Enforcing Health and Safety Regulation in Germany and England & Wales
An economic comparative approach
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Abstract

Regulation and enforcement of Occupational Health and Safety (OHS) has been a subject-matter of a vivid academic debate which to a great extend focused on compliance versus deterrence-based techniques to ensure compliance. Although meanwhile there seems to be a consensus that both strategies are necessary and desirable, the emphasis as to the appropriate role of advice versus sanctions in enforcement differs among regulators, sectors and countries. In view of Better Regulation initiatives across Europe, the balance is continuously shifting towards providing more advice and guidance to businesses and inspection resources are increasingly being rebalanced towards a more proactive and targeted approach. At the same time, recent developments seem to put an increased emphasis on more effective sanctions for serious flouting of the law. In England and Wales, for example, a new sanctioning regime is being introduced which makes civil penalties for regulatory breaches more readily available for regulators as an alternative for criminal prosecution. Introduction of new and (calls for) strengthening of the existing sanctions ranging from negative publicity, directors’ disqualification or enforceable undertakings is highly topical as well. This paper scrutinizes and compares the approaches adopted in health and safety enforcement in England and Wales and in Germany from a ‘law and economics’ perspective. It identifies main tendencies in health and safety enforcement and addresses the role of proactive and reactive inspection, post-detection discretion and informal enforcement, and sanctions for non-compliance. In search for cost-effective techniques to ensure compliance, the paper analyses the full range of enforcement techniques employed by the enforcement authorities and sheds light on their potential to induce compliance with health and safety provisions.

Keywords: law and economics, regulatory enforcement, inspection, sanctions, health and safety
1. Introduction

Regulation and enforcement of workplace health and safety has been a topic of a heated debate which to a great extent focused on co-operation versus deterrence-based techniques to ensure compliance. Whereas the first set of approaches focused on promoting willingness to comply by means of informal, cooperative techniques such as advice and persuasion, the latter ones highlighted the role which (criminal) sanctions can play in achieving compliance. The debate has numerous times been labeled ‘deterrence versus compliance’ or ‘punish or persuade’. Moreover, the views as to appropriate enforcement options have been closely related to the views held about the regulated community and its motivations to comply.

The debate between scholars of ‘compliance’ versus ‘deterrence’ meanwhile has become more balanced, as it is acknowledged that both persuasion and sanctions are desirable and necessary in enforcement - an idea successfully captured in the idea of responsive regulation and its core element the ‘enforcement pyramid’. Yet, the emphasis as to the desirable role of, for example, sanctions and particularly criminal law in health and safety enforcement differs. In other words, how high should be the ‘heights’ of the pyramid and how often should the regulators resort to them?

Tendencies towards both ‘deterrence’ and ‘compliance’ can be well discerned in the current regulatory debate both in Germany and Great Britain. For example, it is broadly acknowledged that lack of knowledge about regulatory requirements is a frequent source of noncompliance, especially in the SME sector. Hence, in view of the plethora of Better

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6 See, for example, the work of Tombs and Whyte who vehemently argue for strong sanctions and more reliance on criminal law on health and safety enforcement, S. Tombs & D. Whyte, Safety Crimes, Portland: Willan Publishing 2007.; and other publications by Tombs.

7 To avoid confusion concerning the terminology used, it should be noted that this paper focuses on health and safety enforcement in England and Wales which share the same enforcement arrangements, whereas they are different in Scotland. Yet, when the overall health and safety system of regulatory policy in general is addressed, reference is made to Great Britain.

8 See, for example, the NAO briefing Paper for the regulatory Reform Committee. How BERR and HSE are seeking to understand businesses’ interpretation of legislation, June 2009 and studies therein cited. See also a research carried out by the Food Standards Agency: The Evaluation of Effective Enforcement
Regulation initiatives, an increasing emphasis is put on making the regulated community understand their regulatory obligations by providing more advice and guidance. At the same time, strengthening sanctions for serious non-compliance is high on the regulators’ agendas as well. This is true for Great Britain where recent years have seen an increased recognition of the gravity of and higher fines for health and safety offences. Moreover, the introduction of a system allowing regulatory agencies to impose civil penalties without resorting to criminal courts is highly topical as well.

This paper analyses these and other issues from a law and economics perspective. In analyzing compliance, law and economics scholars traditionally focused on the role of ‘external’ factors in determining compliance behaviour, notably the threat of legal punishment. The enforcement debate has been centered around the notion of ‘deterrence’ which draws the attention to the probability and severity of punishment as crucial motivators of compliance. Accordingly, it has been argued that regulatory enforcement can induce compliance with legal rules by, inter alia, increasing the levels of inspection, engaging in more prosecutions or imposing more and higher penalties. Clearly, doing so will imply high costs for the regulators as, for example, engaging in comprehensive inspection or lengthy prosecutions will put a substantial strain on the regulators’ resources. Moreover, achieving perfect compliance will be neither possible nor desirable as the costs of achieving it would inevitably outweigh its benefits. The goal hence becomes cost-effective enforcement which envisages achieving a high level of compliance at the lowest administrative cost. The criterion of cost-effectiveness gains even more importance against the background of the ever shrinking resources of regulators in and beyond Europe. It is from the cost-effectiveness perspective that the relevant enforcement regimes in England and Wales and in Germany are scrutinized in this paper.

Due to the focus on the threat of punishment, the economic approach has numerous times been viewed as advocating a pure ‘deterrence’ model relying on detecting and punishing as many offenders as possible and leaving little scope for informal enforcement. Yet, the reality is more complex, as it will be addressed below.

First, to put regulatory enforcement in context, the paper outlines the health and safety organization and the enforcement framework in Germany and in Great Britain. Second, it scrutinizes the inspection approaches employed in both countries including reactive and proactive inspection. After doing so, it discusses the role of post-detection discretion and informal enforcement including advice and guidance. Next, some measures of formal


9 In this paper, the word ‘civil’ is being used to imply non-criminal penalties as English law makes a distinction between criminal and civil law, whereas in some legal systems and academic contributions the word ‘administrative penalties’ is more frequently encountered.


11 The deterrence hypothesis goes back to Becker, G.S. Becker, ‘Crime and Punishment: An Economic Approach’, Journal of Political Economy (76) 1968, p. 169-217. The ‘deterrence model’ has been criticized heavily in literature due to the underlying rationality assumption - a debate which has been elaborately dealt with elsewhere and will not be covered here.

enforcement including sanctions are discussed, ranging from improvement and prohibition notices, administrative financial penalties and criminal prosecution. The last section evaluates and concludes. The study draws on the analysis of the legal framework, numerous policy documents and the existing evaluation reports, the available enforcement statistics and a number of interviews conducted in with health and safety inspectors.  

2. The Enforcement Framework

The overall structure of the health and safety provisions (which, moreover, to a great extent stem from EC law) in Great Britain and in Germany is, broadly speaking, similar. The first tier of health and safety provisions is formed by an overarching statute of overall application\(^{14}\) complemented by a web of regulations or ordinances covering specific aspects of health and safety which are issued by the relevant ministries. These regulations are concretized by numerous advice and guidance materials such as the Approved Codes of Practice (ACoPs) in GB. In Germany, an additional layer of health and safety provisions is formed by the sector-specific regulations and technical guidance documents issued by the so-called statutory accident insurers (BGs) which play a central role in German OHS system, as it will be addressed below. Among the central and the most commonly enforced health and safety provisions are, for example, the requirement to conduct risk assessment, the duty to provide safe working equipment (machinery), to prevent falling from height (e.g. scaffolding, edge protection etc), limitations of handling of loads, provisions relating to explosives or dangerous substances and the general duty of employer to ensure safe work environment.

