confusion. The scope of civil liability under the 1974 Act is more restricted than that of criminal liability. But this restriction has nothing to do with the SFAIRP clause. It stems from s. 47 which excludes any civil proceedings for breach of s. 2, which imposes a general duty to ensure safety. The real issue is not whether it is civil liability or criminal liability that enables the directive's objectives to be achieved. On all the evidence, the SFAIRP clause limits all forms of liability and lets infringements of the directive's provisions go unpunished.

Nowhere in his Opinion is the Advocate General's assessment substantiated. It is literally plucked out of thin air. At no time does the Advocate General analyse the SFAIRP clause either in terms of civil or criminal liability. Consult any legal textbook and you will find that the clause is based on identical criteria in whichever field it is applied. The criminal courts tend to rely on civil court findings to define what is reasonably practicable[20]. Nowhere is there any reference to discrete criteria. What there is, by contrast, is a clear attempt to bring consistency and uniformity to the application of the SFAIRP clause in criminal and civil proceedings, but also in judicial oversight of the administrative decisions of the enforcement authorities. It is a surprising voyage of discovery to find that the SFAIRP clause is three in one. The discovery of this new Holy Trinity is an original contribution by the Advocate General to UK law. So, in paragraphs 136 to 140, the Advocate General finally comes to the influence of the SFAIRP clause on the extent of the duty to ensure safety and duty of prevention. And, this time, he rightly points out that it involves "an evaluation which goes beyond establishing whether it is possible to prevent a risk arising or to reduce the extent of that risk on the basis of the technical possibilities available".

It is readily understandable that a continental European lawyer should hypothesize three different meanings for the "reasonably practicable clause" according to the contexts. But the logical thing would have been to check that hypothesis against the cases. The most frequently cited reference is Edward v NBC (1949), a case dealing with the civil liability issue. This ruling is used in exactly the same way as a basis for judgements on criminal liability for contraventions of specific health and safety enactments. In Gibson v British Insulated, Lord Diplock argued that the statutory duty to keep the workplace safe so far as reasonably practicable in substance "does no more than provide a penal sanction for a breach of what would have been the employer's duty at common law"[21]. Likewise, common law tort liability does not involve criteria substantially different from the civil liability related to breach of a statutory duty (Ford and de Navarro, 2001, p. 250).

If the SFAIRP clause does restrict the duty of prevention, how can it be concluded that the Commission's application should fail? Sensing that he is on shifting sands, the Advocate General accuses the Commission of failing to put a proper case. He salami-slices the Commission's arguments in the same way as he did the framework directive. It takes some insouciance to affirm that, "it is clear from the content of the Commission's written submissions and all of the exchanges that took place during the written procedure and at the hearing that the Commission is not challenging the legitimacy of the clause at issue in terms of its ability to affect the extent of the employer's duty to ensure safety, but rather in terms of its capacity to operate as a limit on the employer's liability in relation to events detrimental to workers' health which occur in his undertaking" (paragraph 59 of the Opinion). Although apparently, it is not as clear as all that, since the judge rapporteur concludes exactly the opposite in his report for the hearing (paragraph 12 of the report).

Infringement proceeding applications are not a report for an academic conference. They must say specifically how a Member State has failed to fulfil its obligations and give sufficient grounds to support the complaint. They do not need to analyse all the subtleties of the case law, nor expound on the theory of legal principles. It is hard to see from the wording of the application[22], or the Commission's arguments at the hearing, how the Advocate General can unilaterally reduce the Commission's arguments to the liability issue alone. The Commission argues that the SFAIRP clause breaches both the duty to ensure safety and the liability/responsibility provisions of Community law. It offers arguments drawn both from an analysis of the framework directive and

[20] R v HTM refers to ten legal precedents on civil liability.
[21] Cited in Gilles (2002), p. 584.
[22] *Official Journal*, C 143, 11 June 2005, p. 18.

an analysis of UK law. The emphasis on the responsibility/liability issue probably stems from the lack of case law on the duty to ensure safety in any other context than that of civil or criminal liability. Since no-one (other than the Advocate General) denies that the SFAIRP clause applies consistently to all aspects of health and safety at work, it is hard to see where the Commission's line of argument lacks relevance. The limits of an employer's liability as traced in R v HTM are also limits to his duty to ensure safety. The framework directive's objective cannot be secured, if only because there is no penalty provided for certain actions that are at odds with that objective.

Analysis of the SFAIRP clause

Origin

The SFAIRP clause originates in the determination of an employer's civil liability for a work related injury. Throughout much of the 19th century, the British courts considered that in general no liability attached to an employer. Workers were deemed freely to accept their working conditions and the risks they entailed. UK law differed little from the law in other European countries on this point[23]. Only in exceptional circumstances were workers awarded damages after an accident.

The late 19th century saw a gradual development in the case law. Leaving aside the specific characteristics of each legal system, the changes in Britain basically differed little from those observed in most European countries. Civil case law moved on only after the state had intervened. The common law began to seek remedies for the carnage wrought by the first industrial revolution only after decades of legislation forced developments in case law[24]. From 1891, the courts began to reduce the scope of workers' putative consent to the injuries caused by their work[25] (the courts had relied on the Latin maxim *volenti non fit injuria* to find that workers could waive protection for their lives and health in the employment contract). Civil liability was attached to an employer on the basis of the duty of care owed by him. This concept is not specific to employer-employee relations, and is fairly akin in legal and sociological terms to the continental European obligation to act "*en bon père de famille*" (literally, a responsible householder). It is a duty to take reasonable care to see that no foreseeable damage is caused by fault or negligence. The duty of care applies equally to contractual (e.g., employer-employee, doctor-patient, etc.) and non-contractual relations (e.g., business owner/manager and local residents in the case of industrial pollution, golfer and driver of a car in the path of the golf ball).

The SFAIRP clause was used to clarify the precise extent of the duty of care. It is referred to in the case law of the 1930s and 1940s. The earliest decisions appear to be concerned with breaches of statutory health and safety duties (Gilles, 2002, p. 491). While many 20th century safety statutes define employers' duties by reference to this clause, others set stricter standards which employers must meet: practicable duties. The case law is very clear on the difference between these two concepts: a practicable duty must be fulfilled regardless of the cost entailed. It is enough that the measure is physically possible[26].

The SFAIRP clause provides a defence by which for an employer (or any other person with a duty of care) to justify conduct that has caused harm. While the reference to a duty of care was undeniable historical progress, it has an equally great drawback. It is a jurisprudential construct which is not specific to, and is apt to disregard the singular characteristics of, employer-employee relations. Such a construct does not encompass all the ramifications of subordination, and is apt to disregard the health damage caused by the ordinary course of work. Wear, psychological pressures, workload, the organisation of working time are all factors that the duty of care generally fails to encompass.

The SFAIRP clause was then applied by the Health and Safety at Work Act 1974 to specify the extent of almost all the employer's duties. The clause works in the same way to define civil liability, criminal liability and delimit the enforcement authorities' activities under the Act. It must be pointed out, however, that civil liability for a breach of statutory duties is limited on two counts. First, by the SFAIRP clause on the same conditions as for civil liability on the basis of the common law duty of care. Second, by the impossibility of bringing civil proceedings for a breach of the general duty to ensure safety (s. 2 HSWA). Only breaches of more specific duties can give rise to proceedings (e.g., failure to provide personal protective equipment). From this point of view, civil liability for a breach of statutory duties has a narrower basis than criminal liability or the content of the duty to ensure safety.

Content of the clause

The cost-benefit calculation is the fundamental criterion of the reasonably practicable clause. But how that calculation is carried out can only be gleaned from an analysis of the case law. A detailed examination of the case law is beyond the scope of this article, but the main trends can be summarized around four constituents: foreseeability of risk, cost-benefit calculation, gross disproportion, the benchmark of an abstract average employer. The discretion left to the courts on each of these points is vast.

■ Risk-foreseeability

The role of risk-foreseeability is open to discussion. Some legal theorists do not see it as a standalone criterion discrete from that of the economically calculated benefit. An unforeseeable risk would by nature be a risk whose elimination brings no benefit. Therefore, no preventive measure would be required. Quite apart from this issue, the courts have

[23] For an overview, see Ramm, 1986.
[24] With the Employers' Liability Act 1880, Parliament forced the courts to revisit the common law principles which gave employers almost total immunity from civil liability. New legislation passed in 1945 forced a development in another means of limiting employers' civil liability – the Law Reform (Contributory Negligence) Act 1945.
[25] Smith v Baker (1891).
[26] Summers & Sons Ltd v Frost (1955).

a discernible tendency to use the unforeseeability of risks as a litmus test for concluding, without any other test, that an employer was not obliged to apply preventive measures. Fifteen years after the entry into force of the framework directive, such unforeseeability is generally defined without regard to the duty to conduct a risk assessment.

Unforeseeability is a very broadly construed concept. In some cases, it refers to circumstances external to the work organisation, when it very closely approaches "force majeure". At other times, it refers to aspects of the work whose consequences for the individual were impossible to foresee. Such an interpretation jettisons the collective risk assessment in favour of a simple duty of care to the individual. In such cases, the courts may take prior information given to the employer by an individual worker as a decisive criterion.

In some cases, the judiciary have put support for a control relationship before a consideration of the actual facts. In HTM, the risk of electrocution was anything but unforeseeable, given that a power line was in the potential path of telescopic towers. A mere glance through the literature on the causes of work accidents is enough to show that there is nothing unforeseeable in what is classed as human error. Even someone who has never seen a building site run by a sub-contractor should not have too much difficulty conceiving that the work is often done at a rush, working against the clock, and may involve problems of interacting with other subcontractors. All these are conditions conducive to not following instructions. In some cases, there is no other option than to ignore safety requirements. That is well and truly a risk inherent to a particular work organisation. The control relationship may give rise to a conflict of demands between safety requirements and production requirements. Both empirical observation and more detailed analyses yield evidence that an experienced and trained worker may not always obey safety instructions. To class such a situation as an "unforeseeable risk" is tantamount to saying that a worker's mistake can scale down or invalidate his employer's duty to ensure safety.

■ Cost-benefit calculation

The cost-benefit calculation is the main feature of the SFAIRP clause. Whether an employer must eliminate a risk is determined by an equation between the cost factors and the expected benefits of preventing it.

This criterion is beset with difficulties. It involves "comparing apples with oranges". The costs of a particular preventive measure can be estimated with reasonable accuracy. Less so, the costs of completely reorganizing the work. Changing technology choices, replacing dangerous substances with less dangerous ones, increasing workers' control over how they perform their work are complex changes that cannot be easily costed-out. Then, there are two uncertainties surrounding the expected benefits of a preventive measure. One is the difficulty of putting a cash price on a human life, physical and mental well-being. The other is related to externalising the costs towards society, which remains the general tendency in health and safety at work.

Significantly, the decided cases hardly ever refer to a mathematical calculation. Actual money is never mentioned in judgements, which are entirely built around an implicit monetary reasoning. There is a sense of judicial embarrassment about having to reason in practical financial details. Mostly, they talk in terms of a very approximate overall assessment, and do not go into a detailed valuation. Whenever possible, they bring in other factors (like risk-unforeseeability) to side-step a detailed cost-benefit calculation. Perversely, one of the very few judgements that does explicitly refer to a financial amount considers that, based on the Community directives, a cost-benefit calculation is not relevant[27].

The HSE has tried to construct economic models. While these have never been referred to directly in court judgements, they have had an indirect effect in informing HSE activity. This means that in some cases, the guidance drawn up by the HSE reflects these models, and can be used as yardsticks by the courts. Also, the HSE plays a key role in prosecutions, and its economic models can inform its choices in this area.

Technically neutral on the face of it, the cost-benefit calculation gives the courts very wide discretion in deciding what is expected from a "reasonable employer". This is a factor of uncertainty in the law, which can be seen from an analysis of inconsistencies between cases.

