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HEALTH AND SAFETY COMMISSION

Update on SFAIRP Infraction European Court of Justice hearing date and next steps

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Cleared by Jonathan Rees on 24 August 2006

Issue

1. This paper:
 - updates HSC on developments in the SFAIRP infraction case; and
 - sets out what will happen at the European Court of Justice (ECJ) oral hearing on 13 September in Luxembourg

Timing

2. Routine. Commissioners should be aware of the latest position before the ECJ oral hearing takes place on 13 September. However, no final decision is expected until well into next year (see paragraph 6).

Recommendation

3. That Commissioners note:
 - the progress of this infraction case at the ECJ; and
 - the proposal to issue a press operational note (**Annex 1**) before the oral hearing;

Background

4. In March 2005, the European Commission (EC) started formal infraction proceedings against the UK Government for alleged under implementation of the EC's health and safety Framework Directive (Council Directive 89/391/EEC of 12th June 1989). In essence the EC is challenging the use of the qualifier "so far as is reasonably practicable" (SFAIRP) in the UK's transposition of the duty on employers to ensure the health and safety of their workers (article 5(1) of the Directive).

5. Since the EC made its application to the ECJ, we have submitted, in June 2005, our written defence. The EC replied to this in September 2005; and we submitted a further rejoinder in November 2005. During this written procedure, the issues in contention were refined and clarified.

6. The oral hearing will take place at the ECJ, in Luxembourg, on 13 September 2006. At the hearing, counsel for the UK (a senior QC) and for the EC will plead their case. Senior HSE officials will also attend but will not take part in the hearing. It is then for the judges to consider the submissions and the previous pleadings, and then decide the case. However before they do so,

the Court's Advocate General will issue an opinion. This is likely to be delivered around 8-9 weeks after the hearing. We estimate that the Court will deliver its final judgement around spring 2007.

Argument

7. In the light of advice from Counsel, HSE remains optimistic of a successful resolution to the case. It will continue to mount a robust defence of SFAIRP on both legal and practical grounds.

8. We have already given some thought to contingency planning in light of an adverse judgement. In the light of the oral hearing we will refine this, although it is really only after seeing the Advocate General's opinion that we can develop more detailed options. And even these could only be provisional since the Court is not obliged to follow the Advocate General's opinion although this generally provides a pointer to the likely outcome of the case.

Consultation

9. The UK policy line on defending the SFAIRP principle was agreed by DWP Ministers and Cabinet colleagues in June 2005, before the UK defence was submitted.

Presentation

10. As this action is against the UK Government, Department for Work and Pensions Ministers lead on it and DWP press office will handle any media interest, with advice from HSE. A press operational note has been drafted (**Annex 1**) and will be issued by DWP approximately one week before the hearing. This is standard practice in all high profile cases of this kind.

11. Until now all documentation (submissions, etc.) relating to the infraction case has been closed. This will largely remain the case even after the oral hearing. The only information that is currently in the public domain is the Official Journal summary of the case¹. On the day of the hearing a Report for the Hearing, which will be a short summary of the parties' earlier written submissions, will be presented to the Court. This information will be in the public domain but is not published as such. All other documents remain confidential.

12. It is proposed to make this HSC paper **fully open** on the day of the hearing. Doing so will allow us to alert our key stakeholders to the progress of the case and the fact we are continuing to robustly defend it. Previous HSC papers on SFAIRP remain closed as they contain confidential material on the handling of legal proceedings.

Clearance

13. Colleagues in Legal Advisors Office have been consulted, and have approved this paper.

Costs and Benefits

14. Were the UK to lose the ECJ case, there could be considerable costs for HSE and both the private and public sectors in dealing with the consequences of changing occupational safety and health legislation. Detailed estimates can only be formulated in the light of the final ECJ judgement and its precise terms.

¹ http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_143/c_14320050611en00180019.pdf

Financial/Resource Implications for HSE

15. At this stage, financial implications are mainly in staff resource of the International Unit and Legal Advisors Office, and legal fees.

OPERATIONAL NOTE

RELEASED BY DWP PRESS OFFICE: Approx one week before the hearing

CASE C127-05 EUROPEAN COMMISSION V UNITED KINGDOM

ORAL HEARING 13 SEPTEMBER 2006 THIRD CHAMBER

Executive Summary

The European Commission (EC) has brought a case against the UK in the European Court of Justice (ECJ) challenging the UK's implementation of Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work (The Framework Directive.)

The Commission's action is founded on the UK's use of the phrase "so far as is reasonably practicable" in section 2(1) of the Health and Safety at Work etc. Act 1974 (HSWA). The EC believe that this amounts to defective implementation of the Directive, which does not contain such a qualification.

The UK is robustly defending the case.

The ECJ hearing will take place on 13 September in Luxembourg.

Background

By application to the ECJ (Case C-127/05), registered on 21 March 2005, the EC commenced infraction proceedings against the UK Government for alleged under implementation of Council Directive 89/391/EEC of 12th June 1989 on the Framework Directive.

The UK's defence was lodged on 16 June. The EC's Reply to the UK's defence was lodged at the ECJ on 16 September and received on 27 September. No other Member States decided to intervene. The UK's Rejoinder to the European Commission's Reply was lodged at the ECJ on 30 November.

The EC's claim (as reproduced in the Official Journal) is that the Court should declare that:

"In restricting the duty upon employers to ensure the safety and health of workers in every aspect related to the work to a duty to do this 'so far as is reasonably practicable', the United Kingdom has failed to fulfil its obligations under Articles 5(1) and 5(4) of Council Directive 89/391/EEC of 12th June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work."²

The EC's complaint is based upon section 2(1) of the Health and Safety at Work etc. Act 1974 which states that it shall be the duty of every employer to ensure 'so far as is reasonable practicable' (SFAIRP) the health, safety and welfare at work of all his employees. The EC considers the SFAIRP qualification placed upon the employers' duty is incompatible with Articles 5(1) and 5(4) of the Directive.

The Framework Directive Article 5(1) imposes 'a duty to ensure the health and safety of workers in every aspect related to the work'.

² http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_143/c_14320050611en00180019.pdf

Article 5(4) provides that the Directive “shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care.”

The UK position: The UK has not breached its EC obligations

The UK does not accept that it has failed to properly implement the Framework Directive. The UK believes that the wording of s2 (1) of the HSWA, as interpreted by the UK courts, achieves the aims of the article. Furthermore, this is demonstrated by the UK's health and safety performance record, which is among the best in Europe (see Annex A, attached). The UK is robustly defending the case.

Next Steps: The Court's Advocate General usually delivers an opinion 8-9 weeks after the hearing. The Court's final judgement is expected spring 2007.

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Great Britain's achievements in health and safety performance are also commendable on an international basis. Though some care is needed when making comparisons between countries, the EU has published the chart, reproduced in the Figure below, showing the annual rate of workplace fatalities in 15 Member States (2003 figures). **On this basis Great Britain has the lowest rate of 1.1 per 100,000 workers compared with the EU average of 2.5.**

EU comparisons for rate of fatal injuries

