



**The machinery of  
occupational safety  
and health policy  
in the European Union**  
History, institutions, actors

— **Laurent Vogel**

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**etui.**

The **European Trade Union Institute** (ETUI) is a non-profit international association which conducts research and provides training on key European economic and social policies.

The Working Conditions, Health and Safety Unit provides ETUI expertise to the European Trade Union Confederation in order to inform the European political debate and social dialogue. Its aim is to promote a quality work environment in all sectors throughout Europe.

The ETUI keeps the drafting, transposition and application of European health and safety at work legislation under close review. It set up an *Observatory on the application of the European directives* to conduct comparative analyses of what changes Community legislation has brought to the different preventive systems of EU countries, and works out common trade union strategies.

The ETUI provides support to the trade union members on the Luxembourg-based Advisory Committee on Safety and Health at Work.

It carries out ongoing research into fields like risk assessment, the organization of prevention, chemical and psychosocial risks, asbestos, the participatory design of work equipment, and the gender dimension in workplace health.

It runs networks of experts in technical standards development (ergonomics, safety of machinery) and chemical substances (implementation of REACH, classification, risk assessment and framing occupational exposure limits). The ETUI is an associate member of the European Committee for Standardization (CEN).

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## Preface

*One of the aims of the European Trade Union Institute (ETUI) is to provide tools for analysis and information that enable a better understanding of how the European Union functions, particularly in terms of its social policy developments.*

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Improved occupational safety and health (OSH) is a major challenge for the trade union movement. When surveyed about what they expect from their unions, most workers list occupational health as a top priority. Action in this regard is complex, however. First, there is the essential day-to-day work undertaken by the unions in the workplace. This is reinforced by networking the experiences of particular sectors with regard to specific or regional issues. There are numerous links between occupational health issues and other union objectives (democracy in the workplace, gender equality, environmental protection, etc.). In addition, the need to act across borders is increasing in line with international trade, globalisation and EU enlargement. All these developments demonstrate the importance of cross-border trade union cooperation and the production of joint strategies.

This guide is aimed primarily at worker representatives responsible for health and safety at work and union officials involved in this area. It will also be useful to anyone with an interest in EU policy developments or involved in preventing occupational risks.

It gives an overview of the background to, principle actors in, and essential tools of, EU occupational health and safety policy with the aim of contributing to a better understanding of this policy and of facilitating effective intervention at European level.

The information is up-to-date as of the end of March 2015. Our Institute's information tools, such as *HesaMag* magazine, the *Hesamail* e-newsletter and our website, will provide regular updates of any changes.





# Chapter 1

## A long and winding road

### (1958-2004)

The European Union is the product of the links forged between different European countries in the aftermath of World War II. The Treaty of Paris established the European Coal and Steel Community (ECSC) on 18 April 1951 for a 50-year period that ended in July 2002. The six countries that created this Community were the Federal Republic of Germany, Belgium, France, Italy, Luxembourg and the Netherlands. The coal mining and steel industries had a central role to play in rebuilding the post-war economy.

In 1957 two new 'Communities' were established by the same six Member States. The two 'Rome Treaties'<sup>1</sup> became effective on 1 January 1958. One established the European Atomic Energy Community (EAEC) referred to in shorthand as Euratom. The other laid the foundations of the European Economic Community (EEC) usually referred to at the time as the 'Common Market'.

The EAEC is an industry community whose main objective is rapid growth for the nuclear industries cast as a contributor to raising the standard of living in the Member States. The European Atomic Energy Community has not merged with the European Union, but has kept a distinct legal personality while sharing the same institutions.

The EEC has powers across all sectors of the economy. Different treaty revisions accompanying the further development of the Community have expanded the spheres of responsibility of what has become the European Union.

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1. The term 'Treaty of Rome' used without further qualification below means the Treaty establishing the European Economic Community. The other Treaty of Rome is referred to as the 'Euratom Treaty'.

The executives of the three Communities were merged in 1965, but the term ‘European Union’ was not used until the Maastricht Treaty which came into force on 1 November 1993. The European Union took over all the competences of the ECSC when it ceased to exist in July 2002.

The European Union has been repeatedly enlarged from its original six founding Member States, starting in 1973 with the accession of Denmark, Ireland and the United Kingdom. The biggest enlargement came in 2004, when the European Union increased from 15 to 25 Member States, mostly by new additions from the former Soviet bloc. At the present time, the European Union has 28 Member States.

Negotiations are underway with other countries also wanting to join. Those lined up in 2015 are Albania, Macedonia, Montenegro, Serbia and Turkey. Two further countries regarded as potential candidates are Kosovo and Bosnia-Herzegovina. As part of the negotiations for joining the European Union, the States concerned are gradually incorporating the Community workplace health and safety rules into their national law.

An agreement on the European Economic Area was also concluded in 1992 with the European Free Trade Association (EFTA) countries. This was rejected by the Swiss people in a referendum and currently covers Iceland, Liechtenstein and Norway. The EU health and safety at work directives have to be implemented in these countries and the rules on the markets in work equipment and chemicals also apply. While there is no obligation for these directives to be implemented in Switzerland, in practice a part of the Community rules on health and safety at work have been voluntarily incorporated into Swiss law.

#### Health and safety under the ECSC and Euratom

Article 3 of the ECSC Treaty provided for ‘improved working conditions and an improved standard of living for the workers in each of the industries for which it is responsible so as to make possible their harmonisation while the improvement is being maintained’. This general provision did not vest law-making powers in the ECSC apart from in one very specific area: it could put a stop to reductions in wages if these resulted in a drop in workers’ living standards and were used by businesses as a means of permanent economic adjustment or inter-firm competition. The ECSC’s assigned task, by contrast, was to promote technical and economic research (Article 55 of the ECSC Treaty), a responsibility that also covered occupational safety. In the wake of the Marcinelle disaster in Belgium (8 August 1956) that cost the lives of 262 miners, the ECSC Council of Ministers created a permanent body for safety in coal mines, its jurisdiction being later extended to all the extractive industries. In 1964, the ECSC also set up a general committee for health and safety in the steel industry. Health and safety have been affected by countless research programmes into hygiene, ergonomics,

occupational safety and occupational medicine. The present-day European Union has a tripartite working group reviewing issues of health and safety in the extractive industries – the Advisory Committee for Safety and Health, frequently referred to as the ‘Luxembourg Committee’.

The Euratom Treaty has a separate chapter on protecting the health of workers and the general public against the dangers arising from ionising radiations by setting basic standards, the first of which were laid down in Directives of 2 February 1959. These have been repeatedly amended and the current benchmark provisions are those of Directive 2013/59/Euratom. Legal rule-making under Euratom is subject to different legislative procedures than those used for the EU’s binding instruments, a factor that reduces the input that trade unions can have. Euratom worker protection rules pay scant attention to the workplace labour relations system. No mention is made of participation and consultation of workers who are treated as the objects of protection measures requiring mere information and training, thereby reflecting a technocratic, authoritarian approach to prevention. Collective representation

for workers is mentioned in the Euratom founding documents in one eventuality only – where the competent authorities of each Member State are allowed to specifically authorise firms to exceed the maximum exposure levels set for workers for a limited time and in certain work areas (Article 52 of Directive 2013/59/Euratom). The structure of employment in the nuclear power industry creates working conditions that place subcontracted workers at heightened risk of the most hazardous exposures. The Community legal rules unnecessarily link health protection to individual exposure levels, this being an approach that faces subcontracted

workers with an unacceptable choice – to try to keep their jobs by fiddling the dosimeters that record exposure levels, thereby putting their health at risk, or to follow the rules and be treated as ‘Kleenex workers’, i.e. discarded once the maximum annual exposure levels have been reached.

**Read more**

Mengeot M.-A. (2012) *The daily dice with death. The perils workers face from nuclear technology*, Brussels, ETUI.

Thébaud-Mony A. (2011) *Nuclear servitude: subcontracting and health in the French civil nuclear industry*, Baywood.

## Developments in the European Treaties

### The Treaty of Rome

The basic premise of the Treaty of Rome was that competition, economic growth and social progress were linked for the good. Its optimistic outlook was reflected in Article 117, currently reworked into Article 151 of the Treaty on the Functioning of the European Union (TFEU): ‘The Member States have as their objective the promotion of improved living and working conditions so as to make possible their harmonisation while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action’.

There is a twofold political and legal ambiguity here. Politically, the Treaty takes it as read that creating a Europe-wide market will have a knock-on effect of harmonising social/employment conditions within it (what economists call a ‘spillover effect’). This belief is partly explained by the very specific historical context of the post-war boom decades – that period in the history of Western Europe beginning with the post- World War II years of reconstruction and ending in the mid-1970s’ economic downturn, rising tide of labour unrest and disintegration of the Soviet bloc. In this relatively brief lull, enterprise capitalism in the founding states of the European Union was mitigated by major concessions to workers while economic growth was put centre stage in the global division of labour. This resulted in an accumulation of material wealth and, under the constant pressure of organised labour struggle, a less unequal distribution of wealth than before or since<sup>2</sup>. The context was conducive to a culture of compromise, enabling a significant expansion in social security systems and the institutionalisation of collective labour relations in workplaces, industries and politics. *Having a job was more important than having a good job.*

2. This more egalitarian interlude in the history of capitalism is extensively documented in Piketty (2013) *Capital in the Twenty-First Century*, Harvard University Press.

Against this backcloth, the creation of the European Economic Community can be viewed from two angles – as a western European process bringing states together around a common venture, but also as an affirmation of a specific kind of western European identity, i.e. not only opposed to the Soviet bloc Stalinist regimes but characterised also by a form of alliance-building different from that of the United States. The European project was beset by no major political differences between traditional mainstream political forces. There are differences in the scale and speed of the process to be implemented (depending on whether the primary impetus is that of a federal Europe or that of national sovereignty), but considerable like-mindedness as to the content of European policies. The one area concerning which the founding states were substantially at loggerheads during this first stage was agricultural policy.

Subsequent developments showed that market unification was compatible with widening inequality gaps both between and within EU member countries. Far from bringing about a spontaneous ‘harmonisation of living and working conditions while the improvement is being maintained’ (the objective set by Article 117 of the Treaty of Rome), unbridled competition was able to use employment conditions as cyclical buffers, and paring them away delivered a competitive edge. This is apparent from the wide variations today visible in the European Union between wages and the share of welfare benefits in gross domestic product.

The legal ambiguity is not confined to the social chapter of the Treaty of Rome. The very principles of the Treaty enshrine the overriding importance of the purely economic functions of law. What it describes as four fundamental freedoms is the translation into law of enforced competition between workers, goods, business and capital. The only important areas of employment jurisdiction overtly specified in the earliest days of European integration are functional in relation to and an adjunct of the free movement of workers. They relate to the creation of a common labour market and its necessary consequence of coordinated social security systems. These powers are exercised proactively through a copious body of secondary legislation<sup>3</sup>. The adoption of the principle of equal pay for men and women was itself driven by considerations of economic competition. France already had provisions on equal pay and believed that writing it into the Treaty of Rome would offset the dismantling of trade barriers<sup>4</sup>. It felt that the very low salaries of women in the Italian textiles industry would undercut its own businesses. Article 119 of the Treaty of Rome was negotiated less because it represented a fundamental social right than because it would avoid distortions of competition. This hard-nosed concern kept this Treaty provision to no more than a simple statement of intent for the first fifteen years of European integration.

The same tendency to reduce the law to economic considerations can be seen in much of the case law of the Court of Justice of the European Union. Be it free movement of workers or equal pay for men and women, the Court’s decisions tend to characterise the employment relationship predominantly in economic terms of competition between individuals in a market, the definition of which can be extended to the wider labour market where freedom of movement is concerned or confined to a particular business where equal pay is the issue. Where collective rights are concerned, it subordinates fundamental rights like the right to strike to economic considerations as to the impact of collective action on freedom of movement of businesses.

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3. The term ‘secondary legislation’ or ‘secondary law’ refers to the entire corpus of legal rules produced by the European institutions as opposed to ‘primary law’ which consists of the Treaties establishing the European Union and governing its operation, which are negotiated and ratified by the Member States.
  4. Jacquot S. (2014) *L'égalité au nom du marché ? Émergence et démantèlement de la politique européenne d'égalité entre les hommes et les femmes*, Bruxelles, P.I.E. Peter Lang.

The Treaty of Rome does not expressly address any other aspects of labour law except in provisions of limited scope (like the *standstill*<sup>5</sup> rule on holiday pay) or in some specific sectoral policies (transport, agriculture). It is true that Article 117 specified that powers in respect of employment would be exercised ‘under the procedures provided for in this Treaty’, but the fact is that no specific procedure was provided for other than provisions on the free movement of workers and coordination of social security systems. In practice, the failure to provide a specific legal basis for social/employment matters resulted for over fifteen years in a fairly meagre output of comparative studies, seminars and declarations. The very most the institutions did was to produce recommendations of no binding legal effect on the Member States.

### From the first social action programme to the Single European Act

Not until 1974 was the first social action programme adopted with proposals for a substantial body of new laws. The Treaty would not be amended but reinterpreted to enable social directives to be adopted with an economic justification, namely, achievement of the common market. These were matters of subsidiary social jurisdiction, whose legal bases were Articles 100 and 235 of the Treaty of Rome.

Things changed with the entry into force of the Single European Act (SEA) on 1 July 1987. The revision of the Treaty gave a more solid foundation to the development of a proper corpus of Community social law. It set out to enshrine a better balance between the Treaty’s social and economic provisions, to which end it made protecting workers’ health a ‘constitutional’ element, as it were, of the single market process through the introduction of a new Article 118a. This was promoted by Denmark in the negotiations for the Single European Act in an effort to ensure that competition in the single market could not undermine the rules protecting health and safety of workers. It was a position backed by the European trade union movement.

The wording of Article 118a is not unambiguous, however<sup>6</sup>. In the traditional manner of Community compromises, the quality of legal drafting is secondary to political demands in negotiations. Each Member State is keen to leave its mark in the final text so that it can later challenge the actual import of decisions if need be.

What is clear in Article 118a is its provision for a legislative harmonisation of working conditions through Directives adopted by qualified majority. Improvements to working conditions are an area of responsibility shared by the European Community and the Member States. Harmonisation is an aim that can only be legislated into existence. Directives aim to bring about a minimum harmonisation, leaving Member States free to maintain or introduce measures providing a higher level of protection for workers. This harmonisation has to be achieved ‘while the improvement is being maintained’, which means both that it must contribute to raising the level of existing national laws and that this competence is exercised through steady positive improvements to the common rules.

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5. A ‘standstill’ clause imposes a principle of non-retrogression: the Member States cannot reduce the current length of statutory paid leave.
  6. The European Court of Justice (ECJ) judgment of 12 November 1996 – United Kingdom v. Council (C-84/94) – is key to interpreting Article 118a. In it, the Court refused to annul the 1993 Working Time Directive, dismissing the British government’s arguments that Article 118a was not an appropriate legal basis for regulating working time.

### Health and safety as a fundamental social right

Health and safety has been recognised as a fundamental social right by various international and European legal instruments.

In 1989, the EU countries – the United Kingdom excepted – adopted a Community Charter of Fundamental Social Rights, Article 19 of which provides that: 'Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonisation of conditions in this area while maintaining the improvements made.

These measures shall take account, in particular, of the need for the training, information, consultation and balanced participation of workers as regards the risks incurred and the steps taken to eliminate or reduce them. The provisions regarding implementation of the internal market shall help to ensure such protection'.

It is a political declaration, but nonetheless taken into account in EU court rulings interpreting national and Community legal rules.

On 7 December 2000, the Nice European Council proclaimed the Charter of Fundamental Rights of the European Union. Article 31 refers to health and safety at work in the following terms:

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'

This is less precise and expansive than the previous provision. The Treaty on European Union, adopted in Lisbon, gives the Charter the 'same legal value as the Treaties'<sup>7</sup>.

The European Social Charter was adopted by the Council of Europe which has 47 European member countries. Various of its provisions relate to health and safety. All Council of Europe countries have also joined the European Convention on Human Rights and Fundamental Freedoms which, while it does not explicitly mention occupational health and safety as being a fundamental human right, has many provisions that can be relied on where health is damaged by working conditions. The Convention enables legal proceedings to be brought in the Strasbourg-based European Court of Human Rights which has latterly dealt with several cases concerning health and safety at work. The Lisbon Treaty provided for the EU to sign up to the European Convention on Human Rights and Fundamental Freedoms. The process of doing so is ongoing.

The key legal instruments at international level are the International Labour Organisation Conventions, many of which concern health and safety at work. They are adopted on a tripartite basis at the international labour conferences held every June in Geneva. To be implemented at national level, they must be ratified by the Member States. Trade union organisations argue that any international trade agreement should refer to the main ILO Conventions and include practical means of enforcement as being essential to avoid competition that undermines workers' fundamental rights.

The subject-matter of this competence is less clear. Article 118a refers to the 'working environment' – a concept unknown to eleven of the then-twelve Member States. It was borrowed from the Danish law concept of *arbejdsmiljø*, referring to a broader approach to health and safety matters to cover not just the physical risk factors but also the intangible factors relating to work organisation. The 'wobble room' was further increased by the use of the qualifier 'in particular', opening the door to a broad and evolving definition of that jurisdiction. While establishing competence in social/employment matters in order to pursue a discrete objective of protecting workers' health, Article 118a also made reference to an

7. With exceptions, however, for the United Kingdom and Poland.

economic clause couched in cryptic terms: Directives adopted under it must avoid imposing constraints ‘in a way which would hold back the creation and development of small and medium undertakings’. Literally taken, this provision opens any employment regulations to challenge. Prohibiting child labour could be claimed to prevent the creation of an SME that employed children. The wording chosen creates an uncertainty that can call secondary legislation into question as being dislocated from the central objective enshrined in the primary law of the Treaty: improving working conditions.

The entire subsequent history of Community regulation of health and safety at work bears the imprint of this contradiction. Some laws have had ambitions beyond the requirements of existing national laws. Carcinogens Directive 90/394 is a case in point. At the time, no Member State had introduced comprehensive legislation on workers’ exposure to carcinogens, so the directive undeniably contributed to improving existing situations. But there are also big omissions from the legal rules. Psychosocial risks, for example, featured only in two fairly unassuming framework agreements adopted by the European social partners. Community legislation in this area is lagging behind that of various Member States and certainly not contributing to harmonisation while the improvement is being maintained. Community law has failed to develop rules on preventing musculoskeletal disorders, because effective prevention of them means challenging the employer’s power to determine work organisation. Instead of tackling the matter head on, Community law has sought to dodge the issue by regulating a handful of risk factors – handling of heavy loads, work on VDUs and vibrations – on a standalone basis.

## **Community regulation of safety and health at work**

Safety and health at work Directives make up the bulk of Community social/employment law. Between 1977 and 2013 more than thirty Directives were adopted, fundamentally covering employers’ duties to their workers. This is a classic pattern in labour law, especially where health and safety are concerned.

The early Directives were mainly about laying down substantive rules, the scope of which alone pointed to what was expected of those concerned. This was particularly so with those Directives setting limit values or prohibiting spray-on applications with asbestos. Over time, Community law has evolved more and more towards what is known as reflexive law<sup>8</sup> where the Directives still specify a limited number of substantive rules (for example, banning asbestos or setting maximum noise exposure levels) but increasingly lay down a general duty to provide safe working conditions with best-endeavours obligations that put specific procedures in place (risk assessment document, planned prevention, health surveillance, etc.).

These procedures have multiple functions that interact to form a system:

1. They require all relevant information to be taken into account and result in appropriate decisions. This gives the process a prevention-driven aspect.
2. They structure the employer’s safety activity by prescribing a strict order of priority of preventive measures.
3. They restrict the employers’ power over work organisation by requiring mechanisms for consulting workers or their representatives to be put in place.

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8. Teubner G. (1996) *Droit et réflexivité : l’auto-référence en droit et dans l’organisation*, Paris, LGDJ.

4. They lay down the basics of traceability, like the written risk assessment document, keeping records on work accidents or workers exposed to carcinogens, etc.

Five stages can be distinguished in Community rule-making on workplace health and safety, but this breakdown into phases does not match up to a strictly chronological timeline. Community rules are built up layer by layer, with each stratum bearing traces of a previous era.

### The first three stages (1962-1988)

The first stage begins very early in the Community's history. The Commission adopted a Recommendation on company medical services on 20 July 1962, followed on 23 July 1962, by a Recommendation to harmonise the systems for the recognition and reporting of occupational diseases in the countries of the Economic European Community. While the former is no longer of anything more than historical interest, the latter has since been expanded through new Recommendations adopted on 20 July 1966, 22 May 1990 and 19 September 2003. This first stage was not an unqualified success – the open system of recognition of occupational diseases called for by the Recommendation of 20 July 1962 was, for instance not incorporated into Belgian law until the Act of 29 December 1990.

