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The contribution of case law to compliance management in Occupational Health and Safety (OHS) in France

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Abstract: Companies face two challenges in the field of Occupational Health and Safety (OHS). They must first ensure that they meet the legal obligations that apply to them. This requires that they first clearly identify what these obligations are (with the help of management compliance tools of varying degrees of complexity). However, at the same time, employers and other stakeholders in the prevention of occupational risk (OHS professionals, human resources managers, etc.) must take precautions against the potential risk of both civil and criminal legal action. In order to limit these risks, it is essential to have a highly specialized knowledge of judicial precedent. While the courtroom culture of Anglo-Saxon law emphasizes the importance of case law (judicial decisions create and modify the structure of the law as it is applied), this is not so true in countries where the legal culture places greater emphasis on the role of the legislature (e.g. France).

Although employers and managers of large companies are becoming more aware of their legal obligations, they remain less alert to the identification and understanding of judicial precedent in the field of OHS. This situation is unfortunate as a good understanding of case law in the area of legal liability is useful for the implementation of measures to evaluate relevant compliance activities. Judicial precedent can shed particularly welcome light on the interpretation of certain statutory provisions or the understanding of complex legal mechanisms (e.g. the conditions for a valid delegation of authority).

This paper uses the current situation in France to demonstrate the point. It is organized into two parts. The first part offers an overview of the legal context that French companies operate in, in the area of OHS. The second part aims to demonstrate the extent to which the study of case law contributes to a better understanding, and hence management, of legislative compliance and legal liability risk.

Keywords: Occupational Health and Safety (OHS), Case law, Legal Compliance Management System (CMS), Conditions of Legal Liability

1. INTRODUCTION

One of the key policy challenges currently faced by the administration of large companies concerns legal compliance management in the area of Occupational Health and Safety (OHS). A quantitative study of 820 French health and safety professionals [1] (conducted jointly by the Centre for Research on Risk and Crises of MINES ParisTech, AFNOR and Preventeo) showed that one of the priorities of compliance management strategy is to minimize the possibility that employers (and other corporate actors responsible for the prevention of occupational risk) may be considered legally responsible. To address this key concern, companies deploy management systems of varying complexity. However, the same study highlights that only 6% of French companies ‘very often’ incorporate case law into their OHS compliance management system. This paper therefore aims to highlight the benefits of a better understanding of legal precedent within the framework of compliance management systems.

It is divided into four distinct sections. It begins with a brief presentation of the framework for French case law in the OHS domain (section 2); it then outlines the usefulness of applying case law to compliance management (section 3). We then propose a management model that incorporates a body of case law (section 4), and describe a concrete example of its application (section 5).

2. FRENCH CASE LAW APPLICABLE TO OHS

In the OHS context in France, business leaders face a case law framework consisting of various jurisdictions with the power to intervene on various grounds. First, we outline the three tiers of the French judiciary, and then examine the various types of legal liabilities that may be incurred.

2.1 *The three judicial tiers*

Putting aside the very marginal possibility that the European Court of Justice may become involved in a case, there are three judicial tiers in internal French law.

The first of these tiers applies when, for example, an employer is sued. Typically, this is the result of a work-related accident, or the notification of an occupational disease, or when an employee challenges the reason for their dismissal. In the specific domain of OHS, cases can be brought not only before the civil courts, such as the *tribunal de grande instance* (a superior civil court), *le tribunal de prud'hommes* (a Labour Tribunal which deals with disputes and suits between employers and employees), but also the *tribunal correctionnel* (the Criminal Court) or the *cour d'assises* (a criminal trial court) in the case of criminal proceedings.

The second tier consists of the intermediate appellate courts. Should a decision of the inferior (first tier) courts be disputed, one of the parties to the case (the employer, the employee etc.) may appeal and request reconsideration of the case by an appellate court.

After this point, only the third and final judicial tier is likely to become involved. This is the *Cour de cassation* (Court of Cassation). This court of last resort is part of the topmost tier of the internal court system and has jurisdiction over all judicial matters. The judgments of this court leave aside the facts of the case and its treatment of a matter is based solely on a consideration of points of law. In practice, a case involving all three judicial tiers can take four or five years to complete.