Gross disproportion

The cost of preventive measures must be grossly disproportionate to the expected results if they are to be considered not reasonably practicable. That obviously limits the damage. Preventive measures whose cost would slightly outweigh the expected benefits must still be taken. This "gross disproportion" criterion adds some safety margin to the cost-benefit calculation, but does not alter its nature. Because the calculation is never spelled out in detail, the difference between a gross disproportion and a simple overshoot tends to be blurred. The finding of one of the most comprehensive studies of the case law is that, "given that the balancing is being done intuitively and qualitatively, the difference may not be all that significant (Gilles, 2002, p. 585).

The courts have never specified how gross disproportion is to be determined. The only quantitative benchmark I have found relates to the nuclear industry (HSE, 2007-b). Based on a proposal drawn

[27] Skinner v Scottish Ambulance Service (2004), see paragraphs 18 and 33.

up by the HSE in 1987, there may be a gross disproportion where the costs of protecting workers are more than three times the expected benefits. Where members of the public are concerned, the calculation distinguishes minor risks and major risks. For major risks, the costs may be ten times higher than the expected benefits. For minor risks, there would be gross disproportion once the costs were more than double the expected benefits. Behind the ostensible neutrality of the calculation technique lie values that express relationships of control in the workplace. Minor health damage is played down, while workers enjoy significantly less protection than the general population against the possibility of serious health damage.

The abstract average employer

The calculation is not tied to the specific economic circumstances of the individual employer, but to an assessment of how a reasonable employer, taken in the abstract, would behave. It is what many commentators describe as an objective test. In fact, it leaves wide discretion with the courts. Rather than an objective test – which cannot be done when comparing apples with oranges – it is a test in which the subjectivity of individual employers is replaced by a subjectivity about the workplace expressed by the judiciary or enforcement authorities. The reference to an abstract reasonable employer also has a drawback: it enables the level of prevention to be lowered in firms which, for various reasons, would have implemented more effective but more costly measures than what will be accepted as "reasonably practicable". So, for the HSE, good practice is not necessarily best practice if the cost outweighs the expected benefits: "Some organisations implement standards of risk control that are more stringent than good practice. They may do this for a number of reasons, such as meeting corporate social responsibility goals, or because they strive to be the best at all they do, or because they have reached an agreement with their staff to provide additional controls. It does not follow that these risk control standards are reasonably practicable, just because a few organisations have adopted them" (HSE, 2007-a).

Other elements of uncertainty

The case law shows that there are many other elements of uncertainty that may act to exclude or scale down the employer's duty to ensure safety without even having to perform a cost-benefit analysis.

One of these is the nature of the company's business. The criterion – under a variety of names – is used to find that some risks are inherent in a business or a certain type of work[28]. In some instances, the worker is presumed to possess particular abilities that enable him to contend with the risks. In some cases, the judges' reasoning leads to the conclusion that workers must make the choice between keeping a job which involves a health risk, or repudiating the employment contract[29].

Another element of uncertainty, acknowledged by the HSE, lies in the differential social value attached to risks. The deaths of 150 people in an oil rig fire stirs a greater public outcry than the 2 000-odd killed each year in the United Kingdom just by mesothelioma – the most specific asbestos-related cancer. This differential perception is reflected in the case law. In some cases, very substantial and immediately visible damage may require preventive measures that cost more than less spectacular damage, regardless of the level of risk defined by a formula that ties damage to probability of occurrence. But this language of emotion is also a social construct: it operates to justify inequalities. More than a common "societal" culture, it is a set of values of particular social groups. The UK's *Hazards* magazine compared the situation of Italian and British workers who had developed cancer from exposure to vinyl chloride monomer. While in Italy, executives of the Montedison chemical company were tried and found criminally liable, for the workers at Vinatex in Derbyshire, who suffered similar exposures and developed cancer and other diseases, "any thought of compensation or justice remains a distant hope"[30].

The wide discretion which the SFAIRP clause leaves the courts to formulate assessment criteria in fact makes it impossible to list all the elements of uncertainty. In cases of post-traumatic stress disorder, for instance, the courts have distinguished "primary victims" from "secondary victims". The former would have been involved as "active participants" in a traumatising event, while the latter would have been involuntary, passive bystanders. The employer's liability would not extend to the latter category. For example, a worker who witnesses a workmate's death in a work accident caused by his employer's negligence cannot claim to be within the ambit of the employer's duty of care, and will not be entitled to compensation for the harm suffered[31]. Once again, the judiciary call into question the framework directive's principle that health and safety must be guaranteed in "all aspects related to the work". It matters not whether the worker was a "bystander" to or an "active participant" in any of these aspects, his presence and activity form part of a collective process. The rationale of this body of case law is to deny the specific characteristics of employer-employee relations, and to seek to apply to it rules that generally result from precedents in fields where there is no control relationship between individuals. Which is why most of the precedents cited to justify the distinction between "primary victims" and "secondary victims" involve bystanders at road accidents.

Differing scopes

The SFAIRP clause has implications in three areas: criminal liability, civil liability in terms of the employer's common law and statutory duties, and in determining the practical extent of the duty to ensure safety.

[28] Langridge, Canterbury City Council v Howletts and Port Lympne Estates (1996) refers to "the idiosyncrasy" of a particular business.
[29] Sutherland v Hatton (2002).
[30] *Hazards*, October-December 1998, p. 10.
[31] Robertson and Rough v Forth Bridge Joint Board (1995).

The civil and criminal liability consequences of the clause can be seen in the case law cited in this article. It shows that the criteria used in the United Kingdom go well beyond the terms of article 5.4, which only allows Member States to limit the employer's liability to cases of "force majeure".

It remains to be seen how far the clause also effectively curtails the employer's duty to ensure safety irrespective of its consequences for liability. Such an analysis can be based on two types of information:

1. Empirical data on the operation of the enforcement authorities (the Health and Safety Executive). The enforcement authorities are a crucial institutional interface between employers and the law. Their activities are guided by whatever limits the law set on the employers' duties;
2. The administrative case law on decisions taken by the enforcement authorities. Any employer can appeal HSE decisions to specialized tribunals, and these decided cases enable his duties to be circumscribed in a context which involves neither criminal penalties nor compensation in a civil liability claim.

The empirical data on the enforcement authorities' operations are inevitably piecemeal. They can be supplemented by a comparative analysis of different national enforcement systems.

Hawkins (2002) gives a detailed analysis of HSE decisions about whether to prosecute. The study highlights the uncertainties with which the SFAIRP clause shrouds inspectors' activities, forcing them to second-guess how the tribunals will exercise their discretion. It points out that, "If the general principle of reasonably practicability requires a balancing by the court of the risks and costs involved, for inspectors it implies a loss of control over the outcome, since in shifting from absolute to general duties matters are moved from questions of fact to questions of value" (Hawkins, 2002, p. 394). The same author quotes personal testimony from several inspectors that they would rather have to deal with specific obligations unqualified by the SFAIRP clause. A principal inspector for the construction industry recounts his experience, "it's nice to be able to get a case where there's an absolute duty. There's no doubt about that ... At one time the words 'reasonably practicable' filled me with dread" (ibid., p. 397-398).

Comparative studies of enforcement authorities' operations are thin on the ground. One of the most detailed studies is of enforcement activities concerned with chemical hazards. It analyses enforcement action on reducing exposure to styrene in chemical firms. It covers six countries: four Scandinavian countries, Great Britain and Italy. On the plus side, it investigates what level of requirements the enforcement authorities make in comparatively similar economic and technical conditions. On the UK inspectorate, the author observes that, "inspectors could plan for the difficulties of having to argue about the 'reasonably practicable' nature of precautions and investments in prosecution proceedings. Both the qualifications of HSE inspectors – who are usually not specialists- and the lack of backing in terms of a national assessment of the dangers of exposure to styrene prevent HSE inspectors from calling for more than 10 to 20% of the amounts spent by Italian or Scandinavian companies" (Olsen, 1992, p. 54-55).

While the incomplete empirical data tends to show that the SFAIRP clause does hold back enforcement activity, the case law clearly confirms that it gives the duty to ensure safety a content that is not commensurate with the framework directive criteria. An analysis of Langridge, Canterbury City Council v Howletts and Port Lympne Estates is extremely enlightening on this point (see box p. 29).

The consequences

■ Inherent bias

The most outrageous consequence is probably the inherent bias. If life and health are not to be bargaining chips in the work relationship, it must be recognized that there is a fundamental right – the same for all – to protection of that life and health independently of the situation of financial need that

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might induce a person to "accept" health damage in exchange for pay. The duty to ensure safety imposed on employers stems directly from that fundamental right. A business's financial objectives are therefore subservient to the duty to ensure safety. In other words, if for objective economic reasons, a business cannot secure the duty to ensure safety, it becomes an unlawful economic activity.

The SFAIRP clause establishes an inverse relationship of subordination. It makes the protection of life and health dependent on a financial calculation. The levels of risk and the cost of effective preventive measures vary from industry to industry. It is less costly to secure an optimum level of protection for a senior executive than for a building labourer, for the Health Minister than for a nurse. There is nothing random in this variation. It tends to concentrate the risks on those occupational groups with less bargaining power over working conditions. The SFAIRP clause in fact enshrines and legitimises this unequal distribution of work hazards. So much is very clear from an official HSE document, according to which, "Duty-holders should review what is available from time to time and consider whether they need to implement new controls. But that doesn't mean that the best risk controls available are necessarily reasonably practicable. It is only if the cost of implementing these new methods of control is not grossly disproportionate to the reduction in risk they achieve that their implementation is reasonably practicable. For that reason, we accept that it may not be reasonably practicable to upgrade older plant and equipment to modern standards" (HSE, 2007-a).

What is more, economic research into health and safety at work confirms that the inequality is on both sides of the equation: the costs of prevention, and the cash valuation of the benefits secured. To put it baldly, human lives are worth very different amounts. British research found that, "Results from a recent study of the retrospective value of life implied by safety investment decisions in various sectors find that implied values of life range from £200 000 to £400 million" (Soby *et al.*, 1993, p. 366).

A case decided after the framework directive was already in force[32] moves away from the traditional abstract reasonable employer test, making the dominance of economic considerations even clearer. Among the general criteria that determine an employer's duties in relation to work stress-related mental disorders, Hale LJ specifically mentions that, "the size and scope of its operation will be relevant [to determine what can be reasonably expected of an employer – *ed.*], as will its resources, whether in the public or private sector, and the other demands placed upon it" (paragraph 33). The mention of the particular employer's resources is obviously apt to shroud the extent of the duty of prevention in yet further uncertainty. In one of the cases covered by this judgement on appeal in the House of Lords[33], Lord Walker also applied a cost-benefit calculation to specify the extent of the employer's duty, "supply teachers cost money, but not as much as the cost of the permanent loss through psychiatric illness of a valued member of the school staff" (paragraph 68). This argument would suggest that, in the particular case, the school head could have considered trying to reduce the workload of the "valued member of staff" in question. The suspicion lurks that such an investment might not have been required for a cleaner or canteen lady (assuming these jobs had not yet been outsourced by the school management).

■ Undermining the order of priority of preventive measures

The second thing affected is the order of priority of preventive measures. The framework directive lays down a clear order of priority. The overriding priority is eliminating the risks, then evaluating those risks that could not be eliminated, and giving priority to collective preventive activities concerning work organisation, the choice of equipment, substances and work processes. These collective measures, which often come down to business strategy choices, take priority over individual measures like training, information, wearing personal protective equipment, etc. The SFAIRP clause heavily qualifies this order of priority of preventive measures by allowing a priority measure to be regarded as disproportionate to a less costly and possibly less effective one.

■ Widening the net of "acceptable risks"

The third consequence is the emerging concept of acceptable risks, which is inseparable from the SFAIRP clause. Where risks exist that it would be relatively costly to prevent, using a cost-benefit calculation means that some of these risks with a low probability of occurrence and "low cost" possible consequences can be classed as "acceptable risks". The HSE documents published to explain the scope of the SFAIRP clause are clear on this (HSE, 2001). They distinguish three categories: unacceptable risks, whatever the possible benefits attached to an activity; tolerable risks, which must be kept at the lowest level reasonably practicable; and acceptable risks. The intermediate category of "tolerable risks" is defined by a quantitative model as lying between an upper limit of annual deaths of 1 in 1000 people exposed and a lower limit of 1 in 1 million people exposed. A risk below the latter limit falls into the "acceptable risk" category.

