COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, xxx
SEC(2007) 737

COMMISSION STAFF WORKING PAPER

Annex to the

REPORT FROM THE COMMISSION

"BETTER LAWMAKING 2006"

pursuant to Article 9 of the Protocol
on the application of the principles of subsidiarity and proportionality
(14th report)

{COM(2007) 286 final}

CONTENTS

1. INTRODUCTION

The first part of this working document is mainly concerned with the progress made in 2006 in implementing the Commission action plan on better regulation as revised in March 2005[1] and the Inter-institutional Agreement (IIA) on "Better Lawmaking" of December 2003[2]. The focus is on the activities of the EU institutions. Member States' activities on Better Regulation are covered in the relevant parts of the Commission's Annual Progress Report on Growth and Jobs[3] and are not presented in this report.

The second part of the document relates to the application of the principles of subsidiarity and proportionality. Describing firstly the legal and institutional framework in place 2006, it then reviews the way in which those principles have been interpreted and applied by the Commission, Parliament and Council during the past year. Lastly, it examines action taken by the Committee of the Regions and national parliaments and also looks at the case law of the Court of Justice of the European Communities.

2. BETTER REGULATION

Improving the regulatory environment is the joint responsibility of all EU institutions and the Member States. While the progress on Better Regulation made in Member States is not reported on here, significant achievements can be identified for the EU institutions. Better Regulation has been a high priority for the Commission, the European Parliament, and the Council, and for all elements of the Better Regulation agenda, the phase of development and testing of approaches has ended and given way to a phase of delivery and refinement of tools. The Commission, in line with its role as initiator of legislation, has taken on a leading role on Better Regulation.

2.1. Action taken by the Commission

In its 2005 Communication to the spring European Council entitled "Working together for growth and jobs - A new start for the Lisbon Strategy"[4], the Commission proposed to give fresh impetus to the Lisbon Strategy by channelling its efforts towards two main goals: achieving stronger and lasting growth and creating more and better jobs. Improving European regulation (i.e. in particular creating the right incentives for business, cutting unnecessary costs and removing obstacles to adaptability and innovation) was identified as one of the key priorities in that perspective.

---

1 "Better regulation for growth and jobs in the European Union" COM(2005) 97, March 2005, referred to subsequently as the "action plan". This Communication updates and completes the Action Plan set out in 2002 ("Simplifying and improving the regulatory environment", COM(2002) 278, 5 June 2002). The action plan follows up the White Paper on European Governance (COM(2001) 727, 25 June 2001). It takes into account the recommendations made by the Group on Regulatory Quality chaired by D. Mandelkern, presented to the Laeken European Council in December 2001. For more information on the eight specific communications detailing its objectives, see the annual report "Better Lawmaking 2003", COM(2003)770, 12 December 2003. For the previous annual reports on Better Lawmaking, see the last footnote of Annex 1.

2 OJ C 321, 31 December 2003, p. 1.

3 European Commission, 2006-Annual Progress Report on Growth and Jobs "A year of delivery", COM(2006) 816, 22 December 2006.

4 COM(2005) 24.

These goals were confirmed in the "Strategic Review of Better Regulation in the EU", which the Commission presented in November 2006 and in which it took stock of progress and mapped out action for all EU Institutions and Member States for the coming years.[5]

Implementing the Better Regulation Agenda, the Commission in 2006:

– carried out some 67 impact assessments, launched an evaluation of its impact assessment system and established an Impact Assessment Board as an independent quality support and control function for impact assessments prepared by Commission departments;

– continued implementation of its simplification programme, reported on the progress made and added more than 40 new items to it[6], and integrated simplification items into its Legislative and Work Programme for 2007[7];

– integrated the EU Standard Cost Model for the measurement of administrative costs into its impact assessment guidelines and proposed the launch of an ambitious action programme to reduce administrative burden in the EU;

– completed its screening of pending proposals dating from previous Commissions and re-launched its programme for codification and repeal of obsolete legislation.

This more detailed report on Commission activities follows the order of the legislative process: preparation and drafting, participation in legislative deliberation, implementation and review of the legislation.

2.1.1. Consultation of interested parties

The Commission further increased its efforts to consult interested parties .

In 2006, the Commission produced 10 Green Papers (- 4 compared to 2005), 2 White Papers (no change) and 217 non-legislative Communications (+28). It also published 106 reports (+14) and organised 129 internet-based consultations (+23) via the web portal “Your Voice in Europe”– the Commission’s single access point for consultation.

External consultation on the implementation of the minimum standards for consultation

With its Green Paper on the European Transparency Initiative[8], the Commission launched a debate on its relations with interested parties and asked for external feedback on the application of its general principles and minimum standards for consultation of interested parties[9]. The consultation period ran from May 2006 until August 2006. More than 100 contributions[10] were received to the "minimum standards" chapter of the Green Paper, mostly from various business interest groups and NGOs[11].

---

5 COM(2006) 689 final, 14 November 2006.

6 "First progress report on the strategy for the simplification of the regulatory environment"- COM(2006) 690 final

7 COM(2006) 629 final

8 COM(2006) 194.

9 These standards were introduced in 2003 (COM(2002) 704, 11 December 2002).

10 Contributions are available at: http://ec.europa.eu/comm/eti/contributions.htm

11 The European Economic and Social Committee also gave an opinion on the Green Paper on ETI on 26 October 2006 (SC/028 – CESE 1373/2006). The opinion of the Committee of the Regions is expected early in 2007.

Respondents generally welcomed the Commission's minimum standards and efforts to improve its consultation processes and acknowledged positive developments in this field. However, only 30% of respondents provided a general assessment as to whether the Commission had applied the minimum standards for consultation in a satisfactory manner. Of those, 4 out of 5 gave a positive general assessment. Furthermore, the stakeholders' responses provided extensive feedback on specific features of the Commission's stakeholder consultations. The main results are as follows:

– The Commission's single access point for consultation, the "Your Voice in Europe" web portal[12], was generally praised as a good consultation and information tool. However, there were complaints that the Commission had not managed to publish all the submissions to open public consultations via 'Your Voice', a minimum standard required.

– Regarding the minimum eight-week deadline for open public consultations, it was felt that this should be the absolute minimum consultation period and the Commission should provide longer periods whenever possible and take into account the main holiday periods when calculating the consultation period. Some organisations asked for the minimum consultation period to be extended to 12 weeks.

– Several contributions complained about the lack of well-argued general feedback. Information on whether and how the contributions received had been taken into account in the final policy proposal was deemed to be essential by many of the respondents.

– Some respondents also claimed that there was a lack of balance in the representation of relevant sectors in targeted consultations (for example, in some high-level groups).

To summarise, it seems that there is scope for further improvement in applying the minimum standards for consultation, particularly in relation to general feedback, targeted consultations and observing the minimum consultation periods. The full conclusions of the ETI Green Paper will be presented in the forthcoming Communication on the European Transparency Initiative.

