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The Regulatory Challenges of Fulfilling the Policy Goal of Protecting Workers from Occupational Diseases

Ugochukwu Orazulike *

1. PART A: Introduction and Context

The author makes a clear delineation of classifying occupational harm into two broad groups: occupational injuries; and occupational diseases. Occupational injury here is a work-related bodily harm a worker suffers while carrying out occupational duties, whether caused by accidents, the physical nature and demands of work, or the use and nature of work tools, instruments and machines.

Occupational disease in this article means any form of bodily impairment, or malfunction of the bodily system, which is caused by work-related exposures of a worker to suspended particles, vapours, gases or fumes, in the air, either in the form of singular biological or chemical (whether synthetic or natural) substance/mixture or a combination of substances. These two classes of occupational harm can be sometimes but not always caused by occupational accidents. It could well be possible though that some work-related injuries may lead to diseases, and that some work-related diseases may lead to bodily injuries. That last correlational situation in so far as it falls outside the frames of the aforesaid definition for occupational disease is not of interest in this article.

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This article directs its analysis primarily to the regulatory challenges of occupational diseases. It treats law and policy standards governing occupational diseases by considering the compliance challenges and enforcement of EU OSH law under the Framework Directive 89/391/EEC, particularly two individual directives concerning OEL standards: Directive 98/24/EC, and Directive 2004/37/EC.¹ The protection of the safety and health of more than 217 million workers in the EU, and the prevention of risks for occupational diseases which certain chemical agents or hazardous substances pose to a portion of that workforce is an objective which the European Commission takes seriously.² At the moment, there are a number of policy implementation challenges which the EU must solve in order to achieve its objective of eliminating the causes of occupational diseases both in the EU and worldwide. Three relevant determining factors for these policy implementation challenges are of relevance in this article. The first is the increasing economic challenge of enforcing and monitoring EU OEL standards at the Member State levels.³ The second is the lack of appropriate knowledge among important stakeholders who play various regulatory roles in the enforcement of OEL standards at the Member State levels.⁴ And finally, the consequence of economic constraints and lack of proper knowledge about the importance of OEL standards, leading to what may be referred to as the normalisation of non-

¹ Council Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC); Directive 2004/37/EC of the European Parliament and of the Council on the protection of workers from the risks related to exposure to carcinogens and mutagens at work (Sixth individual Directive within the meaning of Article 16 (1) of Council Directive 89/391/EEC).

² EUR-Lex, EU Strategic Framework on Health and Safety at Work 2014 – 2020 at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0332>. (accessed September 19, 2015); European Commission Press Release, Health and Safety: Commission Requests Italy and UK to Protect Workers from Hazardous Chemicals, 21 June 2012 at http://europa.eu/rapid/press-release_IP-12-667_en.htm?locale=en (accessed September 19, 2015).

³ Commission Staff Working Document: Evaluation of the European Strategy 2007 – 2012 on Health and Safety at Work at [file://nask.man.ac.uk/home\\$/Desktop/SWD_2013_202_STAFF_WORKING_PAPER_EN.pdf](file://nask.man.ac.uk/home$/Desktop/SWD_2013_202_STAFF_WORKING_PAPER_EN.pdf) (accessed September 19, 2015).

⁴ L. Schenk, Awareness and Understanding of Occupational Safety Limits in Sweden, in *Regulatory Toxicology and Pharmacology*, 2013, vol. 65, 305 – 310.

compliance with OEL rules at the enterprise level, especially small scale enterprises.⁵

What do the formal regulatory principles for OEL standards entail? With regard to the foregoing three implementation challenges identified EU OSH law stipulates legal standards for encouraging improvements at workplaces in order to guarantee a better level of protection for the health and safety of workers.⁶ The rules while accounting for the administrative financial and legal constraints that could place undue burden on the creation and development of small scale enterprises also recognise that the improvement of workers' safety hygiene and health at work is an objective which should not be subordinated to purely economic considerations.⁷ Accordingly, risk assessment is required to be carried out by employers at the enterprise level to determine the potential health impacts that chemical agents and other substances used in industrial processes have on workers exposed to those substances. The basis for such risk assessments depends often on a mandate bestowed on employers by legislations. Nevertheless this obligation requires an employer to make necessary risk evaluations to determine measures which can be taken to account for the health risks that business activities can pose to workers. And depending on the result of the risk assessment procedures enterprises are expected to adopt preventive measures to ameliorate those health risks, or determine less harmful business alternatives in terms of change of production process, or change of equipment if such option is technically feasible.⁸

In fulfilling its mandate for setting uniform scientific standards for the protection of workers from hazardous chemical agents the EU established the Scientific Committee on Occupational Exposure Limits (SCOEL) in 1995.⁹ EU OEL standards are enacted through different layers of regulatory considerations: policy outline about harmful chemical agents or

⁵ D. Walters, K. Grodzki and S. Walters, *The Role of Occupational Exposure Limits in the Health and Safety Systems of EU Member States*, prepared by South Bank University for the UK Health and Safety Executive, Research Report 172, 2003.

⁶ Paragraph 1 Preamble and article 1 Directive 98/24/EC; paragraph 2 Preamble and article 1 Directive 2004/37/EC.

⁷ Paragraphs 2 and 3 Directive 1998/24/EC; paragraphs 2 and 3 Directive 2004/37/EC; paragraph 17 Preamble to Directive 89/391/EEC.

⁸ Paragraphs 14, 15 & 19, articles 3, 4, 5, 6 & 9 Directive 1998/24/EC; paragraph 11, 13, 14 & 15, articles 3, 4, 5, 9 and 16 Directive 2004/37/EC. This process is referred to as Occupational Safety and Health Management System (OSHMS).

⁹ Commission Decision of 3 March 2014 on setting up a Scientific Committee on Occupational Exposure Limits for Chemical Agents and repealing Decision 95/320/EC.

carcinogenic and mutagenic substances; scientific considerations of the nature of the agents; technical and economic considerations about regulating them; time-bound regulatory limits of exposures to hazardous chemical agents and substances; the health implications for workers and individuals exposed to the agents/substances; and the environmental implications of allowing the use of the chemical agents. EU OSH law allows Member States to implement and enforce OEL rules through their national OSH regulatory regimes which although sharing certain basic features, have national features dependent on historical, legal, geo-political, social, economic and regional specificities. From these channels of regulation two social and economic factors are wedded into the author's logic for analysis: the regulatory roles of workers in the national OEL regimes, in the implementation of legally envisaged OEL standards both within and beyond the enterprise; and, the economic constraints of EU Member States, both in the broader sense of enormous economic setbacks since the Eurozone crisis, and in the specific sense of sharp reductions in the economic budget for the enforcement of OEL standards at the national levels. To this second ambit of socio-economic factor is the economic challenge of small scale enterprises in implementing OEL standards also included.

What do we know about the occupational health impacts of some chemical agents currently used across industries? A study about colour vision impairment on male workers carried out by Zavalik et al. in 1998 showed that colour vision, an occupational disease caused by exposure to toluene pose occupational problems to workers.¹⁰ There are also numerous studies concerning the occupational diseases of workers exposed to different chemical agents.¹¹ While some research studies indicate that the exposure of workers to industrial use of certain regulated

¹⁰ M. Zavalic et al, Assessment of Colour Vision Impairment in Male Workers Exposed to Toluene Generally Above Occupational Exposure Limits, in *Occupational Medicine*, 1998, vol. 48, n. 3, 175 – 180.

