



OPINION OF THE HIGH LEVEL GROUP

Subject: Administrative burden reduction; priority area *Working environment / Employment relations*

I. Background

- (1) The High Level Group (HLG) was set up to advise the Commission with regard to the Action Programme for Reducing Administrative Burdens in the EU, and in particular to provide advice on administrative burden reduction measures.¹
- (2) Working environment / Employment relations is one of the 13 priority areas in scope of the Action Programme which covers more than 40 pieces of legislation.² For this priority area the Action Programme initially covered the following pieces of legislation:
 - Ø Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (the Framework Directive).
 - Ø Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (the Construction Site Directive). Directive 92/57/EEC is one of 19 individual directives linked to the Framework Directive.
- (3) On 28 January 2009 the Commission adopted the Third Strategic Review on Better Regulation³. The Commission proposed to extend the Action Programme to two additional directives, ie related to the establishment of a European Works Council or an equivalent procedure for the purposes of informing and consulting

¹ Cf. Commission Decision C(2007) 4063.

² Cf. Communication from the Commission COM(2007) 23 final, 2.3.

³ Cf. Communication from the Commission COM(2009) 15. Attached to this Communication is the Commission Working Document „Reducing Administrative Burdens in the European Union“, COM(2009) 16.

employees; and to the protection of workers from the risks related to exposure to carcinogens or mutagens at work.⁴

II. The current position

- (4) Legislation in this area results from the EC Treaty: Article 136 frames the objectives of European legislation as the protection of the fundamental social rights of workers. Article 137 foresees the adoption of, inter alia, directives setting minimum requirements for the improvement of the working environment in order to protect workers' health and safety while avoiding "imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings"⁵. Member States are allowed to maintain or introduce more stringent protective measures compatible with the Treaty.
- (5) Moreover, it is foreseen in Article 138 of the EC Treaty that management and labour at Community level (the European Social Partners) shall be consulted in two stages, the first before submitting proposals in the social field, and a second consultation on the content of the envisaged proposal. The social partners may decide to initiate negotiations which may lead to an agreement, instead of the proposed legislative measure.
- (6) The Framework Directive has changed the approach to the protection of the safety and health of workers in Member States as it laid down a common and integrated preventive approach to health and safety at work, requiring a continuous improvement of the health and safety conditions. The responsibility of the employer, the priority to prevention and the workers' right to information, training, consultation and balanced participation are the cornerstones on which the Community approach to health and safety at work protection is based. Since the adoption and implementation of the current EU legislation in the field of health and safety at work, major achievements have been obtained between 1995 and 2005 in terms of occupational accidents: The EU-15 incident rate for accidents in total fell from almost 5 m. in 1995 to just over 3.9 m. in 2005 and, as regards fatal accidents, from over 6,200 in 1995 to just over 4,000 in 2005. One group particularly affected by the costs of accidents at work are small and medium-sized enterprises which make up 99% of the companies in the EU.
- (7) In 2004, Eurostat estimated⁶ that costs due to accidents alone were €5 billion, corresponding to 0.64% of the GDP of the EU-15 in 2000. The construction sector has the worst accident rate. The report also indicated that non-accidental work-related health problems probably cause even more lost working time and healthcare costs than accidents. The cost of accidents at work and of occupational diseases in the EU-15 was estimated to range from 2.6% to 3.8% of GDP.

⁴ Cf. Annex 9 to COM(2009) 16: Commission working document - Reducing Administrative Burdens in the European Union - Annex to the 3rd Strategic Review on Better Regulation

⁵ EC Treaty, Art. 137, 2b

⁶ Eurostat (2004), Statistical Analysis of Socio-Economic Costs of Accidents in the European Union / Governmental Interest Group of the Advisory Committee for S&H at Work 31.03.2009.