Self-assessment of the Commission departments

The Commission departments generally assess the Minimum Standards for Consultation, introduced in 2002, favourably. They help staff to hold rational and efficient consultations. DGs did not signal that complying with minimum standards for consultation caused any delays in the execution of the Commission's work programme. In a few cases, the Commission staff had shortened the consultation period to less than the eight-week minimum, due to time constraints and because stakeholders had been closely involved throughout the process or by other additional means. Several Commission departments, while fully recognising that external consultations were indispensable, signalled that they represented a significant additional workload, in particular to assess the contributions received.

[12] http://ec.europa.eu/yourvoice/consultations/index_en.htm

2.1.2. Collection and use of expertise

In line with the principles and standards set in its 2002 Communication on the collection and use of advice from external experts[13], the Commission developed the interface between experts and (EU) policy makers called SINAPSE (Scientific INformAtion for Policy Support in Europe)[14]. This web communication platform contributes to the quality, openness and effectiveness of collection of expertise mainly by offering: (1) "Yellow Pages" of expertise for quickly identifying and contacting scientists or scientific organisations with specific expertise; (2) a library of scientific advice and opinion; (3) an EC consultation module designed to support existing scientific consultation mechanisms (expert groups); and (4) tools to create e-communities.

In 2006, the setting up of SINAPSE proceeded on schedule. The registration phase launched in 2005 was completed. By December 2006, more than 800 European and international scientific organisations were registered (as against 300 in December 2005), together with 2400 members. Several e-communities have been created. These include the European Science Advice Network for Health, (EuSANH) set up at the initiative of the Belgian and Dutch National Health Council and aimed at sharing information and expertise between science advisory bodies in Europe active in the field of public health and to adopting common opinions where appropriate.

2.1.3. Impact assessment

In 2006, the Commission continued to refine its approach to the integrated assessment of the economic, social and environmental impacts of its most significant proposals.[15] The practice, introduced by the Barroso Commission in 2005, of requiring impact assessments for all major legislative and policy-defining initiatives in the annual Legislative and Work Programme resulted in 67 being produced in 2006[16]. In addition to this requirement linked to the items in the Legislative and Work Programme, there is an increasing tendency for voluntary impact assessments to be carried out on initiatives outside the Work Programme.

The Commission has also developed a methodology for the measurement of administrative costs to be applied where Commission initiatives have a significant (positive or negative) impact in terms of administrative cost. A manual on applying the methodology was incorporated into the Impact Assessment Guidelines[17] in March. The methodology was progressively applied in relevant impact assessments conducted in the second half of 2006.

Efforts to ensure that Commission staff are adequately trained to carry out impact assessments have been stepped up. In addition to the introductory training course, attended by about 500 Commission staff since it began in late 2003, a series of advanced workshops have been put in place, covering more specific elements of the impact assessment approach such as applying the administrative costs methodology and stakeholder consultation techniques.

---

13 COM(2002) 713, 11 December 2002.

14 http://europa.eu.int/sinapse/sinapse/index.cfm.

15 See the original mandate of the 2001 Gothenburg Council (Presidency conclusions) for a coherent assessment of economic, social and environmental effects of Community policies in the context of the Union's Sustainable Development Strategy.

16 List on http://ec.europa.eu/governance/impact/practice_en.htm.

17 SEC(2005) 791.

There is clear evidence that the growing attention being paid to the need for quality impact assessments, together with efforts to enhance support for impact assessment through clearer guidelines and more comprehensive training and tools, is feeding through into a general improvement in overall quality[18]. Quality improvements in both qualitative and quantitative assessments have been identified in some impact areas. However, there continues to be an imbalance in some impact assessments in terms of examination of impact areas, with the *analysis of social impacts often receiving less attention* than the economic or environmental impacts.

A further area of improvements is upstream coordination between Commission departments as part of the impact assessment approach, in which setting up Inter-Service Steering Groups has now become standard practice.

Impact assessment continues to help improve the quality of Commission proposals[19]. In some cases, preliminary analysis led the Commission to conclude that intervention would be premature or unnecessary[20]. To improve transparency for citizens and stakeholders, the executive summaries of impact assessment reports are translated into all Community languages since 2006.

Notwithstanding these improvements in terms of practice and quality, the Commission acknowledges that more can still be done. To ensure that this progress is entrenched and further developed, the President of the Commission has set up an *Impact Assessment Board*, which operates under his direct authority and independently of Commission departments, to scrutinise draft impact assessments and provide support and opinions on their quality. It is expected that the work of the Board will lead to further improvements in impact assessment quality.

Further measures to improve the overall approach and raise the quality of Commission impact assessments are likely to materialise as follow-up to the results of the external evaluation of the system, which was carried out in the second half of 2006. The results of the evaluation are due in the early part of 2007 and will be made publicly available.

2.1.4. Choice of instruments (self-regulation and co-regulation)

In its 2005 Better Regulation Action Plan, the Commission stressed the need to pay more attention to the choice of instruments for pursuing Treaty objectives and implementing Community policies and, in particular, to alternative instruments to 'classic' legislation (self-regulation and co-regulation)

The European Commission and the European Economic and Social Committee (EESC) have together looked at ways to facilitate exchange of information and identification of best practice in this area. The objective was, on one hand, to encourage and support private parties

---

[18] See, for example, the impact assessments on the Thematic Strategy on Pesticides – SEC(2006) 894 - and the proposal for the Postal Services Directive – SEC(2006) 1291.

[19] The impact assessment carried out on the proposal for a Regulation on 'roaming' mobile telephone charges is a good example of where the shape of the final policy choice i.e. the decision to opt for a European Home Market pricing approach, was influenced by the results of the impact assessment. Another useful example is the proposal for a Regulation on the banning of exports of metallic mercury, where the impact assessments improved the focus of the final proposal.

[20] For example, a study carried out by DG ENV on the functioning of current legislation on End-of-life vehicles led to the decision that no new proposal was necessary.

willing to develop or improve self-regulatory schemes and, on the other hand, to assist regulators responsible for co-regulatory design. Another objective was to improve the monitoring and evaluation of self-regulation practices and co-regulation mechanisms, which are essential to the latter's credibility[21].

To this effect, they jointly developed in 2006 a database of "EU self- and co-regulation" gathering operational knowledge on initiatives with an EU dimension. The public launch of this database, hosted by the Single Market Observatory[22], is scheduled for early 2007.

At the same time, the Commission consulted stakeholders on the appropriate use of self- and co-regulation in the context of its impact assessments but also through roundtables and studies[23]. The Commission and the EESC will assess the added value of complementing the database with an on-line forum to give stakeholders further opportunity to contribute to the debate on good practices in this domain.

At sectoral level, 2006 saw the acknowledgement of important self-regulatory and co-regulatory mechanisms. For example, in July the Commission announced its preference for an industry-led approach to a more efficient and integrated securities post-trading market in the EU, as opposed to proposing a Directive[24]. It called upon the industry to provide a suitable solution. In response, the three main industry associations[25] prepared a "European Code of Conduct for clearing and settlement" which was signed on 7 November 2006 by all their members. The Commission welcomed this Code as an important first step. Sometimes, the Commission invites and acts as an honest broker. This was the case with for the "European Charter for the Development and the Take-up of Film On-line" called for in 2005 by the Commission and endorsed on 23 May 2006 at the Cannes festival by film makers, internet service providers and of telecom operators.