¹¹ K. Korhonen et al, Occupational Exposure to Chemical Agents in the Paper Industry, in *International Archives of Occupational and Environmental Health*, 2004, vol. 77, 451 – 460; K. Thoren, S. Hagberg and H. Westberg, Health Effects of Working in Pulp and Paper Mills: Exposure, Obstructive Airways Diseases, Hypersensitivity Reactions and Cardiovascular Diseases, in *American Journal of Industrial Medicine*, 1996, vol. 29, 111 – 122; T. Kauppinen et al, Assessment of Exposure in an International Study on Cancer Risks Among Pulp Paper and Paper Product Workers, in *American Industrial Hygiene Association Journal*, 2002, vol. 63, 254 – 261; W. Jin Lee et al, Mortality from Lung Cancer in Workers Exposed to Sulphur Dioxide in the Pulp and Paper Industry, in *Environmental Health Perspectives*, 2002, vol. 110, n. 10, 991 – 995.

chemical agents at levels below OEL standards are harmless or inconclusive,¹² significant number of studies point to clear correlations between occupational health problems, and prolonged high or cumulative exposures of workers to suspended particles of hazardous chemical agents – above legally permitted limits.¹³ Of particular significance also is the risk which certain chemical agents can cause to female workers and the children of female workers in some industries.¹⁴

Apart from the health implications of exceeding formally enacted OEL standards for workers, there are economic consequences to occupational diseases, that is, economic implications for workers immobilised to work due to the harmful effects of exposures to chemical agents. The negative and positive links between occupational harm and wellbeing; and, the individual and societal economic costs have been recognised in the

¹² K. Teschke et al, Occupational Exposure to Chemical and Biological Agents in the Nonproduction Departments in the Pulp Paper and Paper Production Mills: An International Study, in *American Industrial Hygiene Association Journal*, 1999, vol. 60, 73 – 83; AS. Fonseca et al, Characterisation of Carbon Nanotubes in an Industrial Setting, in *Annals of Occupational Hygiene*, 2015, vol. 59, n. 5, 586 – 599; ‘We conclude from the present field study that PVA fibres have a low potential to release fibres with critical fibrous (WHO) dimensions. Their use in fibre cement factories does not significantly increase the magnitude of the cumulative (personal and environmental) exposure of the worker to airborne organic (EHO) fibre.’ H. de Raeve, J. van Cleemput and B. Nemery, Airborne Polyvinyl Alcohol (PVA) and Cellulose Fibre Level in Fibre Cement Factories in seven European Countries, in *Annals of Occupational Hygiene*, 2001, vol. 45, n. 8, 625 – 630 at 629.

¹³ ‘A review article that included all relevant reports prior to 1995...on health effects of workers in the pulp and paper industry revealed that high exposure to chlorine compounds and paper dust was associated with an increased prevalence of impaired lung function, allergic respiratory diseases and death, and reduced sulphur compounds were associated with increased mortality rate due to ischaemic heart disease’ K. Korhonen et al 2004, p 459 (n 11); Some studies about interstitial lung disease aka nylon flock worker’s lung carried out in parts of the US show that prolonged exposure of workers to nylon fibre in nylon flock processing may have caused interstitial lung disease. See W.L. Eschenbacher et al, Nylon Flock-associated Interstitial Lung Disease, in *American Journal of Respiratory and Critical Care Medicine*, 1999, vol. 159, 2003 – 2008; D.G. Kern et al, Flock Worker’s Lung: Chronic Interstitial Lung Disease in the Nylon Flocking Industry, in *Annals of Internal Medicine*, 1998, vol. 129, n. 4, 261 – 272.

¹⁴ E Andersson et al, Cancer Mortality in a Swedish Cohort of Pulp and Paper Mill Workers, in *International Archives of Occupational and Environmental Health*, 2010, vol. 83, 123 – 132; R. L. Zielhuis, A. Stijkel, M. M. Verberk and M. van de Poel-Bot, *Health Risks to Female Workers in Occupational Exposure to Chemical Agents*, Springer Verlag, Berlin Heidelberg, 1984.

literature for quite some time.¹⁵ Eurostat statistics show that there are around 23 million persons affected by work-related health problems or work accidents every year. Based on data from 2007, at least 8.6% of workers in the EU-27 reported work related ill health in a 12 month period; the fourth European Working Condition Survey showed that 28% of workers in Europe believe that they suffer from health problems which are caused or may have been caused by either their current or previous jobs; work-related health problems resulted to about 367 million calendar days of sick leave in 2007; 1.4 million individuals are estimated to never work again due to their work-related health problems; and workers with work-related health problems retire early, usually before the age of 55.¹⁶

It is therefore estimated that the economic cost of occupational diseases to the individual worker, affected business enterprises, and the society, is quite enormous. For the individual worker immobilised by ill-health caused at the workplace there are physical and mental health aspects to such a situation, each with contingent economic consequences. Such a worker would face the financial consequences of loss of future earnings, medical costs associated to the occupational disease, and additional medical costs for some workers who may fall into depression due to loss of self-confidence and/or diminishing quality of life. A business enterprise may incur economic costs if a significant portion of its human resources are lost to occupational diseases. The business can lose time on business targets due to absence of parts of its workforce, it can miss output targets for its customers, it could incur economic costs for hiring and training new employees, and in extreme situations it may liquidate due to inability to acquire competent individuals to replace workers which it had lost to occupational diseases. For the society, there are economic burdens as well, on the healthcare system, and depending on the nature of the occupational illnesses additional costs for daily care of immobilised individuals.¹⁷

Despite the incidents reported in the literature showing the practical health impacts of various hazardous chemical agents, there are as well reported widespread cases of partial compliance or non-compliance,¹⁸ and gaps in knowledge among OEL stakeholders, regarding the importance of

¹⁵ European Commission, Directorate-General for Employment Social Affairs and Inclusion, *Socio-economic Costs of Accidents at Work and Work-related Ill Health: key messages and case studies*, European Union, Luxembourg 2011.

¹⁶ *Ibid.*

¹⁷ European Commission 2011 (n 15).

¹⁸ Walters et al 2003 (n 5).

full compliance with OSH standards.¹⁹ There is also a serious challenge about the non-uniform and sometimes lax practices of recording and reporting occupational diseases across many EU countries.²⁰ Quite profoundly, this has thus far made monitoring and accurate comparative assessment of the OEL regimes of the EU problematic. One of the obstacles that affect a comprehensive evaluative assessment of EU OEL standards across Member States was identified in a study carried out by Spreeuwiers et al. on registries of occupational diseases in various EU countries.²¹

Some crucial regulatory challenges of meeting the policy target for occupational diseases have been clearly identified in my introduction so far: that some occupational diseases are caused by chemical agents, that economic problems across countries in the EU bring more strains to national capacities for full compliance with OEL standards, that many workers or their health and safety representatives lack adequate knowledge about the usefulness of OEL standards, and that many small scale enterprises struggle to meet the technical and financial requirements of conforming with formal OEL standards.

From among these issues, the author explores the consequences of the recent socio-economic trends already identified in regard to how they affect the roles of workers and their health and safety representatives in the enforcement of OEL standards. This necessitates considering the role of unionised workers in the regulation of OEL standards. In this case the role of trade unions is relevant because trade unions partake in the enforcement and monitoring of OEL in many EU countries,²² and their functions in the regulation of occupational protection at the workplace are

¹⁹ Schenk 2013 (n 4).

