Framework Directive up before ECJ

The ECJ has handed down rulings in the first two sets of non-compliance proceedings on the 1989 Framework Directive. In both cases, the Court held that the States concerned - Italy and Germany - had failed to transpose the Framework Directive properly. But proceedings are also pending against other States, and some national transposing legislation has been amended as a result of Commission threats to open formal proceedings. These include the French government's passing of the Decree of 5 November 2001 requiring a written statement to be drawn up of the results of the risk assessment and updated at least once a year, and the Belgian government's Royal Decree (regulations) of 10 August 2001 on the consultation of workers on welfare at work in firms with no collective representation bodies (Occupational Safety and Health Committee, or, failing that, a shop stewards' committee).

The ruling against Italy

The ECJ handed down its ruling in case C-49/00, Commission v Italy on 15 November 2001, upholding the three grounds of complaint put forward by the Commission, namely:

1. The risk assessment provision of Decree-Law No 626/1994 refers to a specified set of risks. It does not make it clear that this list is indicative, and that all risks must be evaluated by the employer. The Court held that Member States must require employers to carry out a risk assessment of all sources of risks in the workplace.
2. The Italian legislation did not make the enlisting of external prevention services compulsory where the skills available within the undertaking were insufficient. In practice, circumstances vary widely, and many firms simply use the services of a "competent doctor" where health surveillance is compulsory.
3. The Italian legislation did not define the capabilities and aptitudes that the workers appointed to form the company prevention services must possess, nor the external expertise. It left employers too much discretion.

Interestingly, it is not just the Italian transposing legislation that falls down on the latter two points - enlisting external prevention services and the capabilities of internal prevention service personnel. Other countries (the United Kingdom and Ireland in particular) have brought in very similar rules to the Italian legislation so as to leave employers wide discretion in the choice of what preventive services to establish. In Italy's case, the 1993 draft legislation to incorporate the Framework Directive clearly defined the capabilities and aptitudes of the internal prevention service personnel and left the expertise of external service personnel to be defined by future regulations. But Confindustria, the main Italian employers' confederation, took violent objection to this provision, and the government caved in to the employers' demands in flagrant violation of Community law when passing Legislative Decree 626 of 19 September 1994. Every government that came and went between 1994 and 2002 failed to enact the necessary regulations, and the capabilities and aptitudes of all prevention personnel (apart from occupational health doctors) were never defined. The practical outcomes of this soon filtered through: the evidence of many assessments of the implementation of the Framework Directive is that the formation of preventive services is completely shambolic. An unregulated prevention consultancy market has developed, whose professional abilities do not necessarily match the real needs.

The ruling against Germany

The ECJ handed down its ruling in the proceedings against Germany (Case C-5/00) on 7 February 2002. The Commission's view was that by exempting employers of 10 or fewer workers from the duty to keep documents containing the results of a risk assessment the German legislation had not properly transposed the Framework Directive.

The Commission's arguments focused on three issues:

1. the need for a written risk assessment regardless of the size of the firm;
2. the employer's obligations as regards risk assessments;
3. the method of transposition used in Germany, where some of the Framework Directive's obligations were laid down in compulsory regulations made by the *Berufgenossenschaften* (statutory work accident insurance institutions).

The ECJ ruling found in the Commission's favour on the first point. All firms must have a written risk assessment statement. The German legislation exempting small firms is in breach of the Directive.

But it sided with Advocate General Geelhoed's view that the Commission had not brought proof that Germany had used an unsatisfactory method of transposition.

The Court also upheld the German government's contention that a regulation which requires occupational health doctors and safety officials to draw up a risk assessment is inherently equivalent to the Directive's requirement for employers to be in possession of a risk assessment. This is a questionable finding based on too rigid a distinction between article 9 of the Directive (which requires the employer to be in possession of a document containing the results of the risk assessment but does not specify by whom the document is to be drawn up) and article 6 of the Directive, which requires the employer to evaluate those risks which cannot be eliminated. Arguably, two distinct documents - one containing the specific input of certain specialists to the risk assessment, and the overall assessment covering all working conditions - are not one and the same thing. The essential thing here is not to specify who should draw up the document, but to make it clear that the risk assessment is a multidisciplinary exercise covering all aspects of a business activity. It is open to discussion whether a two-tier preventive service (occupational health on one hand, safety on the other) can come up with such a comprehensive assessment.

Here, too, the scope of the judgement reaches beyond the facts of the German case alone. Legislation in other countries allows groups of employers to evade their obligation to be in possession of a written risk assessment. Italy is a case in point where a sort of self-certification system allows family businesses employing 10 or fewer workers to declare that they have evaluated the risks without providing a shred of written evidence on the contents of their assessment.

These two judgements are the first cases in which the ECJ has found Member States guilty of non-compliant transposition of the Health at Work Directives in cases other than complete failure to transpose. The Commission's job, of course, is to ensure that Member States give full application to the Directives. But where occupational health is concerned, we have time and again pointed out how seriously under-resourced the Commission is to do this. It must be better-resourced if it is to be an effective watchdog not just on the transposition, but also the practical application of the Directives. ■

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