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## Securing compliance: Some lessons for EU strategy on occupational health and safety

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# **Securing compliance: some lessons for EU strategy on occupational health and safety**

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## **Abstract**

This paper discusses findings from a review of recent literature on support for securing compliance and better practice in occupational safety and health (OSH) in the changing world of work in advanced market economies. It explores innovative responses of regulators and private actors to the challenges created by these changes, as well as considering their impact on further forms of support for good practice, such as provided by prevention services and OSH professionals. Although the review is based on a wide-ranging search of the literature in English, its discussion is focused on implications for prevention policies in the European Union. In particular, it considers the extent to which the literature suggests that the current strategic framework for supporting compliance – via EU policies over the past two decades, with a new Strategic Framework anticipated in 2021 – can be said to address these challenges effectively. Not surprisingly, it finds that the literature reveals some gaps between the policy rhetoric and the practice at both EU and Member State levels.

## Introduction

In 2020, the European Union Agency for Safety and Health at Work (EU-OSHA) announced a new research programme on ‘support for securing compliance in safety and health’ and commissioned an overarching review of current knowledge to help inform its decisions on future empirical work (the EU–OSHA review). This recently completed review provides a detailed exploration of evidence and understandings concerning such institutional support, in the context of current changes in advanced market economies (EU-OSHA 2021 a; b; and c).

In this article we argue that the review’s findings also provide a useful and timely opportunity to contribute to a discussion of the new EU Strategic Framework on Occupational Safety and Health anticipated in 2021. We analyse recent EU discourse on the development of current occupational safety and health (OSH) policy, and consider how the review’s findings offer insights and strategies to address the EU’s policy objectives more effectively. In particular, we focus on ways of securing substantive compliance with OSH regulation in the Member States of the EU that take account of challenges presented by the changing contexts of work, employment and the political economy of the EU. By ‘substantive compliance’ we mean achieving the collective goals of the regulatory scheme (e.g. ensuring the safety and health of workers), as distinct from ‘rule compliance’ which involves merely implementing the content of particular requirements (e.g. doing a risk assessment) (Morgan and Yeung 2007:152). As substantive regulatory goals concern measures and action to improve the prevention of, and protection of workers from, work-related death, injury and ill health, they encompass better OSH practice. Thus, we use the term ‘substantive OSH compliance’ to encompass both regulatory compliance and better practice.

The article begins by briefly describing the main features of the EU discourse on inspection, enforcement and securing compliance found in the strategy statements published by the EU over the past 20 years. It considers the aims of these strategies within the context of wider social and economic policies in which they are embedded. It then summarises the EU–OSHA review’s key findings concerning current understandings of support for securing substantive compliance with OSH standards. It focuses on recent innovative, practical and theoretical approaches to address the challenges posed by emerging work, employment contexts and risks in advanced market economies, while taking account of the Covid-19 pandemic. The article draws



on the review of literature and opinions of key informants (EU-OSHA, 2021 a; b; and c), but broadens the analytical framework to include the role and needs of, and implications for, organised labour, including unions and other worker organisations.

We conclude by questioning the extent to which the EU's recent, current and likely future strategic approaches to the governance and regulation of OSH take account of knowledge and understandings evident in the literature. We identify some gaps and question the extent to which current strategy development can be regarded as fit for purpose in addressing emergent challenges for OSH, during the period covered by the new EU Strategic Framework for Safety and Health 2021-27.

## **1. Support for securing compliance in EU strategies on OSH in the past 20 years**

Despite advances in technology and health sciences, current data indicate that the high incidence of work-related injury and ill health, as well as the severity of outcomes, remain a challenge. This is true even in advanced market economies in the EU where longstanding regulatory duties require those who create the largely preventable work risks to implement control measures to ensure those risks do not harm workers and others.

The EU response to this challenge includes the series of ‘strategies on health and safety at work’ produced for several decades by the European Commission, with the endorsement of the European Council (see e.g. European Commission 2002, 2007, 2014a). These strategies address a number of recurring themes, including challenges for OSH presented by enterprise size, rapid changes in technology and the nature of the labour force. They acknowledge that the EU economy is, numerically at least, dominated by micro and small firms in which over half of its labour force works, often with limited or non-existent arrangements in place to manage OSH effectively. A recent, albeit belated, concern is with changes in business and work organisation in which traditional employer-employee relationships – the historical focus of OSH regulation – are increasingly replaced with work arrangements and relationships, such as supply chains and other forms of outsourcing, for which OSH legal responsibilities are harder to define and locate.

The article is principally concerned with approaches to regulation and their influence on compliance. Consistent with current thinking on regulatory practice and theory (Drahos 2017: ch 1; Scott 2017), our interpretation of what supports securing compliance is a broad one, encompassing a wide range of policies and practices (such as social norms, financial incentives and influential parties in supply chains) that work together with legal regulation (standard setting, compliance promotion, inspection and enforcement) to secure compliance.

Since the EU does not intervene directly in support for securing compliance with OSH standards, its strategy statements address the responsibilities of Member States, including for their labour inspectorates. The 2002-2006 Strategy, for instance, indicates that (European Commission 2002: p. 1):

‘(...) labour inspection activities must be capable of appraising all the risks (...) inspectorate services must combine their inspection role with a prevention function (...) be open to audit, using result and quality indicators to promote innovative approaches.’

And:

‘The checks carried out by the inspection services must give rise to uniform sanctions which are dissuasive, proportionate and effectively applied.’

Often such statements hint at current concerns in the regulatory literature. For example, the 2007-2012 Strategy (European Commission 2007) suggests involving ‘labour inspectors as *intermediaries* to promote better compliance with the legislation in SMEs, *primarily through education, persuasion and encouragement*, then, where necessary, through coercive measures.’ This recognises the role of inspectors (and others) as ‘boundary spanning agents’ (see Marchington *et al.* 2004), and appears to reflect notions of a hierarchy of possible actions to achieve compliance in which recourse to enforcement occurs only when other strategies have been found inadequate. As the strategy states (European Commission 2007: 7):

‘At national level, appropriate steps should be taken to enable labour inspectorates to ensure that those concerned meet their obligations and are able to exercise their rights, including carrying out checks which result in the imposition of dissuasive and proportionate penalties and prosecution for failure to abide by health and safety rules. The new challenges, including migratory flows, justify checks being carried out in a more targeted manner and the knowledge of inspectors being improved.’