Thereafter, occupational health virtually drops off the Community radar between 1966 and 1977 – a hiatus that coincides with the period of most widespread labour ferment over working conditions. Improvements in this period came as a slow drip both through developments in many Member States' national laws and the discussions that took place in the International Labour Organisation. During this phase of inaction, however, one industry stood apart in terms of levelling-up the conditions of competition. The transport industry received the first two binding pieces of legislation impacting on occupational health: Regulation 543/69/EEC of 25 March 1969 on the harmonisation of certain social legislation relating to road transport and Council Regulation (EEC) No 1463/70 on the introduction of recording equipment (tachographs) in road haulage.

The late 1970s ushered in a third stage focused on occupational hygiene. The starting point can be pinpointed as the scandal that erupted around the exposure of workers to a chemical widely used in the plastics industry – vinyl chloride monomer. The main industrial groups concerned had concealed from European and United States public authorities alike the data they had collected establishing beyond doubt that exposure to the chemical was causing cancer in workers<sup>9</sup>. The Commission prioritised the development of binding Community instruments on two grounds: the protection of workers' health and a level playing field between firms.

After the adoption of a Safety Signs at the Workplace Directive of 25 July 1977, the EU turned its sights on setting mandatory exposure limits. This it did in Vinyl Chloride Monomer Directive 78/610/EEC of 29 June 1978. This Directive contained an unusual provision for legislation adopted under Article 100 of the Treaty of Rome – it provided for minimum requirements, leaving it to Member States to adopt higher levels of prevention at the workplace if they so wished. Traditionally, Article 100 of the Treaty of Rome was used

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9. Livock R. (1997) Science, law and safety standards: a case study of industrial disease, *British Journal of Law and Society*, 6 (2), 172-199; Soffritti M. et al. (2013) Vinyl chloride: a saga of secrecy, in EEA (ed.) *Late lessons from early warnings: science, precaution, innovation*, Copenhagen, European Environment Agency, 179-202.



to achieve full harmonisation. The way in which the specific objective of intervening on an aspect of labour law required a different approach from that which prevailed for the rules on movement of goods is clear to see. The weakest element of this Directive concerned occupational health services. It laid down an obligation for workers to undergo regular medical examinations, but there was no obligation for Member States to centralise and analyse the data. Medical checks were not a new thing for plastics firms, but the data collected had never been disclosed to the public authorities. The Directive established no mechanism for workers' collective control of risk assessments and preventive measures.

The cornerstone of EU provision to harmonise occupational hygiene was Directive 80/1107/EEC of 27 November 1980 on chemical, physical and biological risks. This Directive specifies that the obligations it lays down need be complied with only 'so far as is reasonably practicable'. This form of words was alien to the legal systems of most Member States. It existed only in the United Kingdom and Ireland, where it was interpreted as subjecting prevention obligations to a 'cost-benefit' calculation. It would be dropped in the subsequent stage of Community regulation. Similar provisions were to be found in the law of countries that joined the EU after 1992: Finland, Malta and Cyprus. The only country to have continued interpreting the 'SFAIRP' clause in the traditional way is the UK, the others having either repealed or redefined it in terms consistent with the 1989 Framework Directive which have effectively scaled it down to a variant of '*force majeure*'.

The 1980 Framework Directive set the Community a programme for the systematic development of mandatory limit values. Nine chemicals or families of chemicals were considered priority, but only two were legislated on: lead in Directive 82/605/EEC and asbestos in Directive 83/477/EEC (see table on p. 39). One physical agent was also regulated in the Noise Directive 86/88/EEC. The negotiations for each of these directives were difficult and embroiled in ongoing controversy about the alleged cost of employers' obligations.

Directive 80/1107/EEC was also the basis for adopting Council Directive 88/364/EEC outlawing four aromatic amines. This Directive had a more general scope in that it prohibited certain agents or activities. The four banned carcinogens were included in a list which it was planned would be gradually expanded. In reality, it was the swan song of this period of new legislation. After negotiations for a Benzene Directive foundered, the setting of mandatory limit values was abandoned with the revision of the 1980 Directive on 16 December 1988. Limit values would henceforth not be binding but indicative<sup>10</sup>. The paradox is stark: whereas in 1986, the Treaty stated for the first time that binding texts (directives) were needed to harmonise the working environment, the lawmakers of 1988 changed the linchpin directive of this provision to give these values nothing more than indicative import. The requirement to set a very small number of mandatory limit values would subsequently be taken up again under other Directives (see p. 39). The last mandatory occupational exposure limit value was adopted by Directive 2003/18/EC of 27 April 2003, setting a limit value for occupational exposure to asbestos which leaves a relatively high risk of contracting cancer. Since 2003, no further binding limit values have been adopted or updated by the European Union, notwithstanding the fact that chemical hazards are the leading cause of worker mortality in Europe.

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10. Two lists of indicative limit values were adopted by the Commission under Directive 80/1107: 27 chemicals were included in Directive 91/322/EEC of 29 May 1991; 23 were taken up by Directive 96/94/EC. Both directives were later repealed and the indicative limit values they set were included in the Directives adopted under Chemicals Directive 98/24/EC.

## The fourth stage: a decisive impetus to national reforms (1989-2003)

The fourth stage runs from approximately 1989 to 2004. It is the most dynamic period which produced a significant body of regulation both in terms of the number of Directives adopted and what they added to the Member States' national laws. The programme's failure to adopt limit values had a paradoxical result. It enabled Community health and safety at work policy to bounce back on the basis of more ambitious goals: a global transformation of the working environment.

Across Europe, these Directives delivered a momentum of reform that improved the various national laws. The extent of each reform was also dictated by the social and political context of each country. Some countries took care to carry out a 'light touch' implementation of simply carrying over the wording (the United Kingdom and, to a large extent also, Germany). Other countries, by contrast, embarked on far-reaching, comprehensive reforms (Italy, Spain). Legislative reform in France was limited, but case law developed to a remarkable extent in the years following the asbestos scandal. In the countries of central and eastern Europe, legislation and regulations underwent a substantial shake-up.

The Framework Directive of 12 June 1989 is still today the centrepiece of Community occupational safety and health legislation. It incorporates some of the gains made by labour organisations in the previous decade in setting working conditions in the forefront of labour demands. Across Europe, demands converged to shatter the Fordist compromise and demonstrate that the economic growth of three decades of prosperity had been based on inhumane working conditions for the least skilled workers<sup>11</sup>. The high level of requirements laid down by the Framework Directive can partly be put down to the fact that it was negotiated in parallel with the Machinery Directive which was intended to allow free movement of work equipment around the European market, so the employers' organisations were willing to make major concessions. Also, the Framework Directive was not modelled on the national law of any particular Member State, but was a design unto itself. It is true that each component was based on similar rules in certain countries or in the international labour Conventions, but the effort to make everything hang together made for a high-quality piece of legislation. Some forms of wording, however, leave the Member States too free a hand when it comes to implementation (e.g. the Directive is not explicit enough on the role of health surveillance).

In the wake of the Framework Directive, 19 individual directives were adopted to address different risk factors and categories of workers<sup>12</sup>. The general criterion by which a directive was framed was the level of risk, either in terms of severity (e.g. carcinogens, biological hazards, explosive atmospheres) or the number of workers exposed (e.g., noise, work on VDUs, manual handling of loads, pregnant workers, etc.). Some of these Directives have subsequently been amended. Other Directives relate to the health and safety of agency, fixed-term and young workers. The scope of these is more restricted and they have contributed very little to national reforms. In general, the principles they enshrine were already found in the national law of most Member States or dealt with procedural matters of seemingly limited effectiveness (particularly with respect to agency workers).

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11. See Pessis C., Topçu S. and Bonneuil C. (2013) *Une autre histoire des Trente Glorieuses: modernisation, contestations et pollutions dans la France d'après-guerre*, Paris, La Découverte.

12. The role of individual directives is to clarify (and, if necessary, develop) the organisation of prevention established in the Framework Directive for specific risks or situations. They therefore strengthen the legal security and offer a concrete methodology for implementing effective prevention.

A number of other directives aim to regulate cross-cutting issues for occupational health. The main one of these is without doubt the Working Time Directive 93/104 of 23 November 1993<sup>13</sup>. A consideration of its provisions, the copious Community case law and its impact on Member States' law are beyond the scope of this publication. Its revision announced more than a decade ago has set the Member States, Council and Parliament, and the trade unions and employers' organisations, at loggerheads. There have been mishaps aplenty between the ordinary legislative procedure for adopting a directive and the failed attempt to delegate its framing to the social dialogue process.

Between 1989 and the mid-1990s, Community legislative activity moved forward with some effectiveness, only to lose momentum thereafter. The Directive to protect workers against chemical hazards, for example, underwent eight long years of difficult negotiations before being adopted in April 1998.

**Read more**

Vogel L. (1994) *Prevention at the workplace, An initial review of how the 1989 Community framework Directive is being implemented*, Brussels, Trade Union Technical Bureau for Health and Safety.

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13. The text currently in force is Directive 2003/88 of 4 November 2003.



## Chapter 2

# The two Barroso Commissions: a lost decade

From 2004 to 2014, during the two terms of the European Commission headed by José Manuel Barroso, new health and safety law-making was at a virtual standstill.

The very few Directives still adopted were either tinkering with the scope of previous Directives, or the delayed culmination of earlier proposals. So it was with the two directives on physical agents adopted during this period: Artificial Optical Radiation Directive 2006/25/EC and Electromagnetic Fields Directive 2013/35/EU<sup>14</sup>. The process of adopting directives on physical agents had begun in 1992. Added to these is Directive 2010/32/EU transposing an agreement reached in the European sectoral social dialogue on prevention from sharp injuries in the hospital and healthcare sector. Other changes were simply codifications of, rather than amendments to, substantive provisions of Directives or adaptations to changes in other regulations (e.g. changes to the classification rules for hazardous chemicals, changes to the ways Member States must report on the Directives).

Where working time is concerned, the Barroso Commission departed from the Treaty objective (harmonisation while the improvement is being maintained) to propose changes to the Directive which rolled back the gains made. Fortunately, these proposals met with opposition from the European Parliament and did not go through.

The legislative standstill has particularly serious practical consequences. The two most important proposals that should have been put forward are for types of health damage that wreak havoc among workers. In both cases, the Commission already had a detailed preliminary draft that required little further development.

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14. An initial Directive on which had been adopted in 2004, but was never brought into force.

Both were shelved! One concerns musculoskeletal disorders, which affect one in four workers in Europe mainly as a result of work intensification and the inadequate ergonomic measures taken by companies; the other relates to cancers and reproductive risks (see box p. 23).

The decline of Community occupational health rule-making is not down to legal changes to the Treaty. The provisions introduced by the SEA have remained in force. The terminology changes have not affected their content. While the Commission's policy steer has been decisive, it would be mistaken to disregard the legal aspect of this debate. The effect of increasingly formalised criteria has been to make all new law-making conditional on cost-benefit-based impact studies and to propound a thorough review of the legislative *acquis* in terms of the purported administrative burden it places on businesses. So the unchanged wording of the Treaty stands in marked contrast to the practical exercise of legislative power which is hobbled by an agenda that makes economic efficiency the central criterion of the legitimacy of law<sup>15</sup>.

This crisis in Community regulation comes in a wider setting of political challenge to the very basis of the harmonising of working conditions by law. The main argument is economic: setting standards at a high level would disadvantage European industry relative to its global competitors<sup>16</sup>. Arguably, the real reason lies elsewhere. It is less about the EU's relationship with the world at large than how the European Union sees itself. The harmonisation of working conditions is seen as an obstacle to rolling out free competition in the internal market. The rise in social inequalities within Member States stems from the increasingly sharp dividing lines within the world of work. The levels of workers' health protection are crumbling from the action of such things as the casualisation of work, outsourcing of high-risk activities, increasing gender segregation in terms of employment norms: part-time work has become the norm of female employment in some EU countries.

## Bureaucratisation of decision-making

The effect of increasingly formalised criteria has been to make all new law-making conditional on cost-benefit-based impact studies and to press for a comprehensive review of the legislative *acquis* relative to the purported administrative burden it places on businesses. The Commission does not bear sole responsibility for this development – all institutions involved in the legislative process (Council, Parliament and Commission) have been broadly on the same page, even if the Commission has often been more zealous than the other European institutions in this instrumental view which claims that a legal rule must be judged primarily on the basis of what 'dividends' it might generate for business. On the international stage, this idea first took root in the United States, and particularly firmly so from President Ronald Reagan's incumbency (1981-1989).

This approach to legal rules through the prism of a cost-benefit calculation alone has had a profound impact on the way decisions are made in the European Union. Procedurally, tripartite consultations continue to be held on a regular basis under the Treaty provisions. However, the real effect of these consultations has become marginal. Only the

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15. Article 118a introduced by the Single European Act was incorporated substantially unchanged into current Article 153 of the Treaty on the Functioning of the European Union (TFEU).

16. An argument already to be found in Wim Kok's 2004 report on reorienting the 'Lisbon strategy'. This shows that the *better regulation* ideology is not the sole preserve of conservative or liberal political parties. Wim Kok was a prominent trade union leader before becoming the Social Democrat Prime Minister of the Netherlands between 1994 and 2002.

employers' voice is listened to. The Commission uses its monopoly power to initiate legislation as a sovereign prerogative. Its refusal to put forward proposals for a directive prevents the Council and European Parliament from discussing them.

In practice, other mechanisms and bodies have come to assume decisive importance over the procedures laid down in the Treaties. The Barroso Commission's two terms were characterised by a twofold process: a politically hands-off Commission increasingly reluctant to come up with ambitious proposals, and the rising influence within the Commission of a 'kitchen cabinet' bureaucracy around its President given oversight over the other departments as part of what was called 'Better Regulation'. Possessing no real expertise in the various matters on which it meant to intervene, this new bureaucracy has developed a lucrative market for private consultants the quality of whose analysis seems inversely proportional to the quantity of reports produced.

The two prime examples of this bureaucratisation of decision-making are the Impact Assessment Board and the Stoiber Group.

The Impact Assessment Board (IAB) was established in late 2006 to assess the impact of all proposals for directives even before they were officially framed by the Commission. The assessment criteria are couched in extremely vague terms that allow for an arbitrary management of the procedure. The entire impact assessment process is typified by a lack of transparency that allows lobbyists to play a very active role and minimise the effectiveness of the forms of consultation set up by the EU treaties. Thus, the Impact Assessment Board was able to block the proposed Directive on the prevention of musculoskeletal disorders. There is no legal reason why the Commission should not override a negative IAB opinion, but in practice, it tends to confer on it blocking powers that act downstream and prevent a decision being taken by the only directly elected EU body – the European Parliament. The revision of the Carcinogens Directive (see box p. 23) is at a complete standstill, one reason being that the Commission has commissioned private consultants to do costly studies on the 'costs and benefits' of its contemplated proposals. It became clear from the completed studies that the impact assessment requirements had been tightened up to such an extent that the Commission no longer had a sufficient basis on which to put forward its evaluation.

The creation of the Stoiber Group in August 2007 offers a textbook example of the political manipulation of regulation. Originally, the Stoiber group was meant to be just a group of high-level experts tasked with examining the 'administrative costs' of existing laws. It has always been top-heavy with business interests. Of the Group's 15 members at the end of its term in 2014, six were employer representatives, and four others had been involved in the consultative bodies set up by right-wing governments to promote deregulation in the UK, Germany, Sweden and the Netherlands. Various labour interests were never taken into account by the Stoiber Group – it never considered the impact of its recommendations on gender inequalities, for instance.

The Stoiber Group's term had been due to run out in 2010 and the group should have stuck to examining the 'administrative burden' of existing legislation. In practice, the Group set its own agenda that far exceeded its remit. Through his political links, Edmund Stoiber won the Group two extensions running up to 31 October 2014. In June 2014, it produced firmly deregulatory recommendations, which it claimed would achieve more than 40 billion euros in savings<sup>17</sup>. These fanciful economic estimates were based on a simplistic method whereby private consultants quizzed a handful of company executives about the

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17. Those of the Stoiber Group's members who represented workers, environmental and consumer protection interests adopted a dissenting opinion pointing out the weakness of the Group's proposed figures.

putative costs of different regulations, then extrapolated the claimed costs to all EU businesses. No checks were made to see whether the interview figures matched up to the reality. The only ‘proof’ consisted in the endless repetition of the same figures from one document to the next with no accompanying reference to their origin or the questionable methodology on which they were based.

The symbiotic relationship between bureaucrats and consultants is symbolised by Edmund Stoiber’s November 2009 appointment as Chairman of the Advisory Board of the Deloitte Group which has been paid millions of euros for studies of debatable quality on the ‘administrative costs’ of legislation. He subsequently stepped down from the post with never a word about the potential conflicts of interest it might have created. One method used was to mount a show in the worst traditions of political grandstanding. A conference held in Brussels in 2010 saw Mr Stoiber photographed using an oversize pair of scissors to cut a red ribbon meant to represent the supposed red tape of EU laws, all of which was paid for from the Community budget! The vocabulary is deliberately warlike and Christian – a crusade against bureaucracy. The German right-wing conservative press tends to describe Mr Stoiber as ‘Europe’s anti-bureaucracy tsar’.

Mr Stoiber was not long off the European deregulation stage. Within two months of the end of the third term granted by José Manuel Barroso, he was back under the auspices of the new Commission. On 18 December 2014, the European Commission’s new President, Jean-Paul Juncker, made Edmund Stoiber special adviser for ‘Better Regulation’, sending a worrying signal of policy continuity between the new Commission and the two previous terms under Mr Barroso. The press release proudly announced savings of 31 billion euros from the Commission’s ‘better regulation’ initiatives. These figures are based on no serious statistical evaluation but derive from the same uncheckable private consulting firm extrapolations on the cost of the Directives. The Commission has nothing to say on the huge public health costs created by blocking new health and safety at work legislation.

The deep crisis in EU regulation worsened with the REFIT<sup>18</sup> programme launched in December 2012 to assess all existing legislation (the ‘Community *acquis*’) and make it harder to bring in new social/employment, environmental or consumer protection laws. Using the ongoing assessment of existing health and safety Directives as an excuse, the Commission called a rest from legislative initiatives which was initially intended to run up to the end of the second Barroso Commission (1 November 2014)<sup>19</sup>, but which the Juncker Commission has now extended until the end of 2015.

The blind alley of ‘soft law’ and voluntary approaches sums up the entire performance record of occupational health over a century and a half, and the employers know it. The Bilbao Agency’s ESENER survey conducted on a sample of 36,000 companies reveals that the main driver for firms to develop a prevention policy is the existence of legislation<sup>20</sup>. 90% of firms cite compliance with the law as the reason for acting, and this tops the list of answers in 22 of 27 countries. The second most-often cited driver of preventive action is demand from workers and their representatives (three out of four firms). It bears pointing out in this connection that half of all workers in Europe have no form of representation. This is especially critical in small and medium-sized firms. But there are practical ways of tackling this problem. Encouraging schemes for workers’ district safety representatives are to be found in both Sweden and Italy.

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18. REFIT is an acronym for ‘Regulatory Fitness and Performance’.

19. Communication COM 2013 (685) final of 2 October 2013.

20. Rial González E., Cockburn W. and Irastorza X. (2010) European survey of enterprises on new and emerging risks: managing safety and health at work, Bilbao, European Agency for Safety and Health at Work.



**100,000 deaths a year is not a legislative priority for the Commission**

The seriousness of the Community's legislative standstill is exemplified by the problem of occupational cancers from which the Commission itself admits some 100,000 people die each year in the European Union. It has long been clear that the current legislative framework was inappropriate, inadequate and based on scientific knowledge dating from the 1970s when the role of endocrine disruptors and epigenetic processes in cancer development was largely unknown. The current Directive is not even in line with the REACH definition of substances of very high concern because it excludes reprotoxins which have far-reaching consequences for exposed workers and their children: damaged fertility, birth defects and development disorders, childhood cancers.

The current directive sets binding limit values for only three substances to which must be added asbestos and lead dealt with in other directives. These limit values fall well below what today's prevention techniques would allow. They cover fewer than 20% of the actual situations of workers' exposure to carcinogens, when the evidence is that the most hazardous situations are linked to multiple exposures and exposures caused by production processes, as with crystalline silica and diesel fumes. The health surveillance provided for by the Directive is inadequate. It is known that very long latency periods may elapse between exposure and the development of a cancer, making it essential to provide for lifelong health monitoring of exposed workers which is neither currently a feature of the Community Directive nor operative so far in the majority of Member

States. The trade unions and many Member States have been calling the Commission's attention to the importance of this for upwards of ten years. The 2002-2007 strategy already recognised the need to revise the Directive, but there has been little progress in the situation in the twelve years since. A joint letter sent by the government, trade unions and employers' organisations of the Netherlands to the Social Affairs Commissioner on 28 August 2013 stressed the need to revise the Carcinogens Directive and reduce asbestos exposure limit values. On 4 March 2014, the Labour Ministries of Austria, Germany, the Netherlands and Belgium sent a joint letter to the Commission calling for an early revision of the Directive on preventing work cancers. Other governments back the call for a revision of the Directive.