In the context of improving legal compliance management, the rulings delivered by the highest court, the Court of Cassation, are the most interesting.

2.2 *Legal foundations of OHS court rulings*

In terms of legal liability, the French OHS domain has a particular feature. Specifically, an employer can be sued both in the civil or criminal courts and also under employment law. In practice, this means that the consequences of non-compliance with a legal requirement are many and varied.

Should a work-related accident occur, the employee or their dependents (in case of the death of the victim) can claim compensation for the injury sustained (civil liability). At the same time, they can claim that the employer was criminally liable. The objective of the criminal proceedings differs to that of the civil proceedings. The purpose of the criminal judgment is to maintain public order. This implies that the penalties imposed are not intended to compensate for an injury but are a punishment for an offence under the law (i.e. a fine or imprisonment).

The OHS domain also places strong focus on employment law. Should an employee be dismissed, they can bring a case against their employer, for example for moral harassment [6].

This variety of conditions under which employers can be considered liable therefore highlights the relevance of case law in the OHS context, and raises the question of whether it has something to offer in achieving a better understanding of the issues. It is particularly appropriate when considering the deployment of a system for legal compliance management.

3. THE ADDED VALUE OF CASE LAW

An empirical study of around one hundred French court decisions [2] highlighted two essential reasons why businesses should be interested in case law. The first is based on an improved understanding of the conditions under which certain legal requirements should be applied. The second concerns the conditions of legal liability for employers (and other actors) in the prevention of occupational risks in the workplace.

3.1 The application of legal requirements

The main value of studying case law rests on an improved understanding of the conditions under which certain requirements or statutory provisions should be applied. In reality it is common, including under French law, for legislative obligations to be imprecise. In practice, it can be difficult to grasp the scope of certain requirements. A concrete example will help to illustrate this point.

From time to time, employers must resort to the use of temporary workers in order to meet specific needs. When these workers are placed in hazardous situations (e.g. exposure to loud noise or certain hazardous substances), the French Labour Code requires that they receive ‘enhanced’ safety training (Article L .4142-2). The text, however, does not explain under what conditions this training can be considered officially sanctioned, or what it should consist of. Nevertheless, a case brought before the Court of Cassation on 18th November, 2010 [7] provides some answers. In this case, the employer was ruled guilty of gross negligence, and the court noted that two hours of training and the issue of a printed booklet did not in any way constitute ‘enhanced’ safety training. However, informal interviews carried out by the authors with several companies have shown that this is common practice, and that few employers are aware that it does not meet the legal requirements.

This example serves to demonstrate that the discretion given to judges makes it necessary to monitor their rulings in order to have a better understanding of how OHS legislation as a whole is applied.

3.2 The conditions of legal liability

In addition to the aspect mentioned above, a proactive examination of case law can provide useful information about the conditions for legal liability of those involved in occupational risk prevention. This is particularly relevant when considering the criminal liability of employers (or their delegates) in the prevention of occupational risk.

Under French law, the employer must personally ensure compliance with the OHS regulations that apply to their business. Nevertheless, the legal system recognizes that because of the extent of the requirements, some of these powers can be delegated to employees of the business (e.g. occupational health and safety experts). However, for this delegation of authority to be considered valid, three cumulative criteria must be met. The holder of the delegated authority must have the competence, the authority and the means necessary to carry out their mission. Judges have the sovereign power to assess whether these conditions have been met.

For example, a decision of 25th May, 2004 [8] refuted the validity of a delegation of OHS powers because of a lack of available resources. The judgement noted that the would-be delegate was not provided with a budget, either for safety training, or to meet compliance standards for work equipment.

Another, earlier ruling of 9th November, 1998 [9] invalidated a delegation of authority issued to two employees on the grounds that they had insufficient expertise and authority. The very fact that the responsibility for the same piece of work was shared between two people restricted the authority of each would-be delegate.

There are other examples of case law that provide further insight into the conditions of criminal liability in the case of a delegation of authority. These examples are far from trivial as they have a direct bearing in determining who is responsible in criminal proceedings. Should a delegation of authority be deemed invalid, the employer is held solely responsible, and other actors involved in safety take no part in criminal proceedings.

It is therefore clearly valuable to take case law into account in the context of OHS management policy, in particular with respect to legal compliance management.