Yet, the organization of enforcement of these provisions differs fundamentally. In Great Britain, it is the national regulator, the Health and Safety Executive (HSE), which is the central authority responsible for the enforcement of the relevant health and safety provisions. The HSE, however, shares the enforcement powers with over 400 local authorities (LAs): whereas the HSE is responsible for health and safety enforcement in construction, agriculture, general manufacturing, engineering, food and drink, quarries, entertainment, schools, hospitals, local and central government and domestic gas safety, the local authorities are mainly responsible for enforcement in lower risk premises such as retail and wholesale distribution, warehousing, hotel and catering premises, offices, leisure and finance sector. To ensure consistency in enforcement, the HSE and the LAs cooperate through a Liaison Committee (HELA).

In Germany, the way health and safety system is organized is first and foremost dictated by the conditions of federalism and dualism. This means that both legislative and enforcement powers in health and safety are not only shared between the Federation and

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13 Within the framework of this research, in addition with many informal discussions with public officials, 12 formal interviews with 16 inspectors in Germany and 12 interviews with 12 inspectors in England and Wales have been conducted. The author is aware of the limitations of representativeness of these interviews, yet often uses them for illustrative purposes.

the Länder (state actors), but also between the state actors and the statutory insurance bodies (Berufsgenossenschaften or BGs). In Germany, all employees are compulsorily insured against occupational accidents with one of the BGs financed by employers’ contributions. The statutory insurers are organized along the lines of different sectors and are empowered to issue and to enforce the sector-specific accident prevention regulations they issue (so-called autonomous legislation of the accident insurers). In enforcement, this means that whereas the Länder inspectorates enforce state-enacted health and safety legislation, the statutory accident insurers enforce their own sector-specific legislation. There is no central enforcement authority responsible for supervision of enforcement but bodies for co-ordination and guidance exist and have been gaining in importance. Therefore, there remains some potential for overlaps and calls for reducing ‘double inspections’ (Doppelbesichtigungen) have mounted in recent years, especially following the evaluation review of the German OHS enforcement by the Senior Labour Inspectors Committee (SLIC) in 2005. Hence, not surprisingly, the central issues that have been dominating the German OHS debate have been improving the functioning of the dual and federal system and more cooperation and exchange. Recent years have seen many reforms primarily aimed at better co-operation of state authorities and accident insurers in enforcement, many reforms are under way. At the same time, one of the greatest challenges for the HSE has been ensuring broad public support as the agency has been operating in a difficult political climate characterized by extremely negative media coverage. On the one hand, HSE numerous times has been pictured as being over-zealous and overly risk-averse and, on the other, too conciliatory, feeble and too reluctant to prosecute. In is this context in which the HSE’s activities should be seen.

Yet, although the organization of the enforcement structures and the main challenges differ fundamentally in Germany and Great Britain, they share one common concern: the chronic lack of resources and the herewith related quest for more efficiency and cost-effectiveness in enforcement. This has implications for inspection activity, accident investigation, advice and guidance policies and prosecution levels. It is these issues to which the following sections now turn.

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15 The importance and volume of such autonomous legislation has, however, been declining over time as efforts increased to reduce the existing double provisions; a newly introduced law stipulates that autonomous accident prevention regulations may only be issued by BGs if there is no state-enacted legislation in this regard and as long as they are appropriate and necessary, Bundesministerium für Arbeit und Soziales, Übersicht über das Arbeitsrecht/Arbeitsschutzrecht, Bonn: 2009., p. 626 et seq.; § 15 SGB VII.
16 Such as the Länder Committee for OHS and Safety Engineering (Länderausschuss für Arbeitsschutz und Sicherheitstechnik, LASI) etc.
3. Inspection

From a law and economics perspective, labour inspection is a crucial motivator of compliance, yet, comprehensive inspection is getting increasingly problematic given the shrinking numbers of inspection personnel. The HSE currently employs 3 702 staff of which 1 342 are front-line inspectors. In the biggest HSE directorate, the Fields Operations Division (FOD) the total number of inspectors felt from 916 in April 2003 to 680 in December 2007. Germany in 2009 employed 3 101 inspectors, but the number of inspectors varies considerably among the Länder, making it difficult to make direct comparisons. Yet the general tendency is rather straightforward: the total numbers of inspectors and inspections are constantly declining. In Germany, the number of inspections of the state inspectorates (Gewerbeaufsicht) dropped by 41 per cent between 1999 and 2009. In Great Britain, the number of FOD inspections dropped by 44 per cent between 2002 and 2007. Not surprisingly, the average inspection frequency is, broadly speaking, low and is estimated in both countries between once in 10 and once in 20 years, although it varies considerably among sectors. Given budgetary shortages, it may further decline or, at best, stagnate in future.

In both countries, labour inspectorates engage in both reactive and proactive inspection tasks. Reactive inspection generally refers to inspection in response to an accident or a complaint and proactive inspection on the authority’s own initiative, without a third party or occurrence triggering the inspection.

3.1. Reactive inspection and private complaining

In theory, the generally decreasing inspection frequency can be compensated to some extent by better targeting of inspections to the most likely violators. In this regard, law and economics scholars have been clear proponents of encouraging private complaining.

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21 From 530 002 inspections in 1999 to 315 309 inspections in 2009. This includes more than only OHS but also, inter alia, consumer protection, medical OHS and OHS in maritime navigation. The number of employees increased (from 38,4 mio to 40,3 mio) during the same time period, Sicherheit und Gesundheit bei der Arbeit Bericht 2009. A similar tendency applies to the Berufsgenossenschaften, whose inspections felt by 37 per cent in the same time period
22 Note no 19 above, p. 25.
23 See studies referred to in the Third Report, note no 19.
24 The cost-effectiveness approach as it is used in this research focuses on the probability that actual violations are detected. The efficiency approach would require targeting areas where the risks (and hence the benefits of enforcement interventions) are the highest.
of third parties or so-called ‘watchdogs’ who may point regulators to actual violations at a low cost and hence effectively aid public enforcement. Yet, some empirical considerations encountered in this research reveal limitations of these suggestions in the area of OHS.

Investigation of complaints forms a substantial part of inspectors’ activities, yet the actual practice of the inspection authorities casts doubts on the degree to which third parties’ complaints are capable of drawing the regulators’ attention to actual (and serious) violations. Generally, inspectors note that – depending on sectors - workers are relatively reluctant to file a complaint to an enforcement authority. This is true despite the applicable anonymity provisions, requiring the enforcing authorities to secure the identity of the complaining party or not even to reveal that the inspection was triggered by a complaint in the first place. Although inspectors will generally adhere to this requirement (although the former generally will be handled more strictly), the applicable provisions on both countries require the potential complainant (worker) to first address the matter internally with one’s employer and only resort to a labour authority if the matter has not been resolved satisfactorily. In these cases, however, it will not be too difficult for the employer to guess who has filed the complaint, especially in small firms. This casts doubts on the way the applicable anonymity provisions operate in practice. It also shows the limits of inspection which (over)relies on private complaining as it can safely be assumed that only a very small proportion of all actual violations will be brought to the public authorities’ attention by third parties/employees. Moreover, it confirms what sociologists have long time ago called reluctance of citizens to ‘mobilize’ the law and economists, among other things, ‘rational apathy’ and is of value for all scholars concerned with private enforcement of law.

Other factors inhibiting private complaints, such as lack of information or invisibility of certain violations (e.g. asbestos dust) play a role as well. Moreover, even if complaints are filed, they are considered to be of a relatively low quality and inspectors tend to refer to them as ‘low grade intelligence’. This is because they often concern trivial violations, are not within the agency’s powers or originate from competitors. Often much time is lost while referring the complaints to the responsible authorities. That is why the HSE, for example, recently installed a centralized ‘complaints’ team which filters complaints and refers only the most serious of them to inspectors for investigation. By doing so, it ensures better use of inspectors’ time and a more cost-effective use of resources. HSE further provides clear information for the potential complainants, which is, however, lacking in Germany. This is further complicated by the complex institutional thicket of responsible authorities which may operate as a further inhibiting factor with regard to private complaining.

