

Seminar Paper 1

**Prescription to Process: Convergence and Divergence in Health and
Safety Regulation in Europe**

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1. Introduction and background

In recent years, national and international regulatory policies have been characterised by their increased emphasis on the pursuit of means to achieve more active management of occupational health and safety. Greater engagement of employers and workers in the processes of preventive health and safety has been deemed to be necessary to provide an effective response to shifts in the pattern and organisation of work and to reduce further the burden of loss to society and the economy represented by work-related injury, ill-health and fatalities. Traditional regulation, in which detailed and prescriptive requirements have been imposed upon largely passive employers, without interfering with their prerogative to manage the way they achieve them, have been considered inappropriate, inflexible and ineffective in responding to such change. As a consequence, greater attention has been paid to the means of stimulating and sustaining effective systematic occupational health and safety management (OHSM). Employers are enjoined to take a more active, comprehensive and enduring responsibility for achieving better performance in improving the work environments for which they are responsible. As Frick et al (2000) have described, there are several inter-related strands to this development. They include the international development of standards of OHSM, the promotion of the voluntary adoption of OHSM systems, and a trend evident in increasing number of countries to make some form of OHSM mandatory for all employers by legislative means. Within the European Union, the latter approach has been discernible in its regulatory policies, in which, since the end of the 1980s, the regulation of the management of health and safety has become a prominent feature (Walters, 1998).

This EU approach shares two main new features. One is a pronounced tendency to replace traditional detailed technical standards in primary legislation with more general duties for employers and other duty-holders and to supplement such primary provisions with delegated legislation and codes of practice in which technical standards are included. Their second feature is their requirement from duty holders for a more *systematic management* of occupational health and safety. This latter requirement, while fundamental to the shift in regulatory style, has experienced a slow and uncertain

gestation in many national systems, but is currently an element of major importance behind regulatory thinking (Frick and Wren 2000).

Some elements of these developments in regulatory strategies have been influenced by the changes in the structure and organisation of work. Others have been brought about by changes in the political and economic strategies of countries within the EU (and in the EU itself). The effects of neo-liberal policies of disengagement of the state from traditional roles in regulation for example, are also reflected in emphasis on more self-regulatory systems for health and safety management. The new approaches to regulatory strategies on health and safety have been introduced at the same time as governmental concerns over public expenditure and the effect on the national and EU economies of so called “over-regulation” of employment. This has meant that in many countries there have been trends towards reduced support for the resourcing of regulatory inspectorates, and deregulation of existing provisions governing employment. Such scenarios also add their influence, causing regulatory strategies to place greater emphasis on self-regulation and require less involvement of inspectorates in the piecemeal application of detailed provisions. It is important to distinguish the (ideal) application of this concept from that of deregulating health and safety altogether. In ‘regulating self-regulation’ the regulatory function is intended to operate more in relation to the *management system* than in relation to inspecting and enforcing compliance with detailed and specific prescriptive standards. If the management system is functioning effectively, then it is argued to be a reasonable assumption that compliance with detailed requirements will follow.

It is no coincidence that such increased attention to regulating the management of health and safety also embraces nostrums that better health and safety equates to better business performance¹. Analysis of the wider social and economic policy environment in the EU, shows that these changes often occur alongside or within policies that seek to emphasise and promote linkages between preventive occupational health and safety and efforts to reduce social welfare burdens on the state. Thus, associating effective preventive health and safety with the benefits of reducing the temporary or permanent exit of workers from the active labour force and improving both productivity and social welfare savings in the process. Self-regulatory approaches to managing health and safety are also increasingly linked to wider social and economic policies both nationally and at the level of the EU. Thus, human rights at work, working conditions and socially responsible business simultaneously embrace health and safety, imbue it with particular (and arguably new) constructions of its meaning and locate it within current national and EU strategies on corporate social responsibility and employment creation².

¹ See for example the major European Conference organised by the European Commission and the Dutch Ministry of Social Affairs and Employment in 1997 for a detailed presentation of many of the assumptions behind the idea that good health and safety represents good business strategy (see Mossink and Licher 1997).

² See for example, the [EC Green Paper on a European framework for corporate social responsibility](http://europa.eu.int/comm/employment_index.htm) (<http://europa.eu.int/comm/employment_index.htm>) and Barnard and Deakin (1999) on EU employment policy.