²⁰ 'The registries of the various EU countries differ considerably...Furthermore, the level of under-reporting (as far as such is possible to define and assess) varies between countries. Because of these differences, figures on occupational diseases are not comparable between European countries; moreover, the figures are often regarded as not reliable even within a country.' D Spreeuwiers, A.G.E.M. de Boer, J.H.A.M. Verbeek, and F.J.H. van Dijk, Characteristics of National Registries for Occupational Diseases: International Development and Validation of An Audit Tool (ODIT), in BMC Health Services Research, 2009, vol. 9, 194.

²¹ 'In order to evaluate whether targets of reduction in occupational diseases and work-related disorders have been achieved by policy measures, we must be able to monitor these diseases.' D. Spreeuwiers, A.G.E.M. de Boer, J.H.A.M. Verbeek, and F.J.H. van Dijk, Evaluation of Occupational Disease Surveillance in Six EU Countries, in Occupational Medicine, 2010, vol. 60, 509 – 516 at 510.

²² Walters et al 2003 (n 5); paragraph 16 Directive 98/24/EC.

firmly enshrined in EU OSH law.²³ In an era of declining trade union figures, what can trade unions do to fulfil: the roles endowed on them by OSH legislations; and, their social, professional and institutional roles of facilitating compliance with rules established to protect the health of workers at the workplace? Are trade unions important actors in the pursuit of EU's strategic target to improve the prevention of work-related diseases through the implementation of existing OEL standards?

Part B of the article grapples with the question of whether trade unions are indeed important for the improvement of occupational safety and health management systems (OSHMS) at the workplace. In essence, are trade unions useful for filling knowledge gaps that hamper the protection of workers (members) from occupational diseases?

Part C of this article presents an overview of national OEL regulatory frameworks. This part considers useful pointers for the social, professional and institutional responsibilities of workers, their unions and their safety and health representatives within the national OEL systems in 4 EU countries. It concerns using the concept of accountability to review the functional or structural mechanisms for the regulation of OEL standards at the national level: it is less about the content of the standards themselves.

Part D discusses the potential roles of courts in the prevention of occupational diseases, and to a limited extent the institutional aspect of compliance with and enforcement of OEL standards.²⁴ For illustration purpose, Joined Cases C 307/09 – C 309/09 *Vicoplus SC PUH and others v Minister van Sociale Zaken en Werkgelegenheid* is considered. Should trade unions promote the interests of non-member EU posted workers in regard to occupational diseases?

Part E provides a summation. Here, it is argued that the current socio-economic transformations across the EU have not yet caused any radical changes in the existing EU OSH law and policy. However, it is yet to be seen whether trade unions in dealing with changing socio-economic times, can use social, professional and institutional powers available to them, to protect workers from risks posed by occupational diseases.

²³ Articles 10,11 and 12 Directive 89/391/EEC.

²⁴ European Commission Press Release 21 June 2012 (n 2).

2. PART B: The Role of Workers in the Regulation of OEL Standards

Part A of this article described the policy, economic, social and legal aspects of problems regarding the prevention of exposures of workers to hazardous chemical substances that cause occupational diseases. The policy problem is finding ways to reduce and if possible eliminate occupational diseases emanating from exposures to hazardous chemical agents. The economic problem is that austerity measures and economic regression across EU countries put strains on national implementation and enforcement regimes for OEL standards. In many cases the drastic reduction in the economic budgets for work inspectorates meant changes in the formal State institutions for enforcing OEL standards – where the State operated as regulator, now gradually being swapped with market-based service (implementation) systems, where the State operates more or less like a facilitator.²⁵ There are now instances of use of the so called occupational health services (OHSs) in the revision and establishment of OSHMS within enterprises, advisory and monitoring roles originally undertaken by work inspectorates, and more so as proof of compliance with OEL standards – both in the Netherlands and Sweden. The social aspect of the problem provided empirical research to highlight the consequences of these economic changes by presenting a grim but factual picture about the impacts of occupational diseases in a few work sectors. The legal challenge is a hypothesis built on the assumption that future legal disputes regarding breach of obligations concerning the rules for OELs will be determined subject to formal responsibilities and obligations entrenched in current EU OSH law.

From a legal perspective, EU OSH law accounts for roles that trade unions play in the guarantee of the safety, health and wellbeing of workers in their working environments. EU OSH law possess two streams of standard: statutory OSH standards, and, practice OSH standards. In the first stream, the statutory OEL rules emanate from EU Directives

²⁵ M. M. Lucio and M. Stuart, The State Public Policy and the Renewal of HRM, in *The International Journal of Human Resource Management*, 2011, vol. 22, n. 18, 3661 – 3671; J. T. Scholz and W. B. Gray, Can Government Facilitate Cooperation? An Informational Model of OSHA Enforcement, in *American Journal of Political Science*, 1997, vol. 41, n. 3, 693 – 717. The state-as-a-facilitator model is based on research concerning US OSHA.

regulating hazardous chemical agents, carcinogens and mutagens.²⁶ Local regulations in Member States must at the minimum conform to regulatory baselines established in EU OEL rules. Recommendations for statutory OEL standards are contained in the national legislations of Member States some of which are formulated by formal bodies comprising workers' representatives. The national OEL regimes can establish higher OEL standards but should meet OEL standards set at the EU level. The content of OEL rules are therefore both derived from supranational EU rules, and national rules on similar subject matters – legally envisioned to conform to those EU rules. In the second stream of standards, practice standards are institutional practices that are put in place for the fulfilment of OSH objectives embedded in statutory rules or in EU policies. Theoretically speaking therefore, trade unions have important roles to play in the realisation of legal and policy objectives of protecting workers from hazardous chemical agents, and the prevention of occupational diseases at the workplace, pursuant to their institutional roles in the regulation of OEL standards.

What does empirical research show about the roles of unionisation in the promotion of OSH legal and policy objectives? Before attempting to offer some answers to that question, let me highlight some emerging trends in trade union membership and union density across EU countries. There are some rises and falls in the number of trade union members in various sectors of the EU Member States in the last two decades. The Report of European Foundation for the Improvement of Living and Working Condition (Eurofound) indicates, based on figures from 2003 and 2008, that for 22 countries out of 28, 10 recorded an overall increase in trade union membership whereas 12 recorded overall decrease.²⁷ According to the UK Department for Business Innovations and Skills, union membership levels in the private sector fell from 3.4 million in 1995 to 2.5 million in 2010; the proportion of employees who were trade union members amounts to 14.4% in 2013; and union membership in the public sector fell from 3.9 million in 2012 to 3.8 million in 2013.²⁸ In Sweden,

²⁶ The EU system for enacting OSH rules is so democratic that it requires that the social partners are consulted by the EU Commission in the process of setting and establishing OSH standards. See paragraphs 9& 10 Directive 2014/27/EU.

²⁷ See Eurofound, Trade Union Membership 2003 – 2008 at <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/trade-union-membership-20032008> (accessed September 19, 2015).

²⁸ Department for Business Innovation and Skills, Trade Union Membership 2014, Statistical Bulletin, June 2015. From the surveys, the 2014 data for the levels of union membership in the private sector shows that it continued to show a reversal in previous

there is overall higher percentage figure of trade union membership than elsewhere outside the Nordic countries, but there are new interesting trends of decline in union membership: between white and blue collar workers; in the private versus the public sectors; particularly sharp decline in the union density figures of blue collar workers in the private sector of Sweden.²⁹

Some research studies suggest that the strength of a trade union and its organisational capacity can influence organisational changes at the enterprise level.³⁰ Trade unions have been shown as capable of influencing employees feeling of wellbeing, when assessed between union covered workplaces versus non-union covered workplaces, in enterprises where employers engage in consultation with trade unions.³¹ The study about the

trend, with a rise in the level of union membership in private sectors for the fourth consecutive year; a non-statistically significant increase of 38,000 in 2013 bring the figure to 2.7 million. The percentage figure for 2014 is 14.2% that is 0.2 percentage point lower than in 2013. This is because union membership increased more slowly than the rise in the number of private sector employees. For the public sector, union membership fell for the same period by 79,000.