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27 This point was made within the context of class actions for consumer-related damage where the harm done is minor, see H.-B. Schäfer, ‘The Bundling of Similar Interests on Litigation. The Incentives for Class Actions and legal Actions Taken by Associations’, European Journal of Law and Economics (9) 2000, p. 183-213., p. 185.
3.2. Proactive inspection

The above lists some of the inadequacies of reactive inspection based on complaints and highlights the role of proactive policies in ensuring cost-effective enforcement. This confirms studies which already have been calling for more proactive work and does not take by surprise the enforcing authorities in both GB and in Germany which already blend reactive strategies with proactive inspection and increasingly aim at shifting the balance in favour of the latter. For example, the HSE Fields Operations Directorate’s (FOD) current aspiration is to increase the proportion of proactive work to achieve a 30:70 split (reactive:proactive).

Clearly, proactive inspection has to be selective as well and there is rather little scope for random inspection. Targeting high risk areas is indeed a ‘hot topic’ in both countries and one of the main principles to be followed in HSE enforcement, enshrined in the HSE Enforcement Policy Statement. With regard to targeting, two concepts play a major role: risk assessment and inspection rating, in various forms operated in both GB and in Germany. Risk assessment identifies areas, sectors or topics where the risks are the highest and the need for enforcement action the greatest. Inspection rating implies an ex post ‘grading’ the inspected firms after an inspection while taking into account, inter alia, competence and attitude of management, health and safety record, actual compliance etc. These concepts are interrelated as inspection rating often feeds into risk assessment and both are capable of directing inspection resources to areas where they are most needed. Yet, many academics and practitioners stress the high costs of meaningful targeting which requires comprehensive intelligence, especially given the reduced inspection frequency. The HSE, for example, has been criticized for not sufficiently taking into account the compliance history of an individual dutyholder in planning inspections and basing its enforcement decisions on a rather general assessment of hazardous sectors. Yet, it should also be mentioned that, given the low frequency of inspection and the herewith related lack of intelligence, such knowledge relating to the individual dutyholder often does not exist. Once an inspection reveals noncompliance with the existing regulatory provisions, inspectors normally have an array of instruments including both formal and informal measures to resort to and are given relatively broad autonomy to choose – within the limits of their powers – among them. This is to what the next section now turns.

28 Accident investigation is also an element of reactive inspection which is not addressed in this paper.
32 More details on HSE inspection rating as practised by FOD can be found at http://www.hse.gov.uk/foi/internalops/og/ogprocedures/inspection/rating.htm.
4. Post-detection discretion and informal enforcement

At first glance, the economic model of enforcement and the centrality of the deterrence theory do not seem to leave scope for post-detection discretion allowing authorities, inter alia, to refrain from formal enforcement action. The simple deterrence model suggests that the greater the probability and severity of punishment, the greater the incentives to comply. That is why the economic deterrence model has for a long time been (mis)interpreted as advocating indiscriminate prosecution and severe penalties for as many offences as possible, leaving no room for post-detection discretion.\(^{35}\) Yet, also law and economics scholars developed theories related to post-detection discretion and pointed to its various benefits, which first and foremost relate to the high costs of formal enforcement compared to cooperative strategies.\(^{36}\) For example, prosecution is a lengthy and laborious process which requires regulatory agencies to engage in complex investigations, to marshal sufficient evidence to prove ‘beyond reasonable doubt’ that an offence has been committed and hence put a substantial strain on agencies’ resources.\(^{37}\) Administrative responses or informal measures such as advice and persuasion, on the other hand, have been considered as generally cheaper and therefore - where appropriate - preferred for reasons of cost-effectiveness, provided they can effectively induce compliance.\(^{38}\) Given the high costs of formal legal action, Fenn and Veljanovski further argued that forbearing from formal legal action, or ‘selective non-enforcement’, and bargaining to achieve compliance is, under certain circumstances, a rational and cost-effective strategy of regulatory authorities. By being cost-conscious, such a strategy, moreover, cures some of the ‘over-inclusiveness’ or even ‘harshness’ of health and safety provisions and hence mitigates inefficiencies of the law.\(^{39}\) Yet, does the experience of the German inspectorates and their English counterparts shed light on these considerations? Both England and Wales and Germany grant health and safety inspectors relatively broad post-detection discretion. The HSE Enforcement Policy Statement (EPS) explicitly states that enforcing authorities are expected to exercise discretion in deciding whether to investigate an accident or a complaint and what enforcement action is appropriate; the same applies for prosecution decision-making.\(^{40}\) Similarly, the German authorities use discretion in deciding whether to commence administrative proceedings or proceedings


\(^{40}\) Health and Safety Executive, *Enforcement Policy Statement* 2009., paras 9 and 35.
relating to administrative offences. Yet, the scope to make discretionary choices does not extend, as in England and Wales, to criminal prosecution as administrative authorities are obliged to refer the case to the public prosecutor’s office when there is an indication (‘Anhaltspunkte’) that the violation at hand constitutes a criminal offence. The public prosecutor, then, is obliged to investigate the matter and to decide whether or not to take prosecution action. Yet, which criteria play a role in making discretionary choices?

4.1. Structuring discretion: the Enforcement Management Model

In England and Wales, a publicly accessible document called the Enforcement Management Model (EMM) substantially guides and structures discretionary decision-making. It centers all enforcement activity around the notion of ‘risk gap’ and, in line with the principle of proportionality, first and foremost requires all enforcement action to be proportionate to the risks created by specific breaches. The inspectors are also expected to consider the ‘weight’ or ‘authority’ of standards involved (well-known and established versus hardly known and undefined) which, along with the risk gap, will constitute the basis for the preliminary enforcement decision (‘initial enforcement expectation’). Such decision may then be modified on the basis of the public interest considerations and factors specific to the dutyholder such as relevant compliance or accident history, general attitude towards health and safety or the motivation of noncompliance (for example, deliberately seeking economic advantage). In other words, a violator with a hostile attitude or a relevant enforcement history who is considered to cut corners at the expense of safety is likely to face a tougher enforcement action than a benevolent and responsible one.

The EMM requirement to take into account the ‘dutyholder factors’ is particularly interesting in view of theory on regulatory enforcement as it acknowledges the various sources of noncompliance with health and safety provisions (including rational calculation) and neatly corresponds with academic contributions calling for tailoring enforcement responses to the firms’ behaviour and compliance efforts. The EMM herewith incorporates an element of a ‘responsive’ approach to regulation and enforcement developed following the seminal work of Ayres and Braithwaite and

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41 Such as those leading to the issuing of an enforcement notice, § 22, Law on Administrative Proceedings (VerwVerfG); Ordnungswidrigkeitenverfahren, § 47, Administrative Offences Act (Ordnungswidrigkeiten-gesetz, OWiG).
42 § 41(1) OWiG.
43 § 152 and § 160 StPO. The prosecution decisions in Scotland are made by the Procurator Fiscal; the enforcing authorities use discretion in deciding whether to report a case to Procurator Fiscal or not, see Health and Safety Executive, Enforcement Policy Statement 2009., para 38. In this respect, the German system is more similar to the Scottish system as in Germany prosecution decisions are taken by the public prosecutor’s office (Staatsanwaltschaft).
44 Defined as the difference between the actual risk found during an inspection and risk which remains once the legal standards are met by the relevant dutyholder. It can be extreme, substantial, moderate or nominal.
acknowledges that both ‘compliance’ and ‘deterrence’-based instruments are necessary and desirable under specific sets of circumstances. Yet, all enforcement action will first and foremost be proportionate to the seriousness of the breach and the risks it creates, sometimes, despite how ‘nice’ the violator. It herewith enables entering the enforcement pyramid at different levels, without first exhausting the measures from the lower levels.