The European Trade Union Confederation also adopted a resolution in December 2014 calling for the Carcinogens Directive to be revised and arguing the vital need for the very early determination of binding limit values for fifty particularly hazardous chemicals to which many workers are exposed. This is an area where European policy makes a big net improvement. Effective prevention of work cancers requires a comprehensive strategy that simultaneously embraces the internal market, environmental protection, worker protection and public health. This is a core Community competence. In such a key area, the European Commission's avowed preference for 'soft law' is untenable. The huge costs of occupational cancers are borne not by the businesses that produce the risks but by society and the victims, so voluntary instruments or purely indicative limit values will not improve matters.

## **An ersatz strategy for 2014-2020**

From 1978 onwards the Commission has adopted multiannual strategies for Community health and safety at work policy under various names: different 'action programmes' between 1978 and 2001 were followed by 'strategies' for 2002-2006 and 2007-2012. At the end of 2012, a new strategy was announced for the period 2013-2020. Detailed proposals had been made by both the European Parliament and the Advisory Committee consisting of the Member States, trade unions and employers of EU countries. The Commission dragged its feet and finally published a particularly feeble Communication in June

2014<sup>21</sup>. It is meant to define a ‘strategic framework on health and safety at work’ but takes up virtually none of the European Parliament and tripartite Advisory Committee’s concrete proposals.

This Communication is supposed to give direction to the work of the EU institutions up to 2020 as regards three key challenges. The first challenge chosen by the Commission is to give priority to small and medium-sized enterprises through a markedly deregulatory approach that views health and safety at work as an administrative burden. The idea is not to improve working conditions in such firms but to lavish benefits on employers, to give them a competitive advantage by reducing their obligations. Bearing in mind the existence of subcontracting chains, such a policy will drive all working conditions steadily downwards.

The Commission admits the importance of preventing work-related diseases which kill some 160,000 people each year in the EU, but has nothing to say on the blocking of the two proposals for Directives that have been in the works for over a decade: the revision of the Directive to improve the prevention of work-related cancers and the Directive on musculoskeletal disorders that affect one in four workers in Europe.

Finally, the Commission mentions the ‘demographic challenge’ posed by an ageing population. It does not make the link between ageing and working conditions. Yet the European Working Conditions Survey shows the growing divides between occupational groups in this respect. For many categories of workers, their working conditions are not such as to enable them to continue working up to retirement age. The percentage of workers who think they will still be able to do their current job when they reach the age of 60 went up very slightly between 2000 and 2010, rising from 57.1% to 58.7%. This is modest progress. But it applies only to non-manual workers. For manual workers, by contrast, the situation has gone downhill. Fewer than half of manual workers think their working conditions will allow them to keep doing the same job at the age of 60. Among skilled workers, the share fell from 52% in 2000 to no more than 49.3% in 2010, and among low-skilled workers, from 46.2% in 2000 to just 44.1% in 2010. Faced with these facts, the Commission is simply proposing to set up a network of experts to promote exchanges of good practice and support the dissemination of information. No major policy initiative is on the radar.

The Communication feels like a cut-and-paste collation of snippets from other documents cobbled together with no logical connections. The gender dimension of occupational health gets a mention only in relation to maternity protection! The information sources are a jumble of sound, validated data like the European Working Conditions Survey and anecdotal opinion polls.

At the time of writing (March 2015), the outlook for Community health and safety at work policy is uncertain. Should the new Commission headed by Mr Juncker endorse the preceding Commission’s direction of travel, the goal of harmonising working conditions will drop off the European policy radar. The litmus test will be the legislation on preventing occupational cancers. The Commission cannot claim that the Member States are against it. Most of them want better Community legislation, as was clearly indicated by the conclusions of the Council of Employment and Social Affairs Ministers of 9 March 2015. If the Commission does not come forward with a legislative proposal before the end of 2015, there is little likelihood of a directive being adopted during this Commission’s lifetime. It will result in a ‘transfer back’ of occupational cancer prevention policies with probably massive differences between the actual levels of protection of workers’ lives between Member States.

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21. Communication COM 2014 (332) final of 6 June 2014 on an EU Strategic Framework on Health and Safety at Work (2014-2020).

**Read more**

Vogel L. and Van den Abeele E. (2010) Better Regulation: a critical assessment, Report 113, Brussels, ETUI.

Van den Abeele E. (2014) The EU's REFIT strategy: a new bureaucracy in the service of competitiveness, Working Paper 2014-05, Brussels, ETUI.



## Chapter 3

# Institutions and agencies

The European Union has a wide range of means for acting on OSH. The policy objective and priority means of delivering it have been clearly stated in the Treaty since the Single European Act of 1986.

The objective is the harmonisation of working conditions while the improvement is being maintained. As the European Union's budget is tiny compared to the combined national budgets of its Member States, the main policy instrument for harmonising labour conditions is legislation. This has a ripple effect, stirring Member State action to embrace the Community objectives as their own. It can be supplemented by other means (social dialogue, cohesion funds, defining statistical indicators, etc.) but there is no economic mechanism for the wholesale redistribution of resources among states, nor yet any robust 'economic governance' delivering industrial policies, planned investment or the creation of public services at the European level. This requires new legal rules to be brought into existence if the aim is to have anything more than a simple free trade area.

The EU works with the Member States to implement this policy. It is what is known as a shared competence. Member States are responsible for framing a national health and safety at work strategy, and ensuring that Community directives on the matter are properly implemented and enforced. Community law has little to say as regards public provision to support effective prevention. Health and safety inspection, specialised research bodies and the integration of health and safety at work and public health vary widely from one country to the next. Also, Community directives set only minimum requirements, thereby giving Member States the responsibility for maintaining or introducing laws that ensure a higher level of protection for workers. Better legislation implemented in

one country often serves to reignite Community discussions that help to deliver the aim of harmonisation while the improvement is being maintained.

## **Institutions involved in the EU legislative process**

The **European Commission** is meant to act in the EU's general interest. It is the executive body with sole power to initiate legislation. Strictly speaking, Article 17 of the Treaty on European Union requires that it should be composed of a number of members corresponding to two thirds of the members of the EU but the European Council may waive this rule. The Commissioners are appointed by the European Council for a period of five years. The current Commission, which took office on 1 November 2014, comprises 27 members plus the High Representative for Foreign Affairs and Security Policy. The mission letters drawn up by its President, Jean-Claude Juncker, for the six vice-presidents gave them added powers. Their job is to coordinate the Commissioners' groups on related policy areas. Any legislation initiated by a Commissioner can be blocked by the dual filter system in place. Firstly, it requires approval from the vice-president responsible for coordinating a specific set of competences. Then, secondly, it has to gain the approval of the first vice-president in charge of 'Better Regulation' who, in the Juncker Commission, is the Dutch Social Democrat Frans Timmermans. The Social Affairs Commissioner is the Belgian Christian Democrat Marianne Thyssen. The vice-president with responsibility for the eurozone and social dialogue – Valdis Dombrovskis – belongs to a Latvian Liberal-Conservative party.

Generally speaking, the Commission has no power to pass legislation as such. It adopts proposals for legislation which are then laid before the European Parliament and Council following the rules of the legislative process. In special cases, however, the Commission may adopt delegated legislation enacted under the authority of a primary legislative act. In the terminology of the Lisbon Treaty, these kinds of legislation adopted by the Commission are called 'delegated acts' and 'implementing acts'. Such delegated authority is not commonly found in health and safety at work matters. It is found in Article 17 of the 1989 Framework Directive providing for the directive to be adapted to technical progress. Given that the Framework Directive lays down essential principles of prevention, it is unlikely that changes can be made to them by a 'delegated act' adapting them to technical progress. This procedure is applied, on the other hand, to certain individual Directives under the Framework Directive, such as Chemical Agents Directive 98/24/EC for adopting indicative limit values, Biological Agents Directive 2000/54/EC and Electromagnetic Fields Directive 2013/35/EU. To date, the Commission has adopted three directives on indicative occupational exposure limit values and three directives amending the Annexes to the Biological Agents Directive.

The Commission exercises its delegated legislative power through what used to be known as the 'comitology procedure' (now 'committee procedure'). For delegated acts, the Commission submits its draft to the European Parliament and Council, who have a set time within which to object to it or revoke the delegation on any grounds. For implementing acts, the Commission has to continue submitting drafts to the committees on which the Member States are represented. In principle, all basic acts vesting the Commission with power to adopt legislation adapting to technical progress will be gradually revised and brought into line with the new procedures.

### The European Citizens' Initiative right

The Treaty of Lisbon introduced a European Citizens' Initiative (ECI) right which allows a minimum of one million citizens from at least one quarter of EU Member States to request the European Commission to put up proposals for legal acts in areas of its competence. The organisers of a citizens' initiative have to form a citizens' committee composed of at least seven EU citizens living in at least seven different Member States. They have one year within which to collect the necessary statements of support. The number of statements of support must be certified by the competent authorities in the Member States. The Commission then has three months to examine the initiative and decide on what action to take on it.

This right has more a symbolic than a substantive importance in that the Commission's monopoly right to initiate legislation remains entire. What it does do, however, is to enable European political campaigns to be mounted around the objectives.

The procedures for exercising the right are laid down in Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative.

Launched by the European Federation of Public Service Unions (EPSU), the first initiative, which collected over 1.9 million signatures, was on the 'Right to Water'. The aim was to get the right to water recognised as a human right and to oppose it being turned into a commodity. On 19 March 2014 the Commission adopted a Communication in response to the initiative which does not satisfactorily address the main important issues it raised. Jan Willem Goudriaan, vice-president of the ECI Right2Water, said that, 'The reaction of the European Commission lacks any real ambition to respond appropriately to the expectations of 1.9 million people. I regret that there is no proposal for legislation recognising the human right to water'. The ECI had also asked for a legal commitment that there would be no EU initiatives to liberalise water and sanitation services. But there is nothing in the Communication on this. The exclusion of water and sanitation services from the Concessions Directive was a positive point. However, the Commission's Communication made no commitment to explicitly exclude these services from trade negotiations such as the Transatlantic Trade and Investment Partnership (TTIP).

#### Read more

'Right to Water' initiative website:  
<http://www.right2water.eu>

The **European Parliament** has been directly elected since 1974. In the current legislature, the European Parliament is composed of 751 MEPs who were elected in the 28 member countries for a five-year term. The number of MEPs elected for each country varies from 96 (the biggest – Germany) to 6 (the smallest – Cyprus, Luxembourg and Malta). The Members of the European Parliament belong to different political groups that have facilities to coordinate their activities. At least 25 MEPs elected in at least one quarter of the Member States of the European Union are required to form a political group. There are currently eight political groups. A few MEPs are non-attached members, having no affiliation to any of the groups.

Parliament is part of the EU legislative process but has no power to initiate legislation. This is an unusual limitation in representative democracies. In January 2013, for example, the European Parliament passed by an overwhelming majority (503 votes for, 107 votes against and 72 abstentions) a resolution calling on the Commission to submit a proposal for a directive on restructuring at the earliest opportunity. Such a directive would have created a common legislative framework in the European Union on information and consultation of workers, forward planning and management of restructuring. It would have been meant to address the substantial impact of restructuring on the quality of working conditions and health of redundant and retained workers ('survivors') alike. In June 2013, the Commission rejected Parliament's proposal, recommending only a Communication of no binding effect whatever.

Parliamentary work is organised into specialised committees that discuss proposed legislation put forward by the European Commission and can adopt own-initiative reports. The Employment and Social Affairs Committee deals with health and safety at work matters. Legislative proposals are voted on at plenary sessions of Parliament. Amendments are generally negotiated between the various political groups and discussed in detail at meetings of the committees with lead responsibility.

The **Council of the European Union** (sometimes called the Council of Ministers) is the institution that represents the Member States. It is the other essential body involved in adopting EU laws. In the ordinary legislative procedure (which applies to OSH legislation) it stands on an equal footing with the European Parliament. Unlike Parliamentary procedure, its deliberations are secret, which prevents the positions of the various governments in the negotiations preceding the adoption of Community legislation from being known. Some Member States have national rules requiring government officials to account to their national parliament for the positions taken at the EU Council. The Presidency of the Council is held on a six-monthly rotating basis between the Member States. In 2014, a so-called ‘double majority voting’ system was introduced. For a proposal to be adopted, it must secure the backing of at least 55% of Member States (at least fifteen in the Europe of 28) who must in total represent at least 65% of the EU’s population. The Council’s work is prepared by the Permanent Representations established by each Member State. They meet in COREPER, the Permanent Representatives Committee. All items on the Council’s agenda must be discussed by COREPER beforehand. If COREPER reaches a consensus, the texts submitted to the Council are considered to be adopted without discussion or vote. In practice, this is the case with 75% to 80% of its business.

The **European Council** or European Summit is the main policy body of the EU; it is composed of the Heads of State and Government of the Member States. The European Council was created in 1974 as an informal discussion group between the European leaders. Given official status in 1992, it became one of the seven official institutions of the EU in 2009. European Council meetings are summits at which general political priorities and important initiatives are decided. The European Council generally meets four times a year under a permanent Presidency. Donald Tusk is currently President of the European Council. His term runs from 1 December 2014 to 31 May 2017.

The **Economic and Social Committee** is an advisory body composed of a large number of interest groups, including those of employers and workers. It issues opinions on draft legislation concerned with EU social policies. It may also adopt own-initiative opinions. It has adopted a number of own-initiative opinions on health and safety at work matters, notably on asbestos. Its opinion on the EU Strategy for 2013-2020 reflects the body’s concern about Community inaction<sup>22</sup>.

The **Committee of the Regions** is an advisory body that links with local and regional representatives and involves them in the development and implementation of EU policies. Its role in health and safety at work is fairly marginal.

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22. EESC opinion SOC-512, adopted on 11 December 2014, based on a report by Carlos Trindade.



The **European Ombudsman** is elected by the European Parliament. He investigates complaints lodged by individuals or companies about activities of EU institutions and bodies. He can conduct mediation and if it fails, make a recommendation. In 2007, the European Ombudsman acted at the request of a German citizen to ask the Commission to intervene with regard to infringements of the Working Time Directive. The Commission refused at the time to enforce Community law on the grounds that it planned to amend the Directive's provisions. The Ombudsman considered this not to be in conformity with principles of good administration<sup>23</sup>. Recourse to the Ombudsman can also be of clear interest where an EU institution denies access to documents enabling decision-making processes to be looked back at.

The **Court of Justice of the European Union (ECJ)** ensures compliance with the law in the interpretation and application of the European Treaties and the provisions laid down by the competent Community institutions. It has one judge per Member State. The Court is currently divided into the Court of Justice of the European Union, the General Court and the EU Civil Service Tribunal. The judges are helped by nine 'advocates-general' whose job is to submit legal opinions on the cases brought before the Court.

The case law of the ECJ has contributed to the development of Community health and safety at work law. While most cases have dealt with the 1989 Framework Directive and the 1993 Working Time Directive and subsequent developments, it has also considered the contradictions between the rules for full harmonisation of the internal market and national health and safety at work provisions in various cases concerning both chemicals<sup>24</sup> and work equipment<sup>25</sup>.

Most rulings on the Framework Directive are in infringement proceedings brought by the Commission against Member States which it considers have not properly implemented EU Directives. Where other health and safety at work directives – and indeed most of the other judgments on social/employment rules – are concerned, what has most promoted the development of the corpus of ECJ case law is requests for a preliminary ruling – where national courts ask the Court of Justice to interpret a point of EU law in a case brought before them. This helps ascertain whether national law is compliant with Community law. Trade unions would be well-advised to develop more ambitious litigation strategies to consolidate the legal advances made under Community law.

The Lisbon Treaty also provides a role for Member States' **national parliaments** (see in particular Article 12 TEU). The Community institutions must forward draft EU legislative acts to them. They then have eight weeks to give their opinion. If compliance of a draft legislative act with the subsidiarity principle is challenged by a third of the votes allocated to national parliaments ('yellow card'), the Commission must review its proposal and decide whether to maintain, amend or withdraw its proposal, giving its reasons. This threshold is a quarter for a draft law submitted under Article 76 of the Treaty on the Functioning of the European Union relating to the area of freedom, security and justice. Where compliance with the subsidiarity principle of a draft legislative act submitted under the ordinary

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23. Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission on complaint 3453/2005/GG, 10 September 2007.

24. ECJ, judgment of 17 December 1998, *IP v. Borsana*, C-2/97, Judgment of 11 July 2000 *Kemikalieinspektionen v. Toolex Alpha AB*, C-473-98.

25. ECJ, judgment of 28 January 1986, *Commission v. France*, C-188/84, judgment of 8 September 2005, *Yonemoto*, C-40/04; judgment of 17 April 2007, *AGM-Cosmet SRL*, C-470/03.

legislative procedure is challenged by a simple majority of the votes allocated to national parliaments ('orange card'), the Commission must review its proposal. If it chooses to maintain the draft act, the Commission must justify its position by a reasoned opinion.

The first 'yellow card' was issued in May 2012 in relation to a Commission proposal for a regulation limiting the right to strike in connection with freedom of establishment and freedom to provide services ('Monti II'). The European Trade Union Confederation criticised the fact that the proposal for a regulation did not question the primacy accorded to economic freedoms, nor the role of the proportionality test in resolving conflicts between these freedoms and the right to take collective action. Twelve national parliaments or chambers of parliaments<sup>26</sup> considered that the proposal did not comply with the subsidiarity principle as regards its content. The Commission eventually withdrew its proposal.

## Specific EU occupational safety and health bodies

### The Advisory Committee on Safety and Health at Work – Luxembourg

The Advisory Committee was established by a 1974 decision of the Council<sup>27</sup>. Its remit is to assist the Commission in the preparation, implementation and evaluation of all activities related to safety and health at work.

The Committee's main activities are:

- giving opinions on draft Community health and safety at work legislation and EU strategies in the matter;
- encouraging exchanges of experience between Member States on prevention strategies and highlighting issues where Community action would be helpful;
- alongside the Bilbao Agency<sup>28</sup>, helping to inform national administrations, trade unions and employers' organisations on Community measures in order to facilitate cooperation between them and encourage exchanges of experience and the establishment of codes of good practice;
- giving an opinion on the Bilbao Agency's annual and four-year rolling programme.

The Committee works in cooperation with other committees that have OSH remits, including the Senior Labour Inspectors' Committee (SLIC) and the Scientific Committee on Occupational Exposure Limit Values (SCOEL). It also looks into the interactions between OSH and the Chemicals Regulation (REACH) and the role and limits of technical standardisation in OSH.

The Committee is composed of three full members per Member State: one government representative, one representative of the trade unions and one representative of employers' organisations. Two alternate members are appointed for each full member. Alternate members attend Committee meetings only if the full member they are substituting for cannot. Full and alternate members are appointed by the Council. In practice, they are

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<sup>26</sup>. The Parliament opposed to the proposal were from: Belgium, Denmark, Finland, France, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Sweden and the United Kingdom.

<sup>27</sup>. Decision of 22 July 2003 (2003/C 218/01). This decision cancels the previous decisions on the Committee, in particular decisions 74/325/EEC and 74/326/EEC.

<sup>28</sup>. The official title of the Bilbao agency is European Agency for Safety and Health at Work or EU-OSHA.

appointed by the Member State and the appointment is always confirmed by the Council. Their term of office is three years and they can be re-appointed.

In the most vigorous period of new law-making from 1988 to 2000, the Committee played a particularly key role in the discussion of draft directives, which ultimately incorporated many of its proposals. The Committee can be said to some extent to have been co-draftsman of some of the legislative output, despite its purely advisory role. Over the past decade, by contrast, most of the ACSH's proposals have not been taken up by the Commission. The Communication setting a strategic framework for 2014-2020, for example, includes none of the Committee's substantive proposals.

## The European Agency for Safety and Health at Work – Bilbao

The Bilbao Agency is a tripartite EU body established in 1994 by a Council Regulation<sup>29</sup>. Its main remit is to collect and disseminate information on OSH matters. Since 2000, the Agency has also run two-year campaigns to raise OSH stakeholders' awareness of a particular theme. The annual European Week for Safety and Health at Work (held in October each year) is the high point of these events, which may include training sessions, conferences, lectures and workshops, poster, film and photo competitions, questionnaires, suggestion schemes, advertising campaigns and press conferences. The 2014-2015 Campaign is focused on psychosocial risks.

The Agency has established a European Risk Observatory to collect and analyse information on new or emerging risks from changes in technology and work. As part of this, the Agency conducted an extensive survey in 2010<sup>30</sup> entitled 'ESENER' focused on new and emerging risks. One of the main focuses of this investigation run in different countries is to analyse prevention policies as actually implemented in companies. The survey was carried out again in 2015 to ascertain what if any changes had occurred.

A significant amount of the Agency's information is supplied by national focal points. Sound, tripartite operation of these focal points is crucial to ensure that information is complete and does not underrate the problems. The focal points need to have a more active hand in putting out information to workers in cooperation with the trade unions. Government agencies are often loath to provide information on the unsolved problems and failings in prevention systems.