²⁹ The overall union density for blue and white collar Swedish workers in 2006 was 77%; by 2008, it was 71% and 72% respectively (for blue and white collar workers). In 2010, union density for white collar workers went up by 1% to 73% from 72% figure of 2008, whereas the figure for blue collar workers was 69% - a fall from the 7% fall to 70% in 2009. The development within the private sector is even more dramatic. In 2006 the union density was 74% of blue collar workers and 69% of white collar workers. In 2014, the figure was 68% of white collar workers, and 61% of blue collar workers. See A. Kjellberg, Kollektivavtalens täckningsgrad samt organisationsgraden hos arbetsgivarförbund och fackförbund, in Research Report 2013:1 (updated July 1, 2015) at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1545448&fileId=1545800> (accessed September 19, 2015).

³⁰ A. C. Frost, Explaining Variations in Workplace Structuring: The Role of Local Union Capabilities, in *Industrial and Labour Relations Review*, 2000, vol. 53, 559 – 578; A. C. Frost, Reconceptualising Local Union Responses to Workplace Restructuring in North America, in *British Journal of Industrial Relations*, 2001, vol. 39, 539 – 564; C. Lévesque and G. Murray, Union Involvement in Workplace Change: A Comparative Study of Local Unions in Canada and Mexico, in *British Journal of Industrial Relations*, 2005, vol. 43, n. 3, 489 – 514; D. Walters, Employee Representation and Occupational Health and Safety: the Significance for Europe, in *Journal of Loss Prevention in the Process Industries*, 1995, vol. 8, n. 6, 313 – 318.

³¹ ‘...worker involvement in the introduction of organisational change is what matters for workers well-being, but even this is effective only in the presence of a trade union that has bargaining rights with the employer.’ A. Bryson, E. Barth and H. Dale-Olsen, The Effects of Organisational Change on Worker Well-being and the Moderating Role of Trade Unions, *Industrial & Labour Relations Review*, 2013, vol. 66, n. 4, 989 – 1011 at 1007.

moderating effects of trade unions on employee wellbeing merely focused on trade union influences on decision making during organisational change. With regard to risk assessment requirements for hazardous chemical agents the study about union influence in times of organisational change can contribute to the improvement of preventive actions for work-related diseases in three ways: i) in the process of establishing an OSHMS for business activities that may cause occupational diseases to workers at the enterprise level,³² ii) in the substitution of equipment or production process with the aim of meeting policy targets for OEL standards. In other words, when a change of chemical agent, work equipment or transformation of work process, could eliminate the need to carry out regular technical and expensive measurements of binding occupational exposure limits (BOELVs), indicative occupational exposure limit values (IOELVs), occupational exposure limit values (OELVs), or threshold limit values (TLVs),³³ and iii) when unions exercise their statutory right to consultation, or appeal over compliance with OSH standards.³⁴

In a much more topic-related study, Morantz provides a thought provoking account of safety and health practices in US coal mining industry thereby exposing compelling insights into the question of whether trade unions help promote occupational health and safety at the workplace.³⁵ Morantz's study explored the activities of the United Mine Workers of America (UMWA) stretching back to its historical foundation in 1890, when three of the eleven principles in its Constitution sought for improvements in the safety and health conditions of mine workers. Another earlier study concerning the UMWA suggested that improvement in the knowledge of the regulatory procedures may have helped the

³² Articles 3 (5), 4 & 5 Directive 98/24/EC; Subject to the rule about the employer's obligation to carry out risk assessment for regulated hazardous chemical agents, there are two angles to such risk assessment: i) the determination of risk inherent in used chemical agents, and ii) the assessment of the risks which those used chemical agents pose to the health and safety of workers.

³³ Article 6 (2) & (4) Directive 98/24/EC; articles 3 (2), 5 (e) Directive 2004/37/EC

³⁴ Articles 11(1) (2) (3) & (6) and 12 (1) Directive 89/391/EEC; article 11 Directive 98/24/EC; articles 12 (a) & 13 Directive 2004/37/EC.

³⁵ '...scholars have documented numerous ways in which unions help to promote safe work practices. For example, unions typically play a critical role in educating workers about on-the-job hazards; giving workers incentives to take greater care on the job; attracting more safety-conscious workers; inducing employers to abate known hazards; increasing regulatory scrutiny; and developing safety-related innovations' A. D. Morantz, *Coal Mine Safety: Do Unions Make A Difference?*, in *Industrial & Labour Relations Review*, 2013, vol. 66, 88 – 116 at 88 – 89.

betterment of UMWA in terms of dealing with the safety and health issues affecting its members.³⁶ These studies provide empirical evidence indicating that trade unions could help educate workers about the hazards associated with their workplace as lack of awareness and understanding of the usefulness of OELs among workers, managers, and workers' health and safety representatives, was shown in Schenk 2013³⁷ as one of the major impediments to compliance with OEL standards at the enterprise level in Sweden.

There are further numerous accounts about the roles of trade unions in helping realise the goals of workers in the three market economies that exist within the EU: liberalised market economies (LMEs), social market economies (SMEs) – coordinated market economies (CMEs) and mixed market economies (MMEs).³⁸ The author will not analyse the literature on varieties of capitalism in detail here – in terms of how trade unions may or may not deploy their institutional, professional and political powers to help promote the cause of eliminating work-related diseases affecting workers. Most of these studies while providing credence to the value of unionisation for the achievement of policy and labour interests of workers have mainly different research assumptions as departure points.³⁹ Regardless of which position one may take on whether trade unions can help improve the protection of workers from, and the prevention of occupational diseases at the workplace, EU OSH law is unambiguous in how it accords importance to the institutional roles of trade unions. First in the statutory roles it bestows on unions.⁴⁰ And second, in the recognition of the historical, political, professional and institutional relevance of trade unions in all the Member States of the EU.⁴¹

³⁶ D. Weil, *Turning the Tide: Strategic Planning for Labour Unions*, Lexington Books, New York, 1994.

³⁷ Schenk 2013 (n 4).

³⁸ K. Thelen, *Varieties of Liberalisation and New Politics of Social Solidarity*, Cambridge University Press, New York, 2014; A. Hassel, *Adjustment in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe*, LEQS Paper No. 76/2014, London School of Economics, 2014; J. Peters, *The Rise of Finance and the Decline of Organised Labour in the Advanced Capitalist Countries*, in *New Political Economy*, 2011, vol. 16, n. 1, 73 – 99; P. A. Hall and D. Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press, 2001.

³⁹ For instance the issues of collective bargaining, fair pay, secure employment contracts, and overall working conditions, are generally speaking more popular in research studies about industrial relations and labour market policies.

⁴⁰ Directive 89/391/EEC.

⁴¹ Relations between trade unions and centre-left parties are, for instance, close in many European countries as there has been a tight co-evolution of social democratic parties

In the last two decades, much have changed in the advancement of science and knowledge about occupational diseases, the economic performances of many EU Member States have undergone much transformation, much have also changed in the composition of trade union members and density, and, much changes have as well been exposed in the methods States use for the operationalisation of OEL standards. Yet, little seems to have changed in the institutional functions of workers representatives in the national OEL regimes of most EU Member States. Are the formal roles of workers representative (trade unions) crucial for the realisation of EU policy goals regarding occupational diseases?

