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Europe's bumpy playing field

With the UK on the brink of leaving the EU, there has been much concern that environmental and health and safety protections will suffer as a result. Yet when it comes to workplace safety, European fatal accident statistics suggest that the UK is no laggard. While it is hard to compare accident statistics, Eurostat data tells us that rates of fatal workplace accidents in the UK have been consistently lower than almost any other EU member state for many years (see right).

Those statistics are perhaps surprising given that rich and powerful continental member states, such as Germany and France, are often said to offer stronger regulatory protections and more generous welfare regimes than the UK. Indeed, German and French health and safety law, following the wording of the EU Framework Directive (89/391/EEC), imposes an absolute duty on employers to “ensure the safety and health of workers”. By contrast, the UK qualifies that duty, following the Health and Safety at Work Act, to stipulate that workers should only be protected against harm “so far as is reasonably practicable”. Given that difference in headline law, why might UK fatal accident rates be lower than most other member states? Recent research by myself and colleagues from across Europe (Rothstein et al, *Varieties of Risk Regulation in Europe*, Socio-Economic Review, 2017) helps to answer this puzzle.

Statistics don't always lie

We should first discount two obvious but spurious explanations. The first is of the “lies, damned lies and statistics” variety, which dismisses the UK's lower fatality rates as an artefact of under-reporting. Fatal accidents are the most reliable of such statistics. The second explanation is that the UK may have fewer workers employed in high-risk sectors than other countries. However, Eurostat statistics are standardised to reflect such factors and to minimise biases.

The EU promises workers safety, the UK doesn't. So why are workplace fatality rates lower in the UK than most other EU member states? Henry Rothstein, reader in risk and regulation at King's College London, unravels the threads of the arguments

For a better explanation, we need to look more closely at three key differences in the institutional design of occupational safety regimes across Europe, which are related to legal traditions; approaches to standard-setting; and the design of welfare states.

First, the appearance of greater stringency of headline law in continental member states – that workers should be safe come what may against the UK's protection of workers only so far as is reasonably practicable – is a

By contrast, literal interpretation of statutes is not expected in the civil law systems of continental Europe; instead, statutes tend to take the form of general legal frameworks that set aspirational aims, rather than unambiguous requirements. Legal consistency and predictability instead come from extensive codes of legal rules that give expression to the meaning of general statutes. Consequently, “ensuring” safety in a continental jurisdiction does not mean prohibiting all activities that could possibly lead to harm; rather, it simply means following prescriptive rules that express that aspiration.

“ Look up ladders in the French or German rule book, and you'll find very detailed sector-specific rules for inside or outside, rain or sun”

Henry Rothstein, King's College London

Vive la différence!

A second difference between the UK's and continental Europe's approach to workplace safety regulation is the

legal fiction created by different traditions of law-making. The British common law tradition places great weight on common principles of legal interpretation, which is ensured by constraining judges to interpret statutes according to their literal meaning and case law. The UK, therefore, needed to qualify the Directive's goal of ensuring safety. Legal literalism would otherwise have criminalised almost every employer, since it will always be possible to do more than what is reasonably practicable.

way that their respective legal traditions have favoured two fundamentally different approaches to standard-setting. Until the 1970s, the UK regime had taken a very prescriptive rules-based approach. It had, though, struggled for years to ensure that rules kept pace with requirements, leaving millions of workers facing inconsistent and inadequate protection.

In response, the 1974 Health and Safety at Work Act ambitiously abandoned detailed rules in favour of a principles-based approach



to standard-setting, simply requiring that workers should not face unreasonable levels of risk from any hazard in any sector, whether or not anyone was actually harmed. This flexible approach was better able to cope with the wide variety of circumstances found across workplaces. It also worked with the grain of the UK's common law tradition, in which ideas of "unreasonable" could be subject to common principles of interpretation, not least by a technically expert inspectorate and the courts with a view to best-practice guidance and case law.

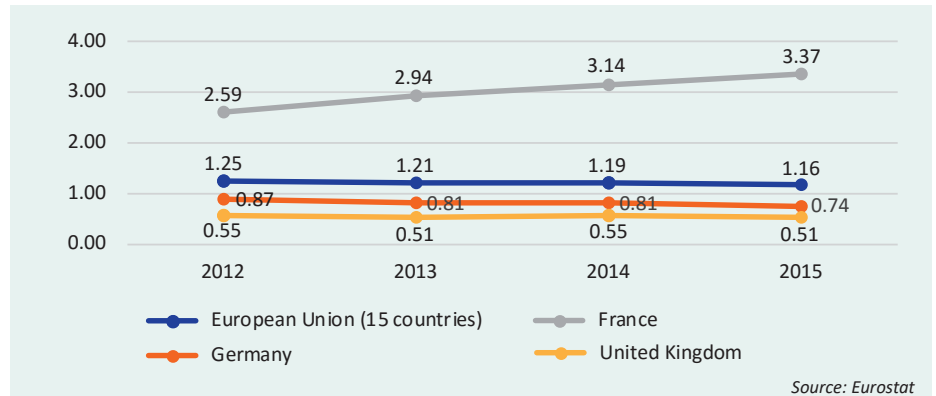
By contrast, the continental approach to standard-setting has been to double-down on prescriptive rule-making, an approach that fits their codified traditions. That has seen the growth of extensive rule books to meet the extraordinary variety of situation-specific problems that arise in workplace safety.

