HSE in the European Court

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Update on the SFAIRP infraction case and next steps

In 1996 the European Commission first noted its difficulty in accepting the UK interpretation of the health and safety framework directive 89/391/EEC. The case finally came up for judgement in September 2006. Judgement will be handed down in 2007.

The Framework Directive Article 5(1) imposes 'a duty to ensure the health and safety of workers in every aspect related to the work'. In the UK a qualifier from the 1974 Health and Safety at Work Act was retained and has since been interpreted by the UK courts. The qualification: section 2(1) of the Health and Safety at Work etc. Act 1974 states that it shall be the duty of every employer to ensure 'so far as is reasonable practicable' (SFAIRP) the health, safety and welfare at work of all his employees.

The EC proposes that these two standards are incompatible. One reason for this is supposed to be that article 5(1) opens the way for strict liability, a standard applied in many EC countries. If the judgement goes against the UK then aspect of the intention of the Directive could be re-examined. One possibility is that the judgement will lead to the need to develop a system of strict liability for occupational injuries and ill health in the UK.

Comment
In practice, no EC member state actually applies the standard stated in Article 5(1); it is an unattainable ideal which leads, in practice, to SFAIRP type decisions at every point in the EC. The UK is among a very few jurisdictions which explicitly states how the ideal is approached in practice.

UK Courts, it could be argued, have actually interpreted the SFAIRP standard to mean that unless a risk control measure is grossly disproportionate to the severity of the foreseeable outcome then it should be implemented. The grossly disproportionate standard is not used in everyday practice in the UK, but that is the standard expected by the courts in HSE prosecution cases, or so HSE claims. In our view, courts take a very varied view of the meaning of SFAIRP.

The UK retains the employer's defence in claims for compensation. It seems highly unlikely that the Framework Directive was intended to introduce strict liability into all member states if it did not exist beforehand. The judgement in 2007 will make it clear whether or not this was the intention.

The EC infraction proceedings do not seem to serve any useful purpose. The Health and safety record of the UK is exemplary. Data taken from an EC publication:

Figure 3. EU comparisons for rate of fatal injuries