The approach of the EU is best illustrated by the Framework Directive on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391 EEC). Through a combination of measures in the Directive obliging employers to undertake workplace risk assessment, use competent preventive services and social dialogue, it seeks to improve the management of health and safety in all enterprises in Europe.

In a recent study undertaken with support from the Swedish Joint Programme for Working Life Research in Europe, we began our investigation with the idea of considering the influence of the EU Framework Directive on national systems for regulating occupational safety and health and especially with the intention of evaluating its effect on the shift in emphasis from prescription to process within different member states. Essentially the basic research question that was our point of departure was:

- *What has been the impact of the EU Framework Directive on the processes and dynamics of change in national systems for the governance of occupational safety and health?*

However, we quickly discovered that the relationship between national regulation and that represented by the supranational measures of the Framework Directive was considerably more complex. The development of many of these approaches at the level of the EU have their antecedents in national systems for the regulation of health and safety. In some countries there have been parallel shifts in both the focus and the breadth of the coverage of health and safety provisions which are long standing. Nearly twenty years before the Framework Directive, regulatory strategy in some European countries was already beginning to move away from the traditions of prescriptive legislation, rooted in 19th century approaches to protecting employees, towards more reflexive and goal-setting approaches. Thus for instance in the UK as early as 1972, the Robens Committee was emphasising that health and safety reforms aimed at creating the conditions for more effective self-regulation were needed. It argued that good health and safety practice was a matter of efficient management and that regulatory strategy should aim to stimulate and support such practice as well as encouraging workers to participate fully in making and monitoring arrangements for their safety and health. Concurrently with this movement towards a more goal-setting focus for legislative provisions on health and safety exemplified by the British experience, in other countries there was concern about the need to broaden the coverage of the terminology of health and safety. Thus, in Scandinavian countries, there was emphasis not only on a more process orientated approach (see Gustavson and Hunnius 1982 on the Norwegian experience for example), but also on what was included within such regulation. There was growing recognition that concepts of occupational health and safety needed to embrace the whole of the work environment and the organisation of work if they were to continue to be meaningful in modern work situations. In the Netherlands from the early 1980s a new approach to health and safety regulation was introduced which was in part influenced by the earlier British self-regulatory reforms, but which was also intended to greatly broaden its conceptualisation of health and safety to include workers' well-being. At the same time, the tradition in many countries of piecemeal coverage with different legislative

instruments for different sectors of employment was giving way to a more generally applicable definitions of the obligations of duty holders in all forms of the employment relationship³. Although their details were beyond the scope of our study, these national developments were important influences on the debate at European level behind the development of the Directive.

What we were dealing with was therefore a far more complex issue to which we could neither do justice, nor indeed, analyse accurately through the ‘top down’ approach that was implied in the original formulation of our research question. We therefore elected to examine the national reception of the Directive by taking a more ‘bottom-up’ view and our research question was thus modified to reflect our desire to understand a more complex reality by asking:

- *How has the nature of national socio-economic, political, technical and regulatory structures, cultures, practices and processes influenced, filtered and formed national reception, transposition and implementation of the Framework Directive?*

2. The impact of the Framework Directive: convergence and divergence

Three possible hypotheses have been suggested to explain the importance and effects of risk assessment in EU countries:⁴

- *a key method* in which it is of paramount importance in making self-regulation operational, and thus lending OHS policy a transparent and preventive character, enhancing the participation of workers and ‘managing’ to contribute to a better working environment;
- *a paper tiger* in which it contributes to further bureaucratisation, technocratisation and uprooting of OHS and drives it further away from the shop floor realities of occupational hazards;
- *a sham* covering a hidden and largely economically driven agenda of deregulation and non-intervention by the state.

³ However, while acknowledging the significance of these antecedents, it is important to recognise that such changes were not uniform in all countries and that in some cases the structures and procedures of national systems remained dominated by more traditional approaches. The effects of such continued domination presented a major barrier to the harmonised implementation of requirements of EU directives including those of the Framework Directive.

⁴ These hypotheses are part of the conclusions of a chapter which compares how four member states (Denmark, Greece, the Netherlands and the UK) transpose and implement the Framework Directive’s requirements for risk assessment. As such, the chapter represents a preliminary and partial analysis of some of the same issues that have been subject to the more extensive treatment of the present text (see Karageorgiou *et al*, in Frick *et al*, eds. 2000)

It is evident that these same three hypotheses could be applied more broadly, not only to risk assessment but to all the requirements on OHSM of the Framework Directive and the measures to effect their implementation in EU member states. Thus in one context the Directive could be regarded as a means of opening up new ways of managing occupational health and safety more effectively. While in other contexts it could be seen as having no more than merely a symbolic function and even to be detrimental to the interests embedded in previous, more prescriptive measures.