In recent years the Agency has developed research programmes and exchanges of information and experience on policy issues that are going unaddressed by the European Commission. These include contributions to studying the gender dimension in OSH, comparative analyses of exposure limits for carcinogens, mutagens and reprotoxins and a wide-ranging programme on ageing at work.

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**29.** Council Regulation (EC) No 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work and Council Regulations (EC) No 1643/95 and (EC) No 1654/2003 amending Council Regulation (EC) No 2062/94 of 18 July 1994.

**30.** European Survey of Enterprises on New and Emerging Risks (ESENER).

### ESENER 2010: what drives prevention?

The 2010 ESENER survey is based on nearly 36,000 telephone interviews with private and public sector undertakings employing at least ten workers in the 27 EU Member States plus Croatia, Turkey, Norway and Switzerland. The primary interviewee is the business owner or a management officer. If he advises that the firm has a workers' health and safety rep, that rep is also interviewed separately so as to get two independent views of the situation in the undertaking. The questions deal with the management of health and safety in general, the management of psychosocial risks and worker participation.

One question asked was about the drivers of preventive action. The answers are clear and fairly consistent for all countries and sizes of undertaking. The main factor that drives undertakings to develop a prevention policy is the law – 90% of enterprises claim that what prompts them to act is compliance with the law. This is the foremost reason cited in 22 of the 27 countries. For psychosocial risks – where the legislative framework is often under-developed compared to more traditional hazards – legal obligations remain the main driver for action (cited in 63% of responses) far ahead of all other factors which range from 36% (demand from workers and their representatives) to 11% (concern about high rates of absenteeism).

The second most frequently given reason for taking preventive measures is demand from workers and their representatives – cited by three out of four enterprises.

However, the between-country gaps are wider here, ranging from a low of 23% in Hungary to a high of 91% in Finland. Economic arguments – be it customer demands and concern for corporate reputation (67%), management policies to limit absenteeism and retain staff (59%) or other financial or performance-related reasons (52%) – play only a more limited role. Pressure from the health and safety inspectorate also appears to have a lesser influence (57%) – understandable given the understaffing of inspection services and low likelihood of inspection that entails. The gaps are also wide where health and safety inspections are concerned – 16% in Hungary versus 80% in Germany. Pressure of health and safety inspections is a lesser concern where psychosocial risks are concerned, cited by just 15% of enterprises.

The barriers to preventive action mentioned in the survey confirm that it is under-resourced in a significant share of enterprises. The most commonly identified obstacles are a lack of internal resources in time, personnel or financial resources. Again, the gaps are wide, concerning three in four Romanian compared to one fifth of Austrian undertakings.

#### Read more

Rial González E., Cockburn W. and Irastorza X. (2010) European survey of enterprises on new and emerging risks: managing safety and health at work, Bilbao, European Agency for Safety and Health at Work.

Walters D., Wadsworth E. and Marsh K. (2012) Worker representation and consultation on health and safety: an analysis of the findings of the European Survey of Enterprises on New and Emerging Risks (ESENER), Bilbao, European Agency for Safety and Health at Work.

## The European Foundation for the Improvement of Living and Working Conditions – Dublin

The Dublin Foundation (Eurofound) was set up in 1975<sup>31</sup> to contribute to the betterment of living and working conditions. It is among the first European agencies to have been set up to research into specific areas of EU social policy. It conducts research and provides data and analysis that inform and support EU policy-making in OSH in particular.

31. Council Regulation (EEC) No 1365/75 of 26 May 1975.

The Foundation is managed by a tripartite Governing Board composed of representatives of the national governments, trade unions and employers' organisations from each EU Member State plus three Commission representatives. The Governing Board meets once a year to lay down the research strategy, adopt the work programme and propose the estimated budget. The work programmes are the outcome of detailed deliberations of the groups making up the Governing Board as well as with the representatives of the EU institutions. The programmes divide the Foundation's work into three sectors: industrial relations, working conditions, and living conditions. It has set up a European Monitoring Centre on Change (EMCC) and a European Observatory of Working Life (EurWORK).

Since its inception, Eurofound has done a unique job of monitoring and analysing working conditions. The European Working Conditions Survey (often cited by its acronym, EWCS) is an essential reference source for Community policy on occupational health. The survey was launched in 1990 and is repeated every five years. It will be conducted for the sixth time in 2015. This will give a picture of changes over the past twenty-five years through comparative data across different EU Member States. The survey was initially conducted in 12 countries and has gradually been extended until the sixth survey will cover 35 countries – the 28 EU Member States plus five candidate countries (Albania, Macedonia, Montenegro, Serbia and Turkey) as well as Switzerland and Norway – making it the most comprehensive survey to date in terms of the number of countries covered. Upwards of 43,000 workers will be quizzed. The initial findings of the Sixth European Working Conditions Survey will be available by the end of 2015. The questionnaire covers all aspects of working conditions, including the physical environment, job design, working hours, work organisation and social relationships in the workplace.

The data collected from this survey will inform a number of analytical reports providing insight into specific issues like working time, gender inequalities, ageing-related issues and casualisation. Sectoral analyses are also published.

**European Survey on working conditions in 2010:  
an alarming rise in inequalities**

The findings of the 2010 Working Conditions Survey provide much evidence that the aim of harmonisation of working conditions is nowhere near being delivered. Inequalities are on the rise in many spheres both between states and between socioeconomic groups within each state.

These trends are summarised by Thomas Amossé as follows: 'The overall trend has not affected the different occupational groups in anything like the same way: employment risks have got visibly worse in the jobs most exposed to them; meanwhile, manual workers, and especially skilled workers, have seen their situations deteriorate in terms of physical strain and work intensity. Despite, or aside from, changes in the economy that

tend to limit physical work risks (through changes in the structure of employment), the relative stability reported by the European Working Conditions Surveys actually conceals rising inequalities which are now also affecting the conditions of employees who were already in the most casualised or second-class jobs. Such plans and advances as are found are clearly shaky and not equally applicable to all' (Amossé 2015: 76).

Many workers endure working conditions that will not allow them to keep working up to retirement age. The build-up of effects from health-injuring events throughout working life is the reason why fewer than 50% of manual workers think they will be able to still be doing the same job when they reach 60 years of age. It is a belief borne out by a large body of data on social inequalities in health that show a high early death rate and lowered healthy life expectancy for manual workers.

The survey also gives evidence of wide gender equality gaps. Women are concentrated in a relatively small number of sectors and lines of work, and generally occupy lower rungs on the job ladder. They do the bulk of unpaid work. Where employment conditions are concerned, the main factor in segregation is part-time work which in a number of European countries has become the 'norm' for women's employment, especially for women with dependent children.

The survey shows a strong read-across between working conditions and a range of injuries to health like musculoskeletal disorders, headaches, sleep disorders and mental health problems.

The survey shows that nearly half of workers in Europe have no form of collective representation. The

percentages vary widely from one country to the next. In the Nordic countries, over 80% of workers have collective representation compared to between 20% and 30% in Turkey and Portugal.

**Read more**

Amossé T. (2015) Les conditions de travail en Europe dans les années 2000 : de fortes inégalités sociales, in Thébaud-Mony A., Davezies P., Vogel L. and Volkoff S. (eds.) Les risques du travail : pour ne pas perdre sa vie à la gagner, Paris, La Découverte, 66-79.

Eurofound (2012) Fifth European Working Conditions Survey, Luxembourg, Publications Office of the European Union.

Eurofound (2012) Sustainable work and the ageing workforce, Luxembourg, Publications Office of the European Union.

Eurofound (2013) Quality of employment conditions and employment relations in Europe, Dublin, Eurofound.

## The Senior Labour Inspectors Committee

The Senior Labour Inspectors Committee (better known by its acronym, SLIC) brings together senior officials from the labour inspection services of each EU Member State. It started to meet in an informal way in 1982 and a Commission Decision gave it formal status in 1995. Its role is important in that equal application of Community directives to all EU workers largely depends on the proper functioning of labour inspectorates. SLIC organises regular joint campaigns in which these services coordinate their activities on a priority theme for a set period. The 2012 campaign, for example, focused on labour inspectors' assessments of psychosocial risks. SLIC has also drawn up common principles for labour inspection. Through SLIC, the operation of each labour inspection service in a particular country can be evaluated by a team of labour inspectors from another country with a view to making proposals for improvements. One big challenge for SLIC is to improve cooperation between labour inspection services in situations where an undertaking operates in a country other than its country of origin. SLIC has rightly expressed deep concern about the dangers posed by the Directive to liberalise the market in services ('Bolkestein Directive' adopted on 12 December 2006).

SLIC's efforts notwithstanding, there is a clear lack of strong inspection systems in a majority of EU countries. Many European countries are failing to meet the International Labour Organisation requirement of at least one front-line health and safety inspector for every 10,000 workers.

## The Scientific Committee on Occupational Exposure Limits

The Scientific Committee on Occupational Exposure Limits (SCOEL) was set up in 1995 to assist the Commission by drawing up scientific recommendations to underpin regulatory proposals on occupational exposure limit values (OELVs) for chemicals in the

workplace<sup>32</sup>. These limit values are needed to implement the Chemicals and Carcinogens Directives. They enable exposures to be minimised. Their compliance requirements help to give impetus to technological improvements by promoting replacement by less harmful substances or production processes. But keeping to these limit values cannot ever be considered the primary objective of effective prevention, which must be based on a set of measures in which replacement of hazardous chemicals comes first and levels of exposure to chemicals that have not been replaced must be reduced to the lowest level technically possible.

SCOEL examines available information on the properties of chemicals, including their toxicological properties, assesses the link between the health effects of chemicals and occupational exposure levels and, where appropriate, recommends occupational exposure limits (OELs) which it considers will protect workers against chemical hazards. The members of SCOEL are selected from among candidates nominated by the Member States. All members of SCOEL act as independent scientific experts and not as representatives of their national government. They include experts in chemistry, toxicology, epidemiology, occupational medicine and industrial hygiene.

Having evaluated the available scientific data, SCOEL proposes where possible an OEL which is specific to the chemical concerned. SCOEL recommendations are in the form of a brief summary detailing and justifying the OEL calculated. Once adopted, the Commission publishes the recommendation to allow all stakeholders to submit scientific comments on the 'healthy' limit of the value and any other data. In some cases airborne exposure limits are supplemented by biological limit values that calculate the concentration of a substance or its metabolites in the blood or urine of exposed workers. Where dermal exposure to the chemical is also possible, this is indicated in the SCOEL recommendation by a 'skin notation'.

After a period of about six months set for the submission of scientific comments, the Committee reviews the document in the light of comments received and adopts the final version which is then published by the Commission. Once the Commission services receive the Committee's final recommendation, they can formulate legal proposals for an OEL. SCOEL makes health-based recommendations on OELs to the Commission. An OEL of this kind can be formulated in cases where a review of all the scientific data leads to the conclusion that a threshold can be identified below which exposure to the chemical in question should not result in adverse effects. The calculation is based on an exposure time of not more than 8 hours/day for 5 days/week over a 40-year working life.

The European Commission uses SCOEL's scientific opinions to draw up proposed occupational exposure limits.

Two kinds of Community limit values can be distinguished. They may be indicative or binding.

*Indicative limits* are based on scientific considerations alone. They are considered adaptations to technical progress and are incorporated into Commission directives under the Chemicals Directive. Because they are indicative, Member States are free to implement a national OEL which may (but need not be) the same as the European OEL. A national OEL may thus be higher or lower than the European OEL.

*Binding limits* also take into account socioeconomic and technical feasibility factors. They are included in directives adopted by Council and Parliament under either the Chemicals Directive or the Carcinogens Directive. Because they are binding, Member States must

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32. The organisation of SCOEL is currently governed by Commission Decision 2014/113/EU of 3 March 2014.

implement an OEL at national level which is at least the same as that defined in the Directive. They may also retain or introduce a more protective OEL.

At the start of 2015, SCOEL had defined limit values for nearly 200 substances or groups of substances and in some cases had revised previously defined values in light of new scientific data. This sterling work notwithstanding, the setting of indicative and mandatory limits is lagging far behind.

As regards indicative limit values, the Commission has adopted three lists under the 1998 Directive on the protection of workers from chemical risks. Some of these limit values do no more than re-enact earlier Community provisions adopted in 1991 and 1996 under Directive 80/1107/EEC. Others modify the previous limit values. Yet others concern substances for which there were no Community limit values. The first Directive, dating from 16 June 2000, dealt with 62 substances; the second, adopted on 7 February 2006, concerned 33 substances; the third, adopted on 17 December 2009, covered only 17 substances. The gap between the SCOEL recommendations and Community rule-making has widened over the past decade. In the second list, the Commission dropped chemicals included in the original version. In December 2003, the Member States represented in the Committee for Adaptation to Scientific and Technical Progress (Technical Adaptation Committee-TAC) had approved a list of 34 substances. And even on this latter list, the indicative limit value proposed for nitrogen monoxide (NO) – a substance that causes respiratory disorders – was opposed by chemicals and mining industry employer organisations. Finally, the Commission bowed to pressure from industry and left both nitrogen monoxide and nitrogen dioxide (NO<sub>2</sub>) off the third list. In so doing, it has created a situation where the chemical industry can veto values set by the competent independent experts who sit on SCOEL.

SCOEL reviewed these substances and adopted updated recommendations in June 2014 so that they can be included in the fourth list set to be adopted in 2015. This will be a litmus test of the new Commission's ability to shake off the paralysing grip of industrial lobbies.

The situation as regards mandatory limit values does not bear thinking about. In over twenty years, there have been only five binding limit values adopted by the EU, the most recent of which was in 2003 with the revision of the Asbestos Directive. Fewer than 20% of workers exposed to a carcinogen in Europe are covered by these exposure limit values.

The roles of the European Committee for Standardisation (CEN) and the European Chemicals Agency (ECHA) are examined in Chapter 5.



**Table 1** Binding exposure limits

Substances	Date first limit value adopted	Date subsequently revised	Values currently in force	Comments
Lead	1982	Never revised	150 µg/m <sup>3</sup>	Described as a temporary compromise in 1982, but the limit value has never been revised. In 2002, SCOEL recommended a value of 100 µg/m <sup>3</sup> , which is in force in a number of Member States (Sweden, France, Slovenia). Lower values: 75 µg/m <sup>3</sup> (Finland); 50 µg/m <sup>3</sup> (Denmark, Norway, Portugal, Poland, Czech Republic).
Asbestos	1983	1991 and 2003	0.1 fibres per cm <sup>3</sup>	This limit value does not ensure adequate protection of workers' health. France and the Netherlands: 0.01 fibres per cm <sup>3</sup> .
Benzene	1990	1997	1 ppm	Several States have adopted values giving better protection to workers. 0.5 ppm (Denmark, Estonia, Poland, Sweden). In Germany, the recommended value for protecting health is 0.06 ppm and the limit value above which any exposure must be prohibited is 0.5 ppm.
Vinyl Chloride Monomer	1978	Never revised	3 ppm	Limit values are set at 2 or 1 ppm in Estonia, France, Sweden, Norway.
Hardwood dust	1999	Never revised	5 mg/m <sup>3</sup>	In 1999, the Commission pledged to put up proposals on other wood dusts. To date, it has not done so. There is no justification for restricting the limit value to hardwood dust alone. The limit value is 2 mg/m <sup>3</sup> in Sweden, 1 mg/m <sup>3</sup> in France.

The Member States mentioned as having adopted binding limit values that give better protection to workers are not exhaustively listed. The system operating in Germany and the Netherlands differs from that of other Member States and usually results in exposure limits that provide better protection than Community ones.

The above table gives only the limit values for 8-hour exposures. It does not show the limit values set for short-term exposures.



## Chapter 4

# Fundamental principles of European OSH legislation

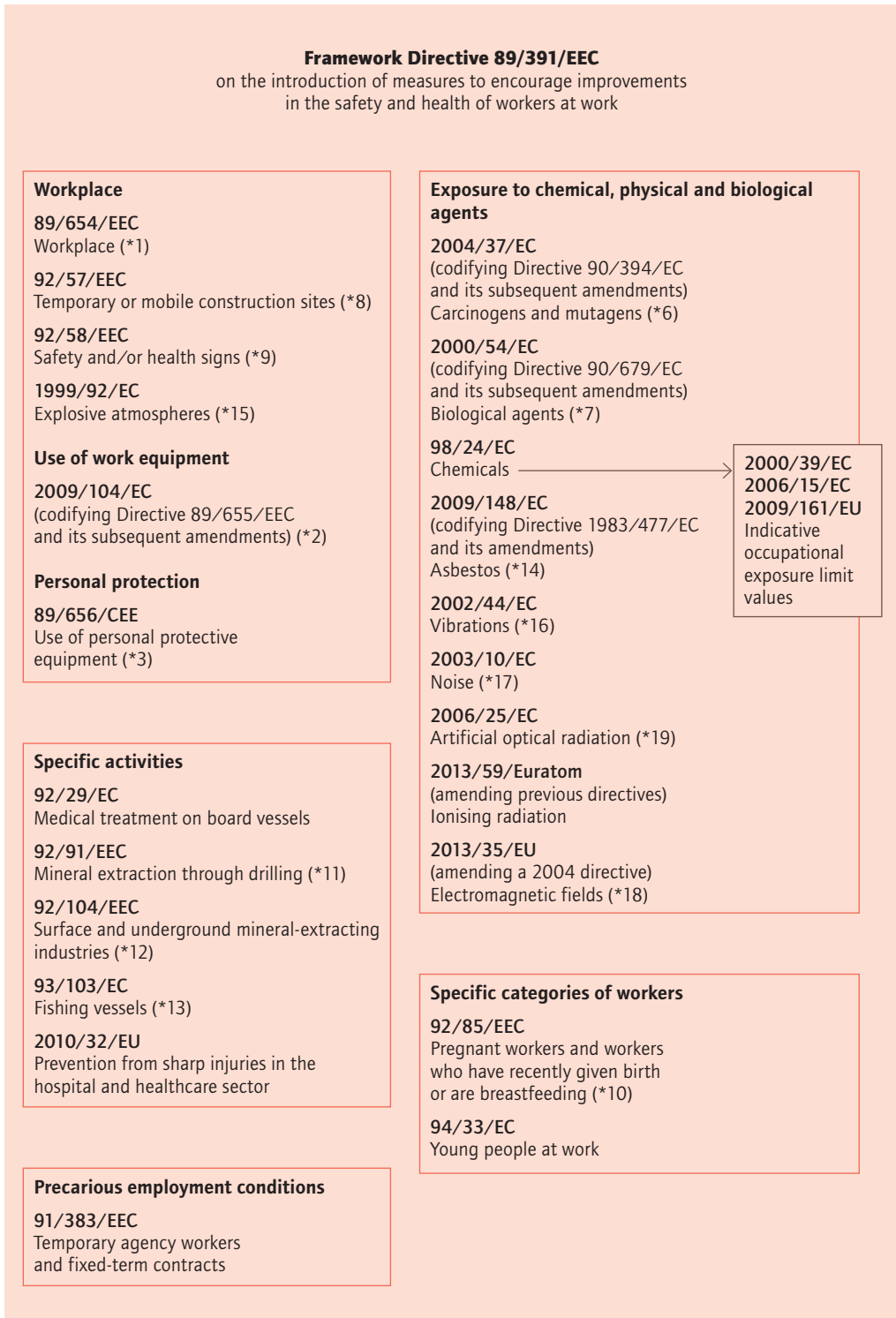
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Everywhere in Europe health and safety were the first issues to be addressed by what was then called factory law but which gave rise to what are now two separate branches of law, namely, labour/employment law and environmental law. The first industrial revolution showed the fallacy of believing that employers' voluntary initiatives or economic interest would produce working conditions that would be protective of workers' lives and health. In that respect, nothing has changed today and the purpose of prevention in workplaces is to make an outside rationale tip the balance away from profit-making: occupational health does not fit readily with business management but, rather, calls into question work organisation, the chain of command and many production choices. While it also addresses some system breakdowns (work accidents interfere with production), its main area of concern is the normal course of work as planned and organised by management. This why organised labour action and public rules are two driving forces of the organisation of prevention.

The creation of the European Union abolished national borders between its 28 members with respect to the movement of workers, goods, businesses and capital. Competition takes place in an extended area compared to States with their own OSH laws. If that competition is not to spark a race to the bottom, a common framework of laws at European level is essential.

That framework is currently based on thirty Directives, the main one being the 1989 Framework Directive.

**Figure 1 EU health and safety Directives currently in force**



**Ergonomic factors****90/269/EEC**

Manual handling of loads (\*4)

**90/270/EEC**

Display screen equipment (\*5)

**Working time****2003/88/EC**

(codifying Directive 93/104/EC and its subsequent amendments)

Working time

+ sector-specific directives

**1999/63/EC**

Working time of seafarers

(amended by directive 2009/13/EU)

**2002/15/EC**

Working time in road transport (also applies to self employed drivers)

**2005/47/EC**

Mobile workers engaged in interoperable cross-border services in the railway sector

**2014/112/EU**

Inland waterway transport

Note: the individual Directives under the Framework Directive are indicated by an asterisk followed by a figure, so '\*10' signifies 'tenth individual Directive under the Framework Directive', for example.

