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.