The 2007-2012 Strategy (and the earlier 2002-2006 strategy) suggests some awareness of the intermediary role of inspectors as change agents in relation to SMEs (see for example Walters 2001; EU-OSHA 2016), as well as of targeting in inspection practices (Blanc 2012). These exhortations are, however, couched within the wider neo-liberal lexicon: Phrases such as ‘proportionate and dissuasive penalties’; and compliance from SMEs to be achieved ‘primarily through education, persuasion and encouragement’, suggest a soft approach to securing compliance (see Carson 1979), and the business-friendly, market-orientated regulatory style evident in wider contemporary economic and political policies of the EU and its Member States.

In a similar vein, the 2014–2020 Strategic Framework (European Commission 2014a) stresses that, ‘labour inspectors are seen as facilitating compliance with legislation rather than obstacles to business activity’. It advocates a systematic approach to ‘map the resources of labour inspectorates and evaluate their capacity to carry out their main duties on enforcing OSH legislation’, as well as to evaluate inspectorate training and how best to enhance collaboration among inspectorates from different Member States through the work of the Senior Labour Inspectors’ Committee (SLIC). It further indicates that through SLIC, the Commission would ‘assess the effectiveness of sanctions and administrative fines imposed by Member States, as well as other measures of “soft enforcement” and non-traditional ways of monitoring compliance’. However, our review of the literature found no published evidence of the outcomes of any of these tasks.

The 2014–20 Strategic Framework also provides summary information on the numbers of inspectors and inspections in the EU, and acknowledges the challenges of resourcing — going so far as to suggest the European Social Fund might be a source of support. The framework indicates a need to address awareness gaps more systematically, for inspections to be supportive as well as compliance-orientated, and to deliver training for labour inspectors, particularly on emerging risks and new technologies, in order that they ‘properly perform risk-based inspections.’

Indications are that the new Strategic Framework 2021–2027 will continue this emphasis on the need for effective enforcement of OSH standards within Member States, as well as referring to the challenges presented by the structure and organisation of work and employment. The ‘road map’ for the framework states that (European Commission 2020: 2):

‘(...) Improving the extent and quality of compliance with OSH provisions is a longstanding objective at EU and national level and is particularly challenging for micro and small enterprises. Moreover, meeting this objective is an increasing challenge given the rapidly evolving world of work (...).’

The road map indicates that ‘effective labour inspections and enforcement contribute to better compliance and fosters at the same time a prevention culture which is at the core of this area and thus improve OSH outcomes’, and even speculates that evidence of poor compliance in relation to risk assessment requirements in some countries may ‘correspond with a lower number of labour inspections in the same countries’ (European Commission 2020: 2).

In short, EU strategies on OSH for the past 20 years have pointed to the need to be responsive to the consequences of change in the structure and organisation of work and employment. Inspection, compliance promotion and enforcement are among the means advocated to help implement this responsiveness and the documents do, in part, reflect elementary thinking in regulatory theory. Thus, risk-based strategies, including targeting inspection, and the need for consistent approaches are emphasised, as are innovation, communication and sharing practice both transnationally and among other inspectorates within Member States. The documents also advocate inspectors acting as ‘intermediaries’ to support duty holders in small and micro firms, and sanctions for non-compliance that are dissuasive, proportionate and applied effectively. They further emphasise the boundary spanning, transnational role of the Senior Labour Inspectors Committee (SLIC) in supporting communications and common good practices among these inspectorates.

However, the strategies offer little more than these broad principles and it is difficult to gauge how the EU prioritises compliance promotion, inspection and enforcement among the other actions they advocate in response to the challenges they identify. This is at least in part because the strategy documents reflect the wider political and economic policies of the EU and are frequently

couched in the market-oriented language dominating the EU during this period. In recent decades the wider regulatory policies of both the EU and most of its Member States have been characterised by pronouncements concerning the ‘rationalisation of the legal framework’ and the removal of unnecessary legislative ‘burdens on business’. Programmes to meet these overarching policy concerns – like the ‘Refit’ Programme’, in which the Commission focuses on areas where business and other stakeholders see excessive costs and burdens – demand stricter economic criteria to be met before new regulatory measures are proposed, and require the principle of ‘one in, one out’ to be applied. They operate at several levels, and influence the wording and implementation of strategy statements on areas like OSH. There are further opportunities for Member States to interpret the programmes before they are operationalised. Most Member States have also pursued market-orientated orthodoxies and reduced state support for regulation and regulatory enforcement during the period covered by the EU strategy statements. Also, given that Member States differ in the level of resources for OSH regulatory intervention, and the priority they give to such intervention, it is difficult to disentangle the effects of programmes to promote support for securing compliance from programmes that emphasise more voluntary and market-orientated approaches.

Other EU policy orientations in recent decades are relevant to this discussion. Examples include promotion of ‘the business case’ for better OSH, encouraging the use of ‘economic incentives’, greater emphasis on training and awareness, and the development of safety cultures. When these are filtered by the demands of wider EU and Member State policies to ensure stricter attention to the cost effectiveness of regulation and securing compliance, both OSH regulatory intervention and its surveillance by state inspectorates may be affected. Elements that the strategies suggest should feature in the practice of regulatory inspectorates, like using ‘proportionate sanctions’ or ‘persuasion and advice’, therefore need to be interpreted in the context of wider policy orientations.

## **2. The background, remit and analytical framework of the EU-OSHA review**

The organising principles underpinning the EU–OSHA review aimed for a holistic appreciation of the system of supports, and the relationships between its elements, in contributing to substantive OSH compliance in order to prevent work-related injury, illness and death. Improving OSH, in this context, therefore included managing OSH risks, implementing and operationalising OSH arrangements, and improving the extent and quality of substantive OSH compliance. In discussing ‘regulatory standards’ and ‘regulatory practices’, the review did not confine itself to standards established and implemented by the state, but included the influence of other actors and processes in the business and social environments in which work takes place. Consistent with this, the review framed its understanding of this knowledge within theorising and analysis found primarily in the regulatory and socio-legal literature.