In practice, the "acceptable risks" category tends to harbour risks with low social visibility. These are usually long-term risks whose health impacts can be partially blamed on non-work factors. This is a frequent head of complaint for trade unionists in the United Kingdom. Some argue that the SFAIRP clause has no serious consequences for the most serious and most immediate physical risks, but that it is fairly systematically raised by employers against

[32] Sutherland v Hatton (2002).
[33] Barber v Somerset County Council (2004).

ergonomic risks in particular related to work on VDUs or psychosocial risks[34]. It may also include immediate and serious risks to specific groups of workers who are deemed to know of and "accept" a high level of risk. Former Director General of the HSE John Rimington contends that an occupational risk of death in excess of 1 in 1000 a year may be accepted in certain occupations like helicopter piloting or deep sea fishing "where people venture upon the risks with a clear understanding, and where extra precautions cannot abate the risk considerably" (Rimington *et al.*, 2003, p. 14).

[34] Interview with Hilda Palmer of the Greater Manchester Hazards Centre, February 2007.

Crouching tiger, reasonably practicable judges

Trevor Smith worked as a keeper at Howletts Wild Animal Park, near Canterbury. The zoo's work practices were meant to encourage social contact between animals and keepers. On 13 November 1994, Trevor Smith went into the enclosure housing two tigers in order to clean it. He was alone, equipped with a shovel and a bucket. One of the tigers put its front paws on Mr Smith's shoulders. He fell to the ground and was bitten at the base of the neck, dying instantaneously. It was the zoo's third fatal accident in ten years.

In the months following Mr Smith's death, a senior environmental health officer[a] tried to negotiate new work practices with the zoo owner to avoid keepers coming into direct contact with dangerous animals. The zoo owner point blank refused. Negotiations broke down and a prohibition notice was served on 6 June 1995 forbidding any direct contact between keepers and tigers (except for animals that were too young to present a serious risk).

The zoo owner applied to an industrial tribunal[b] to cancel the prohibition notice and allow him to maintain operating practices that put employees in direct contact with dangerous animals. The zoo management mounted a high-profile campaign around the appeal. A dozen witnesses were brought in to attest to the importance to animal welfare of the "fundamental rights of wild animals to social contact". The zoo management even went so far as to claim that the prohibition notice "interfered with the freedom of any individual to accept a greater than normal risk to his personal safety for the better practice of his occupation or calling", and could be in breach of the European Convention on Human Rights!

The industrial tribunal found in the employer's favour in January 1996[c], ruling that the prohibition notice forbidding the employer to put its employees in direct contact with tigers was not reasonably practicable.

In finding the prohibition notice to be unlawful, the tribunal argued that the Health and Safety at Work Act did not allow activities to be prohibited which were inherently risky by nature. It argued that prohibiting direct contact between tigers and staff would undermine the nature and ethos of this type of zoo.

The ruling was greeted with some unease in Britain. The European Safety Newsletter (ESN) devoted much of its April 1996 issue to it. An editorial comment observed that, "Perhaps Britain's EU partners were right to be sceptical about the concept of reasonably practicability and to insist that the term be excluded from 118A directives".

The ESN was able to reassure its readers on two counts, however:
- the ruling was not unanimous. The only legally trained member of the tribunal had given a dissenting view;
- an industrial tribunal ruling does not constitute binding precedent in UK law.

The case was appealed to the High Court. Its judgement[d] given in November 1996 confirmed that UK law favoured the employer and that the health and safety enforcement authority had no right to ban inherently dangerous practices if they were found to be of the "essential nature of the business" (paragraph 42). UK law's incompatibility with the framework directive was denied with arguments of doubtful cogency. Mr Justice Turner argued that the issue was resolved by the provision of article 6.2 of the directive which requires the employer to take planned prevention measures "taking into account the nature of the activities of the enterprise" (paragraph 47). He construed this phrase as meaning that the employer has free choice of the enterprise's activities, and that the framework directive cannot have intended "to outlaw certain activities merely on the basis that they were dangerous" (paragraph 47).

This interpretation significantly curtails the employer's duty to ensure safety. It is readily clear from an overall analysis of the framework directive that the phrase quoted is not intended to limit the duty to ensure safety, but merely to indicate that effective prevention is based on the specific characteristics of each enterprise. There is no doubt that the framework directive allows inherently dangerous working practices like putting workers into contact with dangerous animals to be prohibited. It is a great moral and intellectual stretch to argue that having keepers enter an enclosure but not having direct contact with tigers would be tantamount to an attack on the very nature of a zoo like Howletts.

This judgement makes it possible to assess the extent of the employer's duty to ensure safety in a context where what is at issue is not his civil or criminal liability, but his primary obligation to take preventive measures, and how that is limited in UK law.

In the five years since this judgement, two other keepers have been killed in similar circumstances. Darren Cockrill, in Port Lympne, Howletts' twin animal park, in 2000, and Richard Hughes in Chester Zoo in February 2001. Both keepers were crushed by female elephants when working in their enclosure with no physical barrier to separate them from the animals. These "reasonably practicable" deaths could have been avoided had the framework directive's principles been followed in the United Kingdom.

[a] Health and safety enforcement in the United Kingdom is handled for industrial plants and big companies by the HSE, and for smaller service firms by environmental health officers exercising the same powers as HSE inspectors.
[b] Industrial tribunals are quasi-judicial panels formed of a legally-qualified chairman, an individual appointed by the trade unions and an individual by an employers' association. They have jurisdiction over various employment rights-related matters.
[c] Howletts & Port Lympne Estates Ltd v Langridge HS/32450/95 IT.
[d] Langridge, Canterbury City Council v Howletts and Port Lympne Estates (1996).

Questions may be asked about how the limits of "risk tolerability" are set. It is a situation in which the legal rule has an economic function – that of ensuring a level playing field for competition between firms. This overrides the protection of life and health, which is not seen as an unqualified imperative. This is what probably explains an apparent anomaly noted by many observers. Even the most virulent deregulation drives under a Conservative government have always left health and safety legislation relatively unscathed (see Rimington *et al.*, 2003). The other explanatory factor obviously lies in the limits set by the existence of Community directives that prevent all-out deregulation of safety and health.

The upper limit of risk "tolerability" was set at 1 death in 1000 exposed workers a year. This is approximately the death rate of the early 1980s in sectors with the highest fatal accident frequencies: sea fishing, ore mining, and the oil industry. It is as if the upper limit had been set so as to entrench a tolerance to the particularly high levels of fatal accident risks in these sectors. The lower limit of 1 death in 1 million people a year, by contrast, represents the most favourable scenario of what the HSE judges an acceptable risk to the public. Acceptable risks for which preventive measures need not be adopted do not today correspond to real fatal accident risks (which probably exceed the limit set in all sectors). Their scope can only be assessed by being translated into monetary terms. The value of a human life has been calculated at an equivalent of one million pounds, so an acceptable one millionth death risk is tantamount to saying that any risk is acceptable if the estimated annual cost does not exceed 1 pound per person. This shift from an evaluation in deaths to a monetary equivalent valuation obviously creates added problems. In the real world, most deferred risks cannot be precisely costed in cash terms. What is the annualised cost of joint pain until it results in sickness absence? What is the annualised cost of male or female fertility decline? Does the adoption of a child divided by a probability factor have to be included?

The trend towards widening the net of "acceptable risks" has risen sharply in recent years under the effect of campaigns directed against "risk aversion". The Blair government has been particularly active on this front. The courts seem to be receptive to this kind of argument. The Court of Appeal gave a landmark decision in 2002 on four joined cases on work stress and mental health[35]. The ruling, based on the precedent in civil liability, lays down sixteen criteria that flatly contradict the principles of the framework directive. As Brenda Barrett comments, "this decision left the impression that it would be very hard for a claimant to adduce conclusive evidence that the employer's negligent conduct had caused psychiatric injury" (Barrett, 2004, p. 344). The employer's duty to prevent harm to mental health is limited by the costs that such prevention would involve (paragraph 32), with the possible justification of risks intrinsic to the business activity (see paragraphs 12 and 32). The judgement disregards the order of priority of preventive measures in finding that confidential psychological support for the individual worker may be enough to exhaust the employer's duties. No clear priority is given to collective measures on work organisation (see, in particular, paragraphs 17 and 33). The employers were held not to be in breach of duty in three of the four appeals heard. It is significant here that neither the risk assessment nor the adoption of preventive measures based on it are included anywhere in the elements determinative of a "reasonable" employer's duty.

A conflict increasingly hard to conceal

The United Kingdom defence skates over a real debate among British lawyers. There is a broad consensus among legal authority that the SFAIRP clause is at odds with Community law. It is increasingly evident from an uncertain and divided body of case law. Most of the decisions are on specific regulations rather than the framework directive's general duty to ensure safety.

There are three reasons for this:
1. The general duty to ensure safety (s. 2 Health and Safety at Work Act) does not enable a tort action to be brought;
2. Up to 2003, the "best efforts" obligations of article 6 of the framework directive were implemented with similar limitations;
3. The specific regulations do not refer to the SFAIRP clause as systematically as the Health and Safety at Work Act. This leaves greater scope for interpretation of the provisions not expressly qualified by that clause.

A substantial body of case law gets around the difficulty by arguing that the legislature could not have intended to call into question a time-honoured tradition enshrined in precedent. It is an approach particularly found in the Court of Appeal ruling in Hawkes on the manual handling regulations[36]. Aldous LJ evinces the reluctance to take account of Community law: "The Manual Handling Operations Regulations 1992 were intended to implement the Manual Handling Directive 90/269. Even so, I believe it proper to conclude that Parliament had in mind, when they enacted the Regulations, the construction of the words 'reasonably practicable' which had been accepted by the Courts since 1938. It therefore is right to give them the same meaning in the Regulations as was explained by Asquith LJ".

In HTM[37], Latham LJ disposes of the issue of what effect transposition of the framework directive may have in two sentences. The regulations transposing the framework directive also transposed article 5.3,

[35] Sutherland v Hatton (2002), commented on by Barrett, 2002.
[36] Hawkes v London Borough of Southwark (1998).
[37] R v HTM (2006).

which provides that "the workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer". This provision is enacted in Regulation 21 of the Management of Health and Safety at Work Regulations 1999. Latham LJ argues that these are secondary legislation and do not affect the rule laid down by the 1974 Act (which was not amended when transposing the framework directive). He goes on, "Regulation 21 would appear to be an attempt to transpose Article 5.3 of the directive into domestic law. Whether it has succeeded in that regard is not a question that we have to decide in this case" (paragraph 31 of the judgement). It is a reasoning that relies on the order of priority of sources of domestic law to dismiss the primacy of Community law. In Langridge[38], Mr Justice Turner has no hesitation in referring to the framework directive to uphold an interpretation that flatly contradicts the directive's articles 5.1 and 6 (paragraphs 47 and 49 in particular).

The case law on psychiatric and stress-induced problems is not clear on this point, but the courts are manifestly unwilling to take account of the order of priority of preventive measures and obligation to evaluate the risks. In 2004, the House of Lords upheld an appeal in one of the four cases heard by the Court of Appeal in 2002[39]. The Lords broadly confirmed the criteria defined by Hale LJ, recommending that they be given a flexible interpretation. Whether these criteria are consistent with the duty of prevention resulting from the transposition of the framework directive was not considered, even though it formed part of Mr Barber's defence. Lord Rodger cited a judgement in the 1961 case of Withers v Perry Chain Co Ltd to argue that where there was a "slight" health risk, it is for the worker to decide whether to run that risk or face losing his/her job, noting in passing that, "I do not pause to consider how far, if at all, the reasoning in this passage is affected by the current requirements on employers to carry out risk assessments" (paragraph 30). The framework directive is seemingly just a minor irritation…

In other cases, the courts have acknowledged the impact of the Community directives and offered solutions that break with the traditional interpretation. The Scottish courts have often led the way here. In English v North Lanarkshire Council[40], Lord Reed interpreted the UK work equipment regulations[41] in the light of the framework directive, and specifically the order of priority of preventive measures. He found that the concept of suitable work equipment had to be construed subject to the priority requirement to eliminate the risks. Elimination of risks takes precedence over training. That was one ground for rejecting the employer's defence that the worker who suffered the accident was sufficiently trained and experienced. The employer argued that this meant he had done all that was reasonably practicable to avoid the accident by drawing the worker's attention to the need to be careful and to concentrate. Lord Reed expressly refers to the case law of the ECJ, followed by the House of Lords, which requires that national transposing legislation should be interpreted in light of the Community directives. Lord Reed notes that the precedent cited by the defence relies on an interpretation of the Factories Acts[42]. "An approach based on the Factories Acts is fundamentally misconceived. It is also potentially misleading, since the European directives on health and safety at work differ materially from the Factories Acts in important respects. For example, obligations under the Factories Acts tend to be qualified by reference to what is reasonably practicable, whereas the directives generally impose obligations which are expressed in unqualified terms; and the structure of the directives tends to follow a sequential analysis of any hazard and the ways in which it may cause an injury, so that some obligations may be secondary to others".

