

Soft law and voluntary measures: the deregulator's new clothes

The Netherlands is in the driving seat of the European Union for the second half of 2004. Governments usually try to use their Presidency to inter-mediate, intercede and broker compromises. Not so the Dutch Presidency, which has taken a stance firmly on the right of the political stage in Community occupational health debates. Its choice may well be prompted by domestic politics. The Balkenende II government's (see Box) policy stall set out in spring 2004 was an all-out assault on labour. The results are a matter of record: autumn 2004 was marked by mass demonstrations and rashes of strikes not normally seen in the country.

The Balkenende II government

The Balkenende I government was formed in 2002 as a coalition of Christian Democrats (CDA), right-wing liberals (VVD) and the Pim Fortuyn list, an ultra-free-market, islamophobic grouping which won over 16% of the votes in a context marked by the killing of its leader just days ahead of the 15 May elections. It was a short-lived administration. October 2002 saw the coalition plunged into crisis as a result of political in-fighting in the Pim Fortuyn list. New general elections were called for 22 January 2003. The Balkenende II government was again formed as a coalition, this time of Christian Democrats with right-wing liberals and a centre liberal party (D66). It adopted an austerity policy with social security payments in the firing line, and decided to take part in the military occupation of Iraq. Its policy has met with fierce opposition from both the labour and anti-war movements.

Context and challenges

The consequences of the Dutch Presidency's approach are not to be lightly dismissed. The presidency is taking place against a singular set of circumstances, not least:

- It is the first post-enlargement presidency, and the political proposals and spin will to some extent set the tone for the coming years.
- It is the first presidency to follow the election of a new European Parliament in June 2004.
- One core theme was the preparation of the new social action programme for the enlarged EU.

There was no shortage of things to work on for improving prevention. The logical next step on from the Commission's review of the practical implementation of the 1989 Framework Directive and five other directives would have been to discuss what that review told us. The unsatisfactory situation

with preventive services; the fact that many workers have no form of representation in health and safety; States' seeming inability to frame coherent preventive strategies - all these should have been debated. Other big issues were on the agenda, too. The debate around the proposed reform of market rules (REACH project) makes a critical look at preventing chemical risks a live topic. The failings of Community legislation in relation to musculoskeletal disorders could have been tackled. The Community strategy for an enlarged EU of 25 countries should have been spelled out.

Open season on legislation

All these are hot topics, but the Dutch government had its mind set on tackling health at work purely from the employer's angle. The gist of its contribution to the debate can be summed up in two obsessive delusions:

- Prevention costs much too much.
- Legislation "bad", soft law and voluntary measures "good"!

The informal Social Affairs Council meeting in Maastricht on 8 to 10 July 2004 set the tone. The Balkenende II government showed no interest in the substance of workplace health policies. It was all about setting an all-out campaign going for deregulation. The Dutch Presidency's workshop document dismissed occupational health in a single sentence as just one aspect of policies of investment in human capital and productivity gains. It said "In order to increase the level of productivity at the workplace, special importance has to be paid to effective health and safety policies as well as to the introduction of innovative and flexible forms of work organisation". It is a throwaway sentence that holds out no practical perspectives. Above all, it does not add up in a context where flexibility and work intensification (stemming directly from productivity drives) are major causes of health damage. Putting productivity before occupational health puts the focus on action to reduce risks with immediate tangible costs to employers: work accidents and ill-health leading to time off. Long-term risks, like work-related cancers, burn-out and damage to reproductive health barely get a look-in.

The Dutch Presidency hosted a major health and safety conference in Amsterdam from 15 to 17 September 2004¹. It was boycotted by all Dutch trade unions as a worker-bashing exercise.

¹ The conference documents are available at: <http://www.arbo.nl/news/conferentie.stm>

The Amsterdam conference is worth detailed consideration for the insights it gives into the substance and techniques of deregulation strategies.

Basically, the Amsterdam conference's contribution to the debates on occupational health can be summed up in a few words. Legislation is an old-fashioned instrument that puts too big a cost burden on business. Any non-legislative option is virtually a magic bullet. The European Union has to do a U-turn and revise the 1989 Framework Directive and individual directives downwards.