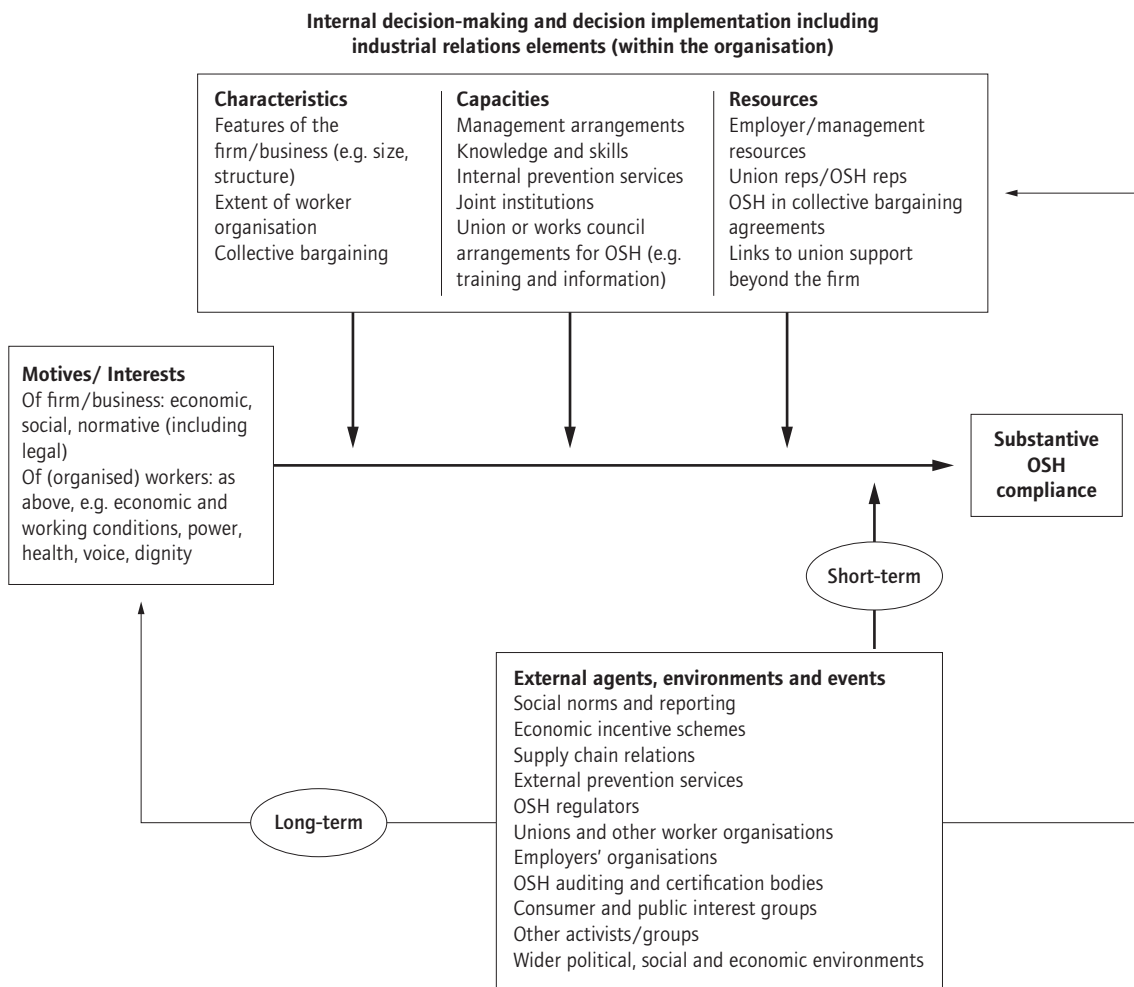
Current scholarship within regulatory studies takes a broad view of the actors in the regulatory process, the tools of regulation, and the disciplines through which regulatory influence is examined. The review drew on this literature to understand processes involved in securing substantive OSH compliance, to undertake a critical comparative evaluation of evidence of their effectiveness, and to identify gaps in this knowledge. In particular, as its analytical framework, the review drew upon and adapted the ‘Holistic Compliance Model’ (Parker and Nielsen 2011; 2017; Nielsen and Parker 2012) to explore the internal and external factors influencing substantive OSH compliance in firms, and the interactions among these factors. This article has adapted this approach to include a focus on the areas of the original EU–OSHA review as well as the interests and influences of organised labour.

In the ‘Holistic Compliance Model’, internal factors relate to the regulated firm’s interests or motives for compliance, their decision-making characteristics, decision-implementation capacities and resources, and the internal factors that might influence them. The latter include knowledge and skills, resources and processes for complying, an internal prevention service (if there is one), and the literacy and education level of the firm’s managers and workers, among other factors, as well as the shared or autonomous influence of organised workers in the firm.

External factors are external agents, environments and events. In the EU, a key external factor is the OSH legislation in each Member State, which gives effect to the Framework Directive 89/391. Others are the five mechanisms for supporting substantive OSH compliance on which the EU-OSHA review

focused. These were the activities of OSH regulators, external prevention services, economic incentive schemes, the role of supply chains, and the influence of social norms and social reporting, including requirements for corporate social responsibility. The review found evidence in the literature that all five mechanisms can influence firms' motives, decision-making characteristics, and decision-implementation capacities and resources. Other external factors with the potential to influence these elements are employer associations, unions and other worker organisations – that act both independently and through the joint or tripartite structures and processes with which they are associated – and OSH auditing and certification bodies, among other influences in the wider political, economic and social context. Figure 1 presents a schematic illustration of the way we have understood how relations between these elements help to determine substantive OSH compliance.

Figure 1 Parker and Nielsen's Holistic Compliance Model adapted for OSH regulation



A substantial focus of the EU-OSHA review was the effects of social norms and social reporting, economic incentives, prevention services and supply chains on the achievement of substantive OSH compliance. While the principal focus of this article is on the roles of regulatory institutions and strategic approaches to achieving compliance with OSH regulatory standards, one of the key findings of the review was that none of the supports for securing compliance exist in isolation from the others. Our holistic analysis therefore situated these elements in relation to one another, and to the wider contextual determinants that affect all of them, as framed in Figure 1. We also attempted to capture some of the implications for securing substantive OSH compliance found in emergent literature in relation to Covid-19 at work. We suggest that this holistic approach is also relevant to strategic approaches at the EU level for improving OSH practices and outcomes in Member States.