The judgement in McGhee applies the same principles to interpret the Work (Health, Safety and Welfare) Regulations 1992 which transpose Community Workplace Directive 89/654. Lord Hamilton argued against an interpretation based on "the terms (as domestically interpreted) of previous and now repealed UK health and safety provisions". He said that the proper approach to interpreting new provisions transposing Community directives was to approach them "untrammelled" by superseded legislation and any interpretation of it[43]. Skinner, also on the Work Equipment Regulations, takes the same approach and dismisses any consideration of the cost of preventive measures that should have been taken[44].

A recent House of Lords ruling goes further, and expressly addresses the conflict between the framework directive and the UK Provision and Use of Work Equipment Regulations[45]. In this case, Mr Robb sustained an injury in 1999 in a fall while working on an offshore production platform. He claimed damages for his employer's breach of safety of work equipment provisions. The resulting incapacity permanently prevented Mr Robb from resuming his work as a scaffolder. The trial court's finding of fact was that the fall was due to an improperly fixed ladder. The trial judge refused to award the injured worker damages on the grounds that the employer could not reasonably foresee that the ladder would be improperly fixed as the result of carelessness by another worker. He therefore held that it was not reasonably practicable for an employer to implement more effective preventive measures which did not depend on a worker's conduct. He nevertheless noted that another system had been introduced nine months after this accident: the ladders were now fixed by means of screws so that they could not be moved. Mr Robb had brought a series of cases over the years to secure compensation. All had failed. His lawyer, Mr Angus Stewart, went to the House of Lords to argue that the provisions in

[38] Langridge v Howletts & Port Lympne Estates (1996).
[39] Barber v Somerset County Council (2004).
[40] English v North Lanarkshire Council (1999).
[41] Provision and Use of Work Equipment Regulations 1998.
[42] The Factories Acts are the different forerunner enactments to the Health and Safety at Work Act 1974. Both make extensive use of the SFAIRP clause.
[43] McGhee v Strathclyde Fire Brigade (2002).
[44] Skinner v Scottish Ambulance Service (2004).
[45] Robb v Salamis (M & I) Ltd (2007). For a detailed account, see Stewart, 2007.

force should be interpreted on the basis of the Community directives. His doggedness paid off, and the case was decided in his favour in December 2006.

In Robb, Lord Clyde expresses misgivings about whether the Work Equipment Regulations are compliant with the framework directive's provisions (paragraphs 45 to 48 of the judgement). He notes that article 5.4 of the framework directive is "significantly different", and that it "may be difficult to construe the words of the Regulation to equate with this language" (paragraph 47).

This judgement exemplifies the potential influence of Community law in moving the case law on. But that in no way detracts from the importance of the infringement proceedings brought by the Commission. The UK precedent is uncertain and divided. The traditional approach restricting the duty to ensure safety has never been called into question where criminal liability is concerned. The HSE is reluctant for political reasons to push the issue of non-compliance with Community law. In HTM, although it brought the prosecution of the employer, the HSE declined to rely on the framework directive, notwithstanding the glaring discrepancy involved between UK law and the Community provisions. A reference to the ECJ for a preliminary ruling could have brought this to the fore. Given the excellence of the lawyers instructed by the HSE, the obstacle is probably political. Raising this issue would have called into question the government's commitment to minimising the impact of directives on UK law. The HSE cut the ground from under its own feet in the case rather than advance a very uncomfortable argument. The administrative case law is limited in the same way for the same reasons. Where civil liability is concerned, the movement started with English, McGhee, Skinner and Robb is far from being the dominant trend. Only a ruling that the government has failed to fulfill its obligations will pave the way for this case law to be unified on a basis of compliance with the framework directive.

Conclusions

The most scathing criticism of the UK defence and the Advocate General's Opinion comes from an English judge. Uttered more than fifty years ago, his words come as a pithy rebuttal of their analyses.

"First, it appears to be an illegitimate method of interpretation of a statute, whose dominant purpose is to protect the workman, to introduce by implication words of which the effect must to be reduce that protection.
Second, where it has been thought desirable to introduce such qualifying words, the legislature has found no difficulty in doing so..."[46]

These two sentences marry an ethical approach to the judicial function with rigorous principles of statutory interpretation. The ruling that the ECJ will hand down before the end of this year will tell how far this lesson remains a living source of the law for the Community judiciary. ■

[46] Summers v Frost (1955).

References

- Ale BJM (2005), *Tolerable or Acceptable: A Comparison of Risk Regulation in the United Kingdom and in the Netherlands, Risk Analysis*, vol. 25, No. 2, p. 231-241.
- Bain P (1997), Human resource malpractice: the deregulation of health and safety at work in the USA and Britain, *Industrial Relations Journal*, vol. 28, No. 3, p. 176-191.
- Barrett B (1981), Employers' Liability for Work Related Ill-Health, *Industrial Law Journal*, vol. 10, p. 101-112.
- Barrett B (1997), Employers' Criminal Liability Under HSWA 1974, *Industrial Law Journal*, vol. 26, p. 149-158.
- Barrett B (2002), Clarification of Employer's liability for Work-related stress, *Industrial Law Journal*, vol. 31, p. 285-294.
- Barrett B (2004), Employers' Liability for Stress at the Work Place: Neither Tort nor Breach of Contract?, *Industrial Law Journal*, vol. 33, p. 343-349.
- Barrett B (2005), Employer's Liability after Hatton v Sutherland, *Industrial Law Journal*, vol. 34, p. 182-189.
- Beck M, Woolfson C (2000), The regulation of health and safety in Britain: from old Labour to new Labour, *Industrial Relations Journal*, vol. 31, No. 1, p. 35-49.
- Bluff L, Johnstone R (2004), *The Relationship between "Reasonably Practicable" and Risk Management Regulation*, Australian National University, National Research Centre for OHS Regulation, Working Paper 27.
- BRC (Better Regulation Committee) (2006), *Risk, Responsibility Regulation, Whose Risk Is It Anyway?,* London.
- Buchan A (2006), *Stress at work: is Hatton v. Sutherland still good law?,* paper to the Industrial Law Society. Available at: www.industriallawsociety.org.uk/speaches.htm
- DTI (1993), *A review of the Implementation and Enforcement of EC Law in the U.K.: Efficiency Report*, London.
- Falkner G, Treib O, Hartlapp M, Leiber S (2005), *Complying with Europe. EU harmonisation and Soft Law in the Member States,* Cambridge, Cambridge University Press.
- Fidderma, H (2007), Reasonable and practicable? Yes, says advocate general, *Health and Safety Bulletin*, No. 356, p. 11-15.
- Ford M, de Navarro M (2001), Breach of statutory duty *in* Hendy J, Ford M, *Employers' Liability*, London, Butterworth, p. 229-255.
- Gilles, S (2002), The Emergence of Cost-Benefit Balancing in English Negligence Law, *Chicago-Kent Law Review*, vol. 77, No. 3, p. 489-586.
- Hasson RA (1974), The Employers' Liability (Compulsory Insurance) Act 1969. A Broken Reed, *Industrial Law Journal*, vol. 3, p. 79-86.
- Hawkins K (2003), *Law as last resort: Prosecution decision making in a regulatory agency*, Oxford, Oxford University Press.
- HSC (Health and Safety Commission) (2002), *Enforcement Policy Statement*, Caerphilly, HSE (reprinted in 2004).
- HSE (2001), *Reducing risks, protecting people. HSE's decision-making process,* Norwich.
- HSE (2007-a), *ALARP "at a glance",* available at: www.hse.gov.uk/risk/theory/alarpglance.htm (version cited consulted on 16 February 2007).

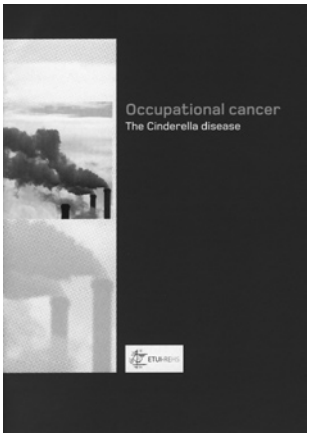
- HSE (2007-b), *HSE principles for Cost Benefit Analysis (CBA) in support of ALARP decisions*, available at: www.hse.gov.uk/risk/theory/alarpcba.htm (version cited consulted on 16 February 2007).
- HSE (2007-c), *Principles and guidelines to assist HSE in its judgements that duty-holders have reduced risks as low as reasonably practicable*, available at: www.hse.gov.uk/risk/theory/alarp1.htm (version cited consulted on 16 February 2007).
- Hodgson JT, Jones JR, Clarke SD, Blackburn AJ, Webster S, Huxtable CS, Wilkinson S (2006), *Workplace Health and Safety Survey programme: 2005 Worker survey first findings report*, Health and safety Executive, Caerphilly.
- Hogarth A (2002), *Hatton v Sutherland – a stress free guide to stress at work claims*, paper to the Industrial Law Society. Consultable on : www.industriallawsociety.org.uk/papers/hogarth.htm
- Howells G, Mildred M (2002), Infected Blood: Defect and Discoverability A First Exposition of the EC Product Liability Directive, *Modern Law Review*, vol. 65, No. 1, p. 95-106.
- James P (1992), Reforming British Health and Safety Law: a framework for discussion, *Industrial law Journal*, vol. 21, No. 2, p. 83-105.
- James P, Walters D (1999), *Regulating Health and Safety at Work: The Way Forward*, Institute of Employment Rights, London.
- Kloss D (1998), *Occupational Health Law*, Oxford: Blackwell Science.
- Lewis D (2004), How should safety concerns be handled?, *Industrial Law Journal*, vol. 33, No. 1, p. 42-45.
- Mayhew L (2005), *Working Time. Holidays*, paper given to the Industrial Law Society, 12 October 2005. Available at: www.industriallawsociety.org.uk/papers/mayhew.htm
- Olsen, P B (1992). *Six cultures of regulation – Labour inspectorates in six European countries*, Copenhagen, Handelshøjskole.
- Parsons C (2002), Liability Rules, Compensation Systems and safety at Work in Europe, *The Geneva papers on Risk and insurance*, vol. 27, p. 358-382.
- Pearce B (2000), United Kingdom: Observations on the Implementation of Directive 90/270/EEC *in* Rauterbeg M, Krueger, H, *The EU directive 90/270 on VDU-work: a European state-of-the-art overview: report over the situation in United Kingdom*, Technical University, Eindhoven, p. 13-23.
- Rimington J, McQuaid J, Trbojevic V (2003), *Application of risk based strategies to workers health and safety protections. UK experience*, SZW, The Hague.
- Samuels A, The Animals Act 1971, *The Modern Law Review*, vol. 34, No. 5, p. 550-556.
- Smith I, Goddard C, Randall N (1993), *Health and Safety. The New Legal Framework, Butterworths, London-Dublin-Edinburgh.*
- Soby B, Ball D, Ives D (1993), Safety Investment and the Value of Life and Injury, *Risk Analysis*, vol. 13, No. 3, p. 365-370.
- Spurgeon A, Harrington J, Cooper C (1997), Health and safety problems associated with long working hours: a review of the current position, *Occupational and Environmental Medicine*, vol. 54, p. 367-375.
- Spurgeon A (2003*), Working Time. Its Impact on Safety and Health*, International Labour Organisation, Geneva.
- Stewart A (2007), After the fall – a backward step for health and safety, *Scots Law Times*, No. 06, p. 35-41.
- Stoppa A (1992), The concept of defectiveness in the Consumer Protection Act 1987: a critical analysis, *Legal Studies*, vol. 12, No. 2, p. 210-226.
- Supiot A (2006), Law and Labour. A World Market of Norms?, *New Left Review*, p. 109-121.
- Takala J (2005), *Introductory Report: Decent Work – Safe Work,* XVIIth World Congress on Safety and Health at Work, ILO, Geneva.
- Tombs S (1999), Death and Work in Britain, *The Sociological Review,* vol. 47, No. 2, p. 345–367.
- TUC (Trades Union Congress) (2005), *The Compensation Myth*, London.
- Vogel L (2003), *The gender workplace health gap in Europe*, Brussels, ETUI-REHS.
- Waddams SM (1974), The Strict Liability of Suppliers of Goods, *The Modern Law Review,* vol. 37, No. 2, p. 154-174.
- Walker H (1999), Relying on "reasonably practicable" as a defence?, *The Safety and Health Practitioner*, vol. 17, No. 4, p. 40.
- Walters D, James P (1998), *Robens Revisited, The Case for a Review of Occupational Health and Safety Legislation*, Institute of Employment Rights, London.
- Walters D. (2002), United Kingdom: From a Piecemeal Transposition to a Third Way, in Walters D (ed.), *Regulating Health and Safety Management in European Union. A Study of the Dynamics of Change,* Brussels, P.I.E.-Peter Lang, 2002, p. 59-80.
- Walters D (2006), One Step forward, Two Steps Back: Worker Representation and Health and Safety in the United Kingdom, *International Journal of Health Services*, vol. 36, No. 1, p. 87-111.
- Wilson G (1986), Legislating on occupational safety and health: a comparison of the British and American experience, *European Journal of Political Research*, vol. 14, p. 289-303.
- WPC (Work and Pensions Committee) (2004), *The Work of the Health and Safety Commission and Executive*, Fourth Report of Session 2003-04, vol. III, Written evidence, London, House of Commons.