**1989 Framework Directive: the benchmark law**

The 1989 Framework Directive lays down the principles that underpin Community occupational health and safety legislation. The Framework Directive enshrines some of the gains made by labour organisations which during the 1970s had put working conditions at the front and centre of labour demands. From Italy to the Scandinavian countries, a number of common issues are identifiable: rejection of repetitive work, intense work paces, a division of labour that denied unskilled workers any autonomy in how to organise their work, demands for wellbeing and dignity that are about much more than just preventing work accidents, workers' desires to have command of the production system and exercise control over technological changes and the accompanying job-related choices, etc.

Among the main developments at least partially enshrined in the 1989 Framework Directive are:

- a move away from an emphasis on monetary compensation for the damage done by work to a prevention focus ('health is not for sale');
- a shift from a focus on the individual to the collective conditions that determine health ('it is not the worker that is sick but the business');
- a shift from a technical approach where rules devised by specialists ordain what is healthy and safe to a socio-technical approach where workers move from being the object to the main subject of prevention ('workers themselves are the primary specialists in their working conditions');
- a requirement for all workers to be equally covered by health and safety laws regardless of their status. This was a big step forward in many countries where prevailing rules created a wide gap between civil servants and private sector workers. Previously, entire categories of workers (agriculture, fishing, family businesses, cooperatives, religious foundations, etc.) were covered by no or only lowest-common-denominator rules. The only exemption allowed by the Framework Directive concerns domestic workers;

- a very broad definition of the scope of prevention as involving all the factors likely to affect health, including repetitive and monotonous work and labour relations within the company;
- a defined general safety obligation requiring a result to be achieved combined with fairly specific criteria on the means to be used (prevention planning, risk assessment, establishment of preventive services, employee representation).

## Other directives

A total of 19 individual directives issued under the Framework Directive cover different risk factors and different categories of workers. None of these Directives can be properly enforced if the Framework Directive's fundamental principles have not been correctly implemented because only on the basis of these principles will the workplace prevention system hang properly together.

There are also a number of 'free-standing' Directives not directly connected with the Framework Directive; these cover the following areas: working time; workers in a fixed-duration or a temporary employment relationship; young people at work; and medical treatment on board vessels. Even here, however, linkage with the Framework Directive is no less important to achieve the integrated prevention that will take into account the interaction of different risks at work.

The Figure 1, p. 42 shows the areas currently covered.

## Many omissions to be made good

The main body of Community OSH legislation was adopted between 1989 and 2000. While its basic principles are still fundamental to properly organised prevention, major gaps remain in this corpus of regulation.

The Community directives mainly laid down a framework governing employers' obligations towards their own workers. While this is essential, it is not a sufficient response for all prevention activities.

The reality of work does not match up particularly well with the constraints of the legal definition of a business venture. Production chains (in a broad sense, whether for production of material goods or services) have become more complex. Situations like the use of agency work, subcontracting, worksite sharing and the use of independent contractors all require regulation that does more than specify the obligations of the different employers concerned. Likewise, technological developments combined with management policies compound the problem of defining what might heretofore have seemed more straightforward concepts, like workplace and working time<sup>33</sup>.

As regards the matters dealt with, directives are non-existent or fall short in the areas where most of the key risks for workers in the European Union are to be found.

Cancers caused by exposure at work cause around 100,000 deaths per year in the European Union but there have been no improvements to the existing legislation for ten years (see p. 23). The Directive – which applies only to carcinogens and mutagens – should

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33. See in particular Popma J. (2013) The Janus face of the 'New Ways of Work': Rise, risks and regulation of nomadic work, Working Paper 2013.07, Brussels, ETUI.

also be revised to include reprotoxins in its scope. The ultimate aim should be to have one directive covering all substances of very high concern to enable uniform prevention of the risks they induce (including endocrine disruptors, in particular).

About a quarter of workers suffer from musculoskeletal disorders (MSDs) which have a build-up of effects throughout and beyond working life. They cause many workers to lose their jobs, affect for the worse the quality of life enjoyed by older people, and can lead to a rise in mortality due to the long-term consequences of inflammations. Most EU states have no specific laws to guide preventive action against MSDs. In practice, the performance records of preventive actions in most companies remain poor. Employers see MSDs as inevitable bodily sacrifices by workers in the interest of productivity. There is also a gender aspect in that MSDs mostly affect women whose working conditions are typified by less job discretion than men's. Women are also more exposed to MSDs by the unequal division of unpaid domestic work. Employers often use this fact to downplay the role of working conditions in MSDs and explain them away as groundless complaints, or lifestyle or biological factors that, so they claim, are unconnected with working conditions.

The only way of preventing MSDs is through a comprehensive approach that makes allowance for the ergonomic conditions of work, the pace and pressure of work, work organisation, whether work equipment is right for the worker's job, and the interaction between all these and psychosocial risk factors. Such an approach challenges the employer's power to determine the organisation of work. Rather than tackle the issue head on, Community law has sought to sidestep the problem by regulating just a handful of risk factors like the handling of heavy loads, work on display screens and vibrations – on a standalone basis. A comprehensive directive on the prevention of musculoskeletal disorders has been on the agenda since 2000. The preparatory work on these directives was brought to a complete standstill by the Barroso Commission in 2012. This U-turn was not unconnected with employers' lobbying for, on 26 March 2012, the European employers' organisation Business Europe and most of the employers' organisations in sectors where poor working conditions mean that MSDs are rife (building, cleaning, shopwork, etc.) called on Commissioners Tajani (enterprises) and Andor (social affairs) to give up on the idea of a directive. The lobbying paid off. In May 2012, the Impact Assessment Board (see p. 21) came out against the draft directive, since when its proposals have been gathering dust on the Commission shelves and have not been submitted to the European Parliament.

Psychosocial risks are another area where current EU directives clearly fall short of requirements. While there is no question that the Framework Directive's prevention principles also apply to psychosocial risk factors, the lack of specific, detailed rules is severely hampering prevention. The only existing Community instruments are the agreements concluded in the context of the European social dialogue (see Chapter 7). These agreements either have no binding effect or do not cover all workers in most Member States.

Scientific knowledge and technology are also adding to the development of emerging risks. This is very much the case with nanomaterials, which have proliferated rapidly in the last ten years with no adequate assessments of their health risks being carried out<sup>34</sup>. Even though the available knowledge on endocrine disruptors now enables a better assessment of the hazards these chemicals pose to exposed workers, at present there are no EU laws to protect workers against the risks of nanomaterials and endocrine disruptors. Not only that, but the Barroso Commission has flouted its own legal obligations on endocrine disruptors.

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34. See: Ponce Del Castillo A. (2013) Nanomaterials and workplace health & safety. What are the issues for workers?, Brussels, ETUI.

It was due to work out criteria for identifying endocrine disruptors found in pesticides in 2013, but bowed to powerful lobbying by chemical companies (notably, Bayer and BASF) and did not do so. This violation of legal rules prompted the Council of Ministers' decision in December 2014 to back the legal action brought by Sweden against the Commission in the European Court of Justice.

### **RISCTox: a union tool**

There is a big gap in knowledge about the risks from chemicals in the workplace. The vast majority of deaths due to working conditions in Europe are caused by exposure to hazardous chemicals. Workers generally lack quick and easy access to accurate and detailed information on the chemicals they use. To help remedy that, the European Trade Union Institute (ETUI) and the Spanish Trade Union Institute Ista co-developed the RISCTOX chemicals database. Workers can now access information sheets on some 100,000 chemicals via the ETUI website, including thousands of chemicals that can cause cancer, allergies, hormonal system disruption or reproductive system damage.

Each datasheet gives the regulation classification and labelling, the main work-related uses of the chemical

(solvent, cleaner, paint stripper, etc.), health effects and occupational diseases caused.

The information can be called up simply by typing the chemical's name or identification number in the main international inventories of chemicals into a search box. Of the approximately 100,000 chemicals listed, almost 570 have been identified by trade unions as substances of very high concern (SVHC) and put on the trade union list of priority substances. These are chemicals widely used in workplaces requiring priority treatment by REACH, the Regulation governing the marketing and use of chemicals in the EU.

#### **Read more**

The RISCTOX database can be accessed in English on the ETUI website: <http://www.etui.org/Topics/Health-Safety/Chemicals-and-REACH/RISCTOX-database>

## Compulsory national report

The Member States have to submit a single report to the Commission every five years on the practical implementation of the health and safety Directives. The report has to be drawn up on a tripartite basis and to reflect the views of government authorities, trade unions and employers' organisations. The first report covers the period 2007-2012. Directive 2007/30/EC of 20 June 2007, which requires these reports to be drawn up, does not apply to the Working Time Directive or the Euratom Directive on ionising radiation. On the basis of these reports, the Commission is supposed to issue a summary status report to assess implementation of the directives and identify any required improvements to Community law. As of March 2015, the Commission's report for the period 2007-2012 had not yet been drawn up.

## Work accidents and occupational diseases

EU law has very little to say on the recognition of workplace accidents and occupational diseases. Recognition and compensation procedures are set by the individual Member State on substantially different bases. The differences are much greater with regard to diseases than to accidents.



Member States have obligations concerning national statistics to be submitted to Eurostat, the requirements for which are currently found in Regulation 1338/2008/EU. On 11 April 2011, the Commission adopted an implementing regulation on statistics on accidents at work (Regulation No 349/2011).

These are used as the basis for European statistics on work accidents, published at regular intervals.

The situation regarding occupational diseases is much more critical. European Recommendations have been in place since 1962, the most recent dating back to 19 September 2003. The original idea was for the European Schedules of Occupational Diseases to be revised every two or three years but that is nowhere near happening. The Recommendations contain two lists: one is of occupational diseases that should be *recognised* and *compensated* by the Member States; the other is of diseases that are *notifiable* by reason of their *suspected* work-related origin. The Member States also have to set up a mixed scheme to enable recognition of any non-listed disease for which a worker can prove a causal link between the disease and his/her working conditions.

The fact that these are non-binding rules has perpetuated huge gaps between countries and limits the ability to make meaningful comparisons, a situation made worse by the decision to discontinue publishing European statistics on occupational diseases.



## Chapter 5

# The different levels of a prevention system

Prevention is organised at different levels. A number of activities take place at the company level. Others make sense only within a wider public and national context. In fact, the extent of prevention actions implemented within the workplace may differ widely from company to company, for a number of reasons: a lack of employer willingness, a lack of resources or knowledge, a lack of union organisation, and so on. Only the existence of a level external to the company is therefore able to guarantee consistent protection for all workers. This level is responsible for a range of tasks that involve setting the rules, monitoring and sanctioning breaches, research, information, training and so on. Carcinogen substitution, for example, can take place only if companies' experiences of prevention are disseminated to others. There are also numerous intermediate (sectoral and regional) levels.

In addition, the organisation of production now generally exceeds the bounds of a company as a legal entity. Over the last few decades, subcontracting networks have grown considerably more complex and this factor stretches the bounds of prevention, which can no longer be based solely on each employer's safety obligations with regard to directly employed workers. Subcontractors generally have only limited control over the activities in which their workers are involved.

The effectiveness of prevention depends on the cooperation established between these different levels as well as on the links between prevention properly speaking and the regulation of various global drivers via a range of other policies: public health, labour market, gender equality, environment, technological choices, vocational training, social security, etc. These considerations of effectiveness are closely tied to a political issue: if working conditions are to be changed for the better, then workplaces need to be viewed as public spaces, with steps being taken to

curb the determination displayed by employers to run them as private assets. In environmental terms, for example, there is a high degree of interaction between companies and the surrounding area. For some risks, such as persistent organic pollutants that are not naturally biodegradable and accumulate along the whole length of the food chain, this notion of 'surrounding environment' is very wide indeed, with effects being seen across the whole planet.

We will here consider four factors that are important when organising a prevention system.

## **Worker participation**

Throughout the 1970s, one of the trade unions' main demands was for greater worker control over factors crucial to their working conditions.

This demand was based on a number of different observations:

- over and above prevention strictly speaking, any change in technology or work organisation is likely to have significant consequences for occupational health. In the 1970s, workers' struggles emphasised the strong links between the humanisation of work, democracy in the workplace and worker control over technological changes as regards both technical choices and the accompanying social choices;
- the lack of workplace democracy is a risk for workers. It is based on a damaging division of labour that separates the 'designers' from the 'implementers', thus denying workers' accumulated collective knowledge and understanding of their workplace;
- the traditional prevention policies established within companies are ineffective because their vision is often restricted to the technical and medical elements of occupational health and safety, based on recognised and insured pathologies (workplace accidents, industrial diseases), thus ignoring other important dimensions of occupational health;
- health cannot be achieved solely on the basis of rules imposed by specialists. It requires mobilisation of the workers concerned who need to be guaranteed the opportunity to express their problems and needs. Failing this, prevention is often little more than a smokescreen;
- only active worker involvement will result in a favourable balance of power when it comes to decision-making.

Worker participation is both a need and a right. It forms part of a triangle of essential elements: the multidisciplinary contribution of preventive services; the legislative and regulatory pressure that results in a basic framework of working conditions; and worker participation as a collective contribution to improving health and acting as a counterbalance to other company actors. Participation does not mean the search for a consensus at any price, for there is a constant stand-off between clearly different and often opposing perceptions and interests and it would be absurd to believe that participation denotes the end of conflict. Participation means the right to collective organisation and the freedom to act collectively via any of the methods characteristic of labour movement action (the right to hold meetings, to strike, etc.).

Historically, worker representation with regard to health and safety emerged as the first form of countervailing power in the face of employer management. From 1872 on, worker delegates with inspection powers began to appear in the mines in England, setting an example that was to become a union demand in other European countries.

Union-appointed ‘social inspectors’ still exist in Poland, responsible for checking workplace health and safety conditions.

Worker health and safety representation takes place in different ways across the European countries. Most countries have joint bodies that are in addition to the general representation bodies (generally works councils). This is the case in the Nordic countries, in France, Belgium, Greece, and in most of the countries of eastern and central Europe. Other countries have health and safety representatives (Spain, Italy, UK, in particular) while some countries have a combination of the two. In this latter case, the required staff thresholds for appointing representatives are lower than those required for the formation of a joint committee. The most usual threshold for such representatives is ten workers while the number giving rise to the need for a joint body is generally 50.

In some countries (Germany, Netherlands, Austria), the focus is on a single channel of representation and works councils are intended to represent workers in all issues relating to company life. There may exist, even so, specialist health and safety committees playing a limited role of technical support. In Germany and Austria, the worker members of these specialist committees are appointed by the employer although the Works Council has a right of veto. In the Netherlands, the Works Council appoints these committee members.

The British case is an exception: health and safety representation is legally required only in those companies where the employer recognises a union. Other forms of representation (union representatives, workers’ committees, etc.) are dependent on a voluntary agreement, i.e., ultimately, on the balance of power between organised workers and the company. Legislation has been in place since 1999 enabling unions that represent a majority of workers in companies with more than 20 staff to obtain recognition by applying to the Central Arbitration Committee. This recognition is subject to very strict conditions and does not automatically involve establishing collective representation in the workplace beyond health and safety representatives.

The introduction of worker representatives revolves around the idea of consultation. The employer first informs the representatives of plans in the pipeline and must give them the opportunity to react and propose alternatives. The employer must then justify his final decision to them. In practice, there is a wide spectrum of levels of consultation. It may be established on a purely formal footing, without resulting in any real social debate; at the other extreme, worker representatives may employ a strategy that skilfully coordinates all legal possibilities and joint mobilisations in order to control the changing aspects of work; the usual situation lies somewhere between these two extremes. In some countries, legislative provisions give worker representatives more extensive rights. Worker representatives in Belgium are able to dismiss an external prevention adviser who no longer enjoys the workers’ trust. Originally, in 1977, this provision related solely to occupational medical officers but, in 1996, it was extended to all prevention specialists from external organisations. In Scandinavia, health and safety representatives have the right to call a work stoppage in the case of serious and imminent danger.

There is a very strong link between the existence of worker representation and the establishment of a health and safety prevention system within a company. This link has been highlighted by numerous national surveys and the European ESENER survey (see p. 34).

A team of British researchers emphasised this point in an analysis of the findings of this survey: ‘The published report of the ESENER survey goes on to examine the ‘impact of formal participation of employees in the management of health and safety risks’ and reports that all measures to manage general OSH risks investigated in the survey were found to be ‘more commonly applied where there is general formal representation in place’. It

finds the existence of OSH policies, management systems and action plans to be positively correlated with the presence of employee consultation, even after taking account of establishment size. Indeed, it suggests that where there is representation in smaller firms, these effects are even more pronounced than when it is present in larger firms.

#### **Covering excluded workers: the experience of regional representatives**

A large number of workers have no representation whatsoever. There are thresholds in the vast majority of European countries that prevent employees of small companies from being represented. These thresholds vary from five workers (Scandinavia, Germany) to 50 (France, Greece, Belgium, Bulgaria, Hungary). Other people find themselves without this right due to their employment status. Temporary workers are often exposed to greater risks, and have no access to health and safety representatives. Moreover, this right is not enforced equally. Even when legislation provides for representation, it may not exist in some companies. The European survey on working conditions indicated that 52% of workers enjoy some form of representation (whether specifically for health and safety, union representatives or works councils). The percentage varies enormously from one country to another. In Finland, Sweden and Norway, more than 85% of workers have such representation, but this falls to less than 25% in Portugal (2010 data). France is more or less on the European average. The survey on working conditions does not provide specific data on the existence

of health and safety representation. According to the ESENER2 (2015) survey conducted by the Bilbao Agency, such representation is likely to exist in approximately 60% of European companies with at least five workers although there are significant differences depending on the sector of activity, country and size of company.

Establishing regional representation is one way of enabling small and medium-sized enterprises to obtain better coverage. In Sweden, around 2,000 regional health and safety representatives have been established on a sectoral basis covering more than 350,000 companies. This system, implemented through collective agreements since 1949, was extended by law to all sectors in 1974. A similar system exists in Italy for some sectors. In Spain, collective agreements provide for union health and safety representatives in 'business parks' (industrial areas where different companies, usually from the same sector, are located), covering different companies and their subcontractors.

#### **Read more**

Wiklund H.O. (2011) Sweden: regional safety representatives, a model that is unique in Europe, *HesaMag*, 3, 32-35.

It also finds that the presence of formal representation is associated with better perceptions of the success of measures (such as the impact of OSH policy) to manage OSH risks, and argues that 'the presence (and involvement) of employee representation is clearly a factor in ensuring that such OSH policies and action plans are put into practice'<sup>35</sup>.

Participation is itself an acquired skill for union teams, who must learn to listen to the point of view of the different worker collectives, take account of their needs, and base themselves on their experience. A purely institutional vision of participation, limited for example to meetings of health and safety committees, runs the risk of being devoid of content.

35. Walters D., Wadsworth E. and Marsh K. (2012) Worker representation and consultation on health and safety: an analysis of the findings of the European Survey of Enterprises on New and Emerging Risks (ESENER), Bilbao, European Agency for Safety and Health at Work.

## Different methods of worker participation

### Information

Without equal access to information, any participation becomes impossible. A true right to information involves the right to consult experts, chosen by the unions, in order to validate or deepen the information provided.

### Consultation

Consultation means that the point of view of workers and their representatives is taken into account prior to any decision being taken. It does not affect the principle of employer decision-making but, to be authentic, in the case of a disagreement, the employer's position needs to be explained and the reasons for rejecting the workers' point of view explicitly stated. It is useful to retain documents relating to this consultation and to consider the possibility of an appeal (for example, to the labour inspectorate).

### Negotiation

This relates to all procedures that result in the conclusion of specific agreements between the parties.

### Codecision

This refers to the creation of joint decision-making structures. The employer cannot take unilateral decisions. Channels for appealing to other bodies (for example, labour inspectorate, joint branch committees, etc.) in cases of deadlock should be defined. The power of codecision is widely recognised in German legislation.

### Worker control

This notion remains exceptional outside periods of strong mobilisation as it attacks the very basis of the social division between labour and the employers' power. It enables workers and their representatives to have control over an employer's decisions by obtaining all

relevant documentation and exercising a right of veto over these decisions. If there is worker control over all of a company's decisions then a kind of 'dual power' is created. In some EU Member States, there are very specific forms of control over limited areas. In Belgium, for example, worker representatives can dismiss an external prevention adviser who no longer enjoys the workers' trust.

### Self-management

Two kinds of self-management are encountered: first, in cooperative businesses that adopt a fully democratic way of working, management powers are exercised by the workers themselves; secondly, in situations of industrial unrest, the workers may ensure continuity of production while carrying out management tasks themselves and preventing the employer from appropriating the goods produced. This second situation rarely lasts long because it challenges legal provisions that allow owners of the means of production to appropriate goods produced by workers.