## **3. Some relevant findings from the EU–OSHA review**

### **3.1 The over-riding importance of context and of change**

In the following sub-sections we explore the fit between the content of past EU strategies on OSH and the evidence base represented in the literature we reviewed. There are signs of common ground between them, but subject to the observation that support for securing compliance does not take place in a vacuum, and that its form and extent are highly context-dependent. Context is not uniform across the Member States of the EU – substantial differences exist between the institutional environments in which arrangements for securing compliance on OSH are embedded in Member States, in the structure and operation of their economies, and in their wider political and cultural settings. The ‘varieties of capitalism’ thus represented in Europe are widely acknowledged in the literature<sup>1</sup> and while there are trends of convergence among them, the same literature points out that substantial differences remain. Institutions involved with support for securing compliance with OSH – regulatory inspectorates, prevention services, unions and employers’ organisations, insurance bodies and so on – differ widely in their presence, structure, organisation and influence among the Member States, as do their histories and their positions in the economies and the public services of which many are part. This makes for a complex picture and means that what might seem an appropriate and effective support for OSH compliance in one national setting may not transfer with the same effectiveness to another. While recent EU strategy statements acknowledge such diversity between Member States, they suggest few concrete approaches to addressing its consequences.

Moreover, such differences are not static, but constantly change. Indeed, the EU–OSHA review identifies ‘change’ as the major challenge for better OSH regulation in each EU Member State. The consequences of such rapid change have been addressed in the literature, in relation to structural, organisational changes to work, employment and business practices, the composition and origins of the labour force, the extent of trade union membership, the increased porosity of national borders and cross-border transfer, and the

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1. There is a long-standing literature presenting a comparative analysis of the political economies of EU Member States, including discourse around ‘varieties of capitalism’ (see for example Rhodes, 2005; Thelen 2015); comparative analysis of welfare capitalism (see for example, Esping-Anderson 1996; Ebbinghaus and Manow 2001); as well as on comparative social democracy (Crouch and Streeck 1997).

operation of both businesses and workers. Other embedded features shaping the regulation of OSH include rapid changes in technology, and the new hazards and risks arising from technological and other sources of change. The challenges posed by all this change are noted in the EU strategy documents, and in the substantial literature describing and analysing the institutional and procedural supports for OSH.

The EU strategy documents do not, however, elaborate on the political and economic policy determinants of these changes, nor do the policy measures they suggest take such determinants into account. Such understandings are also seldom developed in OSH research. Like the EU strategies, OSH research concerns itself more with proximate causes of the work-related risks that lead to poor physical or mental health, injuries and fatalities, and finding technical or managerial ways of preventing such outcomes. In contrast, the EU–OSHA review found that a substantial amount of the relevant wider scholarly literature did seek to understand the nature and effects of these political and economic influences. Consequently, while there may be some measure of agreement between the findings of the review and EU strategies for OSH, there is some variance between the approaches currently canvassed in EU strategy documents and those suggested by the EU–OSHA review.

### 3.2 The status of OSH inspection and enforcement

Interest in the English language literature<sup>2</sup> on approaches to inspection/investigation and enforcement has burgeoned in recent decades. In part, this reflects the way in which approaches to regulation developed during this period, and especially a shift from reliance on traditional standards prescribing specific safeguards, to process-, principle- and performance-based standards, and more responsive approaches to inspection and enforcement. However, these changes also occurred in parallel with the growing influence of neo-liberal political and economic policies on the operation of regulatory inspectorates. The literature has described a general pattern of small inspection bodies with little prospect of actually inspecting more than a minority of the workplaces for which they were responsible (Walters *et al.* 2011: 53–54). This long-standing pattern led to regulatory inspectorates institutionalising a widespread philosophy of seeking to achieve ‘enlightenment’ among duty holders in relation to their OSH responsibilities, in which a focus on promoting voluntary compliance, rather than enforcing the law, was the norm (see Johnstone 2004; Carson 1979, 1985). Inspectorates thus sought to achieve compliance through information and advice, with the

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2. It is important to be clear that the authors of the review acknowledge their bias in focusing mainly on the literature available in English. However, they also argue that for a number of good reasons, most of the key scholarly literature addressing issues of regulation and compliance *is in English anyway*. Therefore, while it is possible the review may have missed a few important studies in other European languages, it seems unlikely these omissions would significantly alter the findings overall. Nevertheless, as we conclude later in this article, a key task for future research is further review of grey literature and unpublished government reports in these languages.

remoter possibility of punishment via criminal sanctions in the background (Hutter, 1997; 2001; Cialdini 2013; Cialdini and Goldstein 2004).

Nevertheless, the literature on deterrence and OSH reports ‘moderately strong’ to ‘strong evidence’ that specific deterrence arises from inspections with penalties and reduces work-related injuries (Andersen *et al.* 2019); and some limited evidence that general deterrence reduces fatalities and lost workdays (Tomba *et al.* 2016: 925, 929). Despite these findings, there is little evidence that OSH regulators have ever used a fully-fledged deterrence strategy to enforce OSH regulatory standards (Tombs 2017). The EU policy exhortations referred to previously suggest this is likely to continue to be the case.

Meanwhile, OSH inspectorates have remained small.<sup>3</sup> Indeed, some sources argue that more recently they have become considerably smaller relative to the growth in the extent and variety of the work situations in which they seek compliance (Vosko *et al.* 2020). For the most part, in recent decades there has been significant reduction in state funding of public inspection bodies and the infrastructure of support for their activities (Walters *et al.* 2011; Tombs 2017). Comparative analysis of these changes is difficult, however, because the mandates of OSH regulators in different Member States vary as to whether they address a narrower or broader range of problems – from a sole focus on OSH matters, to a broader focus on labour relations and employment issues. In some circumstances, the latter may be closely intertwined with OSH matters, but this is not necessarily so (Walters 2016). The literature suggests that despite efforts of international bodies such as SLIC, the ILO, and the International Association of Labour Inspectors (IALI) to achieve some degree of harmonisation of labour inspection practice, there remains significant variation in priority setting and resource allocation, programs and interventions, and how inspection and enforcement are conducted in different Member States (EU-OSHA 2021a and the references therein). Table 1 summarises statements of EU institutions relevant to harmonising labour inspection.

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3. The International Labour Organisation’s ‘benchmark’ in industrial market economies is one inspector per 10,000 employers: ILO (2006: 4). Its analysis shows considerable variation in numbers between countries but suggests that overall, in EU Member States inspectorates are becoming smaller. A recent ETUC report comments – ‘According to ILO data since 2010, the number of annual visits by labour inspectors has fallen from 2.2 to 1.7 million, or a 20% fall in just over a decade. This situation coincides with the loss of more than 1,000 labour inspectors in the European Union (...)’ (ETUC 2021).