As for co-regulation, Parliament and the Council have adopted several schemes to set up codes of conduct at Community level have been adopted by the European Parliament and the Council, as part either of a legislative act or of a recommendation. For example[26], Directive 2006/123/EC of 12 December 2006 on services in the internal market provides that Member States should encourage the development of such codes, in particular by professional bodies, organisations and associations at Community level. The 20 December 2006 recommendation

---

21 The European Parliament, the Council and the European Commission have recognised the usefulness of self- and co-regulation under given conditions set in the Inter-Institutional Agreement on Better Lawmaking of December 2003. These conditions have been integrated in the design of the database.

22 http://www.eesc.europa.eu/smo/prism/presentation/index.asp

23 See for instance "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", July 2006 (http://ec.europa.eu/consumers/overview/report_advertising_en.pdf); "Self and co-regulatory practices in the European Union", October 2006 (http://europa_eu.staging.entr.cec.eu.int/enterprise/regulation/better_regulation/docs/simplification/Final-report-SCR2.pdf); or the Study on co-regulation measures in the media sector (http://ec.europa.eu/comm/avpolicy/info_centre/library/studies/index_en.htm#finalised).

24 The Commission initially envisaged to propose a framework directive (see COM(2004) 312).

25 The Federation of European Securities Exchanges (FESE), European Association of Central Counterparty Clearing Houses (EACH) and European Central Securities Depositories Association (ECSDA).

26 As proposed in 2004 by the Commission (COM(2004) 2), these codes of conduct should include rules for commercial communications relating to the regulated professions and rules of professional ethics and conduct of the regulated professions which aim, in particular, at ensuring independence, impartiality and professional secrecy. They should also set the conditions to which the activities of estate agents are subject.

on the protection of minors and human dignity and on the right of reply also invites the European audiovisual and online information services industry to develop codes of conduct[27].

The Commission also directly set co-regulatory frameworks through various means, including communications, recommendations and letters of acknowledgment, for example in the field of network and information security[28].

In addition to EU-wide codes of conduct, voluntary agreements and charters, the Union continued to experiment with the transposition of EC directives through co-regulation at Member State level, in particular in environmental matters. For instance, Directive 2006/66/EC of 6 September 2006 on batteries and accumulators and waste batteries and accumulators provides that Member States may transpose provisions on collection schemes, export and information for end-users on waste batteries and accumulators through voluntary agreements taken by economic operators. As proposed by the Commission in 2003[29], it also sets a framework for these agreements[30]. A similar option was presented earlier in Directive 2000/53/EC of 18 September 2000 on end-of life vehicles and in Directive 2002/96/EC of 27 January 2003 on waste electrical and electronic equipment (WEEE). According to the information received by the Commission, Belgium is the only country where voluntary agreements on end-of-life vehicules and WEEE have been introduced.

By contrast, 2006 also saw industry request to turn self-regulatory practices into co-regulatory schemes or even into classic legislation as illustrated by the fruit juice case. The European Fruit Juice Association (AIJN), whose members cover 90% of the European market has a code of practice indicating how to meet the requirements set by Council Directive 2001/112. This code was used to define the position of the European Community in the negotiation of the 'Fruit Juice Norm' introduced in the Codex Alimentarius[31] in 2005. Later on, the AJIN reached the conclusion that the non-binding codex norm was not sufficient to tackle unfair competition from non-AIJN members. Consequently, it called for the inclusion of the codex norm in EU law.

---

27 This Recommendation refers to media literacy or media education programmes, the right of reply across all media, cooperation and the sharing of experience and good practices between (self)-regulatory bodies, which deal with the rating or classification of audiovisual content and action against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in all media. As proposed by the Commission (COM(2004) 341), the Recommendation provides indicative guidelines on the content of the codes of conduct and on the consultation and representativeness of the parties concerned.

28 Cf. COM(2006) 251: A Strategy for a Secure Information Society – Dialogue, Partnership and Empowerment.

29 COM(2003) 723.

30 These agreements shall be enforceable, must specify objectives with the corresponding deadlines, be published in the national official journal and transmitted to the Commission.

31 The Codex Alimentarius is the collection of standards, codes of practice, guidelines and other recommendations adopted by the Codex Alimentarius Commission set up by the World Health Organisation and the Food and Agriculture Organisation of the United Nations.

2.1.5. Minimising administrative costs imposed by EU legislation

Minimising administrative costs imposed by legislation has been given high priority in the Union. Action was first taken to minimise administrative costs introduced by new measures[32]. An operational manual for applying the EU Net Administrative Cost Model proposed in October 2005[33] was drafted and eventually included in the Impact Assessment Guidelines on 15 March 2006[34]. The manual was translated into all EU official languages to facilitate methodological convergence with and among Member States. Also called the "EU SCM", this model has been applied in a number of published or forthcoming impact assessments[35].

As for existing costs, the Commission proposed in the Strategic Review of Better Regulation and the attached Working Document of 14 November 2006 to launch an ambitious Action Programme to reduce the administrative burden in the EU[36]. The Commission presented this Action Programme in early 2007, in time for the Spring European Council. As part of this strategy, the Commission proposed that the 2007 Spring European Council fix a reduction target of 25%, to be achieved jointly by the EU and Member States by 2012[37].

2.1.6. Screening and withdrawal of pending proposals

The Commission considers that screening and withdrawal of pending proposal is part of its efforts on Better Regulation. Screening of pending proposals will be a regular feature in the context of preparing annual work programmes in order to ensure that the legislative proposals pending before the legislator are in line with political priorities and up to date.

In 2006, the Commission completed the screening of all proposals adopted by the previous Commissions but still pending before the legislator. In 2005, the Commission screened 183 proposals from before 2004, resulting in the withdrawal of 68 proposals. In 2006, the Commission screened more than 80 pending proposals adopted by the Commission in 2004 before the present Commission took office, on 22 November 2004. Proposals were screened with regard to their general relevance, their impact on competitiveness and other economic effects, progress in the legislative process and conformity with better regulation standards, and possible obsolescence[38].

---

32 Administrative costs are defined as costs of respecting legal obligations to provide information to public and private parties.

33 See Staff Working Paper, "Developing an EU common methodology for assessing administrative costs imposed by EU legislation - Report on the Pilot Phase (April– September 2005)", SEC(2005) 1329, annexed to the Communication on a "EU common methodology for assessing administrative costs imposed by legislation" - COM(2005) 518, 21.10.2005. The EU SCM is building on the SCM models developed and used by several Member States.

34 See http://ec.europa.eu/governance/impact/docs_en.htm.

35 These cases include the postal services directive (SEC(2006) 1292 accompanying COM(2006) 594), the revision of the timeshare directive 94/47, the regulation on pesticides statistics, the inclusion of aviation under the ETS and the evaluation of EU policies on Freedom, Security and Justice.

