

The need to include COVID-19 as agent of Group 4 in Annex III of Directive 2000/54/EC on the protection of workers from risks related to exposure to biological agents at work

COVID-19 is the biggest health challenge in modern history. The dimension of Occupational Safety and Health (OSH) is a fundamental part of the European strategy for maintaining our economy. The workers (most of them female workers) are at the frontline in many sectors, such as healthcare, cleaning industry and retail. The success of the EU exit strategy will largely depend on OSH-appropriate policies, if we want to avoid a “second wave” by sending millions of people back to work.

Among the victims in the 20-65 year-range, a very high percentage is due to the lack of adequate prevention at the workplace. There is no systematic statistics for the time being but there is no doubt that thousands of people have died in healthcare, public essential services, retail industry, and many other sectors which continue the work for the survival of the general population. The OSH dimension has introduced a huge social inequality: some occupations are protected by teleworking, other occupations, often with low-paid jobs and low level in the social hierarchy, are paying a high price.

ETUC is fully convinced that EU OSH legislation is providing high standard criteria for integrating OSH in the exit strategy. Some improvements and innovations are needed but, basically, we have a solid tool. As ETUC, we are proud of it. We are very grateful that OSH is back on the EU policy agenda. The revision of the Carcinogens Directive is an excellent example of this.

OSH prevention needs an urgent adaptation of the Biological Agents Directive (BAD). SARS CoV2 is not considered among the agents of the Directive, which is understandable because it is a new virus and the existing text of the Directive is from 2000, last revised in 2019, to be transposed only in November 2021. The existing instrument therefore needs to be adapted. Its central approach is excellent and was fully appreciated by the Commission during the evaluation of the OSH legislation. We do not ask for a complete revision of the Directive. Some minor adaptations are needed due to the completely new challenges posed by COVID-19 for the workers. It could be solved in due time.

We completely support the view of the Commission that the first step should be the introduction of SARS CoV2 in the list of biological agents in annex III of the Directive. We are aware that it won't solve all the problems, but it will send a strong signal to workers and employers: The Commission integrates OSH as an important dimension in the exit strategy.

We support completely the view of the Commission that we must work rapidly. DG Employment announced on Monday April 27 that the adaptation to technical progress of the Directive could be achieved during beginning of June. It is a realistic timeline.

What is the problem?

The Biological Agents Directive (BAD) is built on three blocks. It is a common approach in OSH legislation.

1. The first block is the identification of dangers and the classification of them on the basis of scientific evidence. In the BAD, agents are listed and divided in four groups from the

lowest danger (group 1) to the highest (group 4). Article 2 of BAD is fundamental. It provides objective criteria to choose the right group. Every stakeholder agrees that SARS CoV2 has to be included in the list. **The conflictive issue is about which group to put it in. The ETUC supports the option of group 4.** This is based on clear legal binding criteria in Article 2 of the Directive. **Despite this, the Commission services have proposed the option of group 3.**

2. The second block is about risk management. Some measures are applicable to all the biological agents. Some measures are specific for one or two groups. Logically, the most stringent measures are required for the most dangerous group. Most of the risk managements measures are excellent for protecting workers against COVID-19. Some of them need adaptation, flexibility, additional measures. The challenge is to combine a high level of protection for workers and to secure the activities linked with the pandemic situation. **We are fully aware that we need flexibility.** We do not want, and we will not create, obstacles for hospitals, laboratories, the pharmaceutical industry, or any other sector by way of a rigid interpretation of risk management measures. **But a balanced solution means that the level of danger is recognized (inclusion of SARS Cov2 in group 4) and all the possible measures of protection are adopted (risk management).** Social dialogue at all the levels has an important role to play in order to define the best prevention plans adapted to each sector.
3. The third block is about workplace measures. The Directive is perfectly in line with the EU OSH Framework Directive from 1989. It combines a high level of prevention with strong possibilities to adapt the measures in every workplace: risk assessment, workers participation, health surveillance, etc.