### Direct and informal participation

Employers often fight the introduction of any specific regulations concerning worker participation and instead advocate direct and informal participation. This is understood as being forms of participation that involve individuals, groups (for example, 'quality circles') or, sometimes, a sort of referendum (for example, asking workers to voluntarily give up benefits, on threat of relocation). Direct participation without a consultative structure, without the trade unions, and without specific rights to information or consultation, is generally an attempt to create a consensus around the employer's objectives and to prevent recognition of the specific interests of the workers. In contrast, when there are collective institutions representing the workers, these can base their action on different forms of direct participation in order to fight for democracy in the workplace.

There are at least four essential conditions to mastering the rules of this art:

- adequate training and information;
- autonomy of intervention, enabling the needs and priorities of the workers to be taken as a basis and compared with the knowledge of prevention specialists and the employer's policy;
- the capacity to create links between the struggle for occupational health and other aspects of company life;

- the unions' capacity to establish a functional network that will enable a sharing of experiences between companies and sectors.

Methods of participation vary enormously from country to country. Important differences can be noted in terms of industrial relations systems, union traditions, legislation, etc.

## **Preventive services**

The Framework Directive focuses on preventive services in Article 7, the wording of which is rather complex. Member States are given an important role in defining a number of obligations, and the article sets out also a certain number of basic principles that are intended to guide the action of Member States. The notion of prevention and the tasks required of the various services can be coherently defined only with reference to Article 6 which clearly states that prevention comprises a range of multidisciplinary activities that form a coherent whole and must address all factors that may have an influence on health and safety.

The current situation of preventive services in the European Union is far from satisfactory. In accordance with the Framework Directive, four criteria may be used to evaluate the organisation of preventive services:

- universal coverage: preventive services must be accessible to all workers whatever the size of the company or sector of activity;
- multidisciplinary approach: the services must include different expert skills and the preventive action must, generally, enable cooperation between these different skills such that a global vision of work can be guaranteed. The Framework Directive specifies that it is up to the public authorities of each Member State to define the requisite skills and that this decision must not be left to the employer's discretion. The notion of 'service' implies internal cooperation and an integration of different disciplines. It is not compatible with completely separate interventions conducted by individual prevention specialists who, more often than not, have the status of 'consultants';
- an approach to prevention that accords with the hierarchy of prevention tasks and measures. The main aim of the prevention services' activity is to improve collective working conditions by eliminating risks. This means, in particular, protecting the professional independence of prevention specialists from pressure by employers;
- effective participation of workers and their organisations in the activity of the services.

The multidisciplinary nature of the prevention services can be seen from the diversity and complexity of prevention tasks set out in Article 6 of the Framework Directive. Based on the experience of countries that have multidisciplinary services, in order to ensure a fully competent prevention service, Member States should bring in and ensure cooperation among experts from the following disciplines:

- occupational medicine (doctor plus possibly nurse);
- safety;
- industrial hygiene and toxicology;
- ergonomics;
- work organisation and all associated psychosocial factors.

Cooperation between different experts does not mean that all experts have to be involved in every prevention activity. There is a difference between prevention services, as a stable



organisational set-up working for prevention, and the concrete content of the prevention activity, the multidisciplinary nature of which will depend on the practical circumstances.

Measures need to be defined that will guarantee the sufficient quality of the preventive services. To this end, accreditation by the competent authorities can be very useful. Participation by trade unions in producing quality criteria and evaluation procedures is essential. Regular evaluation of existing experiences and research aimed at identifying unmet needs should form part of the national preventive service policy.

The activity of preventive services must focus on primary and collective prevention, i.e. on changes in working conditions designed to eliminate the risks. While the services also carry out corrective activities in some countries (depending on their practice or national regulations), these must be performed in such a way as to enable the adoption of preventive measures by tracing observed pathologies back to their causes.

Preventive activity must be guaranteed professional independence that enables the staff of the services to act as advisers to both employers and workers. Respect for internationally recognised codes of conduct, as reflected particularly in the International Code of Ethics for Occupational Health Professionals, must be guaranteed. This means, in particular, that the preventive services should not be required to monitor absenteeism and that their activity should have no consequences for staff selection on the basis of health. In particular, any use of genetic tests to select staff exposed to certain risks should be prohibited. Under the rules guaranteeing protection of private life, an employer must be prohibited access to any information of a medical nature. On the basis of health surveillance, collective and anonymous data must be produced to improve the risk assessment and result in more effective prevention plans.

The Framework Directive stipulates that priority must be given to the formation of internal prevention services capable of implementing a specific OSH policy that is in keeping with the company's activities. This work must be supplemented by the use of external services when the required expertise is not available internally. This most often relates to occupational doctors who, generally speaking, are available internally only in a small number of large companies.

The work carried out by external services will be effective only if it is then fed back into the company by an internal department. There are cases where this work is confined within a purely administrative role<sup>36</sup> whereby the external service produces documents for the employer designed to 'prove' that legal obligations are being met, an approach that cannot promote real prevention activities within the company.

All too often, the work of the external prevention services takes place in a fragmented manner and on a commercial basis. Depending on what their client companies want, the external services intervene sometimes more and sometimes less effectively, while it is rare for the experience gained in one particular company to be used to improve prevention in others, resulting in a piecemeal approach that is proving a serious obstacle to prevention.

Whereas prevention services are supposed to fulfil a public health mission, this is largely incompatible with the existing competitive private service market on which activities are subject to the demands of client companies. The link between public prevention policy and these services needs to be strengthened, requiring support for these preventive services from government authorities. Such support could come in many forms depending on the situation of each country.

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**36.** National reports on application of the Framework Directive indicate that, in many countries, risk assessment documents that are produced by external services do not result in concrete prevention plans within the company.

National OSH strategies have an important role to play in improving the quality of prevention services. The following factors in particular should be taken into account:

- pooling of experiences and solutions and the establishment of an easily accessible database and information systems that help to resolve problems on the basis of tried-and-tested practice in other companies;
- research into experience gained and with the aim of identifying unmet needs;
- continuing training of different prevention specialists in order to maintain their skills at an appropriate level;
- quality control of services in order to avoid creating a market for services that are below the required level of quality;
- protection of the independence of prevention operators from employer pressure;
- better integration of preventive services within public health mechanisms (epidemiological research, consideration of health surveillance data provided by preventive services in order to intervene promptly, particularly with regard to banning or limiting the use of hazardous chemical products, etc.).

## **Employers' OSH obligations**

Practice shows that health and safety are not, as such, priority objectives for employers. In some areas, and under some conditions, however, it is of real benefit to employers to improve working conditions and avoid damage to health. This is certainly the case when it comes to avoiding major accidents or damage to health that represents a direct and visible cost to the company (insurance premiums, fines, costs of absenteeism, etc.). However, this situation is not the norm. The search for profit often results in serious neglect of health and safety issues.

Employers' safety obligations derive from one realisation: damage to health caused by work is not the result of misfortune, fate or individual behaviour. It is the result of the power an employer has to determine the organisation of work and thus impose particular working conditions on company staff.

Employers' safety obligations are associated with the notion of planned prevention and a prioritisation of prevention measures. It is a question of eliminating the risks at source wherever possible, anticipating potential risks, providing preventive solutions and regularly reviewing, in the light of experience, the prevention measures in place.

French research<sup>37</sup> suggests that a number of factors are at play in companies' willingness to assess the risks and establish health and safety committees. One such factor is the perceived likelihood of industrial unrest, and another the presence of factors that serve to reduce a company's isolation, such as belonging to a group, being listed on the stock exchange and being involved in employers' networks.

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37. Coutrot T. (2007) Plus de trois établissements sur quatre déclarent évaluer les risques professionnels, Premières Synthèses, 09-3, Paris, DARES.

### Obstacles to avoid

Practice shows that two significant obstacles must be overcome in employers' risk-management policies.

1. The 'side-car effect', which is when prevention measures are treated simply as 'sticking plaster' solutions intended to limit the adverse effects of the organisation of work and which are generally left to technical specialists. This means that prevention requirements are not an integral part of business policy choices. The organisation of work, the choice of equipment and substances, and business planning are all decided with no real evaluation of their impact on the present or future health of workers. Technical measures are taken only after the event in order to compensate for the harm done by a company's policy decisions. In most cases, these technical prevention measures are unable to eliminate the risks at source, and are variably successful attempts at damage limitation. The twisted logic of this approach can, in some cases, result in workers being blamed for bringing the damage upon themselves through their own behaviour.

2. One alternative sometimes proposed is that of establishing a management system in which occupational health forms part of a broader range of objectives such as quality or the environment. While there can be no doubting the need for systematic occupational health management, we do however need to avoid some areas of confusion.

Management systems tend to be designed as top-down command-and-control systems. Management frames its own objectives, organises the business so as to achieve them, evaluates and checks results, etc. Management systems tend to bring in all players in the firm in order to get everyone behind the roll-out of a prevention programme devised by company management. This is a

dangerous form of integrationism. It aims to cut trade unions and the mechanisms of the industrial relations system, where they have a big presence, completely out of the loop; or it may aim to reduce trade union autonomy under the guise of a consensus around a 'safety culture'. It is vital to preserve workers' collective autonomy at all stages of preventive action, for this is what will bring to light and give visibility to new or previously disregarded problems. This is also what will enable health-promoting actions to be taken that, on the surface, run counter to company production requirements or the management chain. Finally, it is what can lift problems out of the workplace setting and drive the policy debate on the changes that need making.

This approach to health and safety as a command system is characteristic of the 45001 draft standard on occupational health and safety that is currently being produced by the International Organization for Standardization (ISO). This draft standard rarely refers to workers or their representatives. The very framework of its production, ISO, in which employers exert hegemonic influence, has aroused the opposition of the trade unions. These organisations do not feel that a technical standard is an adequate tool with which to address issues relating to industrial relations. It is likely that the ISO standard will be adopted during the course of 2017 despite numerous criticisms made both by the International Labour Organisation (ILO) and most prevention actors with regard to weaknesses in the document, which gives employers' unilateral choice a decisive importance in organising prevention. Like all standards, it will be a private and commercial document of a non-binding nature. While it is likely to be adopted and implemented by some companies, it will be important to oppose any challenge to the prevention requirements set out in national and Community legislation, or ILO conventions.

## Labour Inspection Services

There are two inspectorate models in Europe, and numerous different variations within these. General inspectorates intervene to ensure respect for current rules across the whole range of working relations. This is the case in Spain, France, Greece, Hungary, Poland, the Baltic States, and so on.

In the United Kingdom, Ireland and the five Nordic countries (Denmark, Iceland, Finland, Norway and Sweden), there is a specialist inspectorate for occupational health issues although the area of intervention differs slightly in scope from one case to the next. Belgium has an intermediary situation. It follows the generalist model by making the State responsible for monitoring all labour regulations but has a body of specialist inspectors for ‘monitoring wellbeing at work’.

The task of inspection is often shared between the main institution and other bodies. Thus, in Germany, there is a generalist State inspectorate and a specialist inspectorate made up of joint social security bodies responsible for compensating occupational risks (*Berufsgenossenschaften*). In France, the labour inspectorate is general in nature. With regard to occupational health and safety, social security also intervenes with CRAM (regional health insurance funds) inspectors. In Sweden, the State’s specialist labour inspectorate for health and safety is supplemented by the intervention of another inspectorate focused on the chemical risks for occupational health and for environmental protection and public health. Poland has a general State inspectorate and a specialist occupational health inspectorate organised by union representatives known as ‘social inspectors’. A comparable system exists in the Czech Republic’s mining sector. The work of the central British inspectorate is supplemented by inspectors reporting to the local authorities who intervene primarily in the service sector.

Two sensitive issues are addressed very differently depending on the country: one focuses on the relationship between the specific inspection bodies responsible for environmental protection and those monitoring the application of rules in occupational health; the other on the cooperation between the inspection systems that are monitoring companies with a major risk of chemical accident (Seveso companies) and the labour inspectorates. While institutional solutions vary enormously from country to country, close cooperation between these different organisations is essential. The workers’ health and safety representatives should be systematically included in all these activities.

At the end of the 1970s, Italy established an original system in the wake of demonstrations and widespread industrial unrest over more than a decade (from the ‘hot autumn’ of 1969 through to the failure of the FIAT strike in 1980). The tasks of the health and safety labour inspectorate were transferred to public prevention services organised by the local authorities. In their capacity as preventive services responding to a social demand, these multidisciplinary services coordinate the monitoring and sanction tasks of the labour inspectorate together with company interventions. The ‘Workers Statute’ adopted, with force of law, in 1978 gave workers a right of control over their working conditions. This reform, linked to a revision of the public health system, has yielded remarkable results in regions where political and social mobilisation served to encourage the creation of new institutions. Although challenged by the current government<sup>38</sup>, such a model could be reactivated and extended to other countries, provided the environmental movements led by people living close to industrial activities can be included. Its strength lies in the recognition that collective health and safety practices are intrinsically political.

Apart from the institutional differences, there are some common problems that emerge. The most worrying is the huge lack of resources for inspection work. For a number of reasons, prevention has become ever more complex: proliferation of small enterprises, development of subcontracting chains, existence of a single European market. This means

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38. The Jobs Act adopted at the initiative of the Renzi government at the end of 2014 anticipates creating a single inspection agency. At the time of writing (March 2015), the content of this measure has yet to be defined.

that there is a tendency for unfettered competition to develop without adequate control mechanisms being established for work equipment and chemical products. Company mobility hinders effective inspection in sectors such as construction and transport. Faced with these developments, most national inspectorates suffer from a lack of staffing and do not always have the requisite professional skills and technical infrastructure. The ILO's objective is to have at least one health and safety inspector for every 10,000 workers. Numerous European countries are very far from achieving this and the situation is deteriorating. In Belgium, for example, there is one health and safety inspector for approximately every 26,000 workers. Each inspector has to cover more than 1,800 companies. There was a 42% reduction in the number of inspections in the UK over the 2002 – 2007 period and the situation continues to worsen. In Germany, public authority inspections were reduced by half between 1996 and 2009. Over the same period, the monitoring bodies of the occupational risk insurance companies reduced their number of inspections by more than 40%.

These quantitative difficulties are compounded by qualitative problems. Over the years, inspection missions have multiplied and this can result in inconsistency. The pressure of xenophobic policies sometimes therefore results in a mobilisation of inspections around the hunt for illegal immigrant workers. The priority given to monitoring compliance with the law rather than offering advice sometimes leads to a blurring of priorities. Links with the judiciary are problematic and result in a frustrating situation in which numerous infringements that are flagged up by the inspectors do not result in any prosecutions. The British government has gone furthest in challenging the basic principles of labour inspections. Since 2012, part of the 'service' of the labour inspectorate has been marketised. This means that employers who have received a visit from a labour inspector must pay a contribution. Such a development raises the spectre of some labour inspectorate activities being privatised in the future.

#### Read more

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## Chapter 6

# Links with other Community policies

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Issues of health and safety at work cannot be addressed in an isolated manner given the existence of important links with other policies. This applies, for example, to labour market, social security, environmental protection, gender equality, education or vocational training. Though areas of common or closely related concern are readily apparent, the need to establish and exploit effective links in these different policy directions is not always adequately heeded.

While this is not the place to provide an exhaustive analysis of this problematic, a number of particularly important links should be noted with regard to three issues.

### **Market rules**

Community legislation on market rules began to be established very early in the history of the European Union. It was initially based on Article 100 of the Treaty (with the Lisbon Treaty, this became Art. 114 of the TFEU). Its main purpose is to ensure the free circulation of goods while simultaneously guaranteeing a set of non-economic objectives such as the protection of human health, occupational health and safety, and the environment.

This legislation primarily covers the rules governing the placing of chemical products on the market and those concerning work equipment and personal protection equipment: 'the new approach'.

## Rules with regard to placing chemical products on the market

The first directive in this regard dates from 1967. Though some 40 directives and regulations were subsequently adopted, this complex legislative corpus proved ineffective for the protection of health and the environment, in addition to being poorly implemented. Asbestos provides a good example of how badly the system functioned prior to REACH. By 1976, the European Union had the legislative power to ban asbestos and there was ample scientific data to justify this. However, not until 1 January 2005, with the entry into force of a directive adopted in 1999, was a total ban on asbestos established in the EU. An in-depth reform of the legislation was therefore badly needed and was, moreover, demanded by the Member States that joined the EU during the 1995 enlargement (Sweden, Austria and Finland). These countries already had national regulations providing for a higher level of health and environmental protection and did not wish to be forced to reduce these levels. The REACH Regulation adopted in 2006 was crucial for ensuring better prevention of risks from chemicals in the workplace. The text provides for registration of some 30,000 chemical substances that are produced or placed on the market in the European Union in amounts of at least one tonne per company per year. The information to be provided by companies depends on the volume produced. For amounts of more than 10 tonnes per company per year, a chemical safety report must be produced. The registration of existing substances has been staggered over an 11-year period that comes to an end in 2018. All new substances must now be registered prior to being placed on the market. REACH provides also for regular evaluation by the public authorities of a limited number of substances according to certain criteria. This mechanism is essential to prevent the information provided by manufacturers from being incomplete or manipulated. There exists a list of the most hazardous substances and these are subject to authorisation procedures, a provision that is supplemented by the possibility of restricting or banning the production and use of certain substances. In addition, on the basis of a global agreement, the rules for classifying, packaging and labelling hazardous substances have been reviewed. In specific areas, other Community regulations apply. Such is the case of pesticides and biocides.

In 2008, REACH was supplemented with a new regulation on classification, labelling and packaging of substances and mixtures (Regulation (EC) No 1272/2008) which applies globally defined rules at EU level. This regulation harmonised the classification of some 4,000 substances. For other products, it is the producers who propose a classification according to their own analysis. The safety data sheets have been amended on the basis of this new regulation.

Other pieces of European legislation cover more specific areas such as pesticides, biocides, cosmetics, waste, etc. As a general rule, this legislation underestimates the health and safety issues and links up poorly with the rules protecting workers' health.



### The role of the Helsinki Agency

In budget and staffing terms, the European Chemicals Agency (ECHA) is the most significant specialist European agency. It is based in Helsinki and is a regulatory body in the sense that it plays a direct role in the Community decision-making process regarding the regulation of chemicals.

Its responsibilities lie primarily in implementing the REACH Regulation. It also focuses on other significant legislative texts related to the regulation of chemicals: Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures (CLP text); Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (BPR); and Regulation (EU) No 649/2012 concerning the export and import of hazardous chemicals (also referred to as the PIC – prior informed consent – regulation).

The Agency comprises different specialist committees as well as a Board of Appeal, which is a jurisdictional body responsible for hearing disputes regarding some of the Agency's decisions on the application of REACH or the BPR Regulation. If a party is not satisfied with the decision of the Board of Appeal, it can submit the dispute to the General Court of the European Union in Luxembourg.

The Agency's Board of Directors is not a tripartite body. It comprises 28 members representing the Member States of the European Union, six members representing the Commission and three members representing 'interested parties'. These latter have only a consultative voice. Given the importance of REACH for occupational health and the very active role played by the European Trade Union Confederation (ETUC) in negotiating it, one of the three 'interested party' members represents the unions. Based on an agreement between ETUC and the IndustriAll European Trade Union (to which the chemicals sector unions belong), this mandate is rotated between ETUC and IndustriAll. Observers from Norway, Iceland and Liechtenstein are invited to take part in the meetings of the Board of Directors because REACH also applies to these countries.

## The rules concerning work equipment and personal protection equipment: 'the new approach'

Directives concerning work equipment and personal protection equipment establish only basic and fairly general safety requirements. They are supplemented by technical standards produced by the European technical standardisation bodies (CEN and CENELEC<sup>39</sup>).

The most important directive in this regard is the Machinery Directive. The first Machinery Directive was adopted on 14 June 1989. It has been revised a number of times but its basic principles have not changed. The current text is Directive 2006/42/EC.

The Machinery Directive reflects what is called the 'new approach' that was formalised by Council resolution of 7 May 1985. The 'new approach' can be summarised in three points:

- recognition of the role of standardisation as an auxiliary instrument to the regulation (reference to standards, primarily European but, if necessary, national, as a transitional measure, with the task of defining the products' technical characteristics);
- definition of a new kind of directive focused on the basic requirements that products must meet to be able to circulate freely on the Community market;

39. CEN: European Committee for Standardisation; CENELEC: European Committee for Electrotechnical Standardisation.

– openness to a policy of evaluating compliance (this last point, the weakest of all, was added subsequently).