36 COM(2006) 689 and COM(2006) 691.

37 Commission working document COM(2006) 691: "Measuring administrative costs and reducing administrative burdens in the European Union" Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions COM(2006) 689 : "A strategic review of Better Regulation in the European Union

38 In its Action Plan, the Commission said it intended to exercise its right of initiative through withdrawal of individual proposals whenever the amendments introduced by Parliament and the Council change the nature of the proposal or introduce complexity which is incompatible with the provisions of the Treaty. No such case has been reported in 2006. This type of withdrawal has only be decided five times over

The outcome was that the Commission decided to withdraw another 10 pending proposals, as announced in the Commission's Legislative and Work Programme for 2007[39]. Including proposals intended for withdrawal in the annual Work Programme gives practical implementation to the recommendation of the European Parliament[40]. Furthermore, again in response to Parliament's recommendation, for each proposal the Commission spelled out the justification for withdrawal.

By including this list in its 2007 Legislative and Work Programme the Commission has given Parliament and the Council prior notice of the proposals it intends to withdraw, in accordance with the Framework Agreement on relations between the European Parliament and the Commission. The withdrawal of proposals will take effect when the list of the proposals withdrawn is published in the Official Journal. This will take place after a reasonable time following their notification to Parliament and the Council, to allow the other institutions the opportunity to express any views they may have.

2.1.7. Simplifying and updating the Community acquis

Simplification

In October 2005, the Commission launched a major programme to simplify existing rules[41], listing about 100 initiatives covering 220 legislatives acts to be simplified over the period 2005-2008[42]. As far as the actions scheduled for the 2005 programme are concerned, 13 of the 14 initiatives have been completed to date. The delay for one action relates to the decision to perform an impact assessment.

A regards the items for 2006, 27 of the 54 simplification initiatives listed for 2006 have been adopted by the Commission - as have another 6 carried over from 2005 - while 23 have been postponed, to allow more thorough analysis supporting these proposals. Four initiatives planned for 2006 were removed from the rolling programme in the light of either new policy developments, the outcome of a consultation process, or the conclusions of an impact assessment.

---

the last twenty years (Erasmus programme (1986); 'tax exemptions' directive (1986); the 'right of residence' directive (1989); the proposals relative to the specific research programmes (1991); and the 'pension funds' directive (1994)).

39 Annex 4 to document COM(2006) 629, of 24.10.2006.

40 European Parliament resolution on the outcome of the screening of legislative proposals pending before the Legislator (2005/2214(INI)).

41 COM(2005) 535.

42 Other initiatives contribute to simplify the acquis, but are not put on the programme because they pursue mixed objectives and/or because they are not proposals for legislative simplification. For instance, efforts were made in 2006 to enhance rules applicable to the management of external aid. A revised Practical Guide explains the contracting procedures applying to all external aid contracts financed from the European Communities general budget (Budget) and the European Development Fund (EDF) was published. On 4 July, 2006, the Commission adopted new Implementing Rules of the Financial Regulation which reduce documentary evidence for the economic operators and the administrative services institutions; suppress under certain conditions the obligation to provide a guarantee in the case of pre-financing to a public body; and simplify rules for grants.

On occasion of its Strategic Review of Better Regulation in the European Union[43], the Commission produced the first progress report on the strategy for the simplification of the regulatory environment[44]. It takes stock of progress achieved in implementing the October 2005 simplification programme, addresses ongoing work and presents 43 new initiatives to boost the rolling programme for 2006-2009. It also gives the state of play on codification. The updated rolling programme provides an overview of the Commission's efforts to simplify the current regulatory environment in a multi-annual perspective. Moreover, the major simplification initiatives are for the first time included in the Commission Legislative and Working Programme for 2007, which clearly demonstrates the political priority given to the simplification strategy.

Better Regulation is a shared responsibility, and the Commission relies on the close cooperation of the other European institutions, the Member States and local administrations to achieve Better Regulation goals and concrete results on simplification. At the end of 2006, 29 simplification proposals were pending before the legislator, some of which relate to the 2003 initiative to update and simplify the community *acquis*[45].

The Inter-institutional Agreement (IIA) on Better Lawmaking, in force since December 2003, established a platform to further develop cooperation between the three institutions. The High Level Technical Group responsible for monitoring the implementation of the IIA has regularly examined progress such as coordination and programming of legislative work, the quality of legislation (impact assessment in particular), transposition and application of Community legislation and simplification. Nevertheless, the co-legislators have found it difficult to identify practical measures to prioritise simplification and speed-up the legislative process. The advantages of a lighter Community regulatory environment could easily be cancelled out if national rules are not adapted accordingly. The "Strategic review of Better Regulation in the European Union" of November 2006 therefore underlines the need for Member States to develop their own national simplification programmes to prevent gold-plating. At EU level, 'gold-plating' refers to transposition of EU legislation in a manner which goes beyond what is required by that legislation, while staying within legality. Member States have considerable discretion when implementing directives. They may often increase the frequency of reporting obligations, add procedural requirements for authorising the sale of a product, or apply more rigorous penalties. While not illegal, 'gold plating' may be a bad practice because it imposes costs that could have been avoided[46].

Repeal of obsolete legislation

Another major concern of the Commission is to reduce and update the acquis. The list of Community acts in force is regularly screened to identify those which are obsolete. The resulting list of legislation making up the 'active acquis' enables Commission departments to identify the "dead wood" in their subject-areas by a simple process of deduction. Those acts

---

43 COM(2006) 689.

44 COM(2006) 690.

45 COM(2003) 71.

46 Gold-plating therefore is different from a transposition measure in contradiction with a Directive and subject to infringement procedures. Gold-plating should not be confused either with the introduction of amendments in the course of the EU legislative process and which aim at increasing the number and level of obligations. 'Opting out' of deregulatory measures is not gold-plating either. Some directives only invite, but do not oblige, Member States to remove a set of national rules. When a Member State decides to maintain its rules, there are indeed no additional requirements to the directive.

can then be repealed if the appropriate legal basis exists. Otherwise they may be the subject of a declaration of obsolescence to remove them formally from the 'active acquis'.

Codification

In November 2001 the Commission launched a major programme for the codification[47] of all Community legislation, which was to be completed by the end of 2005. Translation of the acquis into the languages of the ten new Member States joining the EU in 2004 and technical difficulties experienced by the Office for Official Publications delayed this process. On 4 October 2006 the Commission re-launched the codification project with the aim of bringing it to a close by the end of 2008. To this end a series of measures were taken, including provisions to prevent the same delays occurring for Bulgarian and Romanian, which became official languages on 1 January 2007.

To ensure greater transparency and improved monitoring, the acts which the Commission intends to codify are set out in an indicative programme showing approximately when they can be expected to be adopted. So that the programme is disrupted as little as possible, DG's have been asked to postpone the submission of new amendments to the acts listed in the programme[48]. By the end of 2006, a total of 67 codified acts were adopted (49 by the Commission and 18 by the Council). In addition, 34 Commission proposals were pending at the Council.

Recast

Similar benefits to those of codification can be achieved by recasting legislation, i.e. combining amendment of the substance of an act with codification of the non-amended part. The Inter-Institutional Agreement permitting a more structured use of the recasting technique has been in force for four years[49]. Its operation has been reviewed after three years by the Legal Services of the EP, Council and Parliament, as provided for[50].

