Better Regulation: really better for health and safety at work in Europe?

In a chilling announcement, the Commission claims that its plan for better regulation should enable savings of 150 billion euros for 2012 through a 25% cut in the administrative burden on business. The figure may be questionable, but a close look at the specific proposals seems to leave little doubt that much of the handout to business will come at a cost to society. These are not savings from waste, but could be paid for dearly from deep cuts in the guarantees that underwrite public health, environmental protection, consumer protection and other core public interests.

The Commission’s health and safety policy thrust claims to differentiate the employer’s substantive duties (e.g., replacing a dangerous chemical, using highly safe machinery) from their “information obligations”. This kind of approach cannot apply to health and safety at work. EU Directives prescribe systematic health and safety management, and say little about the substantive content of physical work tasks. Information obligations – like risk assessment, logging work accidents, following-up on health surveillance information, etc. – underlie all practical preventive measures.

All reforms of health and safety at work legislation since the 1970s have been based on the premise that what was needed was systematic health and safety management. The production, processing and passing-on of information are building blocks of that. Without regular information input, there cannot be prevention, only case-specific reaction. Without information, consultation of workers and their representatives is meaningless. Without information, public policing is reduced to responding to the worst occurrences like fatal accidents. Without information, there is no hope of integrating health and safety into company strategy. Health and safety at work and a tax measure are as chalk and cheese in this respect. A substantive tax obligation like the payment of a particular levy can be distinguished from administrative-type information obligations like keeping accounting records or making out a tax return. This is an artificial distinction to make in health and safety matters, where there are almost no statutory preventive obligations. Barring the odd case, employers have no list of toxic chemicals that they have to replace, or detailed instructions as to what to do to make machinery safe to use. The legislation is largely what is known as reflexive law – a concept frequently used in environmental law to mean rules that do not specify the substantive outcome to be achieved but lay down procedures by which to achieve ends couched in fairly general terms.

This means that the framework directive and most other Community HSW directives contain few detailed substantive rules (occupational exposure limits, medical checks, technical specs of plant and equipment, etc.). What they do do, by contrast, is to lay down a number of general objectives and establish forms of organization and procedures designed to create a management system and checks and balances tied to traditional collective labour relations. The regulatory procedures are complex, based on forging a link between making health and safety at work part of a business management system, and recognizing the opposing labour interests that make health and safety at work part of the collective relations system. These rules can therefore be said to be chiefly about establishing a properly working system of information and relations (with workers and their reps, public authorities, preventive services and, to a lesser extent, other firms when concurrent activities are carried on, like working on mobile or temporary work sites).

Whether safety and health can be assured in all aspects of work is wholly dependent on this system of information and relations. Attempting to ring-fence substantive obligations by claiming them to be independent of the information obligations and management activities required of firms is pure fabrication.

The demands by some employers’ lobbies to cut down these information obligations are a bid to roll back the implementation of systematic health and safety management in firms, and tantamount to calling for a lowering of prevention standards. Workers and the community will pay a high cost for any savings made by employers. It is on the cards that the short-term financial profits made by firms will soon be undermined by the longer-term costs incurred from accidents and illnesses (see box, p. 4).

Also, the effectiveness of health and safety at work policies depends on having national prevention strategies, which can only be properly informed by drawing on workers’ knowledge and experiences. If there is no systematic feedback to the authorities, the detailed problem analysis, priority-setting and resource allocation cannot be informed by it.

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2 For a more detailed analysis, see D. Walters, 2002 and Frick et al., 2000.

All bibliographical references of this Special Report written by Laurent Vogel, lvogel@etui.org
**Management on the cheap – short-term savings**

An examination of major industrial disasters gives clear evidence of how cutting down employers’ information obligations results in huge costs to society and companies themselves.

The explosion at BP’s Texas City refinery in the United States on 23 March 2005 which killed 15 workers and injured 180 others is a telling case in point. The Chemical Safety Board investigation (the CSB is an independent federal agency that looks into chemical industry accidents) found irresponsible and superficial management of safety designed to make short-term savings.