- (8) The HLG notes that the charter of fundamental rights of the European Union, which would become a legally binding instrument by the entry into force of the Treaty of Lisbon, recognises that the right to working conditions which respect workers' health, safety and dignity is a fundamental right of every worker in the EU.
- (9) In 2004, the Commission presented a Communication on the framework directive and 5 other directives⁷ which argued for actions to improve the level of implementation. According to the Communication, health and safety measures at the workplace are reported to have widely contributed towards improved working conditions, boosting productivity, competitiveness and employment. The high risk areas largely coincide with the sectors and types of jobs on which the report underlines major shortfalls in proper application. The Communication also refers to the crucial role of Labour Inspectorates in this context. The HLG also notes the role and importance of the SLIC⁸.
- (10) The Commission presented a Communication on the practical implementation of the Construction Site Directive and the Safety Signs Directive in 2008⁹. The assessment of the implementation of the Construction Site Directive shows that, while the incidence rate and number of accidents at work was down, the numbers are still too high and signify that construction is the sector where workers are exposed to the greatest risks. The assessment shows that instruments are needed at European and/or national level to facilitate more effective implementation. The Commission is currently developing a practical non-binding guide to help all players meet their obligations effectively, and to clarify certain key concepts in the Directive.
- (11) The European Agency for Safety and Health at Work in Bilbao (EU-OSHA) is an agency with the representation of social partners and Member States and the Commission on its governing bodies. Its task is to provide the Community bodies, the Member States, the social partners and those involved in the field with the necessary information to make Europe's workplaces safer, healthier and more productive; the HLG highlights their European-wide information campaign focusing on risk assessment.
- (12) The Advisory Committee on Safety and Health at Work is a tripartite body made up of members comprising, for each Member State, one government representative, one representative of trade unions and one representative of employers' organisations. The Committee assists the Commission in the

⁷ COM(2004) 62 Communication from the Commission on the practical implementation of the provisions of the Health and Safety at Work Directives 89/391 (Framework), 89/654 (Workplaces), 89/655 (Work Equipment), 89/656 (Personal Protective Equipment), 90/269 (Manual Handling of Loads) and 90/270 (Display Screen Equipment)

⁸ The SLIC: The Senior Labour Inspectors' Committee

⁹ COM(2008) 698 Communication from the Commission on the practical implementation of Health and Safety at Work Directives 92/57/EEC (temporary and mobile sites) and 92/58/EEC (safety signs at work)

preparation, implementation and evaluation of activities in the fields of safety and health at work.

- (13) A recast of Directive 94/45/EC on the establishment of a European Works Council was proposed by the Commission in July 2008¹⁰.

III. Findings of the Consortium

- (14) In the context of the Action Programme for Reducing Administrative Burdens, the Commission hired a Consortium¹¹ to help mapping and measuring information obligations in the 13 priority areas.
- (15) According to the draft figures presented by the Consortium, the total administrative costs for the two acts in scope in the priority area Working Environment / Employment relations amount to ca. €4.26 bn. 89 % of the total costs or €3.78 bn. has been classified as administrative burdens.
- (16) The bulk of the administrative costs, ie € 3.4 bn, can be attributed to the Framework Directive. Approximately 92% (€ 3.1 bn.) has been classified as administrative burdens. One Information obligation alone, the “Obligation to possess assessment of risks to safety and health at work”, accounts for €2.9 bn. in administrative costs, representing 69% of the total administrative costs in this priority area. The administrative burden is estimated at €2.7 bn.
- (17) The Construction Site Directive has costs of approximately € 845 m., of which approximately 78% (€660 m.) has been classified as administrative burdens.
- (18) A number of the Information Obligations identified in the EU legislation stem ultimately from international legislation. In cases where legally binding international legislation had a similar or analogous content to the EU Information Obligation (IO), the EU IO was categorised as an EU IO of international origin. In this priority area, nearly all the costs relate to international origin (98.6%). Six of the seven IOs originate in ILO conventions¹². Only 0.7% has EU origin, and 0.8% has national origin. This factor may substantially limit any possibility to modify the EU legislation.
- (19) Of the 13 priority areas covered by the EU measurement, this area accounts for ca 3.4% of the total administrative costs. The IO “Obligation to possess assessment of risks to safety and health at work” is, according to the Consortium, one of the 10 most burdensome IOs.

¹⁰ COM(2008) 419 Proposal for a European Parliament and Council Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast). A Council agreement was reached in December 2008.

¹¹ Capgemini, Deloitte, Ramboll management; assigned by the Commission to measure administrative burden based on certain EU legislation and to identify measures to reduce this burden.

¹² ILO: International Labour Organisation Conventions, e.g. the ILO Labour Inspection Convention and the ILO Occupational Health Services Convention.