Index of cases

- Adsett v K & L Steel Founders and Engineers Ltd (1953) 1 All ER 97
- Armstrong and others v British Coal Corporation (1996) EWCA Civ 1049
- Balfour Kilpatrick Ltd v Acheson 2003 IRLR 683 EAT
- Ball v Street (2005) EWCA Civ 76
- Edwards v National Coal Board (1949) All ER 743 (CA)
- English v North Lanarkshire Council (1999) ScotCS 29
- Hawkes v London Borough Of Southwark (1998) EWCA Civ 310
- HTM, R v (2006) EWCA Crim 1156
- Imperial Chemical Industries v Shatwell (1964) All ER 999
- Jobling v Associated Diaries Ltd (1982) AC 794
- Latimer v AEC Ltd 1953 AC 643 (HL)
- R G Langridge, Canterbury City Council v Howletts and Port Lympne Estates (1996) EWHC Admin 282
- McGhee v Strathclyde Fire Brigade (2002) ScotCS 16
- Marshall v Gotham (1954) AC 360
- Metropolitan District Council; Bishop v Baker Refractories Ltd (2002) WCA Civ 06
- Nimmo v Alexander Cowan & Sons (1967) SC (HL) 79
- Paris v Stepney Borough Council (1950) BC (1951) HL
- Parkes v Meridian Ltd (2007) EWHC B1 (QB) (14 February 2007)
- Regina v Davies (David Janway) (2003) ICR 586
- Robb v Salamis (M & I) Ltd 2004 (SCLR) 672; (2005) SLT 523; (2007) SLT 158
- Robertson v Forth Road Bridge Joint Board (1995) S.C.L.R. 466
- Skinner v Scottish Ambulance Service (2004), ScotCS 176
- Smith v Baker (1891) AC 325
- Summers & sons ltd v Frost (1955) 1 A11 ER 870
- Sutherland v Hatton; Barber v Somerset County Council; Jones v Sandwell Metropolitan District Council; Bishop v Baker Refractories Ltd (2002) WCA Civ 06
- Taylor v City of Glasgow Council 2002 SC 364
- Walker v Northumberland County Council (1995) IRLR 35 ■

Occupational cancer. The Cinderella disease

Extracts from the brochure written by Marie-Anne Mengeot with contributions from Laurent Vogel and Tony Musu



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The International Agency for Research on Cancer's (IARC) most recent estimates claim 2.3 million new cases of cancer and over a million cancer deaths in the European Union in 2006. Some of these cancers are directly caused by working conditions.

These tens of thousands of deaths each year are not from accidents. They are preventable. Most neither stem from malfunctioning production processes, nor disrupt normal production. They are to do with technical choices about substances, processes, and work organisation.

These cancers write the stamp of labour relations into human biology. They deepen social inequalities of health. By far most affect manual workers.

The main obstacle to preventing work-related cancers is lack of control over working conditions by the workers themselves. The current level of scientific knowledge and the existence of alternative technologies make much more effective prevention possible.

An unequal burden of disease

Cancer is the main killer after cardiovascular disease for all men and women in developed countries. It is responsible for a quarter of all deaths in the European Union of 25, rising to 41% among 45-64 year-olds, making cancer the leading cause of death in middle age[1]. Beyond these general findings, mortality atlases show that the incidences of death, disease and cancer differ with geographical region. These geographic inequalities in illness and death tend to reflect social status inequalities.

Men aged 25-54 living in the Nord-Pas-de-Calais have a higher death rate from cancer than in other French regions for all social status categories, but in very different proportions: 9% higher for senior managerial staff; 30% higher for technician and skilled craft occupations/self-employed skilled workers/independent retailers; 60% higher for manual/office workers[2].

The IARC reports a higher cancer incidence and cancer mortality in low-income groups in all industrialised countries. In the past half-century, the incidence of lung cancer has fallen in the highest-income groups, but has risen steadily among the lowest-income groups. The IARC specialists argue that this difference is not just due to different smoking habits in the social groups. They also claim that exposure to carcinogens in the working environment may account for a third of the observed difference between the cancer incidences in higher and lower income groups, rising up to a half for lung and bladder cancer.

Workers and carcinogens

Set up in 1971, the IARC evaluates the cancer-causing potential of substances and agents (chemicals, biological and physical agents), situations where exposure occurs, and industrial processes. To date, the IARC has evaluated over 900 substances, approximately 400 of which have been identified as carcinogenic or potentially carcinogenic. Of the hundred substances classified as group 1 – i.e., proven to be carcinogenic to humans – 60 are found in the working environment.

Assessing how many workers are exposed to carcinogens at their workplace is a challenging exercise. Compiling statistics is made particularly difficult by the scant data available, the piecemeal nature of what data does exist, and the shortcomings of official figures on occupational diseases. The Carex system is the main attempt to estimate occupational exposure to carcinogens EU-wide.

Carex – Carcinogen Exposure – is a European initiative coming out of the "Europe Against Cancer" programme. It is a database of information on occupational exposure to carcinogens in EU countries. According to the Carex database, 32 million workers in the EU-15 – 23% on average – were exposed to carcinogens. The lowest figure was recorded in the Netherlands (17%), the highest in Greece (27%). The carcinogens to which workers were generally exposed were solar radiation (9.1 million people), passive smoking (7.5 million), crystalline silica (3.2 million), diesel engine exhausts (3.1 million), radon (2.7 million), wood dust (2.6 million), lead and its inorganic compounds (1.5 million), benzene (1.4 million).

The economic sectors where exposure to carcinogens was highest were: forestry work (solar radiation), fishing (solar radiation), mining (silica and diesel engine exhausts), the wood and furniture industry (wood dust and formaldehyde), ores (silica), construction (silica, solar radiation and diesel engine exhausts) and air transport (passive smoking and ionising radiation).

Under-estimating and under-reporting occupational cancers

Epidemiological studies done in the decades following World War Two demonstrated the cancer-

[1] *Causes of death in the EU 25,* Eurostat, press release, July 2006.
[2] Aïach, P., Marseille, M., Theis, I., *Pourquoi ce lourd tribut payé au cancer ? Le cas exemplaire du Nord-Pas-de-Calais,* éditions de l'École nationale de la santé publique, Rennes, 2004.

causing effects of several substances used on a large scale in industry: aromatic amines, asbestos, benzene, vinyl chloride, wood dust, and so on. To address the concerns raised, work was done to determine what percentage of cancer cases were linked to occupational exposure.

The first large-scale study, long taken as gospel in the matter, was done in the United States by two English epidemiologists, Richard Doll and Julian Peto[3]. Doll and Peto argued that 4% of all cancers could be regarded as work-related (8% in men, 1% in women). This figure of 4% seems on the low side compared to the large number of workers exposed to carcinogens, and has often been used to play down the impact of occupational causes in the development of cancers.

Very comprehensive cancer mortality estimates published in 2001 by a Finnish team produced figures higher than Doll and Peto's. The Finnish researchers claimed that the share of occupational cancers among all cancers was as high as 8% (14 % for men and 2% for women), and that in the male population, 29% of lung cancers, 18% of leukaemias, 14% of bladder cancers and 12% of pancreatic cancers were arguably work-related[4].

This vagueness is regrettable. The lack of information which can put figures on the share and number of diseases attributable to occupational factors is deeply damaging. It shrouds the task of setting priorities for effective prevention policies in difficulty and doubt, and leaves the impact of occupational diseases on the community and social security systems unresolved.

Whatever percentages are taken, the number of compensated occupational cancers is well below even the lowest estimates. The consensus view is that compensated diseases are only the tip of the iceberg in all EU countries.

Available data suggest that a bare 10% of occupational cancers are recognised and compensated in the main Western European countries. In Spain, the figure is thought to be even less than 1%. Only 869 of an estimated 10 000 or so occupational cancers – 8.7% – were compensated in France in 1999. Still worse, some countries have no data at all on work-related cancers.

Asbestos cancers – which include mesotheliomas – make up at least three-quarters of compensated occupational cancers in the European Union. But the reported cases nowhere near reflect the real scale of asbestos cancers. A French study found that one in two pleural mesotheliomas were recognised, and one in six asbestos-caused lung cancers.

European legislation

The Carcinogens Directive, the first version of which dates from 1990, lays down the Community rules for protecting workers from the risks related to exposure to carcinogens or mutagens at work. The Directive, which has been carried over into the national law of all 27 EU countries, lays down an order of priority in employers' obligations to reduce the use of carcinogens in the workplace.

First among these measures is the obligation to replace the carcinogen or mutagen by a substance which is not, or is less, dangerous. Where a safer alternative exists, the employer must use it instead, whatever the cost to the business. If replacement is not technically possible, the employer must ensure that the carcinogen or mutagen is manufactured or used in a closed system. If he cannot take this safety precaution, the employer must ensure that the level of exposure of workers is "reduced to as low a level as is technically possible".

The Carcinogens/Mutagens Directive also provides for occupational exposure limit values (OELV) to be set. While OELVs exist for a long list of carcinogens under different national laws, exposure limits have only been set for three substances at Community level: benzene, vinyl chloride monomer and hardwood dust.

In March 2004, the European Commission initiated a revision of the Directive, and unions and employers' views were canvassed on how the gaps in the legislation should be filled. The main failing of Directive 2004/37/EC is that it does not cover substances that are toxic for reproduction (reprotoxins). Another issue is the delay bringing in European-level OELVs for substances covered by the Directive. Three years on, at the start of 2007, the Commission had still not set the second phase of consultations going, and any improvements to the text are still on the drawing board.

REACH, the new EU chemicals legislation

After several years' fierce debates and lobbying, the reform of European legislation on chemicals use and marketing, known as REACH (Registration, Evaluation and Authorisation of Chemicals), was finally adopted by the EU in December 2006. The regulation comes into effect in the 27 EU countries on 1 June 2007, and will replace the jumble of close to 40 existing pieces of legislation that were seen as no longer capable of effectively protecting human health and the environment from chemical hazards.