Figure 1: EMM decision-making process

<table>
<thead>
<tr>
<th>First: risk of serious personal injury? (if so, prohibition notice)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Risk gap analysis</td>
</tr>
<tr>
<td>Authority of standards</td>
</tr>
<tr>
<td><strong>Initial Enforcement Expectation (IEE)</strong></td>
</tr>
<tr>
<td>Dutyholder factors</td>
</tr>
<tr>
<td>Strategic factors</td>
</tr>
<tr>
<td><strong>Enforcement conclusion</strong></td>
</tr>
</tbody>
</table>

In both England and Wales and in Germany inspectors confirm considerable variation in motivations of the regulated community to abide by health and safety rules and, where possible, efforts to be responsive to them. This practice is, however, much more explicit in England and Wales than in Germany as it is formalized in the EMM applying to all health and safety enforcement activity. Generally, businesses which inspectors encounter range from deliberate cost-cutters, the ignorant and the complacent, the indifferent ones to those in economic difficulties who are struggling to ‘keep their heads above water’. Accordingly, whereas some of them (generally well-intended) may be relatively easily induced towards compliance by a ‘soft push’ or a ‘wake-up call’, some others will only comply if exposed to tough enforcement measures. By incorporating the requirement to take into account the ‘dutyholder factors’, the EMM allows a cost-effective differentiation between them. In other words, where the dutyholder generally well-intentioned and can be induced to compliance by means of, for example, advice or persuasion, there is no need (depending on the seriousness of the breach, of course) to take lengthy legal action, even though the applicable provisions provide for it.

In Germany, the enforcement action is determined, to a large extent, by a similar set of factors including proportionality, seriousness of the breach or the attitudes of the dutyholder, although much less formal or explicit. Yet, there is no instrument comparable to the EMM applicable to all enforcement activity which would provide further assistance in the exercise of judgment or guidance on, inter alia, scales of risks, the relevant

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benchmarks and the (possible) respective enforcement responses. This, again, is largely due to the conditions of federalism and dualism with different actors having different enforcement approaches. Yet, even within individual Länder, relevant instructions are often lacking, leading to an impression that every inspector has a system ‘on his own’. Hence, it is not surprising that the SLIC report in 2005 concluded that: ‘there is nothing unusual about the German system in allowing discretion. What is unusual is the apparent absence of criteria or other guidelines under which that discretion is exercised.’\textsuperscript{48} It should also be said, however, that there is a growing body of guidelines issued by the Länder Committee for OHS and Safety Engineering (LASI) which relate to the application of the specific legal provisions and aim at their consistent interpretation and application. Finally, in light of the recent developments aimed at more cooperation in enforcement described above, a body of guidelines applicable for all enforcement activity and guiding discretionary decision-making may emerge in future.

4.2. The regulators’ ‘toolkits’: the enforcement pyramids

In England and Wales, most minor violations result – subject to EMM - in verbal or written advice, guidance, warnings or an inspection form. They are subsumed in this section under the heading of ‘informal enforcement’.\textsuperscript{49} At the higher levels of the English pyramid – which is shown in figure 2 below - follow improvement and prohibition notices. Whereas the former require the relevant dutyholder to remedy identified breaches within a specified time period, the latter ones prohibit engaging in a certain activity pending such remedial action and are only issued where there is a danger for health and safety. A particularity of the English system is that improvement and prohibition notices are made available in public registers and hence imply an element of ‘naming and shaming’.\textsuperscript{50} After improvement and prohibition notices follows the option of prosecution in criminal courts which, again, may have many outcomes including (most frequently) fines, imprisonment, community orders, remedial, disqualification or negative publicity orders or orders to pay the prosecution costs. Finally, license suspension or revocation constitutes another option at the top of the enforcement pyramid, although available only in limited circumstances (where some form of licensing or permissioning is used, applicable in a few areas). At the time of writing, in contrast to many regulatory systems across Europe, HSE inspectors have no power to impose administrative (civil) penalties without resorting to criminal courts.

\textsuperscript{49} They are considered as informal because, although written, they do not possess legal force or include any formal legal action.
\textsuperscript{50} Although HSE officials note that ‘naming and shaming’ considerations were not the primary rationale for the public registers.
In Germany, the options of the enforcement pyramid (shown in figure 3) are slightly different. At the ‘informal’, lower end of the pyramid we find - as in England and Wales - written or verbal advice, guidance and the so-called ‘Revisionsschreiben’ (comparable to inspection form) addressed below. At the intermediate levels of the German pyramid improvement and prohibition notices (Anordnungen) follow, the former backed with a possible threat of a ‘penalty payment’ (‘Zwangsgeld’), payable if a notice is not complied with. Further, inspectors may start administrative proceedings and impose administrative fines (Bußgelder) or, in cases of minor administrative offences, issue an official warning, possibly coupled with a minor penalty (Verwarnung/Verwarnungsgeld). If there are reasons to believe that the offence at hand constitutes a criminal offence, inspectors must refer a case to the public prosecutor (Strafanzeige). As from then, the regulatory authority/inspector is no more ‘in charge’ for the respective case but may act as witness in criminal proceedings. Finally, license suspension of revocation or an operating ban imposed upon individuals constitute an option of last resort, although hardly if ever used by the German authorities.
4.3. Law as ‘last resort’

In fact, the enforcement practice in both England and Wales and in Germany shows that the levels of formal enforcement are relatively low, albeit there are variations in both countries. For example, in 2006/2007, the HSE Fields Operations Division (FOD) carried out 41,496 inspections, issued 7,893 enforcement notices and conducted 570 prosecutions. This suggests a 1:5 ratio of notices to inspections and a 1:73 ratio of prosecutions to inspections. In 2005/06, a year in which the levels of formal enforcement were record low, ca 11.5 per cent of inspections led to an enforcement notice and 0.9 to a prosecution, as the table below shows.\textsuperscript{51} On average, between 2002 and 2007, ca 15.8 per cent of FOD inspections resulted in enforcement notices and 1.3 in prosecutions, as it is shown in table 1.

\textsuperscript{51} Calculation the per cent of inspections which lead to an enforcement notice is not entirely precise as one inspection may lead to several notices, yet it does give some indication of the levels of formal enforcement measures.
Table 1: FOD enforcement measures 2000-2007

<table>
<thead>
<tr>
<th>Year</th>
<th>Inspections</th>
<th>Enforcement notices</th>
<th>Prosecutions (approved)</th>
<th>Per cent of inspections resulting in notices</th>
<th>Per cent of inspections resulting in prosecution</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000/01</td>
<td>66,870</td>
<td>10,610</td>
<td>967</td>
<td>15.9</td>
<td>1.4</td>
</tr>
<tr>
<td>2001/02</td>
<td>65,000</td>
<td>10,580</td>
<td>1,001</td>
<td>16.3</td>
<td>1.5</td>
</tr>
<tr>
<td>2002/03</td>
<td>74,112</td>
<td>12,856</td>
<td>918</td>
<td>17.3</td>
<td>1.2</td>
</tr>
<tr>
<td>2003/04</td>
<td>67,987</td>
<td>10,936</td>
<td>866</td>
<td>16.1</td>
<td>1.3</td>
</tr>
<tr>
<td>2004/05</td>
<td>55,195</td>
<td>8,140</td>
<td>671</td>
<td>14.7</td>
<td>1.2</td>
</tr>
<tr>
<td>2005/06</td>
<td>54,717</td>
<td>6,289</td>
<td>512</td>
<td>11.5</td>
<td>0.9</td>
</tr>
<tr>
<td>2006/07</td>
<td>41,496</td>
<td>7,893</td>
<td>570</td>
<td>19.0</td>
<td>1.4</td>
</tr>
</tbody>
</table>