The CSB investigation found that the isomerization unit where the explosion occurred had experienced eight similar incidents between 1994 and 2004 with no injuries or fatalities. In two cases, however, fire had broken out. The CSB report found that “the eight incidents were not properly investigated, and appropriate corrective actions were not implemented. The investigation of a 1994 incident resulted in an action item to analyse the adequacy of the blowdown drum. The area superintendent was responsible for the completion of this item. However, the item was never finished, and management officials did not follow up to assure completion. (...) In late 2004, following these major accidents and other near misses, the Texas City leadership was attempting to improve the refinery’s safety performance. Several years of audits and reports had identified serious safety system deficiencies. However, the safety initiatives that were undertaken focused largely on improving personnel safety – such as slips, trips and falls – rather than management systems, equipment design, and preventative maintenance programs to help prevent the growing risk of major process accidents.”

Source: CSB News Release, 30 October 2006; CSB Investigation of BP Texas City Refinery Disaster Continues as Organizational Issues Are Probed

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**The over-light burden: a killing yoke!**

The basic tenets of the Better Regulation Lobby’s approach are open to question. The backbone of prevention is more the information obligations than headgear that can be worn or removed at will. But what of the argument that the information obligations on health and safety at work are an onerous burden that stops firms from being competitive?

In practice, firms spend much less time than is needed on health and safety at work. The United Kingdom government is among the most vocal advocates of “better regulation” in health and safety, the aim being to reduce the administrative burden on small and medium-sized businesses. A report published by the Health and Safety Executive dismantles the myth that SMEs are crippled by their health and safety management obligations (Heriot Watt University, 2007). The report was based on a much more substantial methodology than the literature designed to quantify the administrative burden using costing models. The report’s conclusions show how little time is spent on health and safety. The authors report that, “SMEs spend surprisingly little time on health and safety activities, 59% of enterprises spend an hour or less a week with one in four spending no time at all”. The available evidence from other countries points the same way; the time spent on preventive measures in the broadest sense is not enough to ensure an effective health and safety policy.

In France, for example, just 19% of workers were informed about the risks of their work in 2005 (Courtot, 2008), falling to 15% in firms with fewer than 10 workers. It remains very low – below 30% – even in high-risk sectors like building. Women get even less information than men (13% against 25%). In Spain, a bare 25% of workers report a job risk study having been done in 2007 (MTAS, 2008). Temporary workers get a much worse deal than permanent employees (18.2% against 33.8%).

An Irish government study has come up with what seems a likely cost approximation. Total health and safety measures account for an estimated 1% or so of non-construction industry firms’ labour costs, and around 2% in the construction industry. This is a very small percentage given the issues at stake – nearly 160 000 people in the European Union are killed each year because of inadequate workplace prevention.

A comparative study presented to a recent international conference by the Swedish researcher Kaj Frick found that poor OHS management is behind technical and organizational risks, but in SEs (from 1 to 49 workers) this can better be described as a separate risk type. Their lack of competence and-or planning in OHS very often expose workers to risks that otherwise would be easy and cheap to avoid or abate. The higher OHS risks in SEs are partly an effect of having more workers in manual work and-or in hazardous sectors. However, the main problem is the increased risk from poor OHS management.

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3 Daniel Kelly, Economic Impact Assessment of Occupational Safety & Health Legislation in Ireland, presentation to the Conference of 7 November 2008 in Brdo pri Kranju (Slovenia).

4 Notes taken during Professor Kaj Frick’s paper to the International Work and Health Forum, Paris, 3 November 2008.
2004 onslaught on Community legislation. The British authorities put the cost of risk assessment to EU businesses at 5.5 billion euros (BRE, 2008), whereas the European Commission estimates the total cost of all work environment and employment-related information obligations looked at in a recent evaluation of two Directives at between 4 and 5 billion euros (Commission, 2009). It costs out risk assessment at about 2.5 billion euros – less than half the British estimate!

The estimated costs of risk assessment may vary and be somewhat fanciful, but the political issue is clear. The obligation placed on employers to analyse all the factors in their firm’s operations that might endanger health and safety is a prerequisite for preventive activity. Without risk assessment all that is left is to react – usually too late – to unacceptable situations.