4. A COMPLIANCE MANAGEMENT SYSTEM MODEL

Research work carried out between 2008 and 2010 led to the development of a Compliance Management System (CMS) model, tailored to the domain of OHS legislation. This was operationalized and tested in a business context (using software developed by Preventeo). The three examples that follow describe the model that was developed and demonstrate the ways in which it may be improved through the use of case law data.

4.1 A normative prescriptive model based on current practice

The research just mentioned into the issue of OHS legal compliance management had two main aims. The first was to propose a CMS model, and the second to operationalize the model using a software platform. The work was based upon the results of a quantitative survey of 820 OHS professionals (described in the introduction) [1]. The results of this survey made it possible to identify the emerging needs of French companies in terms of work methodologies and support tools.

The proposed model is based on the typology of models established by Le Moigne [3]. The approach adopted is that of a prescriptive type of normative model, i.e. to create a representation of an 'ideal' compliance management system. In line with the ideas of Walliser [4], the overall focus of the model is on objectives to be achieved. These objectives include notably, limiting the conditions of liability for the employer and risk management professionals, and the management of professional risk.

The model is developed in the following two sections. In these sections, suggestions for improvements based on case law are put forward.

4.2 The CMS model based on case law

The OHS legal compliance management model shown in (Figure 1) shows the organisation of variables in processes and sub-processes.

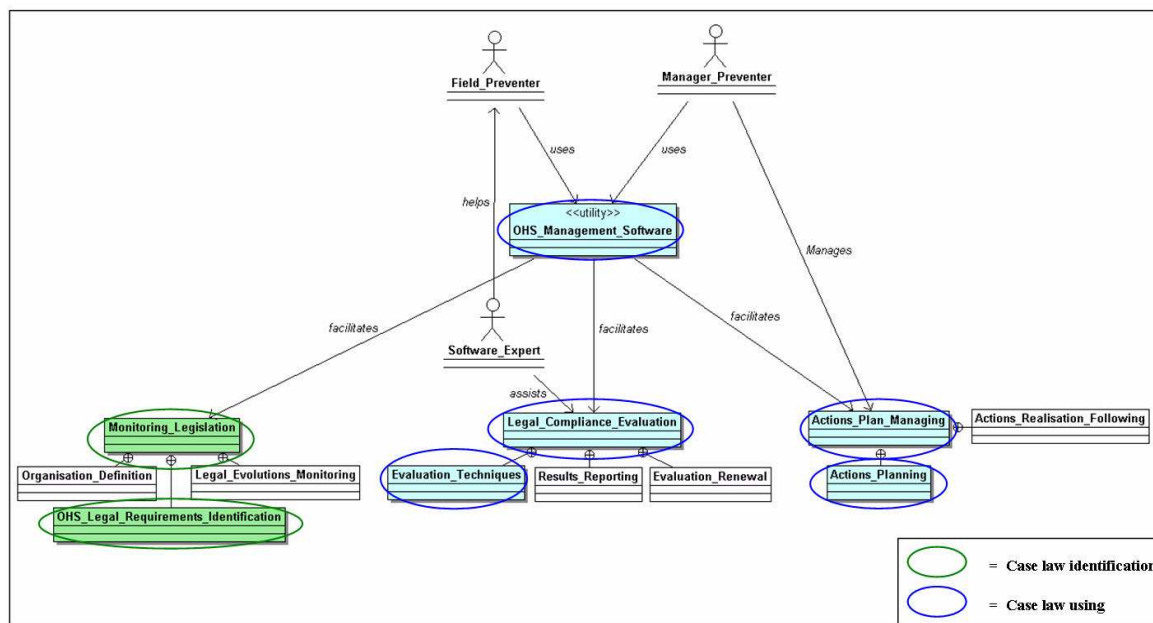


Figure 1. Synthetic overview of the proposed Compliance Management System model

The three basic processes shown here are regulatory monitoring, the compliance assessment and the management of action plans. Regulatory monitoring is the task of identifying and monitoring changes in the laws that apply to the company. The compliance assessment is based on a periodic audit of compliance with the law, while action plans are used to prioritize and manage the removal of non-conformities found during periodic assessments.

