

HSC OPEN MEETING ON TUESDAY, 12TH OCTOBER 2004-10-27

'Implementing European directives'

Report on the discussions

Chair: Judith Donovan, HSC Commissioner

Rapporteurs: Malcolm Darvill, Head of HSE's Better Regulation and International Branch, and Ian Greenwood, Head of the HSE policy section dealing with the Falls from Height Programme and work equipment and machinery safety.

Introduction

The backcloth to the session included the 'Better Regulation' nature of the Commission's founding legislation the Health and Safety at Work etc. Act 1974, that permitted hundreds of sets of outdated prescriptive regulations to be swept away and replaced by fewer sets of flexible goal-setting regulations. HSE had sought to carry HSWA and Better Regulation principles into negotiations in Europe on proposals for health and safety legislation.

The Open Discussion

How are directives negotiated?

In response to questions about how HSE negotiated directives and what checks and balance were in place to ensure negotiating goals were met it was explained that HSE worked to a broad negotiating strategy¹ based on a framework of general principles that was approved by HSC and Ministers. Any changes in the strategy had to be cleared by Ministers and proposal for directives could be challenged by the Commons and Lords Scrutiny committees.

Stakeholder involvement

Concern was express that industry and other stakeholders should be involved in the development of proposals at as earlier stage as possible.²

¹ See Annex.

² As a result of the Maastricht Treaty a provision was introduced whereby the social partners may arrive at a collective agreement on an issue which would otherwise be the subject of a European Directive. The Commission will consult with ETUC and UNICE on social policy issues and the social partners may, if they can reach agreement, issue an opinion or a recommendation to the Commission. Before the European Commission brings forward any new proposals on occupational health and safety, the social partners are given the option to agree a Social Partners agreement or decide that a directive is needed. Therefore stakeholders should ensure that they lobby UNICE (employers) or ETUC (workers) via the CBI and TUC at this stage. This way they get the opportunity to shape new proposals before HSE does.

Use of specific regulation versus HSWA general duties

The balance between implementing directives by specific regulatory provisions and HSWA general duties was discussed. It was suggested that in implementing directives in the early days reliance on general duties had been more common (the relationship between HSWA, the 1989 Framework Directive and the management regulations was cited) but with the subsequent heavy flow of H&S directives in the late 1980s/early 1990s the 'Robens approach' had gone off course with more detailed sets of implementing regulations. HSC's new strategy bore many similarities to Robens. In the case of the Temporary Work at Heights Directive, the general approach had been for one general set of goal-setting regulations, with sector specific guidance.

Miscellaneous

It was pointed out that the Framework Directive called for prevention services and that the UK approach which has resulted in only a small proportion of workers covered by such services, differed from mainland Europe. It was suggested that the UK approach was in part responsible for failure to hit occupational health targets.

Goalsetting, SFAIRP and the need for 'telling people what to do'

The benefits of the UK goal-setting approach supported by case law was pointed up. It was flexible for UK law and permitted a large degree of self-regulation. This contrasted with the continental codified system with its reliance on detailed comprehensive regulation. The two systems did not mesh and created a fundamental problem most obviously seen in the 'so far as is reasonably practicable issue' (SFAIRP). The case for inclusion of a due diligence defence in absolute regulations was made.

Mention was made of the new Irish Health and Safety bill that attempted to define SFAIRP and the wish to 'keep things simple' in legislation in line with Ireland's approach.

The more complex legislative situation that existed currently was discussed and compared to Factory Act days when a simpler approach was possible. It was pointed out that HSE sought in negotiation to clarify the content of proposed directives, for example, HSE negotiators had drafted a definition of the phrase "good software ergonomics" for the Display Screen Equipment Directive when it became clear that the EC originators had not considered its meaning.

Problems created for stakeholders by delays in HSE's producing supporting ACoPs/interpretative guidance were mentioned. In the case of the Work at Heights regulations it was intended to issue a broad simple guide early, with industry following up with sector specific guidance.

Tensions between the goal-setting approach to regulation and the 'coal-face' requirement to actually tell people what they need to do to achieve compliance. In counterpoint, it was suggested that the onus lay with employers to train and educate

their staff in what the law and the employing organisation required on health and safety. The goal based approach allowed business to operate in its own way.