- (20) The measurement results indicate that in relation to turnover and/or numbers of employees, smaller companies face relatively higher administrative costs. The disproportionate distribution of costs can be explained by several factors; eg that larger businesses can employ specialists to deal with regulatory obligations more efficiently. Investment in computerisation and rationalisation of regulatory obligations will often be worthwhile where larger number of cases are dealt with. The Consortium's report further indicates that the distribution of administrative costs between internal and consultancy/equipment costs shows a very high level (about 46%) of consultancy costs.
- (21) The HLG notes that the Directorate General for Employment, Social Affairs and Equal Opportunities (DG EMPL) has disagreed with the Consortium over the measurement results.

IV. Reduction recommendations / stakeholders' suggestions

- (22) The HLG has taken into consideration recommendations collected by the consortium concerning the acts in scope of the Action Programme (cf. below 1.-2.) as well as a variety of suggestions submitted by stakeholders (cf. below 3.).

1. Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (the framework directive)

1.1. Obligation to possess assessment of risks to safety and health at work

- (23) The Consortium has presented three burden reduction recommendations for this Information Obligation: Member States should provide more and better targeted information of practical use to make it easier to do risk assessments so that employers, especially micro- and small enterprises can perform them without excessive administrative burdens. Further, Member States should provide eGov solutions for risk assessment, i.e. tools such as electronic templates, and so diminish the need for outsourcing of the risk assessments.¹³
- (24) Taken together, it is claimed these suggestions could lead to an administrative burden reduction for businesses of up to approximately 31%; €834 m.

1.2. Control and supervision

- (25) The Consortium suggests that the EU institutions develop EU Recommendations on common principles on inspection and enforcement based on a risk-based approach. Applying a common risk-based approach for inspections in all Member States the administrative burden for business can be reduced, they estimate, by 12%; €109 m.
- (26) Member States can further reduce the administrative burden by introducing a more integrated approach to labour inspections in order to avoid employers being visited

¹³ Cf. paragraph (46)

by many inspectors over a relatively short period of time, all of whom inspect the same thing and ask for the same documents. This can reduce the administrative burden by up to 7%; €15 m.

1.3 Obligation to report on occupational accidents

- (27) The Consortium suggests facilitating less burdensome reporting on occupational accidents by either allowing e.g. online reporting or by coordinating this report with other reports such as to insurance institutions/companies. This recommendation addresses Member States. The Consortium estimates that this could reduce administrative burden for businesses by between 88 - 100%; €151 – 172 m.

2. Council Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites

2.1. Safety and Health plan & Health and Safety file

- (28) The consortium has presented two reduction recommendations that concern the Health and Safety plan and the Health and Safety file. Member States should diminish the need to resort to the services of external health and safety coordinators, and supply adequate and practical guidance on the plan and the file. Taken together, these suggestions could reduce administrative burden for these two Information Obligations by up to 23%; €143 m.
- (29) According to the Consortium, Member States could reduce the administrative burden by up to 40%, ie €180 m. by making use of the possibility provided by the Directive to allow derogations from the obligation to draft a safety and health *plan* for low risk sites. As already implemented in one Member State, adaptation of the safety and health plan to the actual characteristics of the specific construction site (by guidelines) could lead to an additional reduction of 45%, ie €202 m.
- (30) If the directive allowed Member States to derogate similarly from the obligation to draft a health and safety *file* for low-risk sites, the burden reduction could be 40%; €70 m. Further, a better adaptation of the file to the actual characteristics of the specific construction sites may reduce the burden by 45%; €78 m.
- (31) Taken together, these suggestions could reduce administrative burdens for businesses associated with the Safety and Health *plan* by €485 m., and the Health and Safety *file* by €188 m.

2.2 Prior notice of construction sites

- (32) The Consortium suggests simplifying the requirements imposed by the prior notice of construction sites. They state that the administrative burden can be reduced by merging the prior notice with other prior notices that have to be made in accordance with national legislation. The possible burden reduction is estimated at up to 40%; €10 m.