Source: HSE statistics

A slightly different picture arises while looking at the enforcement data of the German enforcement authorities which show even more infrequent use of formal measures (shown in table 2). In 2009, the German inspectorates (Gewerbeaufsicht) conducted 315 309 inspections in total and found 469 998 ‘deficiencies’ (Beanstandungen) relating to OHS. Following these deficiencies, 11 713 notices were issued, 824 official warnings (Verwarnungen) were given, 1 367 administrative penalties imposed and 255 criminal complaints made, as the table below shows. According to the data shown in the table, between 2000 and 2009, on average, only ca 2 per cent of detected OHS ‘deficiencies’ resulted in an enforcement notice, and even less than one per cent resulted in a warning, administrative penalty or a criminal complaint. Although this shows a widespread reluctance to resort to formal enforcement - This should, however, not be read as suggesting some sort of ‘measure’ of regulatory agencies’ activity or ‘zeal’ in pursuing their legal mandate, the dangers of which have been extensively discussed by Hawkins. Yet, it may be questioned whether there is not too much reluctance to apply formal enforcement measures.

Although this limited ‘evidence’ used above may seem as anecdotal instead of indicative of an established phenomena of prevalence of informal enforcement, other well-known (qualitative) studies based on a much more comprehensive set of data come to the same conclusion. There is no need to elaborately recapitulate their findings: the law is, indeed, ‘last resort’. The explanations encountered in the course of this research are manifold

52 FOD enforcement review hazards magazine, According to HSE statistics and Freedom of Information (FOI) disclosures.
53 These numbers include OHS, consumer protection, industrial medicine (Arbeitsmedizin), social health and safety legislation (sozialer Arbeitsschutz) and health and safety in seafaring.
54 The same tendency applies to the BGs which are even more reluctant to resort to formal measures.
and encompass a broad range of inter-related economic, political, legal, sociological and psychological factors. The scope of this paper does not allow to elaborate extensively on them; the following paragraphs list some of them without, however, aiming to provide an exhaustive list.

### Table 2: Formal enforcement by the German inspectorates

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number of inspections</th>
<th>OHS deficiencies found</th>
<th>Notices</th>
<th>Warnings</th>
<th>Administrative penalties</th>
<th>Criminal complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>521 523</td>
<td>858 233</td>
<td>18 401</td>
<td>1 747</td>
<td>2 301</td>
<td>145</td>
</tr>
<tr>
<td>2001</td>
<td>507 224</td>
<td>808 922</td>
<td>17 848</td>
<td>1 562</td>
<td>1 832</td>
<td>87</td>
</tr>
<tr>
<td>2002</td>
<td>479 565</td>
<td>763 361</td>
<td>15 756</td>
<td>1 402</td>
<td>1 537</td>
<td>104</td>
</tr>
<tr>
<td>2003</td>
<td>464 523</td>
<td>732 420</td>
<td>12 943</td>
<td>1 354</td>
<td>1 292</td>
<td>106</td>
</tr>
<tr>
<td>2004</td>
<td>449 307</td>
<td>709 625</td>
<td>10 610</td>
<td>819</td>
<td>1 114</td>
<td>193</td>
</tr>
<tr>
<td>2005</td>
<td>391 318</td>
<td>642 613</td>
<td>9 182</td>
<td>927</td>
<td>1 164</td>
<td>216</td>
</tr>
<tr>
<td>2006</td>
<td>370 479</td>
<td>571 231</td>
<td>10 343</td>
<td>1 072</td>
<td>1 099</td>
<td>117</td>
</tr>
<tr>
<td>2007</td>
<td>347 240</td>
<td>568 442</td>
<td>10 104</td>
<td>2 041</td>
<td>1 282</td>
<td>146</td>
</tr>
<tr>
<td>2008</td>
<td>332 199</td>
<td>493 719</td>
<td>12 693</td>
<td>1 357</td>
<td>1 219</td>
<td>273</td>
</tr>
<tr>
<td>2009</td>
<td>315 309</td>
<td>469 998</td>
<td>11 713</td>
<td>824</td>
<td>1 367</td>
<td>255</td>
</tr>
</tbody>
</table>

Source: According to the OHS reports published by the Federal Ministry of Labour and Social Affairs\(^57\)

First, the prevalence of cooperative, informal techniques to induce compliance is related to the self-perceptions of the individual inspectors who see their primary task in changing attitudes towards health and safety instead of merely representing a threat. This is true for both English and German inspectorates but even more so for the German statutory insurers, which especially emphasize their role as service-providers. Accordingly, inspectors view advice and guidance as substantial part of their work, although there are clearly variations among individual inspectors with some being more vigorous than others. At the same time, getting the balance right between their advice and supervision talks, between lenience and rigour remains a central challenge for inspectors. A second and related set of issues is the widespread skepticism regarding fines and their capacity to induce long-term compliance. The adequacy of monetary penalties - be they administrative or criminal in nature - to respond to health and safety offences, widely discussed in literature\(^58\) is doubted as well, although most inspectors agree that fines certainly may play some, although minor role as a deterrent. A third set of issues are the organizational factors including organizational culture of the relevant authorities or internal messages communicated to inspectors,\(^59\) such as ‘not to go too hard on the local economy.’ Introduction of targets in parts of the HSE plays an important role in explaining the levels of formal enforcement as well. For example, concerned that the levels of formal enforcement may have become too low in 2005, the HSE introduced an expectation in relation to the numbers of notices and prosecutions inspectors are expected

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\(^{57}\) Available at http://www.baua.de/de/Informationen-fuer-die-Praxis/Statistiken/Suga/Suga.html.


Currently, full-time FOD inspectors are expected to issue 20 notices and conduct 2 prosecutions a year. This, however, creates perverse incentives and may lead to issuing of notices even in situations where compliance can be induced otherwise. It hence hinders cost-effective differentiation among offenders and offences enabled by the EMM.

As mentioned above, law and economics, in explaining the levels of formal enforcement, traditionally focused on the high costs of formal legal action, particularly prosecution. The high administrative costs of enforcement action definitely plays a role and, probably, not a small one (although it does not explain the fluctuations in the ratios of formal enforcement). The threshold to start HSE action is indeed substantial: inspectors have to conduct lengthy investigations, to ascertain whether there is sufficient evidence to obtain a conviction, to assess whether prosecution is in the public interest and - in less complex cases - prosecute themselves before courts. The difficulty on obtaining enough evidence to satisfy the high burden of proof may indeed explain why FOD prosecutions, for example, are almost exclusively the result of accident investigations.

As mentioned above, Fenn and Veljanovski argued that forbearing from formal legal action by regulatory authorities cures some of the ‘over-inclusiveness’ or even ‘harshness’ of health and safety provisions and hence mitigates inefficiencies of the law. Indeed, British health and safety provisions create relatively many health and safety offences prosecutable before criminal courts. Prosecuting all of them all would indeed be not only ineffective but also inefficient as the costs of it would inevitably exceed the benefits. This may constitute what Fenn and Veljanovski have called ‘harshness’ of health and safety provisions. Therefore, an argument may well be made that allowing enforcing authorities in England and Wales broad post-detection discretion which extends to prosecution decision making indeed cures some of the inefficiencies or harshness of health and safety provisions. Within the German context, this argument applies with lesser force as German law distinguishes between ‘lower-ranking’ regulatory offences punishable administratively and is more parsimonious with criminal law provisions, as will be addressed below. Further, the reluctance to use formal enforcement is certainly related to the underlying consensualist regulatory philosophy which does not put sanctions or formal enforcement at the core of the regulatory policy. Finally, politics of enforcement including the rather inhospitable political climate for regulatory agencies characterized by ‘reducing the burdens’ rhetoric certainly plays an important role as well.