Table 1 EU institutional strategy statements concerning labour inspection

<p>European Commission, Council and Parliament</p>	<p>Effective compliance promotion, monitoring and enforcement, which involves resources and capacity for inspections, methods for monitoring, advice and information to facilitate compliance (particularly for MSEs), proportionate and dissuasive sanctions, and cooperation between Member States and social partners to update legal requirements (European Commission 2014a and b, 2017; European Council 2015; European Parliament 2015).</p>
<p>EU Committee on Employment and Social Affairs (EUCESA)</p>	<p>Increase in staffing levels and resources, and meeting the ILO target of one inspector for every 10,000 workers (European Parliament 2013: 8, 12).</p> <p>Effective penalties that are dissuasive and proportionate to damage caused by a contravention, and above the profit gained from the contravention (European Parliament 2013: 8, 12).</p>
<p>Senior Labour Inspectors Committee (SLIC)</p>	<p>Uniform implementation and enforcement of OSH legislation by Member States, and adoption of comparable criteria in OSH regulators' policies and practices, including organisation and ethics (SLIC 2017:3).</p> <p>Competent and professional inspectorate (SLIC 2017: 10–15) including planning and monitoring performance against annual plans, work plans and priorities; independence of inspectors with powers, protection and assistance to carry out their duties; guidance for inspectors about approach and action they must take in workplace visits; good internal communications between inspectors, policy makers and legislators, and effective external communication for disseminating OSH messages as well as inspection and enforcement outcomes.</p> <p>Common standards for OSH inspector training covering risks covered by regulation, evaluation of risk assessment, preparation for inspection, investigation of incidents and diseases, inspector duties and rights, communication skills, management of conflict and pressure, and influence of a changing economy and patterns of work on OSH issues and priorities (SLIC undated: 4; SLIC 2017: 14–15).</p> <p>Simplified approaches to risk management; accessible guidance and advice for MSEs; and partnerships between OSH regulators, social partners and other stakeholders to enable better management of risks, compliance and prevention of ill health of workers (SLIC 2017: 14–15).</p> <p>Inspections that are compliance-focused, supportive and targeted to specific risks, as well as professional development for inspectors to properly perform risk-based inspections, particularly for new and emerging risks (SLIC 2017: 5).</p> <p>Penalties that have 'a sufficiently deterrent and dissuasive effect', by making the fine proportionate to the damage from the contravention and ensuring that the fine is greater than the profit from the contravention (SLIC 2017: 14).</p> <p>Uniform approach to evaluation (by SLIC) of Member States' inspection systems (SLIC 2017: 8).</p>

### 3.3 Responsive, strategic and risk-based approaches

Most regulatory scholars agree that deterrence is best attempted as a key component in a suite of measures flexible enough to address the multiple drivers and contexts of compliance. This is reflected in the various normative models of inspection and/or enforcement proposed since the late 1980s, most notably in *responsive regulation* (Ayres and Braithwaite 1992). In particular, ‘*responsive enforcement*’ argues for a judicious mix of advice and persuasion, and of deterrence (Braithwaite 2011, 2016), in what has come to be known as the ‘*enforcement pyramid*’ with its hierarchy of increasingly tougher measures (Ayres and Braithwaite 1992; Braithwaite 2011; Black 2001, 2008). Key principles in responsive enforcement are that the regulator’s choice of enforcement measure is largely determined by the firm’s level of co-operation and its ability to self-regulate; and that the more levels there are in the hierarchy of sanctions, and the larger and more severe the sanction at the top of the pyramid, the more likely it is that regulated firms will participate in voluntary compliance activities at the bottom of the pyramid (Ayres and Braithwaite 1992: 40-47). The theory of *smart regulation* significantly advanced responsive regulation by developing a three-sided pyramid that included hierarchies of sanctions for industry self-regulation and for non-state actors, and a broad mix of regulatory techniques (Grabosky 2012; Gunningham and Sinclair 2017; Braithwaite 2017). These can be coordinated and escalated using different but complementary measures (Blanc and Faure 2018: 79).

There is a developing European literature in ‘shared enforcement’ when an EU agency shares its enforcement powers, through formal legal structural and operating arrangements, with the corresponding regulatory agencies within the Member States (Cacciatore and Eliantonio 2019: 523, 525); as well as ‘networked enforcement’, which is an informal, usually ‘non-hierarchical’ and non-sequential form of co-ordinated public enforcement activities (van Boetzelaar and Princen 2012). However, the most significant developments in the enforcement of labour standards generally have emerged from North America. The principles of strategic enforcement (Weil 2010, 2018; and Vosko *et al.* 2020) were developed to improve sustained compliance with labour standards in ‘fissured’ work arrangements (supply chains, franchising etc.). The strategy focuses inspection and enforcement on the business entities that control arrangements and work conditions in those structures, and uses a mix of regulatory measures – with deterrence front and centre of the strategy. Co-enforcement (Fine 2017; Amengual and Fine 2017) seeks to enable worker organisations to contribute their unique resources (workers’ knowledge of their working conditions) in order to make ‘unsubstitutable’ contributions to the inspectorate’s investigation and enforcement activities.

There are some indications in the EU strategy statements for OSH that the multiple and flexible measures in responsive enforcement are acknowledged

and anticipated by Member States,<sup>4</sup> although this has been restricted to addressing challenges presented by SMEs as well as the emphasis on using multiple approaches involving advice, persuasion, education and deterrence (as already discussed). Most recently, responsive enforcement is arguably also embraced by the references to the need to take account of new forms of work, contracting and sub-contracting in European Commission documents promoting a new strategic framework (see for example European Commission 2020). However, there are few specific details concerning how this is to be done. The EU–OSHA review suggests that the next challenge for EU policy makers will be to encourage Member States to adapt the hierarchy of escalating sanctions identified by responsive enforcement and the broad principles of strategic and co-enforcement, to address situations found within their own national contexts and circumstances. We develop this point later in this article.

A second important thread in the inspection and enforcement literature concerns the focus of regulatory attention and actions. Here, the principles of ‘*risk-based regulation*’ (Black 2010; Fooks *et al.* 2007: 37–41), and *targeting* the actions of regulatory inspectorates are prominent in the literature. Risk-based approaches have four central elements (Baldwin *et al.* 2012: 281–283; Black 2010; Hampton 2005: ch 3). First, the regulator identifies its objectives and the risks firms may pose to achieving those objectives; and second, it assesses and scores those risks, either through previous performance of a firm or industry, or by examining the intrinsic characteristics of the type of activity and other factors (Blanc and Faure 2018: 80; Black 2010; and see Peace 2017). Third, the regulator then uses risk assessment scores to allocate resources and to target which firms to inspect; and fourth, the regulator might also use risk assessment scores to determine the type of enforcement action to take with each firm.