The anti-risk assessment brigade put up three types of argument:

1. Some want firms under a set threshold not to have to do a risk assessment, or just do a notional assessment that would not be evidenced in writing anywhere. In Italy, for example, firms with fewer than 10 workers can simply “self-certify” that they have done a risk assessment. The certification gives no statement of the risks assessed nor any planned measures to prevent them. It is unclear how workers’ reps could be consulted on the substance of the risk assessment if all they get is a copy of this administrative self-certification;

2. Others believe a risk assessment should not be required for temporary or agency workers. A leading proponent of this is the Danish employers’ Confederation (DI, 2007) which also wants an exemption for the smallest firms. This is a particularly cynical proposal, given the fact that these categories of workers are often exposed to serious risks without being given essential information and training;

3. Yet others want risk assessment reduced to the exercise of simple common sense, usually based on a check list. This is the view taken by the British authorities in their agenda of “demying risk assessment” and tackling risk-aversion. It is a view apt to lead to standardized, superficial assessments. Many risks do not seem risky in employers’ immediate “common sense” view. Most long-term risks are under-rated, and some are discounted. Prevention works only by seeing the inter-relationships between risks and tracing back to determinants like work organization and workplace labour relations. The scale and complexity of risks are not automatically determined by workplace size. To cite just one example – women cleaners are exposed to a combination of major chemical hazards, awkward working postures, unsocial hours and a despotic work organization, often compounded by social disparagement and gender and ethnic discrimination.

Risk assessment aside, there are a great many other targets which vary with the attacker. Some have a problem with the obligation to log work accidents and analyse their causes with workers’ reps. Dutch employers’ federations are even against compiling European statistics on work-related accidents and occupational diseases (VNO, MKB, 2008, p. 24).

Workers’ representation and its role in workplace prevention seldom come under direct attack. However, the demand to cut back the production and communication of information would turn the consultation machinery into largely meaningless formalities. As far as could be ascertained, only in Slovenia has the consultation of workers’ reps been called into question by the Ministry of Public Administration. At a conference organized by the Slovenian authorities in November 2008, a proposal was made to replace consultation of these health and safety committee reps by an Intranet-based information system. The proposal was knocked back by the Ministry of Labour. At an ETUI conference in January 2009, the representative of the European employers’ lobby BusinessEurope claimed not to see why firms should consult workers’ reps on risk assessments when, in his view, personal consultations of workers would do.

Three other Directives are particularly vexing to employers and some governments.

1. **The Mobile or Temporary Work Sites Directive.** It is clear from the criticisms of this directive that the attack on Community legislation is concentrated on the obligation to provide effective means of managing risk prevention. It contains only a very small number of substantive obligations. It aims to establish integrated management of work sites which incorporates health and safety requirements from the planning stage and requires different firms operating on the same work site to cooperate. The Commission believes that this directive has had positive results, borne out by the national reports on its application. While some call into question the obligation to draw up a written health and safety plan, the Bavarian government wants it scrapped outright;

2. **The Protection of Workers from Carcinogens Directive.** The Danish employers’ confederation wants to move from an approach based on the intrinsic hazards of chemicals to one based on the actual level of risk in a given use (DI, 2007). This would lead to a fragmentation of situations, leaving individual firms free to decide whether or not to use carcinogens according to their own assessment of what level of risk is acceptable. The history of asbestos is a prime example of the disasters produced by this kind of self-regulation policy;

3. **The VDU Directive.** Here, the demand to reduce the administrative burden is a ploy to call for a revision of the few substantive obligations contained in the Directive’s annexes. It would make
more sense to await a comprehensive directive on musculoskeletal disorders before launching into a partial revision of one of the few pieces of legislation that actually exists in this area.

It is clear from this that the “better regulation” debate has been used to take the discussion beyond administrative burdens and call into question many other aspects of health and safety at work – a trend even more clear in the Stoiber group’s proposals on working time and REACH (see article p. 9).

Some of these proposals will probably have to be dropped. Some seem so crude and approximate as to lack any credibility, whereas others could actually undermine Community health and safety at work policy.

Size matters?

One recurring theme for “better regulators” is that company’s obligations should be adapted to their size. They want this approach applied in all areas: taxation, the environment, health and safety at work, and so on.

Adaptation to company size might make sense when defining the nuts and bolts of a set-up. A firm of 10 workers clearly has no need to employ an occupational health doctor to carry out health surveillance. By contrast, adaptation to size is irrelevant when it comes to laying down the basic principles of systematic health and safety management. Information obligations – risk assessment, informing workers or public authorities, labelling toxic substances, or information on dangerous machinery – cannot depend on the size of the firm. Work hazards are much more to do with the production process and how it is managed than company size. Size is often associated with poorer quality management, but it does not have to be. Adapting essential management obligations to company size would probably be the fast route to outsourcing the most dangerous activities by exploiting the regulatory loopholes.