3. PART C: Legal and Institutional Accountability of Workers Representatives in National OEL Regimes

In view of the uniformity objective in the practical effects of social policies in the EU, the rules for EU OSH standards are formulated with due cognizance to their binding effects, to the principle of subsidiarity and to respect for local circumstances and conditions.⁴² Across EU Member States there are different implementation regimes for regulated hazardous chemical agents. The crucial ways by which trade unions can influence the OSH wellbeing of workers were outlined in Part B with help from empirical studies. Trade unions were shown to help influence organisational changes that occur at their workstations when they were consulted by employers (or management) regarding the transformation of work methods, tools, equipment, systems and so on. In situations where unionised workers could exercise a legal right to consultation by the employer, these empirical studies suggest that the influence of trade

and trade unions.’ Hassel 2014 (n 38) p 11; ‘Also the changing structure of European companies promotes the development of European Labour Law: groups with cross-border activities need uniform law already for organisational reasons. At the same time a Europe-scale enterprise entails a Europe-wide coalition of employees to secure and exercise employee rights. With the advancement of the above mentioned trends, the pressure for innovation of labour law increases. It has to be adjusted in order to do justice to the current and future requirements.’ W. Schmeisser, D Krimphove and R. Popp, *International Human Resource Management and International Labour Law: A Human Resource Management Accounting Approach*, Oldenbourg Wissenschaftsverlag GmbH, Munich, 2013.

⁴² See articles 3a and 3b Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007/C 306/01) Official Journal of the European Union.

unions on employees' feeling of wellbeing was much more profound than otherwise. The studies by Morantz about the US UMWA show that the incorporation of safety and health objectives in the founding constitution of UMWA, and the subsequent strategic actions for the education and training of UMWA members, positive actions on the encouragement of compliance based practices at the workstation, and the coordination of the activities of UMWA through their branch offices, helped facilitate goal-oriented outcomes for the improvement of the health and safety concerns of UMWA members.

In this part of the article, the author provides important pointers on the legal and institutional roles of trade unions in four EU countries: Germany, Italy, Netherlands and Sweden. The reason for selecting these countries is due to the legal and institutional structures of their OEL regimes, remarkable, in terms of how they embody some instruments for the best OEL practices.

Germany represents a dual OEL regime where OEL regulation uniquely depends on two parallel channels of enforcement, one by the State, and the other by the social partners. Italy is a country where OSH is firmly embedded in the national healthcare policy of the State. The right of workers to health and safety at work is as well guaranteed in the Constitution, and cannot be subordinated to purely economic concerns. So while most policy agreements in industrial relations are governed by collective agreements, the right of workers to protection from exposures to hazardous substances is unfettered. The hard question in Italy is how to empirically achieve targets for the occupational protection of workers from exposures to hazardous chemicals: not whether there is any Constitutional foundation upon which to pursue it.

In the Netherlands, reforms of social security regulations entailed the introduction of a market-oriented private enforcement mechanism for the pursuit of OEL goals. Dutch enterprises are mandated by law to seek the professional service of OHSs to assist them in the internal OSHMS of the enterprise. In the Netherlands also, workers have a constitutional right to bring complaints against their enterprises for non-compliance with OEL rules or when business activities within their enterprises may expose workers to occupational diseases. Trade unions in the Netherlands assist in monitoring the enforcement of OEL because although they could support workers who submit complaints of non-compliance with OEL rules against their employers, they document applications put forward by their members for non-compliance with OEL standards. And in Sweden, a country often described as relatively having a well-advanced and progressive OEL regime, the rights of workers to protection from

hazardous work environment, the right of workers to consultation on working conditions at the workplace, and to information about the hazardous nature of employment were all long guaranteed in law, even before Sweden joined the EU. Sweden has a model of risk management system known as systematic work environment management (SWEM). The use of OHSs is also a recognised practice in the country therefore enterprises can employ OHSs for the development or improvement of their internal risk management systems through the use of SWEM.

By the time key legal and institutional roles of trade unions in the regimes of the four countries are laid bare hereunder, the selected idiosyncratic features used to characterise these regimes are hoped to provide good insights into the avenues for rethinking social, professional and institutional accountability of trade unions and workers representatives, within the discourse of regulatory challenges for fulfilling the policy goal of protecting workers from occupational diseases. An overview of these national OSH regimes is presented but emphasis lays on the significance of the roles of workers or workers' representatives in the national regulatory regimes⁴³ in helping bridge the knowledge gap about the usefulness of OEL standards among workers, and their overall contribution to preventive actions for tackling the challenges of work-related diseases. The discharge of this role is a responsibility bestowed on unions, in the face of dwindling economic resources for the implementation and enforcement of OEL standards.

As noted by Schmeisser et al. 2013, in the context of vast transformations cutting across governments' and enterprises' (at the least small scale enterprises) economic base, trade unions should find innovative ways of fighting their OSH cause. A critique of the roles of trade unions in light of the type of functions that workers representatives carry out in OEL national regimes in the EU, and in contributing to filling the knowledge gaps about the importance of proper compliance with OEL standards is a form of evaluation *of social, professional, and/or institutional accountability* of trade unions.⁴⁴ Appraising the social, professional, and institutional

⁴³ The account of OEL implementation regimes in the EU is primarily drawn from Walters et al 2003 (n 5).

⁴⁴ In May's position about regulating for result, it is expected that some form of performance-based assessment of the OSH policy targets of trade unions/OSH workers representatives can in theory be undertaken either by trade union officials themselves, members of the union, or independent committees from within or outside the union: P. J. May, *Regulatory Regimes and Accountability*, in *Regulation & Governance*, 2007, vol. 1, 8 – 26; U. Orazulike, *Making Them Pay: A Proposal to Expand Employer*

responsibilities of trade unions is necessary so as to use such assessment of unions' performance on OEL regulation to: i) validate a perception of unions' relevance, and make them legitimate in the eyes of workers – both unionised and non-unionise, and in the eyes of society, that is, other external actors – government, employers, communities, shareholders, and investors. Just like employers or formal State bodies could be held accountable for their performance over different aspects of regulatory functions, trade unions should, even in the context of much more limited resources occasioned by economic setbacks, be appraised on the merits of their performance in contributing to the achievement of fundamental safety and health objectives of policies⁴⁵ ii) project unions as important stewards in the regulation of OEL policies. Workers representatives have firmly embedded institutional roles across many EU countries: at some national boards that set national OELs standards; at the enterprise level, in the process of planning, designing and establishing OSHMS standards both at the national, regional, sector and enterprise levels; and through other mechanisms used in the enforcement of rules for hazardous chemical agents.⁴⁶

Walters et al. 2003 divides the structural systems for the regulation of OELs in various EU countries into two broad categories: the linear system of OEL implementation and enforcement; and, the bi-linear or the so called 'dual system' of implementation and enforcement.⁴⁷ While many OEL regimes in the EU fall into the linear model, the OEL systems of

Responsibility for Occupational Safety and Health, in *Journal of Workplace Rights* – Sage Open, 2015, vol. 5, n. 3, 1 – 10.

⁴⁵ Paragraph 1 Directive 2014/27/EU of the European Parliament and of the Council amending Council Directive 92/58/EEC, 94/33/EC, 98/24/EC and Directive 2004/37/EC of the European Parliament and of the Council, in order to align them to Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures, states as follows: '...Good health and safety standards should not be considered as constraints, since they are fundamental rights and are to be applied without exception to all sectors of the labour market and all types of undertakings regardless of their size.' See also paragraphs 2, 9 & 10 thereof.