In order to continue being manufactured or imported in the EU in quantities above 1 tonne a year, a class

[3] Doll, R., Peto, R., *The cause of cancer : quantitative estimates of avoidable risk of cancer in the United States today*, Oxford University Press, 1981.
[4] Nurminnen, M., Karjalainen, A., Epidemiologic estimate of the proportion of facilities related to occupational factors in Finland, *Scandinavian Journal of Work, Environment & Health*, 2001, 27(3), p. 161-213.

1 or 2 carcinogen, mutagen or reprotoxin (CMR) will have to be accompanied by a registration dossier giving information on its properties, uses and classification, plus guidance on how to use it safely. For chemicals produced in quantities of 10 tonnes a year and more, the registration dossier will also have to include a chemical safety report describing the risk management measures necessary for adequate control for each identified use of the substance. This means that it will no longer be permitted to manufacture or import a CMR substance in Europe without a registration dossier, except in quantities of less than 1 tonne a year.

Industrial users of class 1 or 2 CMRs will have to get European Commission authorisation for each proposed use. To get authorisation, applicants will have to demonstrate that the risks associated with the use of the chemical concerned are "adequately controlled". Even if they are not, authorisation may still be granted if it is shown that the risks are outweighed by socio-economic benefits and there are no suitable alternative substances or technologies.

The obligation to get authorisation for carcinogens under REACH should encourage producers to replace them by less dangerous alternatives, which will promote implementation of the substitution principle which is mandatory in the Carcinogens Directive.

Cancer is also a power issue

At first glance, cancer touches the innermost privacy of the individual. It is a condition that people are not naturally forthcoming about. Sufferers undergo an experience which in some ways cuts them off from the world. Physical pain, mental distress, the feeling of being betrayed by one's own body where vital cell regeneration processes are warped into health-destroying ones. The way our societies see cancer adds to this isolation. It can be put down to modern forms of predestination – faulty DNA – or personal fault – what are too readily accused of being unhealthy lifestyle choices. It is not easy to develop a strategy for collective defence. But nor is it impossible, as feminist lobbying on breast cancer, the opposition to nuclear weapons mounted by the Hibakusha, the Hiroshima and Nagasaki atom bomb survivors, and the exemplary fight by asbestos victims worldwide show. Each of these experiences showed how direct engagement by victims could act as the binder for collective action.

In acting on working conditions that create a cancer risk, the trade union movement can act on several fronts here:

1. For a more effective public policy on health and safety at work. Workplace prevention depends very much on whether there is a public policy on health and safety at work. Producing detailed, independent information on chemicals, carrying out toxicological and epidemiological research, and implementing policing and enforcement systems obviously go beyond the capacity of a single company.

2. For a public health policy that incorporates working conditions. Public health policies in most EU countries do not at present act on working conditions, and have little effect on social inequalities of health.

3. To put work-related cancers in the public spotlight and labour action to put them at the top of the political agenda. Asbestos showed how far prevention depended on putting work-related health damage in the public arena. It was the result both of work done day-to-day by unions and labour action on specific issues. No avenue must be left unexplored: trade union press, mass media, lawsuits, calling political authorities to account, etc.

4. From workplaces out to society: the trade union contribution to environmental protection. Preventing cancers is a litmus test for imposing democratic control on production choices. Profit maximization and meeting human needs, including that of preserving our ecosystem, are irreconcilable opposites. By increasing workers' control over their working conditions, the trade unions can also move towards social control of production, and thereby reduce the harm it causes.

A global issue

The social inequalities described in this brochure are obviously magnified many-fold if the scope of analysis is extended planet-wide. The globalization of capital flows is all about maximising the return on investment. With this, human life and the environment become mere economic variables that shape the factors of competitiveness. One very simple fact is clear from an examination of the lifecycle of any product chain: the activities most harmful to health and the environment tend to concentrate in countries least resistant to exploitation. This is true for traditional sectors like agriculture and raw materials extraction, but no less so for high technology sectors like electronics and advanced chemicals. Multinationals systematically operate double standards.

The REACH regulation bears recent witness to the pressing need for international trade union solidarity to thwart attempts to export the most dangerous industrial activities or products to developing countries. In the discussions leading up to the adoption of REACH, industry pressed for the regulation's scope to be restricted to chemicals for the European market only[5].

[5] Cefic document, *New proposals to improve workability of REACH,* 24 February 2005, p. 4.

Conclusion

Despite the publication of studies evidencing excess cancer mortality among workers exposed to certain chemicals, the understanding that these cancers are not inevitable was too long in coming, and is still not satisfactory in industrialised countries, and even less so in developing countries. Bitter struggles are waged on pay, working hours and unemployment, rallying the mass forces of workers - work-related diseases and cancers have not drawn the same response. Barring the odd event like the Turin cancer factory scandal, or the more recent protests by French asbestos victims, occupational cancers do not grab media headlines. Yet, with their attendant agonies, grief, and lives cut short, work-related cancers affect almost exclusively the most vulnerable workers. It is one of the great social injustices of our time. They should be tackled on the same basis as other inequalities, and top the policy agenda.

It can never be over-emphasized that occupational cancers are avoidable. The REACH regulation gives the opportunity for a new start. But it alone will not be a sure recipe for improved working conditions. The key, here as elsewhere in health and safety at work, is the ability of trade unions to rally workers to take ownership of this debate. The workers on every factory-floor and in every company must be positively involved in the coming identification and assessments of workplace chemicals. They must unite to demand that the most toxic products be replaced, and if this cannot be done quickly, to demand working conditions that will give them the best possible protection. ■

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2006, 48 pages, 21 x 29.5 cm, ISBN : 2-87452-033-0
Also available in French and other European languages

With this 48-page brochure, Europe's trade unions are seeking to help inform the debate on the European Commission's new health and safety at work strategy for 2007-2012. The brochure reviews the failings of the strategy pursued from 2002 to 2006 to recommend a new strategy built around practical initiatives and a definite timetable. The publication makes the union case against any "break from introducing new legislation".
The second part of the brochure gives a capsule view of the surveys done on the health impact of working conditions in the EU.

Finding your way in the European Union Health and Safety Policy

A trade union guide

Lone Jacobsen, Viktor Kempa and Laurent Vogel

2006, 72 pages, 17 x 24 cm, ISBN: 2-87452-011-x
Also available in French and other European languages

This handbook aims to give an overview of the EU institutions and procedures involved in regulating health and safety at work, and the role of trade unions in relation to it. Depending on where their interests lie and what they already know about a given issue, readers can choose to explore the structure and organisation of the EU, ways in which trade unions can have an influence, or specific national examples.

Forthcoming:

MSD: An ill-understood pandemic

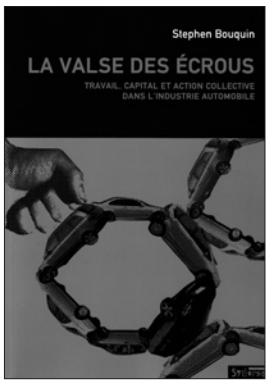
Roland Gauthy

These three letters – MSD (muskuloskeletal disorders) – mask the leading cause of occupational illness in Europe. This brochure presents a summary of the current scientific knowledge of this complex group of pathologies, examines the connection between MSD and changes in the organisation of work and proposes ideas for a necessary trade union mobilisation against this exploding health problem.

To order HESA publications: http://hesa.etui-rehs.org > Publications or email to ghofmann@etui-rehs.org

La valse des écrous

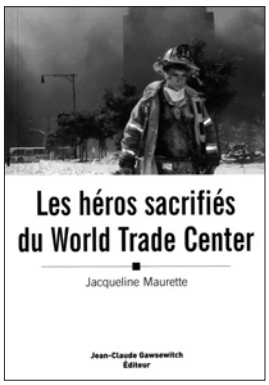
Travail, capital et action collective dans l'industrie automobile



How is the face of work organisation changing? Stephen Bouquin argues that it is not just about "push-button" profit maximization or trying to strike a balance between that and labour demands. It is never a foregone conclusion, but emerges in different ways out of the clash between capital and collective labour action. The author builds his case from an analysis of collective action by carworkers. He begins by looking at the models used to analyse the car industry, with a sound critique of the Japanese fallacy. He then moves on to a description of the key changes in work organisation over the past thirty-five years, picking out some of the big issues, and taking a special look at the use of agency workers and outsourcing in more recent times. The third section reports on ten years of Stephen Bouquin's own investigations of a Renault subcontractor in France and Volkswagen in Belgium. While not the main focus, health and safety at work does come across as one aspect of the clashes analysed by this cogently-argued and enthralling book.

Stephen Bouquin, *La valse des écrous. Travail, capital et action collective dans l'industrie automobile*, Paris, Syllepse, 2006, 306 p.
ISBN : 2-84950-089-5

Les héros sacrifiés du World Trade Center



3000 people died in the attack on the twin towers in Manhattan on September 11th, 2001. Will we ever know how many died from the consequences of clearing away the 1.6 million tons of rubble? Jacqueline Maurette, a reporter for the French magazine *Viva*, describes what it is like to work in a lethal mix of toxic agents including asbestos dust, copper and lead, dioxin, and benzene particles. Far from writing it off as inevitable or down to failings in organisation, she argues that a deliberate policy was at work to speed up operations to get the Wall Street stock exchange back open for business. Over 8000 people are currently suing for compensation for the health damage suffered during this Herculean task.

Jacqueline Maurette, *Les héros sacrifiés du World Trade Center*, Paris, Jean-Claude Gawsewitch, 2007, 205 p.
ISBN : 978-2-35013-080-4

La santé pour tous

Se réapproprier Alma Ata

This collection reflects the wealth of experiences and thinking of the People's Health Movement, a network of 300 grassroots organisations in over 80 different countries. The common theme to all the issues addressed is the fight against social inequalities of health and reclaiming ownership of health by collective movements from the most downtrodden sectors. Many of the contributions take an outspoken stand against received opinion. An essay on bird flu and large-scale factory farming, several articles on women's health, and a critique of free trade agreements are cases in point. Nor is health and safety at work overlooked, with contributions on contingent work and its consequences, and the struggle of asbestos victims.

People's Health Movement, *La santé pour tous. Se réapproprier Alma Ata*, Geneva, Cetim, 2007, 331 p.
ISBN : 2-88053-052-0
www.cetim.ch

Come i lavoratori percepiscono le proprie condizioni di lavoro

Indagine tra le aziende dell'Emilia-Romagna

This book presents the key findings of a large-scale survey commissioned by the Italian trade unions in the Emilia-Romagna region. Questionnaires were designed, based on the European working conditions survey done by the Dublin Foundation, and sent out in huge numbers (over 50 000). The response rate was surprisingly high: 10% is usually considered decent for a widely-circulated public questionnaire – this one netted more than 13 000 responses for analysis. While the survey was too wide-ranging to be able to review all the aspects it covered, some dominant trends can be singled out. There is a clear split between manual and non-manual workers as regards the long-term health impacts of working conditions. A big majority of the manual workers questioned thought they would not be able to keep doing the same job up to the age of 60. There is a separate chapter on postal workers. The book comes with a CD containing several hundred tables detailing the survey findings by different parameters. One regrettable omission is any kind of gender analysis of the results.

Carla Bonora, Davide Dazzi, Francesco Garibaldo, Emilio Rebecchi et Gino Rubini, ***Come i lavoratori percepiscono le proprie condizioni di lavoro. Indagine tra le aziende dell'Emilia-Romagna,*** **Maggioli Editore, 2006**
ISBN : 88.387.2387.7

Occupational Health and Public Health

Lessons from the Past – Challenges for the Future

This collection of articles explores how health and safety at work and public health connect and clash. It is divided into four sections. The first looks at the political nature of health. The second inquires into the changing concept of health. The third looks at specific episodes in industry's historical incompatibility with health. The fourth takes a more international view, addressing as wide a range of issues as world vaccine policy and economics, ethnic labour relations in the textile industry between 1950 and 2000, and public health in Spanish colonial Morocco. The book is also a tribute to Antonio Grieco, a pioneer in the revival of industrial medicine in Italy and one of the occupational health researchers most committed to the ongoing dialogue between labour activists and the scientific community. It is published by Sweden's National Institute for Working Life, recently consigned to the scrap-heap by the right-wing government that took office in September 2006.