In terms of fundamental rights, it is untenable for workers to have different levels of protection for their life or health depending on the size of firm they work for.

The crusade against “gold-plating”

There is an ongoing argument about the way Member States transpose EU laws. DG Enterprise regularly condemns the practice of “gold-plating” – where Member States implement Directives into law with requirements higher than the substantive Community rules.

This argument will not wash for health and safety at work, because the directives are intended to bring about a minimum harmonization.

That means two things:
1. They set only a basic level above which States have every right to ensure greater protection of workers’ health and safety;
2. They never effect a blanket harmonization of national situations. Directives often refer to national laws and practices. Very many mechanisms are largely determined by national rules. Workers’ representation in health and safety and the organization of preventive services are cases in point where the bulk of the rules are defined at national level. To this extent, the directives are deliberately “light” and incomplete, and could not work without “gold-plating”. Likewise, they contain no detailed guidelines for health and safety inspection. Only “gold-plating” can deliver a coherent strategy on this.

Both these things have clearly been allowed for in the EU’s law-making process. Some States and the European Parliament have foregone certain requirements and accepted a middling compromise in the belief that higher-level and more coherent national rules could make up the failings of Community legislation. For example: the binding occupational exposure limit value for lead set at Community level (back in 1983) does not effectively protect the health of exposed workers. This failing is offset by the fact that most Member States have more advanced legislation. Likewise, it is ludicrous to restrict the health surveillance of workers working on VDUs to eye tests when musculoskeletal disorder-related problems are even greater cause for concern. “Gold-plating” has scotched this ridiculous limitation in several Member States. There is no good reason why domestic workers should be excluded from all the Community health and safety at work rules. Why should a cleaning lady not be entitled to maternity leave, or have to suffer unrestricted exposure to dangerous chemicals? Here again, “gold-plating” by many national laws has made good the failings of the Community rules.

Self-regulation: business as usual

One of the “better regulation” lobby’s most groundless beliefs is that self-regulation is a good thing, whereas the experience since the early days of the industrial revolution is that failure and disaster have ensued whenever the authorities have left health and safety to the tender mercies of business. From white phosphorus in 19th century match-making to asbestos, from child labour in the mines to subcontracting risks on the cheap, self-regulation has never done a convincing job. Only direct worker action combined with effectively policed public rules can give an impetus to prevention.

The distinction made between “administrative costs” and “administrative burdens” in “better regulation” documents gives a clear idea of what would happen were the information obligations in health and safety legislation to be watered down. The UK’s assessment
asked employers what they would do in the absence of regulations requiring them to collect, process and keep information on health and safety. Only 17% would prepare data to a large extent anyway, 31% would prepare data to some extent, and 52% would not prepare data at all. In other words, more than half the employers questioned would happily abandon any form of systematic workplace health and safety management if there was a change from binding legislation to self-regulation. The Health and Safety Executive considers this a representative sample for costing.

The figures for other countries tell the same story. In Slovenia, all health and safety information related activities would be cut by two thirds if legislation allowed. Of a total assessment of activities costed at €393 million, employers would readily drop 67% (assessed at €265 million). A recent assessment of the main health and safety information obligations in the European Union found that employers would stop more than 80% of these activities in the absence of binding legislative requirements!

Ignoring the real problems

Championing the existing law does not mean turning a blind eye to the real problems. The legislation is often misapplied. Coherent prevention strategies are not implemented. What is worst about the vast waste of resources that is the better regulation campaign is that it never gets to grip with the real problems. A one-size-fits-all magic solution – reducing the administrative burden by 25% – is supposed to cure all ills. No specific analysis of the difficulties of applying the rules is offered. “All it takes” is to list employers’ complaints and award an across-the-board 25% cut regardless of the area concerned or the aim pursued by the legislation.

A more in-depth study shows that the legislation could be made much more effective and waste avoided by turning towards solutions other than cutting back on relevant information. I shall make do with outlining just some of these here.