⁴⁶ It is crucial to note the amendments to article 2 of Directive 98/24/EC, and that some chemical agents which do not meet the criteria for classification as hazardous under current regulation could be governed by rules for hazardous chemical agents. Under current regulation, the fact that chemical agents do not have established OELs does not mean that employers should not treat them as hazardous if those chemical agents would apparently cause occupational harms or diseases to workers – article 4 Directive 2014/27/EU; see also article 1(2) Commission Recommendation concerning the European schedule of occupational diseases C(2003) 3297.

⁴⁷ Walters et al 2003 (n 5).

Germany, and to some degree the French OEL regime, are the typical examples of dual OEL systems. I draw insights from Walters et al. 2003 to offer a snapshot account of the structural systems of national regimes for OEL, where workers are represented in the national regulation of OEL standards.

Germany has a long history of OSH regulation stretching back to the Industrial Code of 1869 (Gewerbeordnung). In that law, the employer owes employees a general obligation to manage the working environments and work tools in ways that guarantee the protection of workers from threats to life, and health harms. Later amendments in a revised version of the law in 1891 included the condition that such employer obligation meets the contextual circumstances of the business. The second ambit of OSH law in Germany is the Accident Insurance Law locally known as 'Unfallversicherungsrecht', dating back to the Industrial Accident Insurance Act of 1884 (Gewerbe-Unfallversicherungsgesetz). This second stream of regulation was included in the National Insurance Code 1911 (Reichsversicherungsordnung). Beyond these historical enactments, the current model of Germany's OEL enforcement (law making and law monitoring roles) is based on two channels of regulation namely: i) the State based mechanisms for OEL rule making and its monitoring (safety and health regulation of the Federal Republic of Germany), manned by Bundesministerium für Arbeit und Sozialordnung (BMA) and ii) the non-State based mechanisms for OEL rule making and monitoring (autonomous health and safety system of the accident insurance funds), known as Unfallversicherungsträger (UVT). The non-State stream involves two institutions of the social partners, known as i) Unfallverhütungsvorschriften (UVV), and ii) Berufsgenossenschaften (BG) – BGen. The composition of these two bodies is based on the principle of parity entailing equal representation for both employers and employees. The institutions of the social partners have powers to issue and enforce autonomous OEL rules, called Accident Prevention Orders (Unfallverhütungsvorschriften) and Technical Inspection Service (Technischer Aufsichtsdienst).

In Italy the OSH right of workers is enshrined in its 1978 Constitution.⁴⁸ The Italian model of OEL regulation is also subject to central, regional

⁴⁸ 'Health and safety was an important issue in the labour struggles of the 1970s. As a consequence, it has been included in collective bargaining at national and enterprise level for many years. At the same time, the character of the Italian system for regulating health and safety at work before the transposition of the Framework Directive 89/391 was profoundly different to that of other EU member states in the way it conceptualised

and local unit negotiations and delineation of functions. Although national policies and legislations are mostly determined at the federal level, the Italian model of administration recognises the powers of regional authorities to adopt different means for the implementation of federal policies. The 1970s and 1980s reform on health and safety in Italy introduced fundamental changes that entrenched the primacy of working conditions and the principle that workers health must not be subordinated to economic considerations. Article 9 of the Workers Statute (the Terms and Conditions of Employment Act 300 of 1970) provides that workers as a community – not individuals, should be active in the implementation of preventive measures and general regulations on health. This condition has made its way into rules embedded in Italy's collective agreements at national, industry, sector and enterprise levels.⁴⁹ Regarding OEL standards, fundamental safety and health safeguards for workers are introduced in collective agreements, which in themselves are legally binding; trade unions in Italy could therefore influence the regulation of OELs through collective agreements.⁵⁰

In the Netherlands, trade unions, employers unions and government representative are all together involved in the setting of OEL standards. For the determination of OEL standards, the OEL regime of the Netherlands distinguishes between health-based criteria for standard determination, and standard determination criteria that account for economic and technical considerations. Under the rules in the Netherlands, employees can put forward complaints to the work inspectorate against an employer about the rules regulating the use of hazardous chemical agents or mixtures.⁵¹ This right enables trade unions

workers' occupational health, the responsibility for it and the structures and processes set up to protect and promote it. There was a notion of the rights of workers to have a collective control over their own health, which was, arguably, fundamental to the Italian approach and which was more explicit than in other EU countries.' Walters et al 2003 (n 5) p 138; Article 32 of 1948 Constitution of Italy recognised health as a fundamental right which must be achieved through preventive measures, taking account of technically feasible factors that should as well pursue work protection, and so based on this provision, health objectives cannot be undermined by economic reasons.

⁴⁹ 'In general, national industry agreements provide for the role of trade unions in controlling the application of legal provisions and defining preventive measures. The organisation of prevention in small and medium-sized firms is also dealt with, notably through the organisation of regional industry structures.' Walters et al 2003 (n 5) p 140

⁵⁰ Walters et al 2003 (n 5).

⁵¹ 'In inspection reports for 2000 in the chemicals sector, practices concerning dangerous substances were amongst the most frequent violations of the law but OELs are not mentioned. Similarly in reports for the same year for sectors dealing with paints,

to support employee complaints by operationalising internal union procedures for supporting employee complaints.

Since the Netherlands operates a form of corporatism that is based on the so called ‘poldermodel or overlegeconomie’ that is consultation economy, regular ongoing consultations and negotiations between the social partners, and with or without the government, at the national level, the regional level, the sector or industry level, and the enterprise level; are central to its institutional system for regulating OELs.⁵² Collective bargaining arrangements are very useful and recognised modes of agreements in industrial relations in the sectoral level of Netherlands. As a result of certain market-oriented reforms introduced recently to change the social welfare system of the Netherlands, enterprises can, in fulfilling their legal obligation to keep working environments safe, employ the professional services of private OHSs – ‘Arbodienst’, to help them carry out legally mandated risk assessments, preventive OSH management or tailor-made OSHMS for the enterprise.⁵³ There was further development in 1999 by the Secretary of State which entails the introduction of the so called OHS covenanten (arboconvenanten) in the public sector and some areas of the economy.⁵⁴

Sweden is one of the EU countries with the most advanced and grounded institutions for the regulation of safety and health at the workplace.⁵⁵ In Sweden, the system for setting and using exposure OELs standards in the

agrochemicals, rubber and plastics there was mention of work with dangerous substances, but no mention of violations or enforcement actions in relation to exposure limits.’ Walters et al 2003 (n 5) p 156.

⁵² ‘These strategies have resulted in a large measure of consensus and a trade off between economic and social policy objectives. Thus, the role of bipartite and/or tripartite agreements (involving the government) to elaborate or complement legislation by the social partners or to avoid statutory regulation is prominent in the field of industrial relations and labour law.’ Walters et al 2003 (n 5) p 150.

