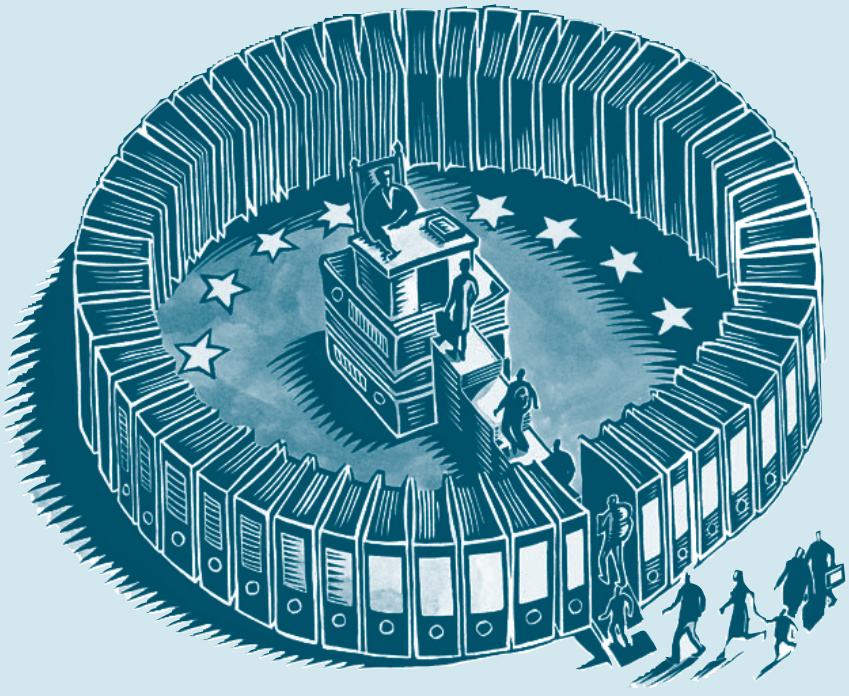
SPECIAL REPORT

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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