Let us explore the most positive of the hypotheses in relation to findings on the impact of the Directive in different national contexts. We could begin with reiterating the acknowledgement that it fits with the regulatory strategies on employment and labour relations of most member states as well as with those of the EU. For example, in the UK, with its historical tradition of voluntarism in industrial relations, and its relatively unregulated economic and labour markets, there is already quite advanced support for self-regulation in existing business and employment relations environments. In addition, current social and economic policy developments in the UK emphasise the role of public/private partnerships, increased self-management of public services, decentralisation of state authority and greater community involvement. In this way they contribute a supportive, wider policy environment for the kind of discretionary/self-regulatory strategies implied in the British transposition of the Framework Directive. Thus, in the agenda of the New Labour Government elected in 1997 and re-elected in 2001, disengagement of the state encourages the replacement of its former role through involvement of both public and private actors in new self-regulating associations. These are promoted as means of developing and sustaining infrastructures for the delivery of services in health, in education and in social welfare as well as in the economic and business environments and in the linkages between them. In the relatively weakly-regulated business and labour environments, the trade unions' search for new identities to address their crisis of representation allows promotion of "social partnership". Here, traditions of limited state regulation of the relations between capital and labour enables a policy agenda in which a supposed economic stakeholder interest between labour market actors is served through notions of "partnership".

Self-regulation in health and safety fits entirely congruently within these wider policy settings. More importantly however, such self-regulation is not restricted to individual firms (as it is usually conceptualised in relation to OHSM systems in large firms). It implies a much wider concept of a self-regulatory environment, one in which supply chain dependencies, contractor compliance requirements, public/private partnerships in service delivery and social partnerships are all recognised means through which the self-interests of external groups apply pressure on *all* enterprises to meet required health and safety standards. This is the vision that informs much of the present British Government strategy on health and safety regulation, which has been 'revitalised' by New Labour, following years of neglect by previous Conservative administrations⁵. Alongside its tenets

⁵ Revitalising Health and Safety, the DETR/HSC (2000) strategy on health and safety regulation in the UK was introduced in June 2000. As we describe in Chapter 9, it contains a 10 point strategy statement and 44 point action plan, which is heavily orientated towards the promotion of wider self-regulation.

on self-regulation, the new governmental strategy emphasises performance targets, increased penalties, private prosecutions and corporate liability, thus also reflecting its perceptions of public concern over social justice in relation to health and safety failures.

In the traditionally more heavily regulated environments of countries such as France, and Germany and in the regionalised and sector specific situations commonplace in Italy, the policies of the state would seem to be less obviously concerned with voluntary self-regulatory approaches in the economy. There is still a more interventionist approach to establishing mechanisms for greater institutional co-operation in these countries— for example between the social partners, the labour inspectorates, insurance organisations and prevention services – and the development of initiatives to achieve better compliance with health and safety standards as a result. However, it is also notable that while this may be state led, there are also plenty of examples of initiatives that have been taken to exploit the same types of business interdependencies as are evident in the UK⁶. In Germany the structural determinants of its historical approach and the traditional technical orientation of rule making in health and safety present considerable practical and conceptual challenges to process based regulation. Nevertheless there is clearly a need to modernise its approach. It is perceived in the country that this includes the adoption of a more process-based system and more holistic definition of employers' responsibilities. In the Scandinavian countries, and the Netherlands the role of social partners in co-determining health and safety is well established and the corporatism that has been a feature of many decades continues to play a role in determining the form of self-regulation experienced. Notably, worker participation is strongly emphasised and prevention services play a highly developed role in securing improvement health and safety management. It is in these countries that we also find the most evidence of the development of strategies to engage in reflexive regulation in practice on the part of labour inspectorates. There is less focus on the push-pull effects on OHSM of pressure from the external business and social environment. Nevertheless, recognition of such effects is far from absent. We observe greater attention from labour inspectorates, work environment researchers and prevention practitioners to addressing their relevance to encouraging compliance in these countries. We also note a more prominent position for policies that link employability to preventive health and safety and (especially in the Netherlands) a more market orientated approach to the role of OHS services and its monitoring.