This is "deja-vu all over again". Employers and right-wing governments regularly set this particular hare running. Think of the Molitor Group's activity in 1994-1995².

The spin bears closer examination, however.

From mantras...

In Hinduism and some branches of Buddhism, the mantra is a key element in the quest for salvation. It is a formula taken from sacred texts which when repeatedly intoned produces a beneficial effect simply in and of itself. To some extent, this was the pattern to which the Dutch government's representatives' speeches went. They contained a ritual refrain of keywords in place of a strategy: soft law, voluntary measures, Social Dialogue (preferably coupled to the adjective "sectoral"), legislative simplification, economic incentives, business case, cut the red tape, etc. The Dutch Presidency presented any alternative thinking to its own in such crude terms as to make it seem impractical³. At no point was any analysis brought to bear to explore what each instrument could contribute, its limitations, and where it made sense.

... to statistics

Nowadays, magic words are not confined just to incantations. Statistics hold a central place. Presenting his statistics, Secretary of State for Work van Hoof had the air of making the decisive case for "simplification" of the Framework Directive. He claimed that statutory health and safety provisions represented a cost of 1.15 billion euros in administrative expenses to Dutch business (on which, see the article on p. 28). 60% of these costs were laid at the door of international regulations, i.e., mainly Community directives. A labour inspector from an Eastern European country sitting next to me burst out, "For the past five years, the European Union has been pushing us to transpose directives, saying that they would be good for our economies. Only now are we being told that they cause financial disaster". Mr van Hoof's figures may have been questionable, but his message got across very clearly...

The analysis of the administrative costs claimed by the Dutch government is informative. All occupational health management, planning and communication activities are treated as a cost. The litany of activities includes:

- risk assessment;
- information and training for a worker using dangerous machinery;
- choosing work equipment;
- warnings to workers in the event of serious and imminent danger;
- building stability inspections.

Singling out all these activities as red tape to be cut at any cost raises a big political issue. For over thirty years, there has been a fairly wide consensus that health at work is not to be dealt with purely reactively on a risk by risk basis; that it is important to put in place across-the-board management that mainstreams health and safety across business policy choices. It makes no sense to want businesses to carry out across-the-board management of problems that impact health and safety, but to skimp them.

An approach that sees every management activity as an administrative cost to be cut can lead to two kinds of political proposals:

- a return to risk-by-risk regulation (clearly not the Dutch government's option of choice);
- a call for full-on deregulation that leaves employers free to choose what they do by way of prevention.

Behind the economic analysis (based on a bluff) lies a power issue. It is not costs as such that the liberal right cannot stomach. Even assuming total deregulation, big costs would still remain if only for fear of the legal consequences of a lack of prevention, or for evident practical reasons. In fact, any employer with a smidgin of common sense can see the folly in setting a worker to work on dangerous machinery without giving him instructions. However little he may care for the worker's life, production interests will give the necessary prompting. Likewise, the third-party certification of firms so heavily sold by the Dutch government usually involves high administrative costs. What it cannot buy, therefore, is the idea that public or social control can dictate any of an employer's activities, the fact of limiting the exercise of the employer's power by conditions set by society. It betrays a vision that the market will provide, that it will strike a balance between the sum total of individual self-interests and the general good. It is a profoundly tub-thumping approach which disregards the fact that the market is structured precisely by social institutions. It holds out the administration of business (described as "management" to give it a positive spin) as completely distinct from the administration of the State (dubbed "bureaucracy" to give it a negative spin).

² See: Molitor Group: deregulation assault on health and safety, *TUTB Newsletter*, No. 1, October 1995, p. 2-3.

³ To illustrate this offhand treatment of the other options, in a document which claims to summarize the contribution made by the Amsterdam conference, the Dutch Presidency writes: "The next Action Programme on Occupational Safety and Health should explicitly allow for other methods of intervention in addition to legislation" (SZW, Conference "A Social Europe: Let's Deliver", Workshop Documentation, 8-9 November 2004). The assumption is that this is not happening at present, otherwise what is all the talk about? A simple glance through the various Community action programmes on health and safety is enough to show that they invariably refer to the need to combine different methods of intervention.

Skimped concrete proposals

But this general spin should have led on to policy proposals, and here, the Dutch government had little to say.