2.1.8. Monitoring the application of EU law

The Commission, in its capacity as guardian of the Treaty, has made monitoring the application of EU law one of its strategic objectives. Throughout 2006 the Commission pursued the objectives set in its 2002 Communication on better monitoring of the application of Community law[51].

The annual report on monitoring the application of EU law adopted in July 2006 confirms that the combined effect of the size of the EU body of law, the number of EU Member States and the number of working languages makes it all the more necessary to use the most efficient tools available to manage the system of EU law[52]. The increase in the number of citizens and

---

47 Codification consists of the adoption of a new instrument, which is published in the L series of the Official Journal, and which incorporates and repeals the previous instruments (i.e. the basic act and all intervening amending instruments).

48 See also: First progress report on the strategy for the simplification of the regulatory environment, Annex 2: Codification rolling programme – SEC(2006) 1220, 14 November 2006, [COM(2006) 690]

49 Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77, 28.3.2002, p. 1–3.

50 That review is integrated in the first progress report on the strategy for the simplification of the regulatory environment, 14 November 2006, COM(2006) 690.

51 See COM(2002) 725, of 20 December 2002, at: http://ec.europa.eu/governance/docs/comm_infraction_en.pdf

52 COM(2006) 416.

companies that can benefit from the application of EU law also puts greater emphasis on using the most appropriate methods possible.

This report led to examine the following:

– taking greater account of potential transposition difficulties when new directives are prepared;

– planning monitoring activities which are proportionate to the nature of each directive when it is being transposed into national law, with particularly strict monitoring for directives of key importance;

– a general requirement for Member States to provide concordance tables showing national provisions alongside the text of the directive;

– improving working methods with Member States to ensure that better information on applying EU law is provided and that problems encountered by citizens and companies when exercising their rights are more quickly solved;

– placing greater emphasis on those cases of EU law infringement which have the most harmful and widespread effects.

Implementation of the electronic notification system for national measures transposing directives was completed in February 2006, when it became operational in the last of the 25 Member States. The operation of the system has been improved through regular user contact and presentations, seminars and technical consultations on possible useful improvements and developments. The system has also proved an effective pre-notification system for Romania and Bulgaria, as acceding EU countries. Regular contact with candidate countries has been maintained with seminars on how the EU law monitoring system works being held in the respective capital cities in November.

As announced in the strategic review of Better Regulation[53], a specific communication on the application of EU law will be issued in early 2007.

2.1.9. Other actions

Quality of drafting

The Commission attaches great importance to the quality of drafting[54] of its proposals and its autonomous acts. Community law has to be clear and easily accessible.

In that context, the Commission Legal Service has reorganised its departments working on aspects of legislative quality (the legal revisers and codification groups) to better coordinate its work on improving legislative quality.

The first drafts of legislation are produced by Directorates-General. This has made a multi-pronged approach to improving drafting quality necessary, with the emphasis on improving the draft at the earliest possible stage. To that end, before it is translated into the 23 official languages, all draft legislation of any significance is examined by the legal revisers in

---

53 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A strategic review of Better Regulation in the European Union [COM(2006) 690 final] [COM(2006) 691 final].

54 The editing service of the Directorate-General for Translation can be used to improve the linguistic quality of original documents.

conjunction with the relevant departments and the lawyers responsible for the substance. In 2006, this process was applied to some 1 500 draft acts. The rules applied were fixed by the three institutions involved in the legislative process in the Inter-institutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation[55], which was a direct consequence of Declaration 39 on the quality of drafting annexed to the Amsterdam Treaty.

The legal revisers are responsible for ensuring that those guidelines are actually applied and for improving the quality of drafting generally. A key measure has been to publish in all the official languages a *Joint Practical Guide for persons involved in the drafting of legislation* and to distribute it to the technical staff who produce the first drafts. It has now been made available to the general public in 11 language versions on EUR-Lex, the EU law portal on the EUROPA internet site[56].

Training in legal drafting is carried out within the Commission's services to improve drafts at an early stage. Courses are often tailored to the training needs of the drafters. Over 200 technical specialists attended one of the special courses in 2006.

Collaboration between the legal revisers of the three institutions involved in the legislative process has been extended in connexion with the enlargement of the EU, insofar as they share responsibility for finalising the Community acquis in the new official languages.

Cooperation with the Member States has been maintained in particular by holding a series of seminars on legislative quality for officials involved in the legislative process from the Commission and the other Community institutions and from Member States. In 2006 a seminar on Spanish views on quality of legislation and a seminar on the Finnish approach to making legislation simple and understandable together attracted over 500 participants. Many more have requested information about the seminars, which have thus promoted closer contacts on legislative matters between all the institutions and many of the Member States.

Accessibility

In 2006, accessibility to EU and national law was improved thanks to a number of developments. **EUR-Lex**, the gateway to EU legislation and jurisprudence providing free access to the largest documentary repository on European Union law, was upgraded[57]. An "advanced search service" offers an interface enabling professionals to fully exploit the database's legal data through flexible search and display modules, a wide range of Boolean operators and full access to EUR-Lex indexed headings. A notification service called "Lex-Alert" warns the EUR-Lex user of the arrival of new documents within a particular field of interest, according to the registered profile of the user. In addition, the case law of the Court of Justice of the European Communities and the legislative proposals transmitted to the European Parliament and Council are uploaded much faster than before (usually within a couple hours of their release). A consolidated version of some 1800 acts is also available.

---

55 OJ C 73, 17.3.1999, p. 1.

56 http://eur-lex.europa.eu/en/techleg/index.htm

57 http://eur-lex.europa.eu/en/index.htm.

Moreover, the Office for Official Publications of the European Communities, in conjunction with the Member States of the European Union, has developed a common access portal for national law in 22 Member States, N-Lex[58]. This experimental portal allows national law references to be found using a single search template. In 2007, further developments should allow direct access to the text of national measures implementing EU law for some of the Member States.

2.2. Actions by EU institutions, the European Economic and Social Committee and the Committee of the Regions

Better regulation and its implementation has become a priority for all institutions. The **European Parliament**, especially, took an active role in Better Regulation in 2006. It held a discussion in April and in May 2006 adopted a package of five resolutions on Better Regulation. The resolutions include a wide range of proposals for action and improvements for co-operation, mainly directed to the Commission but also to the Council and Member States. These resolutions cover the main aspects of Better Regulation:

– Better Lawmaking 2004: application of the principle of subsidiarity – 12th annual report[59]

– *The implementation, consequences and impact of the internal market legislation in force*[60]

– A strategy for the simplification of the regulatory environment[61]

– Outcome of the screening of legislative proposals pending before the legislator[62]

– The Commission's 21st and 22nd Annual Reports on monitoring the application of Community law (2003 and 2004)[63]

The resolutions raise important inter-institutional issues:

In relation to *quality control* of Commission impact assessments the Parliament resolutions requested some "independent scrutiny" and "quality to be monitored by the dedicated quality control function". In the plenary discussion in April, the President of the Commission agreed that an independent quality check should be set up under his personal authority. Therefore, in November 2006 the Commission set up an *Impact Assessment Board* to provide quality control and advice on Commission impact assessments.