3. Stakeholders' suggestions

- (33) Businesses as well as public authorities have made a number of suggestions for the reduction of the administrative burden for this priority area through the on-line and

off-line consultations offered by the Commission. In January 2009, the HLG agreed by majority vote the following:

- (a) *“Priority Area: Employment. Suggestions 5 and 6 concern Council Directive 90/270/EEC on the minimum safety and health requirements for work with display screen equipment. According to many stakeholders some annexes of this directive do not reflect current technological standards and modern work environments, and thus should be either abolished or brought up-to-date. The Commission is currently considering a new initiative that would encompass the provisions of Directive 90/270/EEC (as well as those of Directive 90/269/EEC on manual handling of loads). The HLG advises the Commission to review the added value of Directive 90/270/EEC and to at least adapt the above mentioned directives to technological developments without compromising on legitimate safety and health requirements.”*

The Commission has confirmed that they will take this into account when revising these directives as part of the Commission’s Simplification Rolling Programme 2009.

- (b) *“Priority Area: Employment. Suggestions 7 and 8 are related to Directive 2003/88/EC regulating inter alia the maximum working and minimum rest time of employees. Stakeholders ask for abolition or alternatively more flexibility in the application of the rules (eg extension of the reference period to 12 months, allow for longer periods when the workload is low as in the case of inactive time in emergency services). The Commission has already proposed to extend the reference period and also to allow for more flexibility regarding the minimum rest period, cf. COM (2005) 246¹⁴. The proposal is currently before the co-legislator. The HLG welcomes the proposed changes which will simplify the application of the directive. The Group calls upon the Commission to strive for further simplifications and reductions of administrative burdens and to avoid the introduction of more burdensome additional requirements in the ongoing legislative procedure.”*

The Commission has confirmed their agreement to this approach, but in practice the conciliation procedure has failed to date.

- (c) *“Priority Area: Employment. Suggestions 9, 10 and 11 concern safety and health at work (Directive 89/391/EEC). Stakeholders complain that definitions in this directive are not precise enough or lacking, and thus lead to burdensome implementation or gold-plating in the Member States. The Commission points out that a definition of self-employed was not in scope of the directive, as it deals with workers only. Concerning the other definitions, flexibility should be left to the Member States in the view of the Commission. The HLG advises the Commission to call upon the Member States to ensure a lean transposition and implementation of EU*

¹⁴ COM(2005) 246 Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time

rules, in particular with respect to SMEs. The Group recalls that the Member States share the responsibility in reducing red tape for businesses.”

The Commission has confirmed that it agrees with this approach, which is also in line with the Communication from the Commission on a Health and Safety Strategy 2007 – 2012 (point 4.3)¹⁵.

- (34) A significant number of stakeholders’ suggestions (business associations and public administrations) relate to the obligation to possess assessment of the risks to safety and Health at work in the framework directive (directive 89/391/EEC). Stakeholders call for more flexible rules and for better guidance.
- (35) Stakeholders further suggest that the requirement for risk assessment should take the size of the enterprise and the duration of the employment into consideration. They state that the obligation to create a written risk assessment is not precisely defined and allows disproportionate implementation. Others call for an exemption for the smallest companies from carrying out written assessments. Stakeholders also point at the lack of precise definition of the training required for workers giving first aid at work, which may lead to disproportionate demands at national levels.
- (36) On this point, the HLG notes that the Trade Unions consider that an exemption of small companies from the obligation to document risk assessment is the equivalent of an exemption from risk assessment. In their opinion, it would put those companies out of the dynamics of the framework directive, and would deny the workers of those companies a fundamental social and human right.
- (37) Stakeholders further point out that the Construction Site Directive (92/57/EEC) is causing a high burden on SMEs. They see a need for an implementing guide which should allow implementing methods best suited to the structure of Member States’ domestic construction sites.

V. Advice of the HLG

- (38) The HLG wishes to emphasise the utmost importance of good Health and Safety work in all companies. The approach of the framework directive and an adequate and proportionate assessment of risks in the workplace are essential for all Health and Safety work. The main responsibility correctly lies with the employer to draw up and implement a health and safety policy adapted to the enterprise. The workers and/or their representatives must be closely involved.
- (39) The HLG underlines that the search for administrative burden reduction must not and is not intended to jeopardize levels of protection in the health and safety of workers. This exercise must not reduce safety levels, but should reduce unnecessary, disproportionate administrative burdens and indeed can thereby potentially ensure better compliance and a better Health and Safety culture at

¹⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work, COM (2007) 62.

work. The priority for employers should be to ensure safety for their workers. For some stakeholders; there is an over-emphasis on process rather than outcomes. The HLG believes it is necessary to make it easier for businesses in general and SMEs in particular to understand how to follow legislation, to increase compliance and reduce the need for unnecessary external advice.