Marie C. Nelson (Ed.), ***Occupational Health and Public Health. Lessons from the Past – Challenges for the Future,*** **Stockholm, Arbetslivsinstitutet, 2006, 250 p.**
ISBN : 13: 978-91-7045-810-1
It can be downloaded as a free e-book from: http://ebib.arbetslivsinstitutet.se/ah/2006/ah2006_10.pdf

Authors and publishers

If you have written or published a book about the health impacts of working conditions that you think might interest our readers, we'd be glad to receive a review copy. Please send it to:

ETUI-REHS, **Denis Grégoire – Health and Safety Department – 5 bd du Roi Albert II – B-1210 Brussels**
For more information: dgregoire@etui-rehs.org

Santé & Travail: new look to boost readership

The magazine *Santé & Travail* has been a beacon of information on working conditions in France for a general audience since 1991. In a bid to expand its readership and tie health and safety at work more solidly into public health, it gave itself a makeover in January 2007, which included upping its print run from 5000 to 30 000 and slashing 40% off the annual subscription price.

"The magazine now has backing from a consortium of sickness insurance organizations who will be sending it out to their members", says *Santé & Travail*'s editor François Desriaux. This broader support from French health maintenance organizations forms part of an approach aimed at "better informing a lay public".

For that, *Santé & Travail* is also getting editorial support from another heavyweight partner, the economic review *Alternatives économiques*, whose sympathies lie with the French anti-freemarket movement. "It isn't just a technical partnership. These are people that we've long shared the same philosophy of information with", explains François Desriaux.

Subscriptions: www.sante-et-travail.com

Recently adopted measures

EU Occupational Safety and Health Strategy 2007 – 2012	
Legal basis	Article 137 of the Treaty to implement improvements of the working environment to protect workers' health and safety.
Background	On 21 February 2007, the European Commission issued a Communication setting out a proposal for a new European Occupational Safety and Health (OSH) Strategy to run from 2007-2012. This Strategy succeeds the 2002-2006 strategy *Adapting to change in work and society: a new Community strategy on health and safety at work 2002-2006.* It sets the agenda for the next five years in terms of OSH policy development in Europe.
Key provisions	The new strategy for 2007-2012, titled *Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work*, aims to achieve an overall 25% reduction of occupational accidents. It sets out a series of actions at European and national levels in the following main areas: ▪ improving and simplifying existing legislation and enhancing its implementation in practice through non-binding instruments; ▪ defining and implementing national strategies adjusted to the specific context of each Member State; ▪ mainstreaming of health and safety at work in other national and European policy areas (education, public health, research); ▪ better identifying and assessing potential new risks through more research, exchange of knowledge and practical application of results.
The union approach	The ETUC stated that the new Commission strategy is the poorest in terms of concrete initiatives proposed since the first Community action programme adopted in 1978. The ETUC recalls that accidents at work form only a limited part of the health problems caused by work. The ETUC regrets that the communication says nothing about precisely how occupational diseases, in particular those related to cancers and MSD, will be brought down.
More details	http://hesa.etui-rehs.org > Main topics > Community strategy ETUI-REHS contact: Laurent Vogel, lvogel@etui-rehs.org

EU Chemicals Strategy: REACH	
Legal basis	Articles 94 and 95 of the Treaty on the establishment and functioning of the internal market.
Background	On 13 December 2006, the European Parliament adopted in second reading the compromise it negotiated with Council on the new regulation for chemicals, REACH, which will oblige producers to register all those chemical substances produced or imported above a total quantity of 1 tonne per year. The regulation will enter into force progressively from June 2007, and the registration process will take 11 years to be completed. The calendar for registration depends on the risk of the substance and the quantity produced. All covered substances will have to be registered by 2018. REACH also creates a new Chemicals Agency, to be based in Helsinki, which will be responsible for managing the new system, including the authorisation process.
Key provisions	**Burden of proof:** the regulation transfers the burden of proof regarding testing and evaluation of the risks of chemicals from the authorities to industry. **Authorisation of substances of very high concern:** for the most dangerous substances, there will be an obligation for producers to obtain an authorisation before using or placing them on the market. They will have also to submit a substitution plan to replace them with safer alternatives. Where no alternative exists, producers will have to present a research and development plan aimed at finding one. **Registration:** REACH requires manufacturers and importers of chemical substances (≥ 1 tonne/year) to obtain information on the physicochemical, health and environmental properties of their substances and use it to determine how these substances can be used safely. Manufacturers and importers must pre-register substances that are already on the EU market (so-called phase-in substances), if they want to benefit from transitional arrangements that allow registering them at a later stage. Pre-registration also enables registrants to share data with other registrants and avoid carrying out redundant tests. The pre-registration period is limited from 1 June 2008 to 1 December 2008.

	Communication in the supply chain: Suppliers of substances must pass on information on the health, safety and environmental properties and safe use of their chemicals to their downstream users (via a Safety Data Sheet or other means). Downstream users may only use substances classified as dangerous or which are persistent, bioaccumulative and toxic (PBT and vPvB) if they apply risk management measures identified on the basis of exposure scenarios for their use.
The union approach	The ETUC welcomed the adoption of this crucial legislation but regrets the fact that information vital to protecting workers' health given in the chemical safety reports will now only be required for a third of the chemicals originally planned.
More details	http://hesa.etui-rehs.org > Main topics > Chemicals ETUI-REHS contact: Tony Musu, tmusu@etui-rehs.org

	Adoption by the social partners of an autonomous European framework agreement to fight against harassment and violence at work
Legal basis	Article 139 (2) of the Treaty.
Background	As announced in the European social partners work programme 2003-2005, the social partners organised a seminar on the issue of violence at work on 12 May 2005 to explore the possibility of opening up negotiations on this issue in the framework of Article 139 (2) of the Treaty.
Developments	In December 2006, social partners finalised the negotiations on an autonomous European framework agreement to fight against harassment and violence at work. On 26 April 2007, the text was officially signed by ETUC, BUSINESSEUROPE, UEAPME and CEEP. The implementation of this agreement will be carried out within three years.
Key provisions	Amongst other, the agreement provides a method to prevent, identify and manage problems of harassment and violence at work, which: ■ requires enterprises to have a clear statement outlining that harassment and violence at the workplace are not tolerated and specifies the procedure to be followed in case of problems; ■ recognises that the responsibility for determining, reviewing and monitoring the appropriate measures rests with the employer, in consultation with workers and/or their representatives; ■ allows the provisions of the agreement to deal with cases of violence by third parties where appropriate. This framework agreement is the sixth signed by the European social partners since the beginning of the European social dialogue 20 years ago.
More details	http://hesa.etui-rehs.org ETUI-REHS contact: Roland Gauthy, rgauthy@etui-rehs.org

Measures in the pipeline

	Social partner consultation on protecting European healthcare workers from blood-borne infections due to needlestick injuries
Legal basis	Article 138 of the Treaty.
Background	On 6 July 2006, the European Parliament adopted a resolution on protecting European healthcare workers from blood-borne infections due to needlestick injuries. The resolution requests the Commission "to submit to Parliament within three months of the date of adoption of this resolution a legislative proposal for a directive amending Directive 2000/54/EC on biological agents".
Developments	In January 2007, the social partners were called to give their opinion on the following questions: ■ do you consider it useful to take an initiative to strengthen the protection of European healthcare workers from blood-borne infections due to needlestick injuries? ■ do you think that a joint initiative by the European social partners under Article 139 of the Treaty establishing the European Community would be appropriate?
The union approach	In its response to the Commission, the ETUC said that it is not appropriate at this stage to negotiate an agreement between social partners on the theme covered by the present consultation.
More details	ETUI-REHS contact : Laurent Vogel, lvogel@etui-rehs.org

	Social partner consultation on protecting workers from MSD
Legal basis	Article 138 of the Treaty.
Background	The Community obligations on protecting workers from musculoskeletal disorders (MSD) are fulfilled at present through the general requirements of the 1989 Framework Directive plus a string of individual directives (workplaces, work equipment, manual handling of loads, VDU and vibrations). A Community initiative on preventing MSD was provided for in the health and safety strategy 2002-2006.
Developments	The European Commission launched in March 2007 the second phase of consultation of the European social partners. In its proposal, the Commission considers that a legislative initiative, setting out a revised, integrated and more legible EU regulatory framework on musculoskeletal disorders, might be appropriate. According to the Commission, the current individual directives do not cover all types of work situations or address all risk factors leading to work-related musculoskeletal disorders. The envisaged directive would provide a comprehensive definition of work-related musculoskeletal disorders and work-related risk factors, based on the latest evidence available in the ergonomics and epidemiological literature. Particular attention would be given to the following biomechanical risk factors: force, repetition, awkward postures, static postures and contact stress.
The union approach	In its reply to the Commission in April 2007, the ETUC called for a new directive specific to MSD prevention through a consideration of all risk factors including non biomechanical ones such as work organisation, stressors, etc.
More details	http://hesa.etui-rehs.org > Main topics > MSD http://ec.europa.eu/employment_social/social_dialogue/consultations_en.htm ETUI-REHS contact: Roland Gauthy, rgauthy@etui-rehs.org

	Revision of the Working Time Directive (amending Directive 93/104/EC)
Legal basis	Article 137 of the Treaty.
Background	The Commission published proposals to amend the Working Time Directive on 22 September 2004, and revised proposals on 31 May 2005 (following the First Reading from the Parliament). The proposals must be agreed by Council and Parliament in co-decision.
Developments	■ In first reading, the EP had voted to end the use of the opt-out from the maximum 48 hour working week. A number of Member States, led by the UK, insist however to maintain national derogations from the principle. ■ The June 2006 Employment Council was unable to achieve a compromise. The main points on which deep divisions remain are preservation of national opt outs from and methods of calculating the maximum weekly working time (per contract or per worker). ■ At an extraordinary meeting of social affairs ministers held in Brussels on 7 November 2006, governments were unable for the fifth time in a row to resolve the problem. Five countries - France, Spain, Italy, Greece and Cyprus – rejected a final compromise solution drawn up by the Finnish EU presidency. Their main argument was that Europe should set a clear deadline for scrapping the provision allowing employees to work longer than the average of 48 hours per week set as a current ceiling by EU rules.
The union approach	The ETUC's positions on the main points at issue: ■ scrap the opt out clause; ■ on-call duty must be treated as working time in line with ECJ rulings; ■ the four month reference period must be kept for calculating the maximum weekly working time.
More details	www.etuc.org/a/1839 ETUI-REHS contact : Laurent Vogel, lvogel@etui-rehs.org

	Revision of the Carcinogens Directive (amending Directive 90/394/EEC)
Legal basis	Article 137 of the Treaty.
Background	In its communication *Adapting to change in work and society: a new Community strategy on health and safety at work 2002-2006*, the Commission announced its intention to propose extending the scope of the Directive on carcinogenic agents to include reprotoxic substances. The Commission pointed out the need of adapting existing directives to changes in scientific knowledge, technical progress and the world of work. The Commission launched the first phase of social partner consultations in March 2004.
Developments	The second phase, long-awaited by the social partners, was launched by the Commission in April 2007. The social partners were requested to inform the Commission of their positions on other measures which might be envisaged, such as: ■ extending the scope of Directive 2004/37/EC to include category 1 and 2 reprotoxic substances; ■ updating binding limit values for substances included in Annex III to Directive 2004/37/EC; or ■ including binding limit values for more substances in Directive 2004/37/EC; ■ introducing objective criteria for setting binding occupational exposure limit values for carcinogenic, mutagenic and reprotoxic substances, explaining what these criteria should be, and indicating what should be the process for setting new limit values; ■ training and information requirements (e.g. how existing measures could be implemented more effectively, examples of best practice, ways to improve coordination and sharing of information). The social partners have six weeks to answer these questions.
More details	http://hesa.etui-rehs.org > Main topics > Chemicals ETUI-REHS contact : Tony Musu, tmusu@etui-rehs.org