In July 2006, the 'Common Approach to Impact Assessment', which derives from the IIA on Better Lawmaking and which sets out some basic 'traffic rules' for impact assessment throughout the legislative process, received political endorsement from Parliament[64]. Parliament is paying increasing attention to the Commission's impact assessments when examining proposals and has highlighted areas where it believes that further work could be useful. Parliament and its committees are also increasingly requesting that studies and impact

---

58 http://eur-lex.europa.eu/n-lex/pays.html?lang=en.

59 P6_TA-(2006)0203.

60 P6_TA-(2006)0204.

61 P6_TA-(2006)0205.

62 P6_TA-(2006)0206.

63 P6_TA-(2006)0202.

64 It had already been endorsed by Council and the Commission in late 2005.

analyses on certain subjects[65] or substantive amendments to Commission proposals[66] are carried out, and Parliament departments have stepped up training on impact assessment for their staff.

On *simplification* the European Parliament proposed a fast-track procedure for un-controversial simplification proposals. The aim of speeding up the process and implementing the provisions of the Inter-Institutional Agreement (IIA) on Better-Lawmaking is positive but it may be difficult for the Commission to produce pure and uncontroversial simplification proposals. For efficiency reasons, Commission proposals to update and simplify the *acquis* normally combine amendments of the substance of the legislation with elements of simplification.

The Resolution on reinforcing the *monitoring and application of the Community law* contains a significant number of detailed suggestions and specific requests to the Commission. This Resolution marks Parliament's increased interest in overseeing the work of the Commission on the application of Community law, including any prioritisation of work. It also confirms the importance of monitoring the application of EC law, which is one of main responsibilities of the Commission as well as a strategic objective. Some further work is under way in this area and Commission initiatives are foreseen for 2007.

Parliament also proposed that the Commission should indicate in the Commission Legislative and Work Programme those proposals which might be susceptible to alternative instruments other than 'classic' regulation. However, at the time of drafting its Legislative and Work Programme, the Commission does not necessarily have at its disposal information on and assessments of whether an initiative lends itself to alternative regulatory approaches. Finally on *withdrawals and modifications*, Parliament proposed to draw up Common inter-institutional guidelines concerning withdrawals and modifications. However, the Commission considers the option of withdrawing a proposal to be an aspect and corollary of its right of initiative and could not agree to negotiating criteria but only to prior notification as provided for in the Framework Agreement between the European Parliament and the Commission. The resolutions were discussed in the inter-institutional High Level Technical Group in June 2006.

In 2006, the *Council and its presidencies* took an active role in putting some of the provisions of the 'Common Approach to Impact Assessment' into practice. During the Austrian Presidency the Council drew up an indicative guide for working parties on handling impact assessments in the Council[67]. The Finnish Presidency followed the guide by normally using the Commission impact assessments for the examination of new Commission proposals. However, in 2006 the Council did not carry out impact assessments for any of its own amendments; discussions continue within the Council Secretariat on how best to organise the Council's work on impact assessment on substantive amendments. Since July 2006, the Commission has also sought to facilitate the use of Commission impact assessments by the Council, the European Parliament, and national Parliaments by translating an extended executive summary into all Community languages.

---

65 For example, on the inclusion of social impacts in Commission impact assessments.

66 For example, ENVI Committee impact analysis on amendments to the proposal for a Directive on Air Quality.

67 Council document 9382/06 15.5.2006.

The *Committee of the Regions* (CoR) and the *European Economic and Social Committee* (EESC) took an active part in the Better Regulation debate in 2006, especially on subsidiarity. The CoR requested systematic consultation of local and regional authorities early in the preparation of European legislation; involvement in impact assessment work to ensure that financial or administrative burdens put on local and regional authorities are proportionate to the objectives pursued by EU action; and the inclusion of a regional dimension in the national Action Plans for the simplification of legislation.

The cooperation agreement between the CoR and the European Commission, signed in November 2005, paves the way for structured dialogue with associations representing regional and local authorities as a way of involving them in the EU policy-making process. In this context several structured and thematic dialogue meetings have been held.

In 2006, the CoR set up two electronic platforms to create a network for local and regional authorities in the fields of subsidiarity monitoring and the Lisbon process in order to strengthen the involvement of regional and local authorities in the European consultation and governance process. The CoR subsidiarity monitoring network[68] enables local and regional authorities to exchange information on Commission proposals which will affect them and their policies. The main objectives are to increase expertise on subsidiarity through external channels, and to improve cooperation and to reduce the gap between the European institutions and local and regional authorities. The test phase was completed in 2006 and an interactive website is expected to be operational in 2007.

The CoR Lisbon Monitoring Platform[69] was launched in March 2006 to allow regional and local authorities across the EU to exchange information on Lisbon-related subjects (best practices, challenges). It includes detailed regional statistical data, a documentation centre and interactive forums. The network consists of 50 regions, cities and local authorities. The platform is also accessible to other regions and local authorities. The results of the monitoring exercise will feed into the CoR report for 2008, which was requested by the Council in 2006, and will also support other CoR activities.

In 2006, the EESC adopted an own-initiative report on "EU and national administration practices and linkages" (CESE 1564/2006) in relation to the transposition of EU laws. The EESC takes the view that while subsidiarity is a principle anchored in EU thinking and practices, it must always be borne in mind that the management and implementation of EU law/obligations in Member States often affects other countries and societies in the Union. Public and private partners therefore have an interest in the way each individual country manages its own relationship with the EU. In 2006, EESC's the Single Market Observatory began to draft an exploratory opinion including social impacts in Commission impact assessments, which is to be presented in 2007.

68 http://www.cor.europa.eu/en/activities/sub_mon.htm

69 http://lisbon.cor.europa.eu/

3. APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

3.1. The legal and institutional framework

3.1.1. The definition given by the Treaties

Subsidiarity and proportionality, indicating respectively when and how the Union should act, are among the main organising principles of the Union[70]. Their general definition is provided respectively in paragraph 2 and paragraph 3 of Article 5 of the Treaty establishing the European Community (TEC).

Subsidiarity is a guiding principle for defining the boundary between Member State and EU responsibilities (*Who should act?*). If the area concerned is the exclusive competence of the Community, there is no doubt as to who should act and subsidiarity does not apply. If competence is shared between the Community and the Member States, the principle clearly establishes a presumption in favour of decentralisation: the Community shall take action only if the objectives of the proposed action cannot be sufficiently achieved by the Member States (necessity test)[71] and can be better achieved by the Community (value-added test or compared effectiveness).

Subsidiarity is a dynamic concept, allowing EU action "to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified"[72]. In other words, subsidiarity refers to the most appropriate level of action. It should therefore not be confused with the 'proximity principle', even if applying the subsidiarity principle may lead to bring action close to citizens.