- (40) The HLG recalls its opinion of 20 January on stakeholders' suggestions where the HLG advised the Commission to call upon the Member States to ensure a lean transposition and implementation of EU rules, in particular with respect to SMEs, and recalled that the Member States share the responsibility in reducing red tape for businesses.¹⁶ Workers in SMEs need and deserve the same level of health and safety protection as others. In order to ensure this, there is a clear need to facilitate regulatory compliance for SMEs. As indicated in the EU Health and Safety Strategy 2007 – 2012¹⁷, national strategies on health and safety at work should focus in particular on this issue, e.g. by making national legislation as straight forward and as easy to implement for SMEs as possible.
- (41) The HLG would like to draw attention to the fact that 92% of companies are micro companies (10 or less employees), with an average number of employees of 2.1. Eurostat statistics show that, both in terms of lost time and fatal accident ratios, the best performers are large businesses. However, within the SME categories the performance of micro companies with respect to lost time accidents is much better than both small and medium sized enterprises, and midway between them with respect to fatal accidents. There is thus no evidence that micro entities have a higher accident ratio than other SMEs.

Guidance

- (42) The HLG welcomes the commitment from the Commission to provide better guidance on the regulations in this area. The availability and improvement of guidance documents at both the EU and national levels containing explanations and practical examples of the way in which the employers can meet their obligations would clearly contribute to better outcomes and help to reduce the burdens on companies.
- (43) The HLG also calls upon Member States to commit to provide better guidance on the information obligations in this area, in order for businesses to be able to identify exactly what is asked from them and how they can achieve this in the best and most cost efficient way. The online/offline submissions clearly indicate a need for better guidance. Uncertainty as to what is actually expected from the employers may have two negative consequences, ie non-compliance or over-compliance (partly assisted by external service-providers). Good guidance is a means of getting companies to comply with the legislation, since they will know, in an easily accessible manner, what is expected from them and how they can meet their obligations. Over-compliance can be avoided by providing guidance which

¹⁶ Cf. http://ec.europa.eu/enterprise/admin-burdens-reduction/docs/090114_finver_hlg.pdf

¹⁷ COM(2007) 62 Communication from the Commission: Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work; point 5.

may well enable some avoidance of recourse to external experts. The consultancy sector is a cost driver in this area, and particularly for SMEs.

- (44) It is important that wherever possible employers can rely upon the information given in the guidance. Ideally, guidance documents should provide legal certainty. It seems that compliance with EU guidance cannot create a presumption of compliance with the legislation itself since the EU legislation merely lays down minimum requirements¹⁸. Member States, however, can decide if compliance with national guidance constitutes a presumption of compliance with the national legislation. The HLG urges the Member States to provide guidance for businesses that can be relied upon and create a presumption of compliance to the extent possible within the legal system of each Member State.
- (45) The HLG strongly encourages the Commission to provide better information to Member States on implementation options and in particular on the flexibilities laid down in the directives. Provisions in both directives in scope of this programme allow Member States a certain level of flexibility in the implementation. The derogation possibilities and the limits for exemptions are sometimes very difficult to establish for Member States. Making use of this flexibility could reduce the burdens for businesses.
- (46) Furthermore, the HLG points out the importance of *Good Practice exchange* among Member States. The work of the Consortium shows big differences in the administrative burdens between Member States. A number of Member States have, for instance, sought to address the problem of little knowledge among businesses on risk assessment by producing model risk assessments. These case studies should lower the burden for businesses by providing examples of risk assessment that are “fit for purpose” – complying with the requirements of the legislation, but demonstrating that many risk assessments do not need require complicated processes or documentation. The HLG urges the Commission to share these case studies and other good practices with the member states.
- (47) Some of the recommendations mentioned above show the considerable potential for reducing administrative burdens by electronic or web-based solutions including electronic form-filling in this area. Therefore, the HLG is of the view that the Member States should take the burden reduction potential of information technology into account. However, the Member States also have to be aware that some businesses, and in particular SMEs in certain sectors, still do not have access to computers.