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64 For a long time, one of the most influential theories explaining the low levels of formal enforcement were the theory of ‘capture’ which, due to space limitations, is not addressed here.
4.4. Advice and guidance: tendencies towards ‘compliance’

In addition to the above considerations, advice and guidance strategies are worth being explicitly mentioned here as they form a particular aspect of informal enforcement which is increasingly gaining in importance in health and safety enforcement and regulatory enforcement in general. For example, Germany in 2005 proclaimed a reorganization of health and safety system towards a modern system with a ‘service-oriented’ advice and supervision as its core element whereas specific Länder aim at fulfilling their enforcement mandate by being ‘less of an inspector but more as a consultant’, albeit without losing sight of formal enforcement. Similarly, advice and guidance strategies are the core of numerous HSE activities which, in line with the Regulators’ Compliance Code, aim inter alia at providing advice and guidance to the regulated community easily and cheaply.

The underlying assumption of this tendency is the insight that lack of knowledge and understanding of legal provisions is a frequent source of noncompliance. This concern is confirmed by a number of studies investigating the regulatory system, particularly those concerned with SMEs. Tendencies towards more compliance-based techniques in enforcement and hence strengthening of the lower levels of the enforcement pyramid are hence observable in both countries. In this respect, in Germany a special role is played by the BGs which traditionally have been playing a crucial role in providing sector-specific guidance and whose expenses for training and advice tasks have been on increase recently.

All in all, both German and English inspectorates are given broad post-detection discretion, which enables a cost-effective differentiation between violations and violators and primarily operate at the lower levels of the enforcement pyramid. This is especially true for the German labour inspection authorities. The SLIC evaluation report, for example, observed that in Germany there is a ‘widespread, seemingly institutionalized, assumption that advice is more effective than and preferable to [formal] enforcement.’ The reasons for it are numerous, as the above paragraphs have briefly sketched. Yet, in both countries – although more so in England and Wales - it is acknowledged that strong sanctions play a vital role in enforcement, even though primarily representing a threat. The HSE hence sends a clear deterrence message to those who deliberately violate the law and ‘threatens’ with prosecution or negative publicity. Similarly, German inspectorates, while primarily adopting a conciliatory tone, are keen to not loose sight of strict enforcement action if necessary. It is these measures of formal enforcement to which the following sections now turn.

65 Unfallverhütungsbericht Arbeit 2005, p. 69
66 Ibid., p. 119.
67 See, for example, the NAO briefing paper referred to in note no 8 and studies referred to therein.
68 The Senior Labour Inspectors’ Committee (SLIC), Evaluation Report on the German Health and Safety System, p. 43.
5. Sanctions for non-compliance

As the enforcement pyramids depicted above show, English authorities and their German counterparts can resort to an array of formal enforcement measures and sanctions. The scope of this paper does not allow elaborating in detail on all of them. Therefore, the following sections have to be selective and address only some of the listed measures and issues of debate: improvement and prohibition notices, administrative financial penalties and criminal prosecution.

5.1. Improvement and prohibition notices

Once it comes to formal enforcement, enforcement notices are one of the central options available to both English and German enforcement authorities. An improvement notice requires remedial action to be taken within a specified time period, and a prohibition notice - issued in cases of serious risks to health and safety - prohibits engaging in certain work activities pending such action. In 2006/07, FOD conducted 41,496 inspections and issued 7,893 notices. The German inspectorates, in 2009, found 469,998 OHS deficiencies and issued 11,713 notices which suggests a ratio of notices to deficiencies of ca 1:40.

Next to the general reasons explaining the relatively infrequent resort to formal measures discussed above, it should also be mentioned that the use of enforcement notices should be seen within the context of other enforcement measures available to inspectors. In Germany, for example, a special role is played by the so-called Revisionsschreiben (comparable to inspection form in England and Wales) which sets out the failures identified during an inspection visit and requires the dutyholder to inform the enforcing authority of the steps he has taken or intends to take to remedy them. It, moreover, sets a time period to do so. A Revisionsschreiben does not have any legal force and is considered a ‘friendly warning’ by inspectors. Yet, it does include a time period (to notify steps taken to comply) and is usually followed-up by inspectors during an inspection visit. It can hence also be considered as an enforcement notice ‘on a small scale’. Normally, only if a Revisionsschreiben fails to induce compliance, a notice will be issued. For example, a ministerial instruction for the inspectorates in Lower Saxony explicitly provides that, except in cases of imminent danger, notices should be issued if shortcomings ‘are not remedied on time’. Herewith, inspectors are advised to exhaust the option of Revisionsschreiben first before resorting to a notice.

69 The respective provisions with regard to improvement and prohibition notices vary slightly in England and Wales and in Germany. For example, the HSWA 1974 provides that prohibition notices may be issued if there is risk of serious personal injury; such risk does not need to be imminent. The German ArbSchG makes a distinction between a ‘notice’ and an ‘immediately executable notice’ (sofort vollziehbare Anordnung). The latter are issued where there is a risk to health and safety and, if not followed forthwith, lead to prohibition to engage in activities affected by the order.

70 There are slight variations across the Länder but the author was reassured that they are minor.

In Germany, an enforcement notice may be accompanied by a threat of a penalty payment (Zwangsgeld), payable if remedial action required by the notice is not taken. The maximum amount of Zwangsgeld is set by the laws of the respective Länder and amount to up to EUR 25 000 (Saxony) or EUR 50 000 (Hessen). In setting the level of the threatened payment, inspectors will take into account, inter alia, the costs of measures required from the dutyholder and set the Zwangsgeld at the same or higher level. In other words, the size of threatened Zwangsgeld will be adopted so that compliance ‘pays’. A penalty payment hence operates primarily as a threat and may be considered as a cost-effective option to back enforcement notices and improve their effectiveness. Whereas in Germany enforcement notices may be accompanied by a penalty payment, in England and Wales, an inevitable ‘companion’ of notices is their availability to the general public via public registers. Hence, there is a potential naming and shaming sanction related to enforcement notices and firms, for example in tendering for contracts, are obliged to disclose any enforcement action against them. Commentators have therefore suggested that businesses subject to a notice may suffer reputational damage, increased insurance premiums or a substantial detriment in successfully tendering for contracts. Hence it seems that public registers may add to compliance and deterrence at a relatively low cost, yet such ‘naming and shaming’ may for some firms – especially those depending on tendering for contracts – have substantial, if not crushing, consequences.

In England and Wales, noncompliance with an improvement or prohibition notice is a criminal offence which will normally result in prosecution and may attract penalties of up to £ 20 000 and/or 12 months’ imprisonment (lower court maximum) or unlimited fine and/or 2 years’ imprisonment (higher court maximum). In limited circumstances, non-compliance with an enforcement notice will lead to no further action. Hence, taking into account the possibility of Zwangsgeld, the German authorities seem to have slightly more options to ‘escalate’ up the pyramid and to bring about compliance with an enforcement notice. Noncompliance with an improvement notice in Germany, for example, may result in (1) the imposition of Zwangsgeld, (2) the prohibition of activities affected by the notice (prohibition notice) or, (3) in cases of deliberate or negligent non-compliance in an administrative fine of up to EUR 25 000. Yet, generally, only deliberate conduct will attract the maximum available penalty whereas negligent conduct may be sanctioned with maximum half of it (EUR 12 500). From an economic perspective, enforcement (improvement or prohibition) notices generally seem to score well in terms of cost-effectiveness as they have a large potential to induce compliance and to deal with risks without, however, requiring court involvement (unless appeals are lodged). In both countries, an appeal against an improvement notice (which specifies a time period) has a suspensory effect which,维格
according to some inspectors, operates as an incentive to appeal as costs may be saved by delaying health and safety improvements.