⁵³ ‘At the workplace level several features have a bearing on the approach to dealing with chemical hazards. They include: statutory requirement on employers to contract with occupational health services to provide them with expertise in risk evaluation and control; role of workers’ participation through work councils in arrangement for health and safety; strategies of the labour inspectorate to promote and support a systematic approach to occupational health and safety management.’ Walters et al 2003 (n 5) p 149

⁵⁴ ‘By 2002 there were 19 declarations of intention and 33 convenanten. The strategy can be considered an application of the idea of self-regulation and self-reliance.’ Walters et al 2003 (n 5) p 153; cf. S. Tombs and D. Whyte, *The Myths and Realities of Deterrence in Workplace Safety Regulation*, in *British Journal of Criminology*, 2013, vol. 53, 746 – 763

⁵⁵ R. M. Morillas, J.C. Rubio-Romero and A. Fuertes, *A Comparative Analysis of Occupational Health and Safety Risk Prevention Practices in Sweden and Spain*, in *Journal of Safety Research*, 2013, vol. 47, 57 – 65.

determination of OSHM has been in place since the 1970s. This is a good example of an approach that lays emphasis on regulating work environments based on consensus, and on corporatist decision making at sectoral and national levels. The OEL regime of Sweden includes a highly developed external prevention services and strong representative participation of workers in activating health and safety protocols at the enterprise level. The central tenet of the Swedish OEL regulation is the so called systematic work environment management (SWEM)⁵⁶, established in 2001, designed to incorporate work environment as an integral part of the everyday activities of an enterprise.⁵⁷

There is however new research studies that examined how SWEM worked in 21 small-scale manufacturing enterprises in Sweden. The result of the studies suggest that SWEM underperforms in relation to the cost of implementing it, hence called for an improved cost-effective and simple model for regulating occupational risks and hazards management at the enterprise level.⁵⁸ The implementation of SWEM within the enterprise relates to safety and health regulatory rules or instructions established by 'Arbetsmiljöverket' – The Swedish Work Environment Authority (SWEA), pursuant to its mandate in the Work Environment Act – Arbetsmiljölagen.⁵⁹ According to that Act, employers and employees

⁵⁶ 'SWEM refers to the requirement by every employer to investigate work environment issues of an ergonomic and a physical/chemical nature as well as psychosocial conditions. It encompasses the decisions made and measures taken to manage efficiently any problems arising and to prevent accidents and injuries. Essential activities have to be documented and followed up on.' See <http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions/systematic-work-environment-management-in-sweden> accessed 19 September 2015.

⁵⁷ K. Frick, Sweden: Occupational health and safety management strategies 1970-2001, in D. Walters (ed.), *Regulating health and safety management in the European Union: a study of the dynamics of change*, Presses Interuniversitaires Européennes, 2002, pp. 211-234; Walters et al 2003 (n 5).

⁵⁸ See K. Gunnarsson, M. Andersson, and G. Rosen, *Systematic Work Environment Management: Experiences from Implementation in Swedish Small-scale Enterprises*, in *Industrial Health*, vol. 48, 185 – 196; D. Walters, R. Johnstone, K. Frick, M. Quinlan, G. Baril-Gingras and A Thebaud-Mony, *Regulating Workplace Risks: A Comparative Study of Inspection Regimes in Times of Change*, Edward Elgar Publishing Limited, 2011.

⁵⁹ Arbetsmiljölagen SFS 1977: 1160; SWEA is entrusted with the authority to formulate relevant regulations for safety and health at the workplace; represents Sweden at the European level through its participation in the Advisory Committee on safety and Health (ACSH) and Senior Labour Inspectors' Committee (SLIC) see <https://osha.europa.eu/en/about-eu-osha/national-focal-points/sweden> (accessed September 19, 2015).

should work together to ascertain appropriate conditions for the workers' occupational conditions; and an employer must take all appropriate measures to prevent the exposure of workers to occupational diseases and accidents – including making special risk considerations that may affect a lone worker; and taking measures that account for the appropriateness of the workstation, work tools, protective equipment and other technical factors that could be of concern.⁶⁰ SWEA has further legal mandate to provide instruction or guidelines on how enterprises are expected to implement SWEM. It has therefore a supervisory and monitoring role in the enforcement of OEL standards in Sweden.

In similar vein as the Netherlands, enterprises in Sweden can employ the support of OHSs (företagshälsovård) to help them improve their OSHMS or business activities that require risk determination and assessment, evaluation, preventive measures and adoption of risk management actions.⁶¹ At the moment just like elsewhere in continental Europe,⁶² there are efforts in Sweden to transform the Swedish model of industrial relations.⁶³

⁶⁰ See 3 kap 1a § (1994:479) and 2 § (2002:585) Arbetsmiljölagen SFS 1977:1160.

⁶¹ L. Schmidt, J. Sjöström and AB. Antonsson, How Can Occupational Health Services in Sweden Contribute to Work Ability?, in *Work*, 2012, vol. 41, 2998 – 3001 'According to the Swedish legislation on occupational health and safety OHS should be an expert and particularly work to prevent and eliminate hazards in the workplace. OHS shall also have the skills to identify and describe the relationship between work environment, organisation, productivity and health...In Sweden the employers cover the costs of OHS. Therefore investments in OHS are more determined by economic state of the company than risks in the work environment.' p 2998 thereof.

⁶² Eurofound, The Future of Social Dialogue, Tripartism, Bipartism: Collective Employment Relations – Q4/2014 at <http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations/the-future-of-social-dialogue-tripartitism-and-bipartism-collective-employment-relations-q4-2014> (accessed September 19, 2015).

⁶³ The Confederation of Swedish Enterprise (SN) and the Swedish Trade Union Confederation (LO) announced recently of their agreement to enter into a negotiation about how the Swedish model of social dialogue could be transformed. The most important point about the joint-declaration is the view that bipartite system for decision-making should be maintained, so that decisions regarding the regulation of working conditions in Sweden are made by the social partners; and not politician. See Svenkt Näringslivs, LO och Svenkt Näringslivs vill fortsätta att utveckla den svenska modellen at http://www.svensktnaringsliv.se/material/pressmeddelanden/lo-och-svensktnaringsliv-vill-fortsatta-att-utveckla-den-svenska_599949.html (accessed September 19, 2015).

4. Part D: The Adjudication Challenge in Enforcing OEL Standards

At the Member State levels, the infringement of OEL rules may in some cases lead to court action. Non-compliance with OEL standards can lead to civil, administrative, and/or criminal sanctions depending on the law of the country concerned. There is perhaps no decided case by the European Court of Justice (ECJ) on violation of OEL provisions for workers pursuant to EU law. It is however a settled principle of ‘*acquis communautaire*’ that Member States of the Union have a duty to provide adequate compensation to victims in respect of losses caused to them by the breach of EU law. For illustration purpose here, let us look at a recent case judged by the ECJ in Joined Cases C 307/09 – C 309/09 *Vicoplus SC PUH and others v Minister van Sociale Zaken en Werkgelegenheid*, which may shine some light on OEL standards. In this case the ECJ considered the employment status of Polish workers posted as workers hired out for services, to the Netherlands. The important question for determination was whether the employers of the workers were bound by article 2 (1) of the Law on the employment of foreign nationals – *Wet arbeid vreemdelingen (Wav)* subject to article 1 (3) (c) of Directive 96/71/EC.

One of the joined cases C – 309/09 *Olbek Industrial Services sp. zoo* concerned 20 Polish workers posted to work for HTG Nederveen BV, a Dutch company, in order to carry out waste processing services for a period of several months. The legal dispute of who was the real employers of the Polish workers, and whether failure to obtain work permits for them subject to article 2 (1) of *Wav* constituted a violation of employment law in the Netherlands is not pursued here. On the other hand, the author intends to use the facts of the said case differently, to discuss the right of all EU workers to protection from occupational diseases assuming: i) the matter was brought to ECJ to address violation of EU OEL rules that led to exposure to occupational diseases, and ii) the right of the 20 Polish workers to compensation for occupational harm in the Netherlands was disputed. So how would claims for breach of OSH rights under EU law been decided under the foregoing circumstances, that is, i) failure by both *Olbek Industrial Services* and *HTG Nederveen BV* to obtain work permits for 20 Polish workers, and ii) if the work inspectorates had not discovered their situation, but instead matters brought to limelight in court by the occurrence of occupational harms from hazardous chemicals used in waste processing activities?