Look up prosaic issues like the use of ladders in German or French rule books and you will find very detailed, sector-specific rules on their use outdoors and indoors, as well as in rain and sun. Germany and France even have rules on the most esoteric risks, such as tiger taming, with different rules for circuses and zoos. But the difficulty of designing effective rules is well recognised. As one recent official report by the French Labour Inspectorate rather poetically stated: "The law in practice is, by nature, not fully overlapping with the law ... full compliance with the law is aspirational".

A different kind of trade deal

Finally, a third difference between the UK and much of continental Europe is how trade-offs between protecting workers and cost are shaped by their distinctive regimes to not just prevent workplace harm but also to treat, rehabilitate and compensate injured workers. UK law explicitly recognises regulatory trade-offs between protection and cost, following the principle that the cost of safety improvements must not be grossly disproportionate to the gains in safety. The universal "Beveridgean" health and welfare regimes that look after injured workers – the NHS, welfare benefits and the industrial injuries compensation scheme – have no role in preventative regulation. Tort law, or civil liabilities, might have some effect on employers, but insurance premiums account for only 0.25% of national payroll and only half of employers employ enough workers to be rated according to their accident record (Lewis, *Tort law culture in the United Kingdom*, Journal of European Tort Law, 2012).

By contrast, many continental member states, such as Germany and France, have "Bismarckian" social insurance regimes that play active roles in preventing work-



Eurostat's standardised fatality rate per 100,000 workers, 2012 to 2015

Source: Eurostat

place accidents as a means of limiting their payouts. The clearest case is Germany, where the state has delegated detailed rule-making to powerful sectoral and regional mutual trade associations known as "Berufsgenossenschaften" (BGs). The BGs were created at the end of the 19th century by Prussian chancellor Otto von Bismarck, who was a vociferous opponent of the state meddling in business affairs – a view said to be reinforced by his fury over a factory inspection of his own sawmill. The BGs follow the German guild tradition, and are funded by mandatory employer contributions. While the state sets the legal framework, the BGs have legal duties to prevent workplace harm as well as compensate and rehabilitate injured workers, and to those ends they even maintain their own inspectorates, training schemes and hospitals.

Though headline law and constitutional concerns may prevent explicit UK style cost-benefit considerations, BG rules were expected to internalise costs so that, as the historian Peter Hennock has argued (*The Origin of the Welfare State in England and Germany*, 2007), any "safety measures whose costs could not be justified by clearly foreseeable savings in compensation payments were ruled out". Indeed, compensation concerns sometimes inhibited BGs from recognising the occupational cause of certain diseases, such as some cancers, several decades after other countries such as the UK did.

Insurance-driven system

In France, the state is more central to regulation, with rules set out in an infamously ever-expanding Labour Code. However, like Germany, France also created powerful national, regional and sectoral mutual associations – the "Caisses" – that were similarly funded and governed to ensure workers were medically treated, compensated

and rehabilitated. To manage the gaps in the Labour Code and ensure the sustainability of their funds, the Caisses also issue their own detailed "accident prevention" rules and have technical staff to advise companies on their implementation.

Premiums reflect what is known as the "cost of risk", calculated actuarially from detailed historical data on compensation costs. Indeed, like the German BGs, they have been criticised for delays in recognising certain occupational diseases, such as asbestos-related mesothelioma, which became a major public scandal in France in the 1990s.

These three factors help explain why EU member states that promise workers safety have puzzlingly higher workplace fatality rates than the UK, which qualifies its regulatory goals. Differences in legal tradition conceal how all countries make trade-offs on safety: they simply make them in different ways. The UK explicitly trades safety against the costs of preventing workplace accidents on a case-by-case basis, while Germany and France implicitly make three-way trade-offs between safety, the costs of prevention and the costs of compensation, within dense, complex rule structures.

The story of worker fatality rates therefore suggests that what is at stake in Brexit debates about regulation is far more complex than either unshackling the UK from burdensome regulation or sacrificing environmental and safety protections on the altar of deregulation.

Indeed, differences in legal tradition suggest that some of the arguments heard in ongoing Brexit debates about "ever-closer union" may be missing the point that headline goals take on different meanings and significance in civil and common law countries. It's just a shame that, with our imminent departure, we may have missed the chance to not just understand, but also to change, the terms of the debate. ■