5.2. Administrative or criminal penalties?

The pros and cons of criminal versus administrative sanctions (and of criminal versus administrative law more generally) is, probably, the most fiercely debated issue in relation to health and safety enforcement. On the one hand, criminal sanctions have been considered to express social condemnation of the relevant act, to imply some sort of stigma and negative publicity and hence to send a stronger deterrence message. Criminal law, therefore, has been viewed as potentially more effective and adequate in deterring and punishing breaches of health and safety law, which may lead to injury and death. On the other hand, some law and economics scholars viewed criminal penalties as unnecessarily expensive and ineffective as they require engagement in lengthy and cost-intensive court proceedings, which knowingly make agencies reluctant to prosecute. In other words, criminal prosecution will be applied very infrequently and, as it has been argued, businesses will perceive the probability of being brought to courts as extremely low and will not be sufficiently deterred by the prospect of criminal prosecution. That is why Ogus et al, for example, have numerous times advocated – where appropriate - the use of administrative/civil penalties as a more cost-effective alternative to criminal law. While it is agreed that the public costs of utilizing administrative processes are lower, there is yet some disagreement as to their effectiveness. Whereas, for example, Kerrigan et al argued in this respect that not only criminal but also administrative penalties can achieve deterrence provided they are high enough, others suggested that, under certain circumstances, even relatively small financial penalties can be sufficient to induce behavioural change. Consequently, they have proposed that the very fact of an inspection visit coupled with mild enforcement action may have a significant effect on compliance.

Whereas in the UK the imposition of fines traditionally has been left to criminal courts, in Germany, administrative penalties for the so-called ‘regulatory’ breaches are viewed distinct from criminal processes and may be imposed by administrative authorities. Section 25 of the German Health and safety Act (ArbSchG) provides for imposition of administrative penalties (Bußgeld) in two sets of circumstances: first, for deliberate or negligent noncompliance with a health and safety regulation, punishable with a fine of up

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80 As addressed in chapter 5.
to EUR 5 000\textsuperscript{81} and, second, for \textit{deliberate} or \textit{negligent} noncompliance with an enforcement notice, punishable with a fine of up to EUR 25 000.\textsuperscript{82} In the latter set of cases, issuing of an enforcement notice is hence a necessary prerequisite for imposing a penalty.

The English law does not contain a category of administrative health and safety offences and all financial penalties, however small, have to be imposed by criminal courts. This means that, for example, non-reporting of an accident or failure to conduct risk assessment is equally an offence as putting employees at great danger by, for example, providing defective machinery which may injure workers (clearly, given agencies’ discretion, the former are mostly not prosecuted before courts). Yet, the situation is in flux in the aftermath of the Macrory report\textsuperscript{83} and the Regulatory Enforcement and Sanctions Act 2008 which aim at equipping regulatory agencies in Great Britain with more powers and in principle authorizes regulatory authorities to make use of, inter alia, civil monetary sanctions.\textsuperscript{84} At the time of writing, the HSE has not made use of the new powers but expressed many doubts in this regard. They include the adequacy of financial penalties to respond to health and safety breaches, their capability to induce long-term compliance, the increased danger of appeals and their related costs, damage to the relationship with the dutyholder, the (unwanted) adversarial tone etc.\textsuperscript{85} Although sceptic in relation to \textit{civil penalties}, the HSE is at the moment envisaging implementing a so-called ‘\textit{fee-for-fault}’ scheme which would charge dutyholders found to be not in compliance for the HSE’s costs. At the time of writing, such scheme has not yet been introduced.

On the one hand, (some of) the HSE’s concerns related to the adequacy of financial penalties to respond to health and safety violations are certainly justified and the adequacy of administrative financial penalties to respond to (serious) health and safety breaches may well be questioned. Yet, also health and safety offences encompass a broad range of violations that range from non-reporting of an accident, failing to fill in a form, failure to consult employees in health and safety matters, failure to conduct risk assessment to violations which give rise to serious risks such as unsafe machinery or lack of edge protection. The Enforcement Management Model itself acknowledges that some health and safety duties are not ‘risk control measures’, yet, ‘their absence can undermine the workings of an efficient health and safety system or be evidence of poor health and safety management.’ In such cases, the EMM envisages an improvement notice, a letter or a verbal warning as an adequate response (IEE). Such offences may well be called

\textsuperscript{81} Provided the regulation explicitly refers to administrative penalty/§25 ArbSchG.

\textsuperscript{82} This applies in case of the employer or responsible person. The maximum fine imposed upon individual employees is EUR 5 000.


\textsuperscript{84} The Act includes many other civil sanctions not discussed here. For this purpose, the reader can consult the website of the Department for Business, Innovations and Skills, see http://www.bis.gov.uk/policies/better-regulation/improving-regulatory-delivery/implementing-principles-of-better-regulation/ regulatory-enforcement-and-sanctions-bill, last time visited on 17 June 2011.

\textsuperscript{85} For these and further arguments see the minutes of the Health and Safety Executive and the Local Authority Liaison Committee (HELA) meeting on 4th September 2009, paper number H8/05, concerning the Macrory Alternative Penalties and Adoption of Sanctions under the Regulatory Enforcement and Sanctions Act 2008 following Professor Macrory’s Review of Regulatory Sanctions; Health and Safety Executive Board Paper HSE/07/48 on The Macrory Review of Regulatory Penalties: Application for HSE.
‘minor’ health and safety offences which do not necessitate criminal justice processes but may well be sanctioned administratively. Therefore, it is worthwhile to further explore the potential of administrative/civil penalties as a valuable ‘interim step’ between notices and prosecution.

5.3. Prosecution and sentencing

England and Wales

HSE pleads for ‘firm but fair’ enforcement in which prosecution plays a minor but essential role. Prosecution is being viewed as important in holding dutyholders to account as well as deterring others from breaking the law.\(^{86}\) Every year, HSE and local authorities prosecute some 1600 offences, around 78 per cent of prosecutions result in conviction.\(^{87}\) The time and effort involved in prosecution is indeed substantial. Before taking the decision to prosecute, inspectors have to draw up a comprehensive prosecution report, to ascertain whether there is a realistic prospect of conviction, to assess whether prosecution is in the public interest and, in less complex cases (mostly in cases of ‘guilty plea), to prosecute before courts. In criminal proceedings, inspectors have to prove ‘beyond reasonable doubt’ that an offence was committed. Once a health and safety case reaches a criminal court, the HSE has no direct influence on the imposition of the sanction, yet, it may seek to draw to the court’s attention to all the factors which are relevant to the court’s decision as to what sentence is appropriate.\(^{88}\) Most convictions of health and safety offences result in the imposition of fines, which remains the principle option for health and safety offences. The levels of fines generally have been considered as being low\(^{89}\) but have been increasing recently. In 1996/97, the average penalty imposed per breach was £5 274 and in 2009/10 it tripled to £15 817. Yet, after removing several exceptionally high fines, the 1996/1997 figure of £5 274 should be adopted to represent an ‘adjusted’ average of £3 266 per offence. The FOD enforcement review, moreover, sets out that the number of very high fines exceeding £50 000 or £100 000 has been on increase as well.\(^{90}\) Most fines are imposed upon corporations (employers), although the Enforcement Policy Statement stresses an important role of individual liability as well.