It is almost impossible to predict exactly how the facts of a matter about occupational exposure to regulated hazardous chemical substances,

involving posted workers from new EU Member States will unfold. Nevertheless, it is clear that some of the important issues which courts may grapple with in their judgements in such cases would include all or some of the following: i) whether the host enterprise in the Netherlands has OSHMS in place; ii) whether the host enterprise employed the expertise of OHSs providers iii) whether the host enterprise comply with Dutch OEL law iv) whether the host enterprise had a history of compliance or non-compliance with OEL regulations v) whether the host enterprise was in breach of OEL standards derived from EU OSH standards vi) whether Polish workers who may have been harmed through exposure to hazardous chemical substances could secure compensation in Netherlands despite the fact that no work permits were obtained for their work in the waste processing operation vii) whether Netherlands established all appropriate measures to give effects to OEL rights of EU workers derived from EU regulations, and viii) whether EU law provides sufficient regulations for the protection of posted workers from new EU Member States from occupational harms.

In the event there is a dispute concerning the rules of OELs, the courts will be called upon to decide on OEL statutory standards, but the effectiveness of OEL practice standards depends indeed on the use of institutional functions of OSH stakeholders including trade unions to achieve the goal of eliminating occupational diseases at workplaces, thereby preventing the occurrence of legal disputes.

5. Conclusion

In my view, the goal of protecting workers from occupational diseases should be dearer to workers who work with business activities involving exposure to hazardous chemicals, carcinogens and mutagens, than to any other stakeholder. This is a good reason to imagine or envision contributions from such workers, either by themselves or through their trade unions and representatives in various bodies within the OEL regimes, to the EU strategic goal of protecting workers from occupational diseases. The view that trade unions should show professional, social and institutional accountability in the functions they discharge in the regulation of OEL standards takes cognizance of the limited economic resources that constrain what trade unions can achieve in their roles within their national systems. Assessment of accountability of trade unions concerns an appraisal of the discharge of current powers which are bestowed on trade unions by EU OSH law, the Constitutional laws of Member States, the power of collective bargaining in the national

institutional systems of OEL regimes, the power of consultation and negotiation with employers over OSH issues, the power of monitoring compliance with OEL standards, and the capacity to improve knowledge of workers on the importance of OEL regulatory standards.

In the beginning, this article provided research studies that validate the EU OSH Strategic Framework 2014 – 2020. First, a case was made about the practice of non-compliance to OEL standards, and poor knowledge about OEL standards among workers, small scale entrepreneurs and workers' OSH representatives. This was followed by the presentation of figures on occupational diseases based on empirical findings from the field of occupational medicine. If the EU is to achieve the goal of improving the implementation of existing health and safety rules, and improving the prevention of work-related diseases, then a review of the regulatory roles of trade unions should be brought to bear.

Subsequently, I looked to empirical research from industrial relations to find empirical evidence that trade unions can improve OSH outcomes for their members, especially under circumstances where they exercise a statutory right to consultation or negotiation with employers.⁶⁴ In addition to that, empirical research on UMWA pointed the number of ways in which UMWA made progress in the protection of its members from OSH harms, including targeted efforts to improve the knowledge of mine

⁶⁴ There is currently a rift between NHS employers UK and Junior Doctors Committee (JDC) within the British Medical Association (BMA) over new proposed reforms of medical practitioners' contracts in the UK. The contentious reform was proposed by Doctors' and Dentists' Review Body (DDRB), an independent body set up to advise the British government on pay for doctors and dentists in NHS, in a follow-up to the government's plan to provide an efficient seven-day health service within NHS UK. The JDC claims that the new contract reform will harm the working conditions and occupational wellbeing of junior doctors, and it expressed disappointment in the recommendations by DDRB. As this is a form of collective bargaining over pay and working conditions, there is already a crack in the way in which BMA negotiates with its employers – the (the Ministry of Health) State. The BMA continues to negotiate with NHS employers for its consultants, but the JDC is out of negotiation due to its decision not to re-enter contract negotiation with NHS employers. The controversy has already generated questions of accountability from communities and the public, based on the public relations showdown between JDC and NHS employers. This is a good example of how social, professional and institutional assessments can be made on how trade unions negotiate or consult with employers, and how much they succeed in truly achieving useful outcome for the OSH interest of their members. What is going on now between JDC and NHS employers seems to me though to be confrontation; instead of negotiation. For news about the proposed contract reform see <http://www.nhsemployers.org/news/2015/07/ddrb-report-on-consultants-and-junior-doctors-contract-reform-published> (accessed September 20, 2015).

workers on occupational hazards or risks associated with mine workplaces.

Social and professional accountability was part of the mind-set in the review of legal and institutional roles of trade unions in the four national OEL regimes explored. Could trade unions trade lessons and success stories through the transplantation of OEL practices across borders? Based on the accounts of Walters et al. 2003, the role of trade unions in Germany's dual system of OEL regulation seemed to lead to improvements in the protection of workers from occupational diseases. The law making, monitoring, and documentation roles of Germany's professional bodies comprising both employers and employees sometimes collide with similar roles by Germany's work inspectorate but the important element of the system in my view is that it generates debates and leads to improvement in the protection of workers from occupational harms.

For Italy, an element of social, professional and institutional accountability can provide lessons on how the solidarity of trade unions in supporting regulatory methods that unify practices across districts, sectors or occupations, where empirical understanding of local specificity factors in Italy was shown by trade unions in regard to how best they propose OEL practices should be regulated. For trade unions in the southern part of Italy it is yet to be seen whether consultation and negotiation with employers will provide good OSH outcomes in collective agreements compared to the northern part of the country.

The Netherlands puts the power of complaints for non-compliance with OEL rules in the hands of workers. If workers in Netherlands and elsewhere alike obtain good knowledge about the risks non-compliance with OEL standards pose to their health, then it could be a reliable system for persuading employers to comply with OEL standards, or to seek substitutions that reduced the risks chemical agents pose to their workers. The same could be said for Sweden where the right of workers to OSH, and the right of workers to consultation or negotiation including on matters concerning risk assessment and OSHMS, are constitutionally founded. Sweden is known for its relatively long history and productive use of negotiation in industrial relations. Sweden has a unique OSH regional implementation mechanism where trade unions already show outstanding institutional responsibility and accountability by offering technical and financial support for the improvement of OSH standards for small scale enterprises. Despite these legal and institutional safeguards which are meant to protect workers, there are some empirical studies about OEL regulation in Sweden which point to loopholes in the Swedish

legal and institutional measures for occupational diseases – caused by gaps in knowledge among workers, and small scale employers. The technical and financial support through the Swedish regional trade union mechanism for supporting small scale enterprises is perhaps one step in the right direction to bridge those gaps in knowledge.

Finally, all these challenges do not uncover any striking changes in the existing legal rules for OEL standards, but as seen with the hypothetical analysis about the plight of Polish workers in *Vicoplus* – joined case C – 309/09 *Olbek Industrial Services sp. zoo*, contentious issues about gaps in OSH regulation at the EU and national levels, including how trade unions in the EU should pursue OSH concerns of workers in general (not just their members) may be uncovered in the future. The most difficult regulatory challenge for workers has less to do with the rules for OELs, but rather what workers may need to do in order to ensure that OEL standards are accordingly followed in practice. It is yet to be seen how unionisation across EU countries adapts the need for protecting workers from occupational diseases to changing social and economic times.

ADAPT International Network



ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at www.adapt.it.

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