The only concrete proposals lie in three points:

- a rest from legislation (on which the Dutch government is backed by the European employers' confederation, UNICE);
- "simplification" of the 1989 Framework Directive (which seems not to have been taken up by UNICE or at least not as a priority);
- transforming the individual directives (or the first five, at least) by turning their annexes into simple non-binding recommendations⁴.

Broadly, this bears all the hallmarks of the "will this do?" school of policy formulation. More well-developed and original proposals might have been expected.

The idea of a rest from legislation does not say what will be done about unresolved issues. Will setting up a "sectoral social dialogue" be enough to address the problems of musculoskeletal disorders or work-related cancers? What is the Dutch government's thinking in areas as different as developing occupational exposure limits for dangerous chemicals or the serious health and safety problems of casual hire-and-fire work? These are "details" which bore looking at in a bit more depth at least...

Simplification of the 1989 Framework Directive appears as the centrepiece of the agenda. Let us not mince words. The text of the Framework Directive is simplicity itself. Compared to the Dutch legislation in force at the time when it was adopted, its wording is clear, precise, and not over-complex. "Simplification" is actually a codeword for deregulation. But, here again, the Dutch government has made no effort. What bits of the Framework Directive are to be deregulated? Preventive services? The right of workers to stop work in the event of serious and imminent danger? Consultation of workers and their representatives? Health surveillance? The Dutch government's intentions are unfathomable. Available information suggests that it would particularly like to scrap the employer's obligation to perform a risk assessment. This would be the kiss of death for one of the key elements of any systematic management of workplace health problems. Most of the individual directives would be weakened, too, as they assign a key role to risk assessment.

Turning the annexes of the individual directives into simple recommendations would have devastating consequences. For some directives, it is only the annexes that put a practical gloss on the general terms of the main provisions, which are mainly procedural. The Workplaces and Use of Work Equipment Directives are cases in point - which would be crippled without their annexes. The same also applies to a lesser extent to other individual directives, like the Manual Handling of Loads and VDU Directives. Only the Personal Protective Equipment Directive would be under threat. Such a drastic reform would leave Community legislation in tatters.

A European "Competitiveness" Council of Ministers held on 25 and 26 November 2004 adopted a list of directives to be partially deregulated ("simplified"). The Dutch Presidency managed to get the 1989 Framework Directive included in it. It is more a symbolic than real victory. The inclusion of the Framework Directive (and the REACH project) in the list of texts to be "simplified" is a worrying development, but the decision was taken on extremely chaotic bases with practical proposals nearly devoid of any significance.

The decision to slim down the Framework Directive was explained away by a gross manipulation of the facts. The analysis of the problem comes in just one sentence, "Yearly information requirements with regard to all of the individual measures impose a disproportionate burden on the Member States"⁵. The answer to this awful problem is to cut back to a summary report every six years. The easy reply is that it is not readily obvious how a government could implement a preventive strategy without carrying out a regular and detailed follow-up of the situation⁶. But comparing the "Competitiveness" Council's analysis to the Framework Directive's actual provisions, it is clear that the "Member States' annual report" is pure fiction. The Framework Directive actually requires a report every five years (article 18.2). The conclusion has to be that none of the twenty-five Ministers present at the meeting had bothered to read the Directive they were consigning to the "simplification" process. Likewise, none of the twenty-five ministers was aware of the Commission's plans for a single report for all the health and safety Directives⁷. This shows that handing the "Competitiveness" Council of Ministers a general supervisory brief in areas for which the Ministers concerned have neither a scrap of knowledge or interest is little short of shooting oneself in the foot. ■

⁴ In his closing address to the Amsterdam conference, Secretary of State van Hoof muddled the waters with this requirement by calling for "clarification" of the status of the annexes to Directives. But he cannot be unaware that that status has long been clear both in the intentions of the legislature and the case law of the Court of Justice - the provisions of the annexes have the same binding value as the body of the directive.

⁵ See: Council Document 14687/04 (Press 323), provisional version, p. 13.

⁶ Which is precisely what the Dutch Ministry of Work does with its annual "ArboBalans" report (detailed review of working conditions), which is not a requirement of any Community directive!

⁷ Flagged up in the Commission Communication on the Community health and safety strategy for the period 2002-2006.