Legislative harmonisation is thus limited to adopting the basic health and safety requirements that products placed on the market must meet in order to benefit from free circulation within the European Union. The detailed technical specifications have to be specified in harmonised standards produced by European standardisation bodies and mandated by the Commission. These harmonised standards are not binding; however, products that are designed in line with the harmonised standards (references for which are published in the Official Journal of the European Union and transposed into national legislation) are presumed to comply with the basic requirements of the directives. If a product is not – or is only partially – designed in line with the harmonised standards, or if there is no standard, its compliance with the basic requirements will need to be assessed and, if appropriate, attested by a ‘notified body’ according to procedures that are variably restrictive depending on the level of risk inherent in the product. The certification procedures to be followed by the manufacturer are specified in each of the directives. For the Machinery Directive, certification forms an exception required only for the most hazardous equipment (Annex IV to the Directive). The certification procedures may focus on the equipment itself (known as a ‘type examination’) or on the procedures established by the manufacturer when organising his production. The bodies responsible for certification are private companies registered with the State. They are called ‘notified bodies’. The manufacturer is free to use the notified body of his choice.

For most machinery, the CE marking does not therefore denote a form of external control. It is a simple self-declaration on the part of the manufacturer stating that the legal obligations have been met. This is why, in many cases, the CE marking on a product does not guarantee compliance with basic safety requirements.

The inadequate implementation of Community rules stems in some cases from their incomplete nature, lack of precision and grey areas. It is sometimes the result of a lack of cooperation between the different actors and of insufficient coordination between practical experience in the workplace and market regulation and surveillance mechanisms. It is often attributable to weaknesses in the control and sanction mechanisms put in place by Member States.

Market surveillance for work equipment and personal protection equipment takes place in very different ways in each Member State. The fact that there are different institutional actors involved would not be a problem in itself if their interventions were comparably effective. Unfortunately, this is often not the case. While some Member States do devote significant resources to market surveillance, others seriously neglect it, and there is still little cooperation between the authorities of different countries working in this area. Even within the Community institutions, the level of cooperation between the Commission’s different Directorates-General is rarely sufficient.

The jurisprudence of the European Court of Justice favours a very liberal interpretation of the Machinery Directive that effectively reduces Member States’ capacity to establish a dynamic policy of market control<sup>40</sup>. For the Court, the presumption of compliance deriving from the CE marking and certification by a notified body has the effect of preventing Member States from adopting any measures that might appear to restrict the free circulation of goods other than the prohibitions regulated by the Machinery Directive.

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40. Order of 8 September 2005, Yonemoto, case C-40/04; order of 17 April 2007, AGM-Cos.Met SRL v Suomen valtio and Tarmo Lehtinen, Case C-470/03.

The current form of regulation is partly reliant on the work of private actors operating in a competitive market. A competitive market of private control bodies (in the broadest sense) is only as strong as its weakest link. Once there are different levels of control, there is a risk that private actors who have reason to believe that their activities may not be compliant with requirements will turn to the body stipulating the most lax requirements.

Although the objective of Community regulation is to ensure the health and safety of equipment users, current practice remains dominated by a restrictive vision of safety. In particular, the inclusion of ergonomic criteria in standards remains insufficient.

In contrast with the provisions of the regulation on chemicals, producers of work equipment and the European standardisation bodies are not required to take systematic feedback either from workplace incidents/accidents or from health problems into account in order to ensure constant improvement in the design of work equipment and the content of technical standards.

Effective cooperation between the different actors is inseparable from the need to establish information systems on the links between equipment and health and safety. This involves the systematic gathering of data in the workplace on accidents, incidents, ergonomic issues and other health-related aspects (e.g., noise and vibration), for only in this way can the problems caused by specific equipment be identified. There is currently no European-level provision for such data gathering although positive initiatives in some Member States could well serve as a basis for a Community policy in this regard. Even data on work-related accidents is insufficiently used in market surveillance in most countries. We generally have a clear idea of how many accidents take place by day of the week, time or sector of activity but the data is far more vague with regard to the equipment concerned and the specific circumstances of its use. Accident notifications which, in varying forms, are compulsory in all Member States, could contribute to a far more effective organisation of prevention work.

**Union participation in the activities of the European Committee for Standardisation (CEN)**

One feature of the European standardisation bodies is the poor involvement of the trade unions. Because they represent the end users of the equipment, the unions, both national and European, are striving to participate in the work to perfect these standards. Since 1989, European Union involvement (limited to issues of workplace health and safety) has been promoted by the European Trade Union Institute (ETUI). In particular, this enables support to be provided to union networks active in different countries so that they can feed back experiences gathered in the workplace.

On 25 October 2012, a new regulation on European standardisation was adopted. It recognises the importance of trade union participation in order to defend the interests of workers in standardisation activities. On this basis, the European Trade Union Confederation (ETUC) has set up a new structure aimed at enabling union participation in areas not directly related to health and safety at work, such as industrial policy, environmental protection, the link between standards and the organisation of work, etc. This structure should come into operation during 2015.

## The environment

In Europe virtually no political grouping continues to deny the importance of the environmental crisis<sup>41</sup>, unlike in the United States where industrial lobbies have persuaded a large proportion of Republicans to deny climate change.

There are many links between OSH and the environment. The impact of hazardous chemicals is one immediately visible connection. Most environmentally harmful substances and procedures affect health and safety at work also. This is why, in the debates that accompanied the adoption of REACH and which are continuing throughout its implementation, numerous possibilities are arising for alliances between trade unions and environmental organisations. Likewise, a radical reduction in the use of pesticides in farming would have positive effects on both the health of workers and on public health and environmental protection. The issue is, however, a highly divisive one. It involves clashing with a triple alliance of seed producers, the chemicals industry and the intensive farming sector, which has been the big winner in the EU's Common Agricultural Policy<sup>42</sup>. In the background loom attempts to commoditise living beings which, in agriculture, means applying industrial production processes to crops and livestock rearing.

Most of the major disasters that have occurred in the energy and chemicals sectors demonstrate the existence of close links between environmental threats and the organisation of work. The systematic use of subcontracting in order to reduce wage costs results in a loss of worker control over the whole production process. This applies both to employees in stable jobs within the contracting company and to subcontracted workers. This phenomenon could be observed both in the explosion at the AZF chemicals factory in Toulouse in 2001 and during the environmental disaster caused by the explosion of BP's 'Deepwater Horizon' oil platform in the Gulf of Mexico in April 2010. The control methods devised by the companies are based largely on rigorous respect for procedures and traceability of all the activities of the different companies involved. They are based on a technocratic conception that denies the inevitable gap between what should be done and what actually happens and on strategies that disregard the knowledge held by the workers as a group. It is precisely this casualisation of work that hinders collective cooperation and reduces the margins for essential manoeuvre that would enable unexpected situations to be dealt with.

This does not mean that a virtuous synergy automatically occurs between environmental protection measures and OSH. For a start, certain environmental protection measures may result in dangerous exposure for workers or a transfer of risks. In addition, in recent decades, 'green capitalism' strategies have increasingly become established. These involve measures that are partial and of limited effectiveness, while rejecting any more global questioning of social inequalities. Companies involved in green capitalism often contribute to the casualisation of working conditions and to the privatisation of public services. This trend is particularly visible in sectors such as waste treatment and recycling. It is consistent with the continuity of a concept according to which all human activity should fall within the sphere of the market. There is in this sense a strong link between the

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41. The only notable exception is UKIP in the United Kingdom, which wants to ban teaching on climate warming in schools and is demanding that the British energy strategy be based on coal, nuclear and gas, abandoning all support for renewable energies. Within the European Parliament, UKIP has formed the EEFDF group (Europe of Freedom and Democracy) with the Italian Five Star Movement and various MEPs from the extreme right in different countries (Sweden, France, Lithuania, Poland, Czech Republic).

42. This explains why, in European legislation, the authorisation of pesticides involves procedures other than REACH and which enable products to remain on the market even though they contain particularly hazardous active substances, especially endocrine disruptors.

financial mechanisms that create rights to pollute and the activity of 'reparation' (waste treatment and recycling, cleaning up polluted sites) entrusted to private companies.

More globally, to effectively combat attacks on the environment, we need to link improved working conditions with a global reorientation of production in line with the needs of the majority of the population. This means challenging social inequalities, and planning resources and their use in production (raw materials, energy, water, etc.). These goals are incompatible with the property and power relationships that are characteristic of capitalism. Reducing energy consumption, creating relatively short production and consumption circuits, combating the obsolescence that is programmed into numerous consumer goods, establishing effective public transport systems, curbing our dependency on the car, all are different facets of a global policy. This can be based only on a balance of power built around a coordination of environmental and social equality objectives.

In an ecological transition, the organisation of work is not neutral. The intensification of work and the primacy of competition result in a lack of satisfaction on the part of workers, insofar as they give rise to a feeling of not being able to do a good quality job. They also serve to curtail sociability in the working environment and cause the pressure of work to spill over into private life. This dissatisfaction with work manifests itself in compulsive forms of consumption. The real utility of a product becomes immaterial when its purchase is presented as the symbol of a particular social status. Advertisers shamelessly exploit this sense of compensation and a vicious circle is set in motion: working more to consume, consuming more because work is frustrating and takes up all your living time. Instead of tackling this situation full on, many 'green' policies fluctuate between sterile guilt ('we're all responsible') and a commoditisation of environmental awareness through the burgeoning of green labels.

The association between demands for quality of life and an extension of democracy in the workplace would help to foster and consolidate collective choices that break with economic productivity. Previous failed experiences of bureaucratic planning suggest that it is only on the basis of workplace democracy that economic planning as a whole would enable both social needs and the imperatives of environmental conservation for future generations to be met<sup>43</sup>.

Finally, a critical evaluation of technological choices represents another potential area of convergence between OSH and defence of the environment. Capitalism results in a constant acceleration of the move from scientific knowledge to practical implementation. Whether it is a matter of genetically modified organisms or of nanomaterials, the mass use of new materials or new production techniques becomes a *fait accompli* long before their social impact and health and environmental risks have been evaluated.

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43. Löwy M. (2008) Ecosocialism and democratic planning, *Socialist Register* 2007, 43, 294-309.

### Extending the concept of 'decent work'

'A democratic socialisation of economic decisions is necessary in order to master finance, and preserve the environment and resources. However, it is also necessary to enable access to 'decent work' for all, understood here in a sense broader than that of the International Labour Office: a properly remunerated job, with social rights, clearly, but also one with the political right to be involved in defining the conditions and very purpose of that work.

This means deciding jointly, with the workers, the unions and other interested stakeholders, what the company should produce and how it should produce it; participating in the organisation of work and the election of leaders; jointly considering how the fruits of labour should be distributed and what investment choices should be made: these rights are part and parcel of truly decent work. Self-fulfilling work is work in which the worker is able to assert his own understanding of quality and discuss it in relation to the understanding of others. In this aspect of work we again reach the finding previously established on the basis of economic regulation: that the democratisation of social relations, here production relations, is the key to a social and environmental reorientation of society. Decent work should be considered a

common good, essential both for wider democracy and for preserving the health of people and the environment.

The economic institutions should therefore guarantee everyone the right to decent work, in accordance with the same principles that must prevail for other common goods already mentioned, supportive financial stability and natural resources: democratic governance, controlled by local actors by means of common rules decided by the public authorities. Once this occurs, wage subordination will undoubtedly seem as uncivilised to us as slavery does today.

How do we progress towards building decent work as a common good? In the current context of the break-up of work collectives, the deeply-rooted aspirations of workers to be masters of their own labour do not necessarily result in collective action, and yet such action is alone capable of fostering a move in this direction. It is also this difficulty in raising these problems as explicitly political and collective that in fact precisely explains their harmful effects on people's health. The trade unions are now becoming aware of this, although they are not yet able to influence the situation.'

Extract from Coutrot T. (2010) *Jalons vers un monde possible: redonner des racines à la démocratie*, Lormont, Le Bord de l'eau, 95-97.

## Gender equality

The sexual division of labour is an essential determinant of the organisation of work. Work is generally not mixed. Men and women are not found working equally in different sectors of activity, jobs, levels of responsibility or kinds of work. Moreover, if people's whole working lives and careers are taken into account, significant differences can be seen in the respective situations of men and women.

There is a close association between issues of equality and issues of health and safety at work. The unequal distribution of work results in different risks; unequal access to power implies increased invisibility of the risks run by female workers. In addition, the ability to deny the risks and damage to health relies strongly on the sexual division of labour. For male jobs, the exaltation of virility and the stereotypes associated with it (strength, courage, etc.) means that some risks are not taken seriously and, in some professions, this results in a real selection among the workers.

For traditional women's jobs, the use of stereotypes enables not only real qualifications to be denied (and wage inequalities and poor participation in decision-making to be justified) but also the health risks of tasks described as 'naturally female' to be ignored.

The massive influx of women into salaried work in recent decades has not fundamentally changed the unequal structure of the labour market. The gender segregation of work has

been little affected. This segregation is most marked in the Scandinavian countries where, moreover, rates of women's participation in the labour market are at their highest.

The change in the division of labour between men and women with regard to unpaid domestic work is very slow. This may well be attributable more to the crisis of the traditional family – which is manifestly no longer regarded as the only life model for adults – than to a redistribution of work and roles within it. The effects of domestic work on health are rarely addressed. A more precarious physical and mental state is generally observed among women who devote themselves to housework alone.

The interaction between unpaid domestic work and salaried work is an important factor in understanding the different impact of working conditions on the health of men and women. Flexible working policies thus generally contribute to the increased casualisation of women's work and, in some cases, can lead to the removal of large numbers of women from the workplace. Another element of interaction can be seen in the actual content of the salaried work that is performed predominantly by women and which often forms an extension of their domestic activities: repetitive tasks, personal care and other personal services, attitudes of submission, availability to the needs of others, flexibility.

A gender balance in work (sectors, tasks and levels of responsibility) is an essential prerequisite for any real equality between men and women, as is a more effective sharing of unpaid domestic work and equal representation in political decision-making.

Community policy has not developed a gender-sensitive approach to health and safety at work. The relevant data needs to be gathered and research undertaken to verify the links between the different OSH problems and the sexual division of labour; prevention rules need to be produced for areas with insufficient coverage, meaning women's work in particular. The criterion for judging that work is compatible with health would be that it is organised subject to conditions whereby both genders enjoy access to jobs throughout their working life without their occupational activity being a source of damage to their health.

#### France: incorporating equality into risk assessment

Since the law of 4 August 2014, risk assessments in French companies must take into account 'the different impact of exposure to risk due to gender'.

This is an important provision in that it enables better coordination of prevention for health and safety in the workplace with the objective of gender equality. Several factors are worthy of note. On the one hand, the gender division of labour often denotes significant differences in the respective activities of men and women. The risk assessment must take these into account and prevention plans must contribute to making access possible – for women and men – to all jobs under conditions that are not likely to damage their health throughout their working life. On the other hand, a certain number of risks may have different effects on men and women due

to biological differences. This is certainly the case in the area of chemical risk prevention, for example, in relation to endocrine disrupters. In terms of ergonomics, there are differences in the average biomechanical and physiological data to be considered. There are also specific constraints that weigh – very much more – heavily on women in terms of the compatibility between gainful employment and unpaid work at home.

A form of risk assessment taking into account the respective situations of men and women would be decisive in enabling the stereotype according to which women's work is less dangerous for their health than men's to be overcome. It would encourage the prevention specialists to pay closer attention to activities that are considered secondary (cleaning, reception, maintenance, administrative support tasks), all of which are tasks carried out by large numbers of women.

**Read more**

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HesaMag No. 7 (2013) Special report - Standardization: what roles for the unions?

HesaMag No. 8 (2013) Special report - Chemical hazards: state of play 6 years into REACH.

HesaMag No. 9 (2014) Special report - Waste and recycling: workers at risk.

HesaMag No. 12 (2015) Special report – Women's health and work.

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## Chapter 7

# European social dialogue and health and safety at work

Since the Single European Act (1986), Community treaties have recognised the importance of social dialogue between employer organisations and trade unions. It should be noted, however, that social dialogue is just one particular moment in the dynamic of industrial relations. Historically, labour unrest has always preceded social dialogue of which it is an essential prerequisite; it contributes to changing the balance of power in society. In the industrial relations field, the purpose of discussion and argument is not to separate truth from falsehood but to guide the development of society in the direction of one set of aims or another. These sets of aims are opposed to one another, given that what is at stake is an underlying and objective conflict of interests. The best arguments in favour of a fairer and more equal society will remain ineffectual if not backed up by protest.

Community law has developed a definite ambivalence with regard to conflict between the two sides of industry. In the social chapter on the Treaty of the Functioning of the European Union, such issues are considered as not falling within the Community's field of competence; and yet, the jurisprudence of the Court of Justice has challenged the right to strike and the right to take collective action, in the name of the pre-eminence of market rules<sup>44</sup>.

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44. See, particularly, the Laval and Viking rulings of December 2007. Numerous documents on this issue can be found on ETUI's website: [www.etui.org](http://www.etui.org).

## Social dialogue in Community law

Social dialogue has become institutionalised in the Community treaties through a number of stages. The Treaty of Rome gave it a fairly discreet role by establishing the Economic and Social Committee, which is a purely consultative body involving representatives with equal weight from three groups: the employers' organisations, the trade unions, and organisations representing different activities such as the professions, artisans, consumer rights associations, non-governmental organisations, women's organisations, and so on.

On 14 December 1970, a Standing Committee on Employment was created to enable dialogue on employment issues between the trade unions, employers' organisations, Council and Commission. In the context of implementing the common market, meetings were held between the European unions and employers' organisations, at an intersectoral level, systematically from 1985 on. The Commission also took part in these meetings which were institutionalised in 2003 under the name of the 'European Social Summit'.

The Single European Act introduced the notion of social dialogue into the Community treaties for the first time in its Article 118B. Without explicitly mentioning the role of European collective agreements, the Treaty's wording did not rule out such a development. The agreement on social policy, adopted in 1992 in parallel to the Maastricht Treaty and signed by only 11 Member States, distinguished between two forms of social dialogue. On the one hand, the European employers' organisations and unions could sign agreements autonomously and these agreements could then possibly be implemented through Community directives. On the other hand, the unions and employers' organisations had to be consulted with regard to social legislation. In the context of this consultation, they had the option of deciding to negotiate an agreement that would replace the envisaged draft legislation.

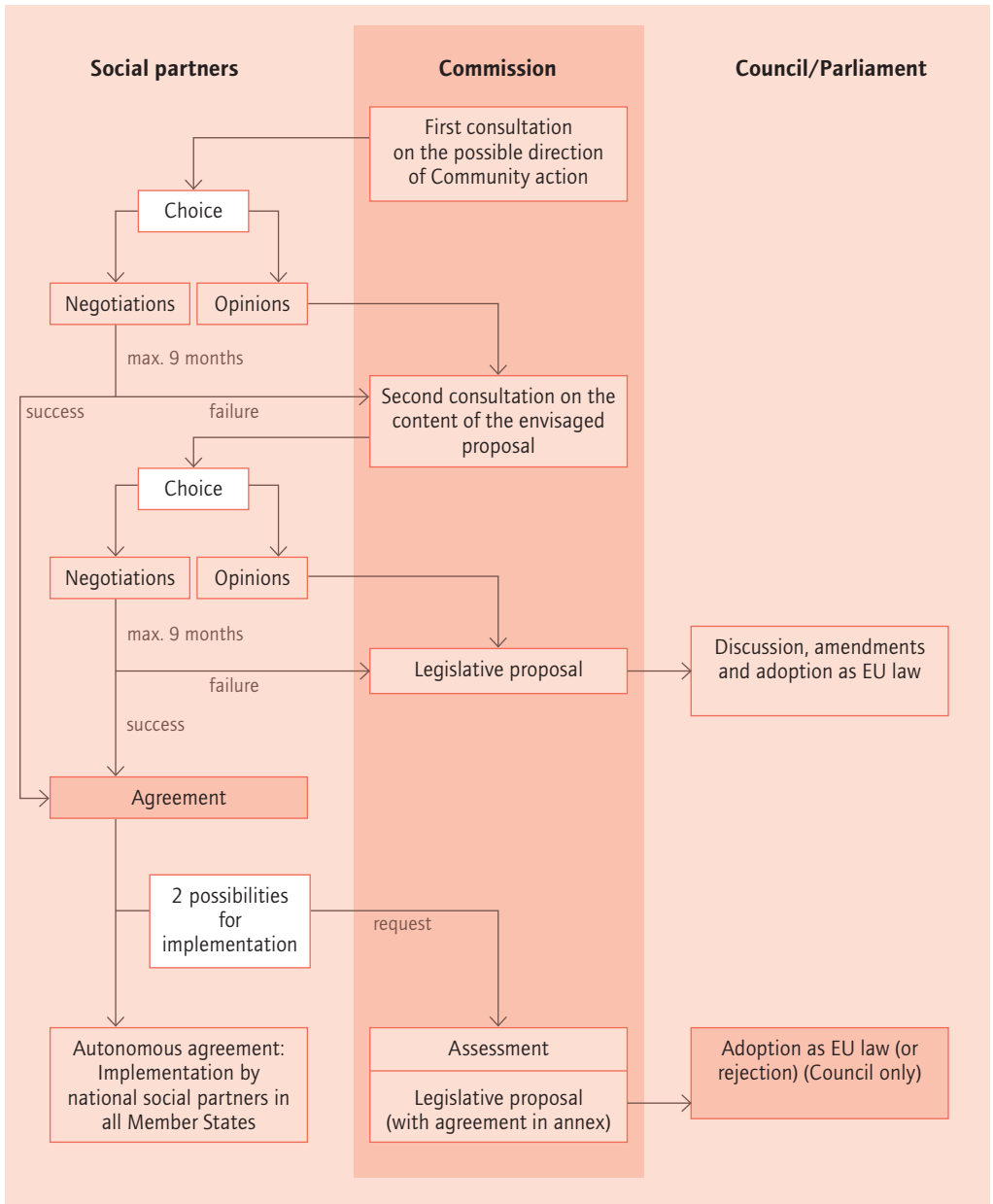
These two procedures have been maintained in the various Treaty amendments adopted since then. They are currently stipulated in Articles 154 and 155 of the Treaty on the Functioning of the European Union (TFEU). They are described in Figure 2.