Collectivising knowledge and experiences is a key way in which the public authorities can help firms implement more effective prevention policies. The experience of the Work Environment Funds in the Scandinavian countries for two decades after the reforms of the 1970s is a prime example of that. In all categories of risk, the existence of systems to exchange information and experiences on problems and possible solutions is a big help to firms (and possible solutions is a big help to firms (and Community policy could valuably incorporate this aspect more actively). In a sector like the construction industry, populated by a large and fragmented body of what may be short-lived small businesses, the existence of databases on substitutes for hazardous chemicals has paid dividends. Collectivisation starts from a completely different approach to that of “better regulation” which is based on a rose-tinted view of enterprise seen in terms of the Old West pioneers, lone riders who scorn public rules and mean to be accountable to no-one for their actions. Any form of communication – verbal, written or otherwise - is an intolerable nuisance. Having to account to the authorities, workers or other firms is seen as a burden. Economic history offers little endorsement for this blinkered view. Far from holding back directly productive activity, management tasks play into development. Markets work only on the two foundations of the systematic production/exchange of information and regulatory mechanisms. It takes some political neck to swallow whole employers’ resentment and disparagement of public regulation when those same bosses unceasingly demand more public rules and intervention when it suits their immediate interests.

A further factor of effectiveness is the development of organized participation by workers in health and safety. Various European surveys have shown that where there is independent workers’ representation for health and safety with sufficient means to act, preventive practices are much more systematic, practical and better fitted to address long-term problems. This again is diametrically opposed to the “better regulation” argument that workers’ representation is only ever an added cost.

The third thing is effective, competent and credible health and safety inspection. Here again, the “better regulation” agenda has health and safety inspection down as an administrative cost to business. The analysis of the framework directive commissioned from a consortium of private management consultancies tries to cost out health and safety inspection as if the systems had been established the 1989 framework directive. At this juncture, it is not known what recommendations the Commission might make to enable business to reduce this cost.

Many firms have outsourced a large part of their preventive measures – especially risk assessments in a large number of countries – leading to the development of an unregulated market of the best and worst consultancy of all kinds. In many cases, external consultants’ assessments are simple tick-box exercises that do not result in systematic preventive plans and are seldom informed by workers’ experience and consultation of their reps. That this is probably behind much waste was highlighted in Britain’s case in a report by the parliamentary Work and Pensions Committee (2008). But the UK government and “better regulators” are standing by and doing nothing about this real problem, for

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6 Health and Safety Executive, Administrative Burdens of Regulation, 2006.
7 Paper given by S. Patekar of the Ministry of Public Administration to a conference in Birdo pri Kranju on 7 November 2008.
purely ideological reasons. The way to cut waste and improve the quality of external preventive services is to lay down a more detailed regulatory framework and give workers’ reps more powers of scrutiny over these services activities. Such a practical solution is dismissed with horror by those whose only credo is that the market should decide.

**The next stages**

Transparency is not the strong point of the “better regulation” campaign. As things stand, there is no way of knowing what specific proposals will be made on health and safety. DG Enterprise’s deregulatory line is meeting with opposition inside the Commission itself. More than one Member State is increasingly peeved at standing accused of “over-regulation” when faced with implementing minimum directives that need to be filled out by national rules. The only concrete proposals so far to come out of the Stoiber group (see p. 9) lack credibility. Mostly, they simply repeat the incantation about giving more let-outs to small and medium-size businesses.

The European Council being held in spring 2009 under the Czech Presidency will focus on the “better regulation” campaign. This is probably when we will get a flavour of what will happen for health and safety. But it means staying vigilant. Pressure from business and some governments could see Community health and safety at work legislation being rolled back.

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**More Catholic than the Pope**

In its legislative and work programme (CLWP) for 2009, the European Commission whose term of office should end about mid-year tells its successor, “At the start of this Commission’s mandate in 2004, it screened pending proposals for their relevance to policy objectives and conformity to better regulation standards and agreed a substantial list of withdrawals. The Commission intends to propose that its successor undertakes a similar exercise. The CLWP includes additional pending proposals that the Commission intends to withdraw.”

It is a flabbergasting injunction. After having wrought havoc for five years with a signally deregulationist approach, the current Commission is calling on its successors to show even more zealotry, and for its own pending proposals to be scrapped. Given how tight-fisted the Commission has been with draft legislation to address the citizenry’s most pressing health and safety at work, environmental or employment rights issues, the question is – what is there left to withdraw?