Of course, these generalisations are not absolute distinctions between countries. But they represent a connection between several general and related sets of ideas. The first is that while it is undeniable that there have been overall improvements in health and safety outcomes during the twentieth century, at least some of which were attributable to prescriptive regulatory strategies, in the eyes of most national and European level policy makers, command and control approaches to regulation, inspection and enforcement have reached the limits of their effectiveness. Yet the level of work-related injury and ill-health remains unacceptably high. The second set of ideas therefore suggests that alternative

⁶ See for example the many instances of this type of initiatives described in relation to achieving improved health and safety management in small firms and related peripheral employment in Walters (2001).

strategies are needed to bring about further improvement. Means to institute participative OHSM seem to offer a way forward. As Wilthagen has put it above, they lend OHS policy a transparent and preventive character, enhancing the participation of workers and 'managing' to contribute to a better working environment. It can be further hypothesised that to be effective, such approaches should be both congruent with other areas of social and economic policy and also stimulate greater engagement and activism on the part of those whose activities they seek to regulate and those they seek to protect.

The third set of ideas follows from this by taking account of the emerging profile of the structure and organisation of work. This is increasingly dominated not by large sized single companies/organisations with full-time permanent employees, but by networks of production in which work is undertaken in small, fragmented, and peripheral organisations by temporary, casual or outsourced workers. The organisational aspects of these situations are less defined by individual employment relationships and more by structured networks for production (see Frick et al 2000). In these scenarios, influences from outside the enterprise and its employment relationships have greater control over what is produced and how it is produced (through for example, contractual arrangements such as out-sourcing, franchising, subcontracting and self-employment) and production decisions are increasingly removed from the direct control of the employer. Such situations remain inaccessible to traditional command and control approaches of inspectors, conventional actions of organised labour, as well as the intervention of prevention services. They therefore represent a stumbling block for regulatory strategies based on traditional conception of the employment relationship. Of course, there is a paradox here as the Framework Directive is firmly rooted in this tradition, which serves to provide its legal basis. At the same time however, while it relies on conventional means of ensuring its application — whether through the inspection powers of the regulatory authorities, national and sectoral collective agreements, or the interventions of prevention services— its reflexive approach to OHSM possesses considerably more flexibility than associated with more prescriptive legislation. An occupational health and safety management approach to improving health and safety performance in *all* firms and in peripheral work cannot rely entirely on traditional approaches to regulation (be they from the under-resourced labour inspectorates, or from increasingly less well organised labour) for monitoring and enforcement. Therefore, such monitoring and regulation is likely to be aided by means that exploit existing economic and social dependencies. This can be achieved partly by making OHSM requirements more explicit conditions of such relationships and also by involving stakeholders at sectoral, regional and local levels in their organisation.

3. What is missing?

National policy environments vary in relation to these scenarios. However the general direction of European political economies are converging towards support for such development. There is less regulation rather than more; traditional forms of employment and labour relations are being replaced by those that are increasingly fragmented, devolved and unregulated, peripheral work, atypical work and the role of small enterprises in the economy are increasing; there is greater political emphasis on the role

of self-regulatory practices replacing that of state intervention. Labour inspectorates are required to 'do more for less' with their available resources for inspection and control. In this context national requirements that implement the Framework Directive are perhaps most positively understood as transitional measures amongst the strategies that attempt to address these challenges.

However, it is important to acknowledge that these are *policy* perspectives. They are not well grounded in empirical evidence of their success in terms of improved health and safety outcomes. While it may offer *plausible* means of addressing the difficulties of tackling current health and safety issues, there has been very little serious research undertaken to measure the results of reflexive health and safety regulation outside large firms. Moreover, such material that does exist, for example, the limited evaluation of the operation of the instrumental elements of the Framework Directive is not encouraging. As we have seen, measures of the application of risk assessment, worker participation and preventive services show relatively poor uptake outside large, well-managed firms and little evidence of greater worker participation. We have shown that a partial reason for this may be found in the complex factors that contribute to resistance to changes in national regulatory systems in different countries. Other matrices of economic, social, cultural and political factors, of which regulation is but one, also strongly influence the ways in which employers respond to national health and safety considerations. An established finding in the OHS literature is that delivery of effective OHSM requires both the willingness and capacity on the part of employers and their management. It is not certain that such organisational development is present even in the majority of organisations with conventional structure and organisation. It is far less sure to be found in fragmented and peripheral organisations and structures in which a large part of work in the EU takes place. It may be that the evolving strategies of regulatory authorities for applying process regulation are effective in relation to large organisations with relatively advanced concepts of management. But there is little evidence to encourage a belief that on their own, they will necessarily be effective in the majority of situations that increasingly characterise the current structure and organisation of work.