	European Commission's proposal for a Globally Harmonized System of Classification and Labelling of Chemicals
Background	The Globally Harmonized System of Classification and Labelling of Chemicals (GHS) is a United Nations scheme designed to make sure that across the world, the same criteria are used to come up with classifications of harmful effects of chemicals and that they are labelled in the same way.
Developments	On 21 August 2006, the European Commission published a draft text of a Regulation on Classification and Labelling of Substances and Mixtures based on the Globally Harmonised System. The proposed Regulation will apply directly to Member States (like the REACH Regulation). The European Commission Internet consultation closed on 21 October 2006. When adopted by the legislature, the GHS Regulation will repeal the currently existing EU Directives on classification and labelling, i.e. Directive 67/548/EEC and 1999/45/EC, after a transitional period.
The union approach	In its response to the consultation, the ETUC strongly disagrees with the proposal to exempt from the scope of the Directive 98/24 – protection of the health of workers from the risks related to chemical agents – additional substances classified as hazardous under the GHS. The ETUC also stated that the GHS Regulation must assure that all substances today listed on the Annex I of Directive 67/548/EEC will maintain their classification after implementation of GHS and REACH.
More details	ETUC detailed comments are available from http://ec.europa.eu/enterprise/reach/ghs_stakeholder_replies.htm ETUI-REHS contact: Tony Musu, tmusu@etui-rehs.org

	Draft directive to simplify and rationalise the national implementation reports on the 1989 Framework Directive
Legal basis	Article 137 (2) of the Treaty.
Background	The 1989 Framework Directive on Health and Safety and its daughter Directives contain provisions requiring Member States to report to the Commission on the practical implementation of a number of occupational safety and health Directives at either four or five yearly intervals. This proposal is the first occupational safety and health proposal to come from the EC's simplification plan from their *Communication, Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment* published in October 2005. The proposal has completed two stages of social partner consultation, at the European level, in 2005.
Developments	The proposal seeks to simplify and rationalise the reporting process by: ■ aligning reporting cycles from four to five years so reports will have to be submitted less frequently; ■ synchronising reporting cycles so that all reports will be due at one time; ■ developing a standard reporting structure with two parts consisting of a general and specific section. The proposal will extend the reporting obligations to include Directives 2000/54/EC and 2004/37/EC on biological agents and carcinogens respectively. Council negotiations commenced on 12 October 2006. The proposed directive is expected to be on the agenda for political agreement at a Council meeting during the first half of 2007. It will then go through the standard co-decision procedures.
The union approach	In its response sent to the European Commission on 25 May 2005, the ETUC stresses that "the current system is inadequate" because it provides for publication of reports at different intervals and does not allow the interaction between the directives to be taken into account. The trade union body hopes that having a single report will enable an in-depth evaluation to be done of each Member State's overall health and safety at work strategy. But the ETUC will not accept a rationalisation that rolls back European OSH legislation. Its response takes a firm stand against any attempt to simplify or unpick the 1989 Framework Directive on promoting workers' safety and health at work.
More details	http://hesa.etui-rehs.org/uk/newsevents/files/Consultation-SS-CES-EN.pdf ETUI-REHS contact: Laurent Vogel, lvogel@etui-rehs.org

Forthcoming

	Proposal for a Regulation of the European Parliament and of the Council concerning Community statistics on public health and health and safety
Legal basis	Article 285 of the Treaty.
Background	The Community strategy on health and safety at work 2002-2006 called on the Commission and the Member States to step up work in hand on harmonisation of statistics on accidents at work and occupational illnesses, so as to have available comparable data from which to make an objective assessment of the impact and effectiveness of the measures taken under the Community strategy. In a proposal issued in February 2007, the Commission considers it is necessary now to give a firm basis through providing a basic legal act in the areas of public health and health and safety at work statistics.
The union approach	There is no doubting the value of harmonising statistics. So great are the differences between Member States where occupational diseases are concerned that harmonisation of statistics will not be possible without a minimum harmonisation of systems for reporting and recognizing work-related illnesses. Ironically, this is one of the earliest things the Community set out to do but has never managed because the legal instruments adopted since 1962 are only recommendations.
More details	ETUI-REHS contact: Laurent Vogel, lvogel@etui-rehs.org

	Commission proposal for the codification of Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work
Legal basis	Article 137 (2) of the Treaty.
Background	Council Directive 83/477/EEC of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work has undergone repeated and extensive amendment. The Commission wants to clarify and streamline it by codifying it.
Developments	The Commission presented its proposal to codify Directive 83/477/EEC in November 2006.
The union approach	The Commission is proposing to codify all the provisions in force. It will help make the Community rules simpler to understand.
More details	ETUI-REHS contact: Laurent Vogel, lvogel@etui-rehs.org

	Commission proposal for the codification of Directive 89/655/EEC concerning the minimum safety and health requirements for the use of work equipment by workers at work
Legal basis	Article 137 (2) of the Treaty.
Background	Compliance with health and safety regulations in the use of work equipment is an important aspect of prevention measures. Since 1989 these measures have been the subject of a minimum harmonisation. The directive of 30 November 1989 has been amended several times so as to cover a large number of work situations (mainly related to work at a height) and to incorporate a broad approach to safety at work by referring to ergonomic principles.
The union approach	Codification may not make any changes to the content. The European Economic and Social Committee notes in an opinion that the Commission has breached this basic principle without explanation in the recitals on self-employed workers and training for workers required to use equipment to perform work at a height.
More details	ETUI-REHS contact: Laurent Vogel, lvogel@etui-rehs.org

European working conditions survey: work makes 35% of workers sick

The European Foundation for the Improvement of Living and Working Conditions, located in Dublin, released the full report of its Fourth European Working Conditions Survey on 21 February. It provides a unique insight into the views of around 30 000 workers in 31 countries on a wide range of issues, including work organisation, working time, equal opportunities, training, health & safety and job satisfaction.

The survey found that 80% of European workers are 'satisfied' or 'very satisfied' with their working conditions. But, 35% of those surveyed reported that work affects their health.

Actual exposure to risks seems to have stayed broadly unchanged or gone up slightly since 1991. However, the survey found a sharp rise in work intensification, with more people working at high speeds and to tight deadlines. 46% of the EU25 workforce reported having to work at very high speeds three-quarters of the time or more. This is 11% more than in 1990. This increase in work intensity is higher among highly-skilled blue-collar workers.

The pace of work is also a matter of concern. The Dublin Foundation's survey reveals that the pace of work is influenced by factors over which the worker has no control. For up to 90% of service sector employees, the pace of work is determined by direct demands from other people. In the building industry, the pace of work of more than 60% of workers is set by workmates, while pace-of-work in the manufacturing and mining industries is set for 4 in 10 workers by machinery. Looking at factors like workers' ability to choose in which order they perform tasks, their speed of work or their working methods, the survey reveals that the level of autonomy at work varies with educational level. Unsurprisingly, highly-qualified white-collar workers enjoy most autonomy in their jobs.

The survey also looks at workers' exposure to the main physical risks. Repetitive hand or arm movements are the most commonly cited physical risk, with 62% of the European workforce reporting exposure 25% or more of the time. This is a 4% rise from the 2000 survey. Next come painful or tiring positions, to which 50% of the workers are exposed for at least a quarter of their working time. These risks have a direct impact on workers' health, as almost a third of the European workforce report suffering from backache, muscular pains and stress.

European workers were also interviewed on their exposure to "new" risks like violence, harassment and bullying at the workplace. The findings show that the way in which workers perceive this risk varies with their cultural environment. Broadly, exposure to violence and threats of violence is greater in northern Europe (Denmark, Sweden, the Netherlands, Finland) than in the Mediterranean countries (Greece, Spain, Portugal, Italy, Cyprus, Malta). For instance, reported levels of workplace harassment range from 17% in Finland to 2% in Italy, with the worst-affected sectors being education, health and the hospitality industry. The problem is more prevalent in bigger workplaces (250-plus workers) than in SMEs. Exposure to psychosocial risks brings a significantly above-average level of sickness absences. ■

The next *HESA Newsletter* will take a more detailed look at the findings of this survey into European workers' health.

Belgium: Union claims suspiciously high cancer count in chemical plant

The FGTB trade union is concerned at the rising cancer death toll among former workers at two production plants owned by Belgium's Solvay chemical group at the small town of Jemeppe-sur-Sambre between Namur and Charleroi in the southern half of the country. 21 of the 70 workers in two units producing chlorine and caustic soda by mercury electrolysis have died from cancer, while others are suffering acute kidney failure and loosening teeth. Tests on three workers claiming recognition for an occupational disease have shown up urine mercury levels two to four times higher than the norm in Belgian industry. Mercury is highly toxic to the kidneys and brain. In Belgium, mercury poisoning has been a scheduled occupational disease since 1927.

The lack of a large-scale epidemiological study means that no link has yet been able to be made between cancer and exposure to mercury vapour. The FGTB believes that making all the urine screening of workers employed in both mercury electrolysis shops available would help move the investigations forward. The files are kept by Solvay and cannot be opened-up to others for reasons of doctor-patient confidentiality.

Solvay has gradually moved away from the mercury-based production process. The first unit was shut down in 1992, followed by the second nine years later. Workers report that little servicing was done on the equipment destined for the scrap-heap in the years leading up to closure, and that mercury leakages from worn barrier seals and tanks were increasingly frequent. "There was mercury all over the shop. It wasn't just vapour in the air, it was on the floor, too; you walked through it and trailed it everywhere. Even in the canteen next door where we ate", a former worker told the local press.

The whistleblowing workers, whose names have been withheld, say that Solvay failed to take the problem seriously enough. Workers whose urine tests showed up excessively high mercury levels were moved to other jobs until their levels came down. This was a case-specific response that ignored the longer-term health impacts of repeated mercury exposure. And even this meagre preventive measure was taken only for workers with exceptionally high levels, if the workers reports are anything to go by. "You could still easily be kept there with a level of 200, because swapping an experienced man for another would affect production", testifies one ex-worker. ■

China: trade union campaign for workers with cadmium poisoning

International trade unions have been campaigning for some months on behalf of at least 400 Chinese workers at two battery manufacturing plants affected by cadmium poisoning. The company Gold Peak Industrial Holdings Ltd, a main world supplier of batteries to the toy and electronics industries, is accused of destroying the health of hundreds of workers in its Chinese subsidiaries. Most of those exposed to cadmium, a metal which the International Agency for Research on Cancer classes as a known human carcinogen, worked in two factories located in the southern Chinese town of Huizhou.

Handling the metal without appropriate protection can cause health problems ranging from simple nausea, dizzy spells or pain to serious kidney, lung or bone damage, and even cancer. On top of that, once it is in the

system, cadmium takes between 10 and 30 years to be eliminated by the body. The Chinese workers, mostly young women, complained of acute pains. There are also reports of fertility problems. Dozens of workers have had to be hospitalised over the past two years. 16 workers have had their cadmium poisoning recognised as an occupational disease.

But the path to getting their diseases recognized as work-related still remains strewn with obstacles for by far most of the workers. Many workers have paid for blood tests out of their own pocket, because those done by Gold Peak's medical service after a strike in 2004 proved unreliable. The Chinese subsidiaries of the multinational, whose biggest shareholders include local government officials, framed a crafty counter-strategy that combined stick – threat of prosecution – and carrot – promise of cash for dropping compensation claims.

In August 2005, seeing no let-up in the pressure, Gold Peak finally announced that it was setting up a fund to provide financial help to the poisoned workers. But the fund was woefully inadequate, and serious management failings rendered it useless. By the company's own admission, only 4% of the 400 poisoned workers received assistance.

More than 200 former Gold Peak workers are now fighting for compensation. They have been backed since March 2007 by the International Trade Union Confederation which is running a letter-writing campaign to the Chinese authorities and the top executives of the Hong Kong-based multinational. ■

Information and to support the campaign: http://www.global-unions.org/pdf/ohsewpQ_9h.EN.pdf

HESA*mail*

European workplace health and safety news

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HESA NEWSLETTER

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