Although in practice the information provided by case law proves more clearly useful in the compliance assessment and in the management of compliance action plans, it is still useful to take it into account in the context of regulatory monitoring.

4.3 The application of case law to a CMS

An examination of the relevance of case law (discussed in section 3), demonstrates that it can be useful both during the compliance assessment, and in the determination of priorities for compliance action plans.

As far as compliance assessment is concerned (Figure 2), the initial model relies on traditional audit assessment techniques highlighted by authors such as Innes [5].

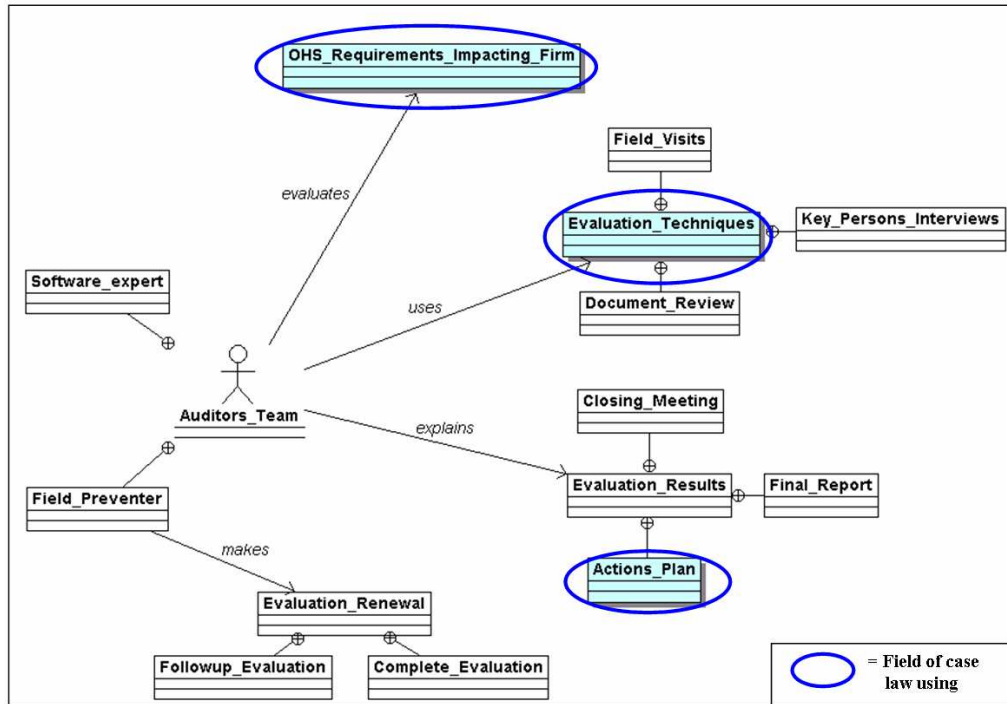


Figure 2. OHS compliance assessment model incorporating case law

These traditional techniques include field visits, interviews with key players (managers, etc.) and a literature review. To facilitate data gathering, the operationalization of the model is based on the use of software tools that provide interactive assessment questionnaires. In this context, each requirement is subject to an assessment that ends with the automatic publication of a compliance report and a computer-generated compliance action plan. The goal is to integrate examples from case law into the help modules of the questionnaire, in order to facilitate or complement the understanding of compliance issues.

Beyond this first application, it is also possible to envisage the direct use of certain case law data in deciding the priority of compliance actions (Figure 3). When looking at judicial rulings, it can be useful to take into account the penalties imposed by the court in deciding what criteria should be used for prioritizing action plans.