In sentencing, the courts first of all will take into consideration the seriousness of the breach (the culpability of the offender and harm/risk) including the aggravating (death or serious injury, failure to heed warnings, deliberate breach for the sake of making profit) or mitigating (cooperation with the investigating authority, responsible attitude towards health and safety, good safety record) factors as well as the offender’s financial

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\(^{90}\) See for example Review of Enforcement by FOD, HSE document HSE/10/54, p. 2.
circumstances. This follows economic logic and enables differentiation of fines according to the circumstances of the individual offender. Recent calls to improve the effectiveness of sanctions by removing the profit gained by non-complying with the law are reflected in a recent Sentencing Guideline\textsuperscript{91} which recommends imposing an additional penalty to account for any quantifiable saving made by the defendant while committing the offence.\textsuperscript{92} In addition to fines, courts are entitled to issue, inter alia, remedial orders, disqualification orders and - since the introduction of The Corporate Manslaughter and Corporate Homicide Act 2007 - negative publicity orders (in cases of corporate manslaughter only). Community service or imprisonment or imposed on individuals, although used rarely, remains a sentencing option as well. With regard to individual liability, the HSE Enforcement Policy Statement provides:

Enforcing authorities should identify and prosecute or recommend prosecution of individuals if they consider that a prosecution is warranted. In particular, they should consider the management chain and the role played by individual directors and managers, and should take action against them where the inspection or investigation reveals that the offence was committed with their consent or connivance or to have been attributable to neglect on their part and where it would be appropriate to do so in accordance with this policy. Where appropriate, enforcing authorities should seek disqualification of directors under the Company Directors Disqualification Act 1986.\textsuperscript{93}

It is not possible within the scope of this paper to give adequate consideration for all the listed sentencing options. Yet, the emphasis on more innovative and effective sanctions, higher fines and individual responsibility has been increasing recently. Upon conviction, the HSE usually takes post-court action which is aimed at maintaining the relationship with the dutyholder or resolving any outstanding issues of compliance.\textsuperscript{94} Further, it aims at achieving publicity for health and safety prosecutions and convictions.

\textit{Germany}

In comparison to Great Britain, German OHS provisions leave less scope for criminal liability. Section 26 \textit{ArbSchG} provides for criminal liability under three sets of circumstances. First, whereas deliberate or negligent contravention of an enforcement notice is an administrative offence, it becomes a criminal offence if such contravention is persistently repeated or, second, endangers life or health of an employee.\textsuperscript{95} Third,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{93} HSE Enforcement Policy Statement, para 43.
\item \textsuperscript{94} \url{http://www.hse.gov.uk/foi/internalops/og/ogprocedures/prosecutions/prosflow.pdf}, last visited on 4 February 2011.
\item \textsuperscript{95} In the latter case, it is a criminal offence only if noncompliance with such notice is deliberate (but not negligent). In other words, if a notice is contravened by negligence, such contravention does not constitute a criminal offence under this provision even if it endangers life or health.
\end{itemize}
\end{footnotesize}
deliberate contravention of a health and safety regulation is a criminal offence as well if such contravention endangers life or health of an employee. Such offences will be punished with a prison sanction or a fine not specified in the ArbSchG. Moreover, in cases of actual bodily harm which was caused either intentionally or negligently, German Criminal Code (Strafgesetzbuch, StGB) provisions apply.\textsuperscript{96} Section 230 StGB provides that physically assaulting or damaging the health of another person shall be punished with imprisonment of up to five years or a fine. This applies in case of deliberate conduct.\textsuperscript{97} Section 229 StGB provides that negligently causing bodily harm to another shall be punished with imprisonment of up to three years of a fine.\textsuperscript{98} Criminal sanctions are imposed almost exclusively on individuals as there is no corporate criminal liability in Germany.

The scope for criminal liability is hence limited in Germany. A violation of health and safety provision is only a criminal offence if it is deliberate or negligent and, moreover, repeated and/or endangers life and health (negligent noncompliance with a regulation which endangers health/safety is not a criminal offence). Once an enforcing authority has evidence/indication (Anhaltspunkte) that a violation at hand includes a criminal offence, it is obliged to refer the case to the Office of Public Prosecutor to further investigate the matter and to decide whether or not to prosecute. Yet, a criminal complaint is being made extremely rarely by the German authorities, as table 2 above has shown. In 2009, for example, the German OHS inspectorates found 469 998 deficiencies and made 255 criminal complaints to the Public Prosecutor. As from then, unfortunately little is to be found on decision-making of the public prosecutor, the number of actually prosecuted cases or on the sentencing practice. Moreover, any form of negative publicity relating to any enforcement measures is ruled out in Germany due to very strict provisions of data protection.

Ultimately, license suspension or revocation is the final option available to health and safety authorities. Withdrawal of approvals or variation of license conditions is applicable in areas where such approvals or some form of permissioning regime is used. This applies for the high hazard sectors including the nuclear industry, railways, offshore installations, onshore major hazard sites and other. Yet, this option is infrequently, if ever, used by the German authorities. In Germany, administrative authorities may also resort to an ‘operating ban’ imposed upon individuals (Gewerbeun tersagung, comparable to a court-imposed disqualification order in England and Wales), provided the dutyholder can be shown to be unreliable. This, again, is an option hardly if ever used by the German authorities.

\textsuperscript{96} § 223, 229, 230 StGB.
\textsuperscript{97} According to § 15 StGB which provides that only deliberate conduct will attract criminal liability, unless the law explicitly provides for criminal liability based on negligence.
\textsuperscript{98} Causing bodily harm intentionally or negligently may only be prosecuted upon request (victim or relatives) unless the prosecuting authority decides that prosecution is required because of public interest, § 230 StGB.
6. Conclusions

Health and safety enforcement is in flux. Both German and English enforcement authorities generally engage in less and less inspections, yet inspection resources are continuously being rebalanced towards a more proactive approach. Inspection visits are, moreover increasingly targeted to specific segments of the regulated community, which is a meaningful strategy given the discussed shortcomings of a reactive approach, especially with regard to private complaining. Hence, whereas decline of inspections is problematic in terms of effectiveness, increased targeting may partially ‘compensate’ for the generally decreasing probability of detection. At the same time, the quality of targeting crucially depends on the quality of intelligence which is, however, very costly for regulators to gather.

When it comes to cases of noncompliance, English and especially German enforcing authorities are reluctant to resort to formal enforcement measures and primarily operate at the lower levels of the ‘enforcement pyramid’ whereas the higher levels are reserved for the most flagrant breaches only. This is especially true for Germany, which seems to rely almost exclusively and, perhaps, too much, on measures of informal enforcement. At the same time, there is rather little guidance for German inspectors to aid discretionary decision-making, which was considered by the SLIC committee as one of the reasons for the extremely low levels of formal enforcement. In England and Wales, the EMM constitutes a central and sophisticated tool in guiding discretionary decision-making. By focusing all enforcement efforts around the notion of risk, it ensures proportionate responses, yet also aims at adapting enforcement responses to, inter alia, compliance efforts of the regulated by requiring taking into account the so-called ‘dutyholder factors’. Herewith, it enables cost-effective differentiation between those who may be induced to compliance by a mere ‘push’ and those for whom a formal (and costlier) enforcement action will be necessary.

Besides a general decline of comprehensive inspection and an increased focus on targeting, the English enforcing authorities and their German counterparts continuously refocus their enforcement efforts towards providing more advice and guidance to the regulated community. Yet, strengthening the ‘softer’, informal enforcement techniques in England and Wales seems to go hand in hand with strengthening the sanctions at the ‘top’ of the enforcement pyramid. The increased levels of fines and the generally greater willingness of courts to impose higher fines for health and safety offences are, moreover, accompanied by efforts to better tailor fines to individual offenders. This may well lead to imposition of more effective sanctions in future, whereas it is worth exploring the potential of administrative/civil penalties as well. Although also Germany struggles to not completely lose sight of tough enforcement measures, the increased focus on advice and guidance strategies in Germany is not accompanied by parallel discussion on improving the effectiveness of sanctions. Instead, the German OHS debate has been primarily dominated by efforts to improve the functioning of the dual and federal system; many reforms are under way. It remains to be seen what the effects of these numerous reforms and tendencies will be.
Literature