Due to the emergency, we agree that the first dimension (classification) must be the first step.

Article 2 of the Directive defines group 3 as biological agent meaning “one that can cause severe human disease and present a serious hazard to workers; it may present a risk of spreading to the community, but there is usually effective prophylaxis or treatment available”.

Group 4 is about biological agent meaning “one that causes severe human disease and is a serious hazard to workers; it may present a high risk of spreading to the community; there is usually no effective prophylaxis or treatment available”.

As is to be deducted from these definitions, there are two basic differences for making the choice between group 3 and 4:

- high level of spreading or only a potential level of spreading;
- the existence of available prophylaxis or treatment or not.

The SARS CoV2 virus meets completely the criteria for group 4. It has a high level of spreading and there is no vaccine or treatment available. That situation could change (if a vaccine is available for instance) but, for the time being, that no other choice in our view.

That issue should not be considered as a purely technical problem.

From a legal point of view, a classification in group 3 could easily be challenged before the European Court of Justice. In order to achieve an exit strategy, it would be counterproductive to wait for a judiciary solution.

From a political point of view, it would send a disastrous message. Workers have been working in the frontline from the very beginning of the crisis. Thousands of them have died. Millions of workers will return to the workplace in the coming weeks. The choice of group 3 would mean that the Commission did not fully consider the high sensitiveness of the problem: high risk of spreading the virus at the workplace, no available prophylaxis or treatments for the time being. Let us avoid any error in the communication strategy. What happened with the debate on Covid bonds should help us to understand that the right message should be very clear. In this case, the legal aspects are not complex. The decision has to be made by the Commission. If the Commission shows leadership, Member States will follow. OSH is a domain where legislative competence is fully recognized by the Treaty.

An error in the adaptation of BAD could provide strong arguments to Eurosceptics. If the EU is unable to take the right decision, the reasoning could soon be: let us work at national level.

Apart from the legal and political effects, two elements should also be considered:

- The symbolic dimension. Workers are ready to make huge sacrifice for essential services needed by the community. They have proved it during the last two months. A wrong classification could only be considered as a double standard policy: high protection for the general population, lower protection for the workers. In public health, Member States have adopted an exceptionally high level of precautionary approach which is fully justified. Nobody would understand that a lower level should apply to the workers.
- The consistency with the entire OSH legislation. We are convinced that the OSH legislation is a fundamental asset and can provide us with good tools for reducing the impact of COVID-19. It will help to save workers' lives. It will contribute to avoid a "second wave" during the exit period.

Large pieces of OSH legislation are based on the 'hazard-based principle/approach'. We are ready to send a more detailed note on that question to the Commission. Basically, it means that the legislation takes into account the fact that at their workplaces, people are not free to choose their behavior. They are placed under the authority of employers and most of the hazards are linked to the work organization. Hazard-based approach means that we list and classify dangers on the basis of their intrinsic potential impact. The reason for that is simple: if we consider the full chain of production, there will always be segments or situations where management does not provide the best solution or is not aware of the risk level. A 'risk-based approach' means that we adopt priorities on the basis of statistical models giving the priority to certain risks. In public health, a risk-based approach can be relevant. It is a way to allocate resources to some priorities. In OSH, a risk-based approach is largely ineffective. Hundreds of thousands of European workers died from asbestos due to the belief that a risk-based proportionate approach would be adequate.

A wrong decision in the BAD revision could open the door to the introduction of risk-based approach in other OSH fields (like for carcinogens). It was the political option defended by the UK government. It received some support from the Barroso Commission. We are ready to discuss with the Commission about the right balance between different approaches. It would be a political error to take a decision which is inconsistent with what is now the axis of EU OSH legislation.

In our view, a realistic solution could be to combine the adaptation of the Directive with a communication from the Commission on the OSH dimension of the exit strategy. It could be a very short document with two key messages: the high priority given to OSH issues, the high

flexibility in management measures in order to avoid any difficulty for the good working of essential services contributing to public health needs.