Proponents of risk-based regulation argue that it reduces costs for the state and burdens for firms, and achieves better public benefits by focusing on improving compliance (Blanc 2012), rather than on simply finding violations (Blanc 2018: 123–124). Such approaches have become embedded in government inspection policies in many countries and sectors, and especially where neo-liberal economic and political orthodoxies prevail. It therefore comes as no surprise to see the language of risk-based approaches also reflected in recent EU strategy documents for OSH.

Critics, however, argue that risk-based regulation and targeting create an illusion of objectivity, when in practice targeting might be quite arbitrary or based on underlying political choice (Blanc and Faure 2018: 100–101). Also, risks may change over time, or the performance of excluded firms or sectors may deteriorate. Therefore, ideally, targets and performance require continuous review. Critics suggest that this seldom happens in practice and, moreover, justifying reduced (or even lack of) attention to certain risks,

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4. See also ILO 2017.



industries or firms is a complex process that may be subject to political influence (Mascini 2016: 529). The literature also suggests that where there is some form of risk-based targeting, this practice should always be combined with random inspections (Hampton 2005: 33; Mascini 2016: 529).

Responsive and risk-based regulation have also been criticized as strategies used in ‘regulatory new governance’ (Vosko *et al.* 2016), and as attempts to find a ‘third way’ between neo-liberal market regulation, and traditional command and control regulation. Such an approach, it is argued, envisages a smaller role for state regulation and the threat of punishment, and greater use of persuasion, negotiation, self-regulation, information-sharing on industry best practice, and monitoring and enforcement by non-state actors. However, too heavy a reliance on non-adversarial enforcement approaches (or ‘soft law’ mechanisms) fails to acknowledge the unequal power relations inherent in work relationships (Vosko *et al.* 2016: 374), which are further exacerbated by declining levels of union membership and reduced union freedoms. This may undermine the development of effective mechanisms for worker voice, and may redefine and weaken accountability (Vosko *et al.* 2016: 381). Furthermore, inadequate resort to deterrence strategies will inadvertently provide incentives for non-compliance, especially in sectors where firms experience heavy competition for their goods and/or services (Vosko *et al.* 2020: 28–29; Davidov 2010; Tucker 2013). Tombs and Whyte (2013: 109) further contend that ‘the complex and often convoluted logic of risk-based regulation provides [regulators with] a rationale for a shift toward more consensus or compliance-based strategies, which appeal to the cooperation and good will of business’.

A recent indication of the dangers of (mis)use of risk-based regulation to determine enforcement actions can be seen in the response of the UK OSH regulator to securing compliance from employers in the face of the Covid-19 pandemic.<sup>5</sup> The Health and Safety Executive (HSE) uses an administrative model to determine regulatory responses to different levels of workplace risks known as the Enforcement Management Model (EMM). In keeping with risk-based regulation, the EMM requires inspectors to identify risks according to a scale which also suggests the level of enforcement action considered appropriate. During the first year of the Covid-19 pandemic, workplace measures to manage Covid-19 transmission were recommended on the basis of the HSE’s politically determined classification that this was a ‘significant

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5. Although no longer a Member State, the UK experience remains instructive. The use of risk-based approaches to regulation has been well-established in inspection and enforcement policies over recent decades. To fully understand the approach of the HSE in relation to Covid-19, it is necessary to set it within the wider political context – which is also responsible for the massive reduction in its resources in recent times (by over one third), the deregulatory policies of ‘Better Regulation’, the Enforcement Concordat of the Better Regulation Executive and a host of government demands for more business friendly approaches to regulation, alongside an overtly political attempt to portray health and safety regulation as both burdensome and trivial and thereby influence public opinion concerning its necessity (see Almond and Esbester 2019; Walters 2021).

risk’ requiring a mid-range enforcement response, rather than a ‘serious risk’ requiring a prohibition notice or even prosecution. As a result, despite widespread evidence of the workplace as a source of transmission, illness and death, an analysis by the respected *Observer* newspaper in January 2021 showed that:

‘(...) no enforcement notices have been served on companies by Health and Safety Executive (HSE) inspectors for Covid safety breaches since the country went into the latest lockdown (...) Overall, just 0.1% of the nearly 97,000 Covid safety cases dealt with by the agency during the pandemic (...) resulted in an improvement or prohibition safety notice, with not a single company prosecuted for Covid-related breaches of safety laws.’ (Wall 2021).

This example shows how bureaucratic procedures developed by new public sector management strategies, under coercive pressure from a Government committed to a particular political orthodoxy, have caused risk-based regulation to be used in a way widely seen as a dereliction of duty on the part of the regulator. Rather than protecting workers, ‘What HSE delivered was a classification more in tune with the government’s desire to keep Britain working’ (O’Neill 2021). These criticisms indicate that caution is warranted before risk-based regulation is embraced as a policy panacea. They suggest that advocating the wholesale adoption of risk-based regulation without proper appreciation of context, as has been the case in recent EU strategy statements, may lead to such unfortunate outcomes.

### **3.4 OSH inspection and enforcement in practice**

Table 1 shows that a number of EU documents focus on the policy and practice of OSH regulators in EU Member States. They generally promote the competence, professionalism and good governance of OSH/labour regulators. However, in contrast to the burgeoning theoretical literature on innovative strategies to secure compliance, the literature on the *practice* of securing compliance in Europe reveals comparatively few empirical accounts, and little innovation. From the evidence gathered in the EU-OSHA review, it is clear that risk-based regulation is applied by some OSH regulators to target resources for investigations and responses to complaints, and to some extent in choosing what inspection action to take. Rarely does it appear to play a role in choosing between inspection and other types of interventions (as proposed in smart inspection, Blanc 2018; Blanc and Faure 2018). Concerns about the adequacy of data and information for risk-based decision-making are acknowledged as well as the potential to overlook new and emerging risks, and vulnerable workers. Some OSH regulators are exploring the use of machine learning to assist in targeting inspections. Generally, however, the review revealed a substantial gap between what is theorised in the literature, and what is reported and analysed of practice among regulators in the Member States (EU-OSHA 2021a).