¹⁸ Thus, Member States can adopt provisions that are more favourable to workers, and/or allow a modulation of the obligations according to the nature of risks or the size of the undertaking, and/or allow derogation in a particular area. Therefore, guidance at Member State level is better suited to explain the specific situation and requirements in a given Member State. Guidance at EU level, which is based on the provisions of the EU directives, cannot create a presumption of compliance with the national rules transposing the directive, since these may to a considerable extent be different and/or contain more detailed requirements. In addition, if guidance at EU level would create a presumption of compliance with the legislation, this would mean that the guidance would have a direct impact on the extent of the rights and obligations of the workers and employers subject to it. This would rather seem to fall under the competences of the Member States or the EU legislator, i.e. the Council and the European Parliament.

- (48) The main responsibility to provide guidance resides with the “owner” of the legislation, but is always to be carried out in close cooperation with the social partners, so that a more cost effective policy can be developed. Active contribution of social partners at the different levels should be promoted, also at the level of the individual workplace.

Reduction recommendations concerning better guidance, etc

- (49) The HLG advises the Commission to act on the recommendations from the Consortium on better guidance, eGov solutions, and better coordination. According to the Consortium, this can reduce the administrative burdens by about €1.7 bn. (46%). The HLG is of the opinion that the reduction estimates are too high, but considers the recommendations important not only because they contribute to necessary administrative burden reductions but also because they can facilitate more strategic management of Health and Safety. DG EMPL has informed the HLG that they are in principle in favour of these recommendations.

Reduction recommendations in the legislative area

a) Obligation to prepare a Health and Safety file for construction sites

- (50) The directive requires that for all construction sites with more than one contractor present a *file* shall be prepared containing relevant safety and health information to be taken into account during any subsequent works. The Consortium has recommended amending the directive to allow a more flexible approach to low-risk sites in the same way as the directive already allows in the case of the health and safety *plan*¹⁹: The Consortium recommends that Member States should be given the possibility, after having consulted the social partners, to derogate from the obligation. The file is particularly useful, for example, in larger / more complex buildings, but there could be doubt as to whether a file is necessary for sites such as individual houses, private habitations etc. Full use of such a derogation option by all Member States might give an estimated burden reduction of 40% ie €70 m. DG EMPL has informed the HLG that this recommendation is unacceptable, as this would not allow proper information of the risks for workers involved in future work, and the directive already provides flexibility regarding the content of the file. The HLG urges the Commission to encourage full use of the existing flexibility, particularly insofar as small sites are concerned.

b) The Obligation to possess assessment of risks to safety and health at work (the framework directive)²⁰

- (51) Risk assessment is at the heart of the European approach to occupational health and safety regulation. It allows those who are responsible for creating a risk to health or safety to devise the best ways of controlling it. In this way, it creates

¹⁹ The Health and Safety Plan: For all construction sites, there has to be a safety and health plan setting out the rules applicable to the construction site concerned, taking into account where necessary the industrial activities taking place in the site (art.5 (b)). Member states have a limited possibility to allow derogations from this (art. 3 (1), second paragraph).

²⁰ Mr. Hontelez and Mr. Potdevin disagree with paragraphs 52-61

flexibility about how risks can be controlled, so that employers can choose the most effective control for their particular situation