Proportionality is a guiding principle when defining how the Union should exercise its – exclusive and shared – competences (*what should be the form and nature of EU action?*). Article 5 TEC provides that the action shall not go beyond what is necessary to achieve the objectives of the Treaty. In other words, it is not enough to establish a correspondence between actions and objectives. The decision must lean in favour of the least demanding option. This is confirmed by the guidelines provided by the Amsterdam Protocol[73]. Although

---

70 If definitions are given by the Treaty establishing the European Community, several elements in the Treaty on European Union make clear that these principles apply not only to Community acts but to EU acts in general (see Article 2 of the Treaty on European Union states that "the objectives of the Union shall be achieved as provided in this Treaty … while respecting the principle of subsidiarity").

71 The Protocol introduced by the Treaty of Amsterdam and now annexed to the TEC provides guidelines for examining whether the necessity condition is fulfilled. It states that Community action is justified whether there are transnational aspects which cannot be satisfactorily regulated by national measures; whether national measures alone or lack of Community action would otherwise significantly damage Member States' interests; or whether action at Community level would produce clear benefits by reason of its scale. The Protocol also mentions that Community action is justified whether national measures alone or lack of Community action would conflict with the requirements of the EC Treaty. It must be underlined, however, that acting in order to comply with the requirements of the Treaty is a general obligation which, *per se*, is not linked with subsidiarity. It is therefore not helpful to refer to this obligation when defining the essence of subsidiarity. (Protocol (No 30) on the application of the principles of subsidiarity and proportionality, http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0105010010, OJ C 340, 10.11.1997, p. 105).

72 Protocol (No 30) on the application of the principles of subsidiarity and proportionality.

73 See footnote 70. Firstly the Protocol states that "the form of Community action shall be as simple as possible" and, whenever legislating appears necessary, "directives should be preferred to regulations". Secondly, the need to minimise the financial or administrative burden for all levels of government,

'minimal proportionality' is obviously more restrictive than 'proportionality', this principle still leaves considerable discretion to the Union's legislature[74]. In most cases, there will be a range of minimal options with different trade-offs (i.e. where minimising the burden for one group would increase the burden put on another group). Decision-makers will then have to make a political choice.

3.1.2. Modes of application, comment and control

While all institutions of the Union are requested to comply with both principles when exercising their powers, some of them are subject to specific procedural obligations. These obligations have been set out in the Inter-Institutional Agreement of 1993 on subsidiarity[75] and the above-mentioned Protocol of 1997.

Among other things, the Commission is required – without prejudice to its right of initiative – to consult widely before proposing legislation; to state in the explanatory memorandum for each legislative proposal the reasons for concluding that the proposal complies with subsidiarity and proportionality[76]; and to take into account the burden falling upon the Community, national governments, local authorities, economic operators and citizens. In order to further improve the explanatory memoranda accompanying its legislative proposals, the Commission introduced in 2005 an informatics tool structuring their content and presentation. This standard explanatory memorandum tool provides, among other things, a set of questions guiding the application of the subsidiarity and proportionality principles[77]. To contribute to a common understanding of the meaning of the subsidiarity principle, this set of questions is presented in Annex 3.

The European Parliament and the Council have to ensure that the amendments they make are consistent with the principles of subsidiarity and proportionality. If one of their amendments affects the scope of Community action, they must provide a justification regarding subsidiarity[78].If the consultation or cooperation procedure applies, the Council has to inform Parliament of its position on the application of subsidiarity and proportionality in a statement of reasons[79]. In other words, the current system puts the burden of proof on the institutions involved in the Union's legislative process.

---

economic operators and citizens should be taken into account. Thirdly "while respecting Community law, care should be taken to respect well established national arrangements".

74 This is confirmed by the case law of the European Court of Justice (see judgment of 12 November 1996, case C-84/94).

75 Inter-Iinstitutional Agreement between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity, adopted 17 November 1993, OJ C 329, 6 December 1993, p. 132.

76 Reasons for concluding that an objective can be better achieved by the Community must in addition "be substantiated by qualitative or, wherever possible, quantitative indicators" (Article 4 of the Protocol).

77 See Annex to the report "Better lawmaking 2005", section 2.1.4. SEC(2006) 737 annexed to COM(2006) 289.

78 Section 2, point 3 of the Inter-Institutional Agreement on subsidiarity of 1993.

79 Article 12 of the Protocol.

Each of these institutions has, in addition, to examine whether the other two are applying the principles properly. The European Parliament and the Council must consider whether the Commission's proposals[80] and each other's amendments are consistent with Article 5 TEC, and oppose any violation of the principles. The Commission must do the same with the amendments of the legislator, if need be by withdrawing its proposal. The Commission must also submit an annual report on compliance with both principles (i.e. the present report). This report has to be discussed by the other institutions and taken into account by the European Council for its own report on the state of the Union.

The application of these principles can also be commented on during the legislative procedure by the different players, for example the European Economic and Social Committee and the Committee of the Regions, either when they are consulted or in own-initiative opinions. The 'Conference of European Community Affairs Committees' (COSAC) can also express an opinion on the application of the principle of subsidiarity[81]. In May 2006, the Commission announced its intention to transmit its new proposals and consultation papers to the National Parliaments, inviting them to react so as to improve the process of policy formulation[82]. The move was welcomed by the European Council in June. Heads of State and Government asked the Commission to duly consider comments by the National Parliaments, in particular with regard to the subsidiarity and proportionality principles.

Finally, ex-post judicial control is practised by the Court of Justice and the Court of First Instance of the European Communities. Annulment proceedings may be initiated in these courts for contravention of Treaty provisions on the principles of subsidiarity and proportionality.

3.2. Application of the principles in 2006

The European Parliament and the Council introduced relatively few amendments referring explicitly to subsidiarity and proportionality[83]. As it is impossible here to review all proposals and acts adopted in the light of the conditions and obligations summarised in section 3.1.2, the working paper limits itself to a selection of exemplary cases. Some cases also look at reactions from national parliaments.

---

80 The Protocol provides that this should be an integral part of the overall examination of Commission proposals. The reason is simple: the TEC gives the right of initiative to the Commission; it means that, although the legislator can reject the Commission's proposals, it cannot refuse to examine them.

81 The COSAC is a body on which the European affairs committees of the national parliaments are represented. In accordance with point 6 of the Protocol on the role of national parliaments in the European Union annexed to the Treaty of Amsterdam, the COSAC "may address to the European Parliament, the Council and the Commission any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity".

82 "A Citizens' Agenda - Delivering Results For Europe", COM(2006) 211.

83 For instance, in 2006, the Parliament referred explicitly to subsidiarity and proportionality principles in 11 legislative reports and 3 own initiative.

3.2.1. Why conferral of competences and subsidiarity need to be clearly distinguished

On 17 July 2006, the Commission proposed to amend Council Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in *matrimonial matters*[84]. Its analysis indicates that the number of divorcing persons faced with conflict-of-law rules has become considerable[85]. There is a need to strengthen legal certainty, ensure access to court for spouses of different nationalities and prevent "rush to court". On one hand, the evolution of the problem shows that these objectives cannot sufficiently be achieved by the Member States. On the other hand, there is no international convention in this field that Member States could ratify. This led the Commission to propose the adoption of uniform rules on jurisdiction and applicable law in the Union[86].