The review further showed that although OSH inspectors have broadly consistent powers across EU Member States, there are differences in the ways in which fines and non-pecuniary sanctions for non-compliance are imposed, and in the conduct of inspections (EU-OSHA 2021b: 123–127). For example, there are differences in the type, mix and focus of inspections and investigations, and whether they are unannounced. There are further differences in inspectors' style, which may be more facilitative, accommodative or coercive; and in whether there is follow-up inspection or some other means for checking response to notices or fines issued. Other differences relate to public display of the outcomes of inspection and enforcement, and firms' OSH management. A further key finding is that OSH regulators and the courts in EU Member States have a limited set of administrative and criminal sanctions to employ, which is an additional constraint on their ability to respond to differences in a firm's capacities and motives. Due to the separation in some national systems of the agencies implementing compliance promotion, monitoring and enforcement functions, some countries may have potentially greater challenges than others in coordinating more innovative regulatory contributions to securing compliance. This would be the case particularly if they were to contemplate a nuanced strategy of responsive regulation requiring coordinated and sequential use of compliance promotion mechanisms and a hierarchy of different types of sanctions — as recommended by EU-OSHA research on OSH in micro and small firms (EU-OSHA 2018). There would seem to be a case for some leadership from the EU level on these matters — yet there is little sign of this in OSH strategic frameworks to date.

### **3.5 Limited engagement with workers' organisations**

Despite limitations in current regulatory approaches and practice, the EU-OSHA review concludes that innovative ways of securing compliance can positively address some of the structural and control challenges of current work contexts. Regulatory inspectorates have a major role to play in coordinating such innovation, but they are not the only actors. Involvement of social partner organisations (employer and union organisations) is encouraged in the EU strategic framework and SLIC's developmental principles, and in policy approaches of OSH regulators in EU Member States. However, the review found that most examples of social partner involvement were routine; for example, their role in disseminating information. They seldom involved OSH regulators, non-state actors and employers strategically in preventive interventions, as discussed above for the three-sided hierarchy envisaged by smart regulation (Gunningham and Sinclair 2017); or tailored interventions addressing the underlying determinants of non-compliance, and drawing on the non-substitutable contributions of worker organisations or exemplary employers, as envisaged in the literature on strategic enforcement and cooperative enforcement (Weil 2018; Fine 2017). Of course, one reason for the limited involvement of trade unions is their diminishing presence more generally in Europe, driven in part by their shrinking membership, and in part by hostility to their presence in the majority of Member States. But co-enforcement envisages that other kinds of worker organisations — migrant

workers centres, young workers centres, workers' defence centres, legal centres for workers — can also contribute to inspection and enforcement processes (Amengual and Fine 2017), and there is scope to explore this in the European context. Again, these are issues on which EU strategy statements for OSH are silent and in which the impression is conveyed of a level playing field in the power relations involved — an impression that seriously misrepresents reality.

## 4. Further insights from the EU-OSHA review

Despite these manifold challenges, the EU-OSHA review found many examples of good practice, reported especially in the grey literature, but also in research papers. They indicate a potential for co-ordinating influences from a variety of sources and levels that could be engaged in supporting substantive OSH compliance across the spectrum of work activities in the EU. This would further suggest possibilities for a greater leadership and co-ordinating role for innovative inspectorates.

The review shows such influences include those embraced by the internal and external drivers of substantive OSH compliance in firms identified in the ‘Holistic Compliance Model’ (Parker and Nielsen 2011), and the synergies among them. This includes, for example: using social norms to amplify support for compliance from ‘hard-to-reach’ firms and so called ‘reactors’ and ‘avoiders’, including micro firms (see also EU-OSHA 2017; 2018); economic incentivisation (see EU-OSHA 2010; 2017 for appraisals and examples); collective bargaining influences, as with the positive role of worker representation in improving OSH performance and outcomes (Walters and Nichols 2007); peer group pressures; and so on. Constellations of factors shaping compliance, such as the motives of business and of interest groups, and the ethical values of corporate directors may be also involved; as may the influence of custodians of professional knowledge of good OSH practices, as found among prevention services and OSH practitioners. There are many examples in the literature of how these various actors, and the intervention processes on OSH in which they engage, can contribute to substantive compliance (EU-OSHA 2021a).

In practice, however, most such interventions have not been conducted in a co-ordinated or systematic way. Rather, they have been ad hoc responses to address specific situations. Yet their success points to promising ways in which coordinated actions might achieve more sustainable and transferable outcomes. For example, interest groups representing workers, consumers, environmentalists and the like, have worked together to take concerted actions (including reporting activities) to persuade controllers of global supply chains of the business benefits of requiring OSH arrangements and improving working conditions for all workers throughout their chains (Locke 2013; Walters and James 2020). These actions are often conducted within regulatory frameworks, or seek to transfer regulatory standards and/or frameworks to influence OSH in supply chains. They may involve the assistance of regulators and their agencies, and also offer opportunities to

strengthen the role of other regulatory actors in better promotion, inspection and enforcement of OSH standards at global, EU and national levels. An important example in the EU context is orchestration of regulatory actors and influences to improve OSH practice in MSEs (EU-OSHA 2018; Hasle *et al.* 2017). Such initiatives are further examples of what needs to be considered in policy development at EU level, and what Member States might examine at national or sector level. However there have been only limited signs of this in past EU strategies.

Other examples in the literature show how OSH regulators have been able to operate at sector or site level (as in some large building projects), to ensure that corporate clients and principal contractors co-operate to support OSH in their contractor chains (Deakin and Koukiadaki 2009). The use of certification standards in these mixes offers further opportunities for systemic improvements (Zwetsloot *et al.* 2011), provided that substantive compliance, rather than ‘paper work’, is the focus.

The literature suggests that such leverage for better OSH often operates more effectively in conjunction with innovative regulatory approaches, in a regulatory mix that is enhanced by a framework of legal duties imposed on a broader range of parties than just employer and employees. This ensures that responsibility for the protection of workers in fragmented/fractured work scenarios rests with the actors who have the power to control and benefit from them. A second significant element to emerge in regulating fragmented/fractured work is leadership and co-ordination. Evidence suggests that neither public regulation nor the market alone can ensure the compliance of the business actors involved in these scenarios. The most successful schemes have been driven by a range of key actors, often external to the businesses and supply chains in question. Inspired leadership and co-ordination play a significant role in the success of such initiatives. Again, strategic approaches at EU level need to reflect these findings.