The three themes that seemed to sum up the session were:

- more detail should be publicly available on the 'directive process' and the relevant checks and balances in Europe and the UK;
- most people recognise the challenges of reconciling UK law and directives and making them the requirements clear, enforceable and relevant;
- more needed to be done in robustly testing out assumptions, for example, by relying on the general duties in the HSWA. HSC/E should be less afraid of infraction action.

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Central Policy Expertise and Support Division

HOW HSE NEGOTIATES IN EUROPE

Preliminary stages

1. HSE will often be involved with the Directorate General within the European Commission that is developing a proposal for legislation before it is published. This may be to offer professional input or the benefit of experience. Some UK industry associations and trades unions will also be involved in Brussels from a very early stage in seeking to influence the shape of a proposal.

The UK Negotiating Strategy

2. Once the proposal is published, HSE policy staff will work up a proposed UK negotiating strategy based on principles agreed by Ministers aimed at ensuring consistency and proportionality in legislation, and achieving improvements where these are justified by risk, promote better standards across Europe and do not have unacceptable consequences for UK industry and the legal framework.. This will be done in close contact with key stakeholders so it reflects their concerns. The draft negotiating strategy is then submitted to the Health and Safety Commission (HSC) for approval. The HSC may accept the strategy or request that it be amended.

3. Once approved, the strategy is then sent for approval to Ministers in the HSC/E sponsor department, the Department for Work and Pensions (DWP). Again, DWP Ministers may accept it or call for changes. It is then sent for collective Cabinet agreement and may be subject to further amendment.

4. The final agreed strategy will then be used by UK officials to guide them in negotiating the directive in Brussels. Proposals for health and safety Directives are generally (but not exclusively.) then discussed/negotiated in what is called the Social Questions Working Group. The Group is chaired by the country currently holding the Presidency of the Council of the European Union. It is attended by staff from the various Member States' Permanent Representations in Brussels, supported by policy/technical experts from their respective health and safety authorities.

The European Parliament and briefing UK Members

5. Additionally, because most proposals for health and safety directives are decided by what is called co-decision (that is, determined jointly by the relevant Council and the European Parliament), HSE will provide for UK members of the Parliament a briefing steer based on the agreed UK negotiating strategy. Where it is deemed helpful, HSE officials will also travel to Brussels to meet and orally brief Members of the European Parliament. It is also open to any group or individual to lobby MEPs about the content of a particular proposal.

6. Within the European Parliament, proposals are considered in detail by Committees. There is an Employment and Social Affairs Committee that looks at proposals in this field. When considering a proposal, the Committee will appoint a rapporteur who is responsible for co-ordinating and documenting the work of the Committee. Where the rapporteur is a UK MEP or known to be sympathetic to the UK position on a proposal, HSE and if necessary Ministers will seek to lobby the rapporteur to influence the Parliament's deliberations.

Scrutiny by the Westminster Parliament

7. All European legislative proposals are subject to scrutiny by the European Scrutiny Committees of the Houses of Commons and Lords. HSE officials have to prepare for the committees documents called Explanatory Memorandums (EM) that detail the purpose of the legislative proposal, its consequences for the UK and support the EM with a Regulatory Impact Assessment containing information on the estimated costs and benefits of the proposed legislation. The Parliamentary Scrutiny Committees can challenge Ministers on any aspect of the proposal, its content and likely consequences.

Adoption of the directive

8. At the end of the legislative process, the Council will adopt the proposal and it becomes a directive. Member States will be given a set period in which to implement the directive (transposition into domestic law) and confirm to the European Commission that this has been done. Once a directive is adopted, the HSC/E will undertake the public consultation required by the Health and Safety at Work etc. Act 1974 by way of a published consultative document including a draft of the regulations intended to turn the directive into domestic law. HSE officials will meet any stakeholders with an interest in the legislation and seek to take their views on board.

The HSC/E consultative process and making regulations

9. Having analysed all the responses to the consultative document and input from meetings with stakeholders, HSE officials will amend the draft regulations to take account as far possible of stakeholder concerns. The amended regulations will then be submitted for approval to the Health and Safety Commission for approval. If HSC approves the draft regulations they will then be sent to Ministers in DWP with a recommendation that the regulations are made into law.

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