Nor has there been much attempt to assess the value of exploiting the various dependencies within economic and labour market environments touched upon here,⁷ that could be sources of additional external pressures augmenting regulatory approaches to improve health and safety management. Indeed, this is unlikely to be a straightforward task. The range and diversity of the situations most national systems currently seek to address in terms of improving health and safety management, present major problems for evaluation. They are hard to access, there is a paucity of data on outcomes, such data that exists is unreliable and subject to a variety of possible interpretations. Thus, it is quite commonly not possible to establish cause and effect with any absolute degree of certainty. The various ideological underpinnings of the different meanings of occupational health and safety management as well as the huge uncertainties relating to

⁷ See Walters (2001) for a review of some international studies as well as some new research within EU. However, the same point is made concerning the paucity of strong empirical data to support such policies

tangible measures of outcome make it a difficult contentious area for objective assessment.

This does not make the need for robust evaluation any the less important. In the end, it remains imperative to the success of all approaches to improving the work environment that the standards sought reflect the interests of the workers whose health and safety they are intended to promote. Their means of achievement must allow internal monitoring through the participation of workers as well as external monitoring whether by state agencies or other economic/social means. While the reflexive approaches outlined, are clearly exerting growing effects on national systems and are in keeping with wider socio-economic policies, there is an urgent need to monitor their application. In doing so it is imperative to determine the objective indicators of their success/failure and to understand if or how they can be best improved to meet the challenges presented by the current world of work in the EU.

In the emerging political economy in Europe, many of the established means of protecting and improving the health and safety of workers and their working environment are less relevant to the situations created by the new organisation of work. But we need to be sure that the approaches of reflexive regulation implied in the national implementation of the Framework Directive offer some ways forward. Caution is warranted before extensively embracing such new approaches largely untested. Moreover, failure to evaluate them critically would risk obfuscating the extent to which the new organisation of work may contribute to erosion of the quality of the work environment of an increasingly significant proportion of the EU workforce. While at the same time, the regulation of such conditions takes a back seat in deference to economic priorities. Above all else, we should be clear that the means of addressing the formidable occupational health and safety problems associated with the changing economic structure in EU member states are capable of delivering the outcomes claimed for them. To do so requires considerably more investigation of their application and effectiveness than has been so far undertaken anywhere in the EU.

References

Barnard, C and Deakin, S. (1999) A year of living dangerously? EC social rights, employment policy and the EMU, in Towers, B and Terry, M. Industrial Relations Journal, European Annual Review 1998/99, Blackwell, Oxford, 1999.

Frick, K, Jensen, P.,L. Quinlan, M. and Wilthagen, T (2000) Systematic occupational health and safety management: an introduction to a new strategy for occupational safety, health and well-being, Chapter 1 in Frick, K., Jensen, P.L., Quinlan, M and Wilthagen, T. eds, *Systematic Occupational Health and Safety Management*, Oxford, Pergamon..

Karageorgiou, A., Jensen, P.L. Walters, D. R., and Wilthagen, T (2000) Risk assessment in four member states of the European Union, Chapter 12 in Frick, K., Jensen, P.L., Quinlan, M and Wilthagen, T. eds, *Systematic Occupational Health and Safety Management*, Oxford, Pergamon..

Frick, K. and Wren, J. (2000) Reviewing occupational health and safety management — multiple roots, diverse perspectives and ambiguous outcomes, in Frick, K., Jensen, P.L., Quinlan, M and Wilthagen, T. eds, *Systematic Occupational Health and Safety Management*. Amsterdam. Pergamon.

Mossink, J. and Licheer, F (1997) *Costs and Benefits of Occupational Safety and Health*, NIA TNO BV, The Hague, Netherlands.

Walters, D. R., (2001) *Health and Safety in Small Enterprises*, Peter Lang, Brussels.

Walters, D.R. (1998) “Health and safety strategies in a changing Europe”, *International Journal of Health Services*, Vol 28 No 2 pp 305-331.