The role of prevention services may also be relevant here. These institutions have a prominent position among the requirements of the Framework Directive 89/391, but evidence suggests that in practice their presence and their capacities to offer support for prevention are quite limited (see for example Rantanen *et al.* 2017; ETUI, 2014). This is at least in part a consequence of changes in the structure and organisation of business and reduction in public funding, which mean that prevention services are increasingly required to take responsibility for their market success. There are several consequences of this for OSH strategies in the EU. Most importantly, a better structured market mechanism is needed to ensure that prevention services are sustainable and serve a wide range of firms. In countries with strong social insurance systems, like Germany, prevention services have weathered marketisation, and maintained quality and diversity (Fischer and Ulmer 2017; DGUV 2016), but they have been less successful elsewhere (Plomp 2008; Frick *et al.* 2005). A further concern is the evidence of poorly qualified or unqualified consultants offering inadequate services, especially to owner/managers in MSEs. Other studies suggest that the costs of prevention services

mean that firms (again, especially smaller firms) use them only minimally and not always for prevention (ETUI 2014).

Policy makers at both EU and national levels might benefit from a better understanding of the factors that have enabled prevention services to survive and to direct future strategies towards ensuring their continued support. Different models of support may be required: for example, prevention services operated by powerful buyers at the apexes of supply chains to support OSH needs at various levels in the same supply chains. Prevention services' role in the economic incentivisation of substantive OSH compliance, as seen in some activities undertaken by the Berufsgenossenschaften (BGs) in Germany (Fischer and Ulmer 2017), may also have potential for transfer. Critically, in many EU Member States an increasing proportion of the workforce has no access to prevention services, which is not so different from the experience in these sectors of poor surveillance by regulatory agencies. The EU-OSHA review suggests that strategic support for innovation in prevention services may be beneficial in co-ordinated approaches to achieve substantive compliance in hard-to-reach scenarios.

## Conclusions

There are several key messages for future policy that stand out in the EU-OSHA review of the literature on securing substantive compliance with OSH regulatory standards. On the positive side, the review demonstrates an awareness in the literature, and also among some regulators and social and economic actors, that more innovative, cross-cutting and collaborative strategies to support securing compliance are necessary to address the challenges of current work patterns in Europe. The review indicates that the European Commission is right to be concerned with addressing the OSH consequences of changing work structures, organisation and contexts in the Member States.

The review further highlights evidence that innovative approaches to inspection and enforcement in a coordinated (or orchestrated) regulatory mix, which stimulates voluntary compliance and enforces compliance where necessary, can be effective ways for regulators to address current challenges. The review has pointed to novel approaches to promoting and enforcing compliance in EU countries and elsewhere. These include combining public regulation and market-based regulatory pressures in constructive ways, to confront challenges resulting from shifts in the locus of responsibility for risk creation and control. Examples are strategic alliances between private and public actors, using social norms and social reporting as means of incentivising compliance; enlisting a range of worker and advocacy organisations, as well as exemplary firms, to appeal to the business interests of duty holders, and take advantage of intermediaries as boundary-spanning agents and/or reinforcers of regulatory messages; and using other techniques to improve engagement with hard-to-reach duty holders and their workers.

These shifts in regulatory strategies require interventions informed by comprehensive data, tailored to address systemic determinants of non-compliance, and employing a comprehensive set of supports and sanctions in securing and sustaining substantive OSH compliance. They also call for careful consideration of the lessons of the Covid-19 pandemic for the future research and strategies of OSH regulators. But there are few, if any, signs of this level of detail evident in recent EU policy statements and strategic frameworks. The studies we were able to find in EU countries reinforce the findings of systematic reviews that regulatory inspection and enforcement can have a positive impact on OSH compliance and outcomes, but they shed little light on the effect of fundamental differences in approaches to achieving this in the Member States. The message here for policy is that such insights are

needed for OSH regulatory interventions in firms generally, and in particular for neglected firms (for example, micro-enterprises), for neglected workers (for example, the precarious and vulnerable) and for specific risks.

The available literature also points to considerable variation in policy and practice between EU Member States, substantially attributable to differences in social, economic and political systems. Further key issues include the limited empirical evidence of what works in practice, the limited range of measures and sanctions that OSH regulators and the courts can employ to secure compliance in the Member States, the limited take-up of innovative inspection and enforcement approaches across EU Member States, and the limited role of organised labour and bi- or tripartite institutional structures in effecting voice for the millions of workers affected.

The review also suggests that innovative approaches are unlikely to result in positive results if adopted by regulators attempting to do more with diminishing resources. Recent EU strategy statements are right to raise concerns about the resourcing of the regulatory apparatus in Member States, but provide only weak support for bringing about change in this respect. As we have argued, many of the underlying political and economic determinants of present-day inequalities in the experience of work-related risks are ignored in the strategy documents. Inconsistency remains in supporting the preventive aims of regulators, at the same time as wider governance continues to reduce their resourcing and advocates business freedoms in EU Member States. There is further discrepancy between the possibilities for influencing large organisations with prominent public profiles, and the many smaller and informal scenarios in which work takes place in the EU. We recognise that the Commission's Directorate-General for Employment, Social Affairs and Inclusion (DG EMPL) is likely to find it difficult to reconcile its responsibilities for providing leadership on social protection and those for promoting market-driven economic policies. But turning a blind eye to the political and economic determinants of, and inequities in, OSH outcomes is unlikely to result in effective action at the level of Member States or in the economic sectors within them.

Overall, therefore, the EU-OSHA review indicates that triggering co-operative updating of national OSH strategies is a necessary element of EU level leadership. However, the same evidence also demonstrates that there is a long way to go before such leadership translates into effective OSH outcomes for the millions of workers in the EU who bear an unequal burden in the experience of risk. A large proportion of these workers remain remote from regulatory scrutiny, from representation by organised labour, and from the support of prevention services. They often work for businesses that are not members of trade or employers' organisations, and their conditions of work, production and employment are controlled by undertakings further up the supply chains that their labour services, and beyond regulatory scrutiny.

It is to address such scenarios that many of the innovations in regulatory practice discussed in the literature have been developed. These developments are only likely to occur if they are supported by a much stronger steer from EU policy. At the time of writing, it remains unclear whether the new Strategic Framework 2021-27 will take up this challenge, but the portents suggested by the Commission's consultation exercise earlier this year are not encouraging. They focused on the consequences of change and identified the important role of regulatory inspection. They promised evidence-based policies and further encouragement to Member States to develop their own national strategies to address the challenges of new work scenarios, and to learn from the experience of the recent pandemic. But like the previous strategies, they gave little indication of any fundamental effort or intent to address underlying causes of inequality in the experience of work-related harm. We encourage the Commission to consider strategies that the EU–OSHA review demonstrates are necessary to improve the experience of safety and health at work in the EU.



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