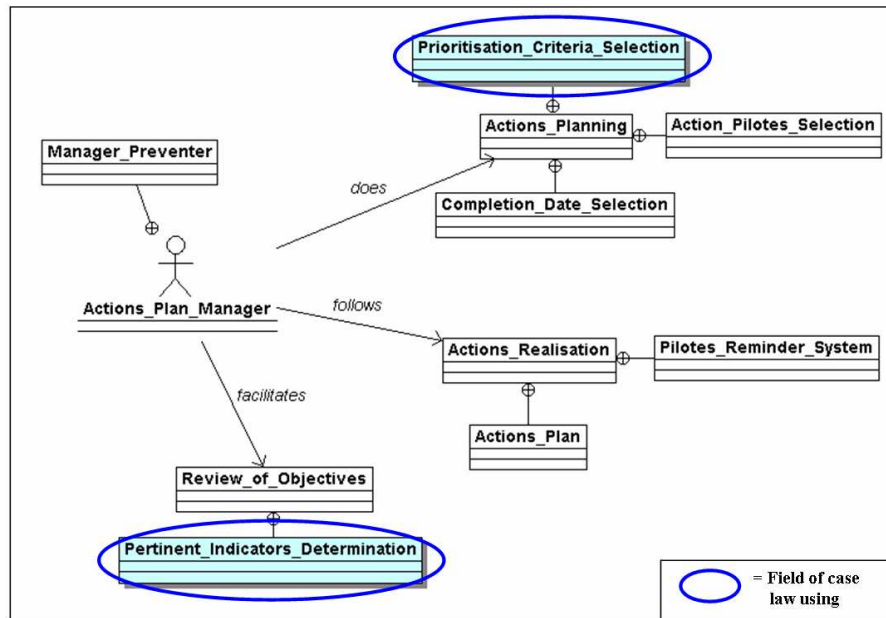


Figure 3. Model of an OHS action plan management system incorporating case law

As companies usually have limited resources to achieve compliance, the extent of the legal risk associated with non-compliance or the severity of the penalty (a substantial fine, risk of imprisonment, etc.) are likely to have an impact on OHS action plan priorities.

To achieve a better understanding of the contribution of this idea, the final section of this paper describes a practical application of the use of case law in a Compliance Management System.

5. CASE STUDIES

The best way to demonstrate the contribution of case law to OHS compliance management is through some concrete examples. The first involves a compliance assessment, while the second describes the management of action plans and discusses the conditions of legal liability and penalties in the case of non-compliance.

5.1 Application of the model to a compliance assessment

In a compliance assessment, the assessment team or the interviewees can sometimes find it difficult to determine whether a particular business practice actually meets the requirements of OHS legislation. The case discussed here is the example cited earlier, namely the ‘enhanced’ training of temporary workers. A typical response to the question of how much training is necessary is ‘about an hour and a half’; although respondents usually think that this complies with the requirements, they are not always certain that it constitutes ‘enhanced’ training. Neither are they always sure of the potential criminal consequences of non-compliance in this area.

In this situation, case law provides several useful examples relevant to the compliance assessment. Among them, two are particularly interesting. The ruling of 18th November, 2010 [7] (previously cited) established the precedent that two hours of training and the provision of a safety booklet does not constitute ‘enhanced’ training. By extension, it seems clear that one hour and thirty minutes of training is insufficient. As for the legal consequences of non-compliance, the decision of 13th April, 2010 [10] demonstrated that failure to provide sufficient operational knowledge and training to a temporary employee is seen as serious misconduct on the part of the employer. In this case (an injured employee), the decision resulted in a two months suspended prison sentence and a fine of 2,500 euros. Figure 4 summarizes how case law can contribute to a legal compliance assessment.

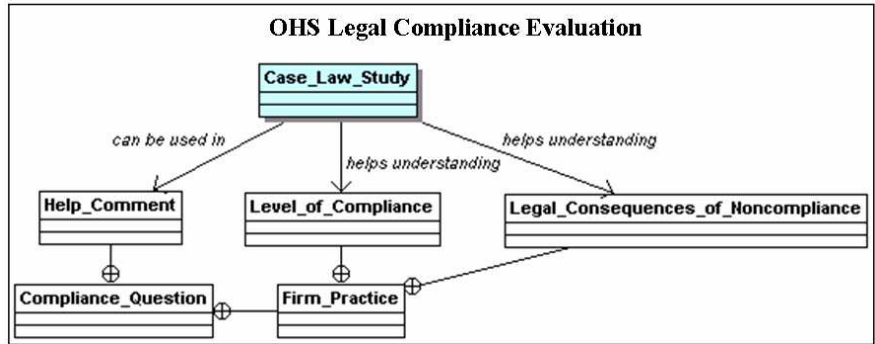


Figure 4. Use of case law in a legal compliance assessment

In the assessment phase, case law can improve the quality of assessment specifications, and in the same way, the relevance of the responses. At the same time it provides a clearer understanding of the scope of the legal penalties that may be incurred.