- (52) However, risk assessment is not a goal in itself. Instead, it should ensure better and more efficient control of risk. There are concerns that businesses, particularly small and medium-sized enterprises (SMEs), can become too engaged in the process of assessment, rather than focusing on its outcome (the control of risk). Consultants, lawyers and others can make these processes overcomplicated. The result is that SMEs in particular can incur an administrative burden from completing and writing down the assessment that is disproportionate to the risk. This explains why a written risk assessment is sometimes perceived as a pointless administrative exercise.
- (53) A disproportionate share of the burden of risk assessments falls on SMEs. According to the Consortium figures, some 92% of the costs related to risk assessment occur at micro and small companies (cf. also paragraph (19)). SMEs face a relatively higher administrative burden.
- (54) A documented assessment does not in itself protect workers. It is the preventive and protective measures that employers put in place as a result of the assessment that protect workers. Therefore, removing the requirement to have a written assessment would not, in principle, reduce the protection afforded to workers. The employer must still carry out the assessment and provide the preventive and protective measures it shows to be necessary. For the activities of many very small firms, the risks presented by the work are low, well understood and straightforwardly controlled. In the opinion of the HLG such firms only need to follow readily-available good practice guidance to ensure that the risks are adequately avoided or controlled. Their assessments are similarly straightforward and little practical benefit is to be gained by insisting that they be recorded, since the relationship between those involved is so close.
- (55) Notwithstanding the above, a judgement of the European Court of Justice of 2002²¹ established that Member States cannot exempt small businesses from being in possession of a written risk assessment.
- (56) In addition to better guidance, the HLG therefore strongly advises the Commission to exempt very small firms undertaking certain low risk activities from having to produce a written assessment of the risks to health and safety. The HLG emphasises that the intention is not to re-open a discussion on the framework directive as such, but to get a very much needed clarification of the ambiguity in Article 9 on the risk assessment and to restore the flexibility that some claim was intended in the directive originally.
- (57) The HLG recognises that small firms can be engaged in very hazardous activities, and where this is the case, it is absolutely necessary to insist that they document their risk assessments. The Member States are best placed to make judgements

²¹ Case C-5/00, Commission v Federal Republic of Germany, 7. February 2002.

about which types of firms and what levels of risk should be allowed to be exempt, and the way in which they should be exempted, since they understand the framework of national practices and how the documentation of a risk assessment is used by the national authorities.

- (58) This recommendation is in conformity with the principles of the European Small Business Act²² and could make a major contribution to reducing administrative burdens. The HLG does not have data on the reduction potential for this recommendation, but draws attention to the fact that the Consortium has measured the administrative burden related to risk assessment to €2.7 bn., and that 92% of this stems from SMEs.
- (59) A redrafted / clarified Article 9 should give the Member States the flexibility to provide for exemptions, in the light of the nature of the activities and size of the undertakings, from the obligation to draw up the documents referenced in paragraph 1(a). Such exemptions may be complete or partial. Further, the redrafted article should clarify that Member States may specify the nature and extent of information required in respect of the drawing up of the risk assessment documents.²³ This would allow the necessary flexibility for Member States to adapt the European system to accommodate the needs of different types of businesses in the different Member States.
- (60) These suggestions have been discussed with stakeholders in the EPC Better Regulation Forum²⁴, and at a meeting with the Bureau of the Advisory Committee on Safety and Health at Work²⁵ 30. March. At the latter meeting, on the issue of the written risk assessments, trade unions representatives voiced concerns, employers associations were generally in favour, and the Member States were

²² COM(2008) 394 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - "Think Small First" - A "Small Business Act" for Europe; http://ec.europa.eu/enterprise/entrepreneurship/sba_en.htm;

²³ Article 9 (suggested redraft): "Various obligations on employers

1. Subject to the provisions of paragraphs (2) and (3) below the employer shall:
a) be in possession of an assessment of the risks to safety and health at work, including those facing groups of workers exposed to particular risks; (b) decide on the protective measures to be taken and, if necessary, the protective equipment to be used; (c) keep a list of occupational accidents resulting in a worker being unfit for work for more than three working days; (d) draw up, for the responsible authorities and in accordance with national laws and/or practices, reports on occupational accidents suffered by his workers.

2. Member States may provide for exemptions, in the light of the nature of the activities and size of the undertakings, from the obligation to be met by the different categories of undertakings in respect of the drawing-up of the documents provided for in paragraph 1(a). Such exemptions may be complete or partial.

3. Member states may specify the nature and extent of information required in respect of the drawing up of the documents provided for in paragraph 1 (b), (c), and (d)."

²⁴ European Policy Centre's Better Regulation Forum 27. March 2009

²⁵ Cf. paragraph (11)

described as having a wide range of views. A meeting with particular reference to the need for written risk assessments was held with Director-General Mr N. van der Pas (DG EMPL) on 31. March. Having made DG EMPL's objections clear, DG EMPL suggested that the HLG publish their position including this point, and invite Social Partners (notably the Advisory Committee on Safety and Health at Work) to reopen discussions on it. An impact assessment would naturally be required.

- (61) The HLG urges the Commission to come forth with a revised article 9 to provide the abovementioned flexibility based on an impact assessment, taking in due account the consultation of all relevant stakeholders.

Brussels, 28. May 2009