Three main levels can therefore be distinguished in the contribution of social dialogue to the production of Community regulations:

- social dialogue as a **consultation procedure** for adopting European legislation and policy;
- social dialogue as a **source of legislation** based on a prior initiative of the European Commission;
- social dialogue as an **autonomous source** that may result in the production of either legislation or texts of a non-binding nature. In this context, intersectoral social dialogue needs to be distinguished from sectoral social dialogue.

To these three European levels must be added the possibility of transposing social directives (whether directly the result of European social dialogue or adopted in the context of the usual procedures) through national collective agreements, insofar as these provide sufficient transposition of the scope of implementation and legal certainty.

**Figure 2** Consultation and negotiation procedure under Articles 154 and 155



Source: European Commission (2012) Consulting European social partners: understanding how it works, Luxembourg

As a **consultation procedure**, social dialogue takes the form of separate opinions from unions and employers' organisations at European level on any legislative proposal concerning social affairs. The consultation takes place in two stages. First, the Commission consults the employers' organisations and unions<sup>45</sup> on the possible direction of European Union action. Then, if the Commission considers action is necessary, it consults them on the content of the envisaged proposal. During both the first and second phases of consultation, the organisations can inform the Commission of their desire to commence negotiations in order to reach an agreement. If this is the case, this negotiation suspends the legislative initiative. It is limited to a nine-month period, which can be extended with the Commission's agreement. If the negotiations do not lead to an agreement, the Commission can submit its proposal through the normal legislative procedure. The specific consultation structures for health and safety were examined in Chapter 3. These consultation procedures enabled the trade unions to exert significant influence over the content of directives during the most productive period of regulatory production between 1989 and 1993 (see Chapter 1).

In the case of a legislative proposal on health and safety, both consultation procedures are followed. The unions and employers' organisations are consulted in two stages, as for any other proposal on social affairs, and the tripartite committee in Luxembourg, which is specifically for health and safety, is also consulted<sup>46</sup>. The Economic and Social Committee is also consulted.

## The contribution of intersectoral social dialogue to OSH

As a general rule, in the health and safety field, the employer organisations and trade unions are unwilling to embark on negotiations that would replace the legislative process.

There are several factors explaining this:

- health and safety issues largely involve the public authorities of Member States. As there are no tripartite negotiation mechanisms within the European Union that could lead to the production of legislation, the option of bipartite negotiations (between employer organisations and the unions) is rarely considered desirable;
- since the 19th century, health and safety have been considered essential pillars of the State's regulation of labour in the different European countries. Without ruling out a complementary role for collective negotiation on certain specific aspects (such as implementing certain rules or procedures for worker participation), the unions are keen to avoid the State's disengagement from such matters;
- occupational health and safety regulation relies on scientific and technical data which cannot be negotiated. The carcinogenic nature of crystalline silica or asbestos is not negotiable for the unions, as opposed to benefits in terms of jobs or salaries;
- for the unions, health and safety at work must result in rules that apply equally to all workers. This remains possible if a European agreement is implemented through a directive. For a number of years, however, the European employers' organisation, BusinessEurope,

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45. The Commission establishes a list of representative organisations at European level which are consulted in the context of this procedure.

46. In some cases, health and safety proposals have not been submitted to the tripartite committee in Luxembourg for consultation. This was the case for different directives focusing on working time and the proposal to revise the directive on protection of pregnant or breastfeeding workers, which was submitted by the European Commission in October 2008.

has been very reticent in demanding implementation of an agreement by means of a directive. If an agreement is implemented through the national industrial relations systems, this will result in a different scope of application in each Member State.

The only proposed directive on health and safety on which negotiations were initiated between the ETUC and the European employers' organisations<sup>47</sup> was the proposal to revise the Working Time Directive. Negotiations commenced at the end of 2011 and continued until December 2012 but led to no agreement.

Regardless of the decision as to whether or not to negotiate the content of a directive when the Commission consults the unions and employers' organisations, these bodies may independently decide to reach an intersectoral agreement. In this case, such agreements can follow one of two different procedures.

At the request of the signatories, they may be implemented through a directive that is legally the same as any other directive: it is a legally binding text which the Member States must transpose within a given timeframe. The difference is that the text emerging from the social dialogue cannot be amended by the Council or Parliament.

The following are some of the directives implementing intersectoral agreements:

- on parental leave (Council Directive 96/34/EC), which replaced Directive 2010/18/EU of 8 March 2010 following the revision of the European framework agreement in June 2009;
- on part-time work (Council Directive 97/81/EC);
- on fixed-term work (Council Directive 1999/70/EC).

Unless implemented by a directive, agreements are non-legally binding and are implemented through the national industrial relations systems. This means that, depending on the country, they will be implemented via general collective agreements or other instruments that may or may not be binding and which may not necessarily be applicable to all firms.

The following initiatives are noteworthy in the area of health and safety:

- framework agreement on teleworking<sup>48</sup> (16 July 2002);
- agreement on work-related stress (8 October 2004);
- agreement on violence at work (15 December 2007).

There is nothing to prevent Member States from transposing the provisions of a European framework agreement using legislative or regulatory means. According to a Commission report on implementation of the 2004 agreement on stress, this resulted in the adoption of national legislation in six European countries<sup>49</sup>.

Since 1992 a Committee on Social Dialogue has been in existence and meets several times a year. It comprises 64 members (32 union representatives and 32 representatives of the employers' organisations).

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**47.** The representative intersectoral employers' organisations at EU level are Business Europe, CEEP (European Centre of Employers and Enterprises providing Public Services) and UAPME (European Association of Craft, Small and Medium-Sized Enterprises).

**48.** This agreement deals with the different aspects of teleworking. It is not primarily devoted to health and safety.

**49.** European Commission (2011) Commission Staff Working - Report on the implementation of the European social partners' Framework Agreement on Work-related Stress, SEC (2011) 241 final, 21 February 2011, p. 25.

## Sectoral social dialogue

Over the last few years, the intersectoral social dialogue has slowed down. The employers' organisation, BusinessEurope, is unwilling to commit to European agreements and does not conceal its hostility to implementation of such agreements via directives. The agreements reached during the 1990s benefited from the fact that, in many cases, the European Commission had undertaken to intervene via legislation should an agreement not be reached. In the 2000s, the Commission's political support for the conclusion of agreements declined.

Sectoral social dialogue has been more dynamic. For the period 1978-2013, the ETUI's database records 734 texts adopted in the context of this dialogue<sup>50</sup>. The process got off to a rather slow start, with less than 10 texts per year up to 1990. This increased substantially from 2000 on with, generally, some 30 texts per year. This form of dialogue benefited from the introduction as from 1998 of sectoral social dialogue committees (SSDC). These committees currently exist in 43 sectors.

The output of sectoral social dialogue is highly variable. Agreements (comparable to collective agreements in the national industrial relations systems) account for around 2% of documents adopted. 'Joint positions' aimed at the EU's institutions or Member States are in a clear majority (56% of texts). Notable among the other instruments are 'statements' which reflect a common position adopted by the signatories but which are not binding upon them (16% of texts), 'tools' such as good practice guides on gender equality or health and safety at work (11% of texts), 'recommendations' which, like statements, reflect common positions but are subject to monitoring procedures (8% of texts) and 'internal regulations' which structure the functioning of the SSDCs (7% of texts).

The implementation of sectoral agreements takes place in the same way as intersectoral agreements. There are two possibilities. If the signatory parties so request, implementation can take place via a directive. This procedure has the advantage of being identically binding on all Member States. If the agreement is not implemented through a directive, its application depends on each Member State's industrial relations system, which means there will be significant disparities in terms of both its scope of application and its binding nature.

The first sectoral agreement on health and safety was that of 30 September 1998 on the working time of seafarers. This was implemented through Council Directive 1999/63/EC. It is a particularly interesting text insofar as it links different legal instruments. On the one hand, it adapts Community rules regarding the working time of seafarers. On the other, it enables application of the provisions adopted in ILO conventions. Following the adoption of a new convention by the ILO in 2006, a new European agreement was concluded on 29 September 2006 and implemented by means of Council Directive 2009/13/EC of 16 February 2009.

In the area of working time, another sectoral agreement was concluded and implemented via a directive. This was the agreement of 27 January 2004 on cross-border rail services. In the road transport sector, by contrast, negotiations failed and there is now a 'classic' directive regulating working time (Directive 2002/15/EC of 11 March 2002).

A multi-sectoral agreement on crystalline silica was adopted in 2006. This text was the object of much controversy<sup>51</sup>. It was signed, for the unions, by the European chemicals

50. For a more detailed account, see Degryse C. (2015) *The European sectoral social dialogue: an uneven record of achievement?* Working Paper 2015.2, Brussels, ETUI. The information in the following paragraph has been taken from this study.

51. See Musu T. and Sapir M. (2006) *Will the Silica Agreement foil EU legislation?*, HESA newsletter, 30-31, 4-8.

and metal industries' federations but the buildings federation and the European Trade Union Confederation did not want to take part in the negotiations. The signatories felt the agreement would enable improvements in prevention by promoting voluntary initiatives in companies where workers were exposed to crystalline silica. Its opponents considered the agreement inadequate because it risked delaying the adoption of a binding limit for occupational exposure across Europe and because it did not consider crystalline silica to be carcinogenic and did not draw the necessary conclusions from this scientific fact. At the time of writing (March 2015), a European limit value has still not been adopted by the European Union and the Commission has not even presented a proposal for a directive in this regard. The agreement is applied on a voluntary basis by those companies that decide to sign up to it. It is monitored by the signatory organisations.

A European agreement on prevention from sharp injuries was adopted for the hospital and healthcare sector on 17 July 2009 by the European Federation of Public Service Unions (EPSU) and HOSPEEM (European Hospital and Healthcare Employers' Association). This agreement was implemented by means of Directive 2010/32/EU. It aims to create a working environment that is as safe as possible for hospital and healthcare workers and to protect workers exposed to injuries from all kinds of sharp medical implements (including needles). The directive proposes defining an integrated approach that covers both risk assessment and prevention but also worker training and information. Clause 11 of the agreement, which addresses its implementation, specifies that, in interpreting the framework agreement, the Commission will be able to refer to the signatory parties for their opinion. EPSU and HOSPEEM have organised numerous initiatives to monitor the application of this agreement and to provide guidance as to its practical implementation under the best possible conditions.

A European agreement on health and safety in the hairdressing sector was adopted on 26 April 2012. This was the result of an independent initiative of the representative employers' and workers' organisations. The agreement draws on the prevention principles of the 1989 Framework Agreement on Health and Safety at Work. It stipulates particularly that employers must take personal protection measures to avoid prolonged contact with water and products that are skin irritants or which might cause allergies. The text also provides for the principle of substituting hazardous chemical products with less harmful alternatives. This relates particularly to powdered colouring agents. The challenges facing this substitution policy are considerable. Different studies in fact show that there is a heightened risk to hairdressing staff of contracting some cancers through the use of hazardous substances in their sector. The agreement also anticipates measures to reduce musculoskeletal problems among the staff of hair salons: employers must ensure a rotation of tasks in order to avoid repetitive movements or intensive work over a long period and must refer to the most recent good practice on ergonomics (light hairdryers, with low vibration, etc.). Psychosocial risks have not been overlooked: the employer must ensure detailed preparation of work, and appropriate planning of time and work organisation in order to prevent 'emotional breakdown'.

The signatory parties to this agreement requested that it be implemented via a Community directive. This request came up against the opposition of several Member States and requirements made by the Commission that seem difficult to reconcile with the principle of the social partners' autonomy, as recognised in the TFEU. In fact, the Commission intends to submit the agreement to an 'impact assessment' prior to possible adoption of a directive that would enable its implementation. From our point of view, the principle of the social partners' autonomy as recognised in the TFEU means that the Commission's control should be limited to two elements that have not been challenged in the case of this

agreement: the representativeness of the signatory parties and the agreement's compatibility with existing rules of Community law. Considerations of political expediency, the hostility of some Member States to the principles of social dialogue or hypothetical calculations of the costs and benefits of such an agreement would not seem to be relevant.

### Information and consultation in companies

The fundamental right to information and consultation is guaranteed **in the workplace** by means of different directives.

In particular:

- Council Directive 94/45/EC on the establishment of a European Works Council<sup>52</sup>;
- Directive 2002/14/EC of the European Parliament and of the Council establishing a general framework for informing and consulting employees in companies employing at least 20 or at least 50 workers;

- Council Directive 2001/86/EC on the Statute for a European company;
- Directives dealing with specific issues include clauses on information and consultation of workers and their representatives: collective redundancies, company relocations, health and safety.

### Read more

Bandasz K. (2014) A framework agreement in the hairdressing sector: the European social dialogue at a crossroads, *Transfer: European Review of Labour and Research*, 20 (4), 505-520.

Degryse C. (2015) The European sectoral social dialogue: an uneven record of achievement? Working Paper 2015.2, Brussels, ETUI.

Dufresne A., Degryse C. and Pochet P. (eds.) (2006) *The European sectoral social dialogue: actors, development and challenges*, Brussels, P.I.E. Peter Lang.

Voos E. et al. (2011) *European social dialogue – Achievements and challenges ahead: result of a stock-taking survey amongst national social partners in the EU Member States and candidate countries*, Final synthesis report, Brussels, European Social Partners.

<sup>52</sup>. The text currently in force, following different amendments, is Directive 2009/38/EC.



## Conclusion

*The need for a Community occupational safety and health policy emerged early in the history of the European Union and formed one of the essential pillars of the first social action programme adopted in 1974.*

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This need was based on a simple observation, namely, that the establishment of a common area in which goods, capital, businesses and workers would circulate freely called for the development of legal rules to ensure that a deterioration in working conditions could not be used as a factor of competition.

In the context of the 1970s, two specific factors provided a strong impetus in this direction. First of all, the International Labour Organisation (ILO) had placed on its agenda – for tripartite negotiation – the adoption of a large number of occupational health and safety conventions. A link is observable between various Community directives and these conventions, the negotiation of which resulted in compromises that subsequently facilitated the drafting of the European directives. The principles of the Framework Directive thus draw partly on Conventions 155 (1981) and 161 (1985). A similar parallel can be seen between the ILO conventions and various specific directives (occupational cancers, temporary and mobile work sites, asbestos, etc.). Secondly, this institutional factor was inseparable from the social and labour history from which it drew its potential dynamic. The 1970s were characterised by labour ferment that challenged the organisation of work, leading to a profound renewal of union strategies in this regard.

At the end of the 1980s, European OSH policy went into reverse when the programme to adopt limit values for occupational exposure foundered upon insurmountable divergence between Member States. The failure was rapidly overcome, however, by a combination of two factors. Those Member States with more advanced national OSH legislation exerted pressure for Community harmonisation; Article 118a (1986) was thus introduced into the treaty at Denmark's request, with the support of a large majority of Member States. Furthermore, the single market that was to be completed in 1992 created conditions conducive to compromise. In exchange for trade union support for completion of the single market, the employers' organisations agreed to ambitious goals for Community legislation on health and safety in the workplace. Though the negotiation of such gains would have been extremely difficult in any other context, the pressing demand for completion of the internal market enabled them to be passed without too much opposition. Even the British Conservatives were pretty much resigned to this compromise. Though they did campaign vigorously

against regulating working time, they launched no major attack on the other Community occupational health and safety directives.

It is clearly apparent that EU-OSH regulation is today in a state of crisis. The two terms-of-office of the Commission presided over by José Manuel Barroso (2004-2014) resulted in a severe paralysis of Community policy in this area. And so we are faced with considering what might be the conditions for a revival of these policies.

The obstacles are many. In a period of crisis, social protest is more difficult to organise around offensive – as opposed to defensive – issues, such as the quality of working conditions. The pressures of mass unemployment, the increasingly complex nature of subcontracting circuits, the unequal impact (often with a considerable time lag) of poor working conditions on the health of workers, are some of the negative factors to be taken into account. Moreover, the bureaucratisation of the Community's legislative process enables industrial lobbies to exert effective pressure against any legislative initiative that might improve working conditions.

Yet these obstacles are not insurmountable. For one thing, the legitimacy of employer power is strongly contested at different levels. Both the economic and the environmental crisis are demonstrating the *impasses* into which neoliberal policies lead. The staggering rise in inequality makes nonsense of the idea that, sooner or later, the whole population will benefit, thereby categorically refuting the theory of German social democrat Helmut Schmidt who believed that 'the profits of today are the investments of tomorrow and the jobs of the day after'. A simple return to the compromises that characterised three decades of post-war social progress and wellbeing for all seems illusory.

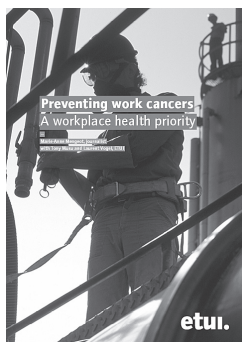
A similar loss of legitimacy can be seen in the daily lives of businesses. The neoliberal reorganisation of work is harmful to health but it is also ineffective from the standpoint of the quality of work. The priority given to immediate profit maximisation has overturned traditional management methods. It has, in particular, significantly reduced employees' margin for manoeuvre even though it was claimed that it would give them greater autonomy. Management is becoming increasingly distanced from the actual activity of work and is advocating management methods that seek to individualise – in the extreme – forms of activity requiring, in essence, collective cooperation. This is the context in which the issue of psychosocial risks is emerging as a increasingly major problem.

Demographic change is another factor that could contribute to a return to mobilisation around working conditions. The management ideologists believe that, as life expectancy increases, it will be normal to work to a more advanced age. This reasoning overlooks the fact that the extended life expectancy does not go hand-in-hand with good health for many of the less privileged sectors of society, a fact that is attributable, in large measure, to their employment and working conditions. Without an improvement in this regard, any extension of the retirement age will result in dramatic situations of exclusion for those categories of workers who are exposed to the greatest risks. Health and safety at work can form the hub of an encounter between the differing expectations of workers across the generations. While a desire to be able to 'ease off' emerges in all surveys of older workers, younger people's central concern is focused on the casualisation of labour, a phenomenon that is producing contradictory effects among new generations of workers. Precarity, most immediately, forms a hindrance to collective action; yet it may contain, at

the same time, the seeds of disaffection, disengagement, or revolt. The employers' injunction that workers should take care of their personal health as their sole capital is having a boomerang effect. The precarisation of jobs can be seen to represent both a major obstacle to the forging of autonomous life projects and the cause of a deterioration in health. It is not by chance that the countries most affected by the crisis are seeing young 'precarised' generations taking the initiative for significant social action, such as the 15-M movement – the *indignados* – in Spain.

The issue of democracy is intrinsic to any form of mobilisation stemming from poor working conditions. Faced whether with the low turn-out of the working classes, with the growth of parties that have swarmed around a leader who exudes the 'spirit of the times', with the sense that 'we' in society are constantly at loggerheads with 'them' in the institutions, it is essential to become aware that, if there is a democratic deficit in Europe, its fundamental locus is the lack of democracy in the workplace. A growing percentage of workers are no longer covered by collective agreements; nearly half of all European workers have no access to organised representation; the subcontracting chains exacerbate this situation by shifting a significant share of real power to the client companies. While there is no easy solution to these labour issues, there is one sure approach to tackling them, namely, the fight for democracy in the workplace, the battle to make politics into an everyday practical exercise.

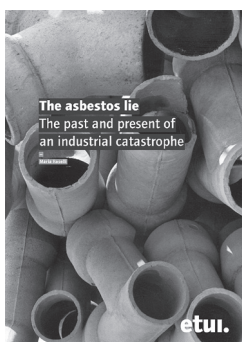
These are some factors pointing to a revival of social action for the improvement of working conditions as a real possibility. Such a revival will require new approaches from the trade unions that effectively highlight the radical and collective nature of occupational health and safety demands, and the fact that, in this field of endeavour, immediate improvements on very specific issues can link up with more ambitious projects aimed at changing society. Now more than ever, the proponents of health and safety in the workplace must, if they are to achieve anything substantial, come out into the open and demonstrate that their efforts within the workplace are an intrinsic component of more all-embracing social challenges, whether in relation to the environment, to equality or to democracy.



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