5.2 Application of the model to prioritisation of a compliance action plan

Once the compliance assessment has been completed, the OHS specialist must prioritize the actions to be carried out. When looking at the list of actions to be taken, particular consideration is given to how easily an action can be implemented and at what cost. However, in itself, cost is an insufficient criterion as it does not take account of the potential legal consequences of non-compliance and by extension, the real costs. In the context of this paper, we call this criterion the 'legal risk' and an examination of a concrete example from case law demonstrates the idea.

The following two examples relate to various non-conformities associated with the lack of signage on earthworks. Two levels of risk were identified; the death of an employee and minor injuries. In the first case of 24th May, 2011 [11] a worker was buried; the employer was convicted of manslaughter and sentenced to six months suspended prison sentence and a fine of 5,000 euros. In addition, the company was ordered to pay a fine of 10,000 euros. A second ruling of 1st February, 2011 [12] concerns a worker injured by a rock fall, and resulted in a fine of 12,000 euros paid by the company. In both of these cases, it is important to note that the penalties imposed only concern the criminal lawsuit. No account is taken of the potential payment of civil compensation (for injuries suffered by the employee or their beneficiaries), although in certain cases the amounts involved can be higher than any fines imposed.

Figure 5 summarizes how case law can contribute to an assessment of 'legal risk' when prioritizing compliance actions.

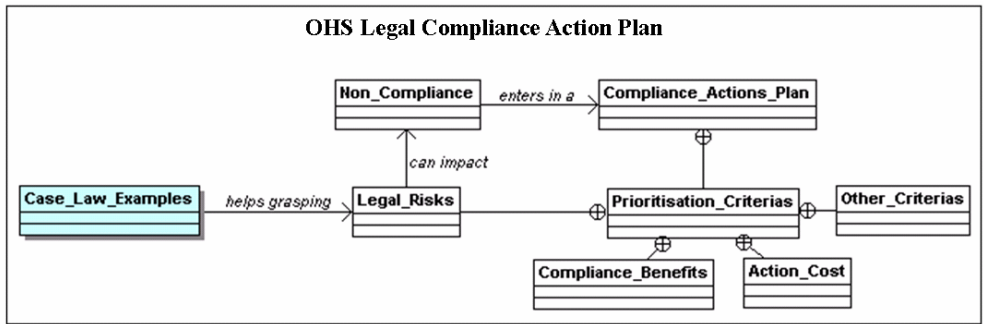


Figure 5. Use of case law in OHS legal compliance action plan management

5.3 *The implementation of case law in specialised software*

The application of some of the principles and lessons highlighted in this paper led to the development of a software tool specifically tailored to the use of case law in a Legal Compliance Management System. This tool provides a database of case law, which is made available in two distinct modes.

The first mode consists of a search engine that searches more than a hundred judicial rulings classified by date, type and theme, or based on specific keywords. The information provided comprises a summary of the judgment, fact sheets that provide a detailed description of operational events (e.g. the conditions surrounding an accident), the legal issue(s) together with the judgment and the penalty imposed. In addition, this information is linked to the OHS legal requirements applicable to the particular case.

This makes it possible to create help modules that can be accessed via a second tool dedicated to compliance assessment. In practice, this second mode allows the actors responsible for a compliance assessment to find any examples of case law associated with a particular compliance matter and identify potential non-compliance issues. This software tool therefore facilitates the understanding of issues related to the OHS legal requirements applicable to the company being assessed.

However, as the software is still under development it does not yet provide sufficiently detailed case law information to enable the prioritization of action plans. This improvement to the software is still under active development at the time of writing.

6. CONCLUSION

While at the present time the study of case law remains very underused in business practices, it offers real prospects for improvements in OHS legal compliance management systems. Potential benefits include a better understanding of the requirements, scope and mechanisms related to the conditions of legal liability and also a wealth of information related to the penalties that may be imposed. This last point is crucial in the context of prioritizing compliance actions. However, one limitation should be highlighted. Case law, like legislation, is continually evolving according to legal precedent. For the approach to be truly effective, it must provide monitoring methods that make it possible to adapt to new developments.

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