The proposal was subject to a subsidiarity and proportionality test in the framework of COSAC (Conference of Community and European Affairs Committees of Parliaments of the European Union)[87]. Some national parliaments concluded that the proposal did not comply with the principles of subsidiarity and proportionality, in particular considering that it "falls outside the powers of the Community."

That argument refers in fact to a different principle stated just before the subsidiarity principle in Article 5 TEC: the conferral principle whereby the Community can only act within the limits of the competences conferred on it to attain the objectives set in the Treaty[88]. The absence of legal basis for action and non-compliance with subsidiarity are of a different nature and carry different sanctions. They should therefore not be confused.

3.2.2. When subsidiarity calls for Community action to be stopped

If subsidiarity allows Community action to be expanded where circumstances so require, it also demands action to be restricted or discontinued when it is no longer justified. The Commission reckoned that such ‘contraction’, or "step-back", should occur with regard to *pre-packaging rules.*

In the 1960s, different national rules on nominal quantities of pre-packed products (pack/bottle sizes) were a major barrier to free movement of goods between the Member States. There was also a need to harmonise these sizes to enhance consumer protection and market transparency. This led the Community in 1975 to set mandatory or optional pre-packaging sizes for a number of products.

As part of the SLIM-IV exercise (Simpler Legislation for the Internal Market), the Commission evaluated the existing system and the desirability of deregulation in this domain. Different policy alternatives (free sizes or fixed sizes) were assessed. For a large number of

---

84 COM(2006) 399.

85 It is estimated that approximately 170.000 "international" couples divorce each year in the European Union, which corresponds to approximately 19% of all divorces.

86 The scope of the proposal is limited to what Member States cannot satisfactorily achieve and what the Union does better insofar as it only deals with the rules on international jurisdiction and applicable law. Hence, national substantive rules are not affected by the proposal. The proposed rules on applicable law are limited to divorce and legal separation and do not apply to marriage annulment.

87 The Commission received 14 replies from national parliaments of different Member States, the majority of which conclude that the proposal complies with the principles of subsidiarity and proportionality.

88 The first paragraph of Article 5 TEC provides that "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."

products, free sizes and voluntary standardisation appear to score better than fixed sizes with regard to innovation and competitiveness in particular[89]. Moreover, the objectives of the current pre-packaging legislation are covered by other directives (consumers are protected by unit pricing and the environment by the Pre-packaging Waste Directive).

The Commission concluded that pack sizes currently under optional harmonisation in Directives 75/106/EEC and 80/232/EEC could be repealed and proposed the adoption of a new directive on nominal quantities for pre-packed products[90]. In its first reading (February 2006), the European Parliament argued that complete deregulation in certain sectors (pre-packed bread, spreadable fats, butter, tea or coffee) would be likely to produce disproportionate and, in some cases, prohibitive costs for many SMEs trying to compete with supermarkets and larger companies[91]. It added that, in order to comply with the proportionality principle, the directive should allow national packaging ranges to be maintained whilst not impeding the import of pre-packaged products of any weight or volume from other EU countries. In April, the Commission modified its proposal, among other things, to see mandatory nominal quantities for soluble coffee and white sugar abolished as well[92]. The common position adopted by the Council on 4 December 2006 on the basis of the Finnish Presidency's compromise allows for a phase-out of national nominal quantities in certain sensitive areas and endorse the modification proposed by the Commission on mandatory quantities for coffee and sugar[93]. The proposal awaits second reading by Parliament.

3.2.3. When subsidiarity calls for addressing transboundary and national problems

In January 2006, the Commission proposed the adoption of a Directive on the *assessment and management of floods*[94]. The objective is to manage the risks pose by floods to human health, the environment, infrastructure and property through flood mapping in areas with a significant flood risk, coordination within shared river basins, and flood risk management plans. The proposed directive concerns all river basins in the EU and coastal areas because most of them are shared between various countries. Under these conditions, a purely national approach to flood risk management was considered as neither technically nor economically feasible.

The Council debated the scope of the directive as regards subsidiarity. During preliminary discussions, some Member States argued that Community action should not go beyond arrangements concerning transboundary river basins; in their view, the inclusion of national river basins and all coast lines was disproportionate and did not bring added value. The European Parliament was in favour of preserving the original scope of the proposal, but

---

89 For wine, spirits, soluble coffee and white sugar, the impact assessment of Directive 75/106/EEC Annex 3 and Directive 80/232/EEC showed that fixed sizes allow offsetting disproportional buyer pressure from large distributors, like supermarkets, on small and medium sized enterprises. For that reason, it recommended to maintain mandatory sizes in these specific sectors.

90 COM(2004) 708.

91 European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council laying down rules on nominal quantities for pre-packed products, repealing Council Directives 75/106/EEC and 80/232/EEC, and amending Council Directive 76/211/EEC (COM(2004)0708–C6-0160/2004–2004/0248(COD)).

92 A survey by the Commission services in December 2005 showed that a majority of Member States no longer have regulation or no longer enforce existing national regulation for these sectors, without this having market disruption as a consequence COM(2006) 171.

93 Common Position (EC) No 34/2006 of 4 December 2006.

94 COM(2006) 15.

introducing more flexibility, for the sake of proportionality, at local and regional level[95]. The Council eventually opted for a similar solution in its common position concluding the first reading of the co-decision procedure: the scope of the Directive should cover both transboundary and national river basins, but Member States should among other things have some discretion as to what investigation period or what likely return period they wish to use as the basis for their flooding maps[96]. The Commission's decision on 5 December 2006 to support the common position of the Council should normally close the debate on the appropriate scope of the Directive[97]. This case shows that inter-institutional dialogue is often indispensable to reach common understanding of the limits set by subsidiarity.

3.2.4. When disinformation feeds the perception of an infringement of subsidiarity

The proposal on *optical radiation* has been used by various decision-makers as an example of EU violation of the subsidiarity principle. It should perhaps be seen instead as the illustration of the need for all media, opinion leaders and decision makers to beware of subsidiarity hoaxes.

The review of the texts in question shows indeed that disinformation played a key role in the allegations made about the proposed directive. In 1992 the Commission presented a proposal on the protection of workers against risks to their health and safety arising from exposure to four physical agents: noise, vibration, electromagnetic fields and optical radiation[98]. The Council opted to concentrate on a single physical agent at a time, starting with vibration. As far as optical radiation was concerned, the main aim was to protect employees exposed to artificial radiation (such as lasers or infrared lamps) and at risk of skin or retina damage. The directive under discussion was also covering the potential hazards of working in strong sunshine[99].

On 4 May 2005, the Commission adopted a Communication on the common position of the Council, formally accepting that, as for natural radiation, the directive should only require employers to assess the risk and pass the information to their workers but not oblige them to protect workers against sunshine. On 3 August, a well known British broadsheet – echoing a Bavarian tabloid paper – printed that “under the EU’s Optical Radiation Directive, employers of staff who work outdoors, including those in Bavaria’s beer gardens, must ensure they cover up against the risk of sunburn”. The broadsheet then added that Bavarian barmaids were told to replace their traditional costume [the "Dirndl"], as it offers insufficient protection. A series of condemnations followed of this 'absurd' legislation that could destroy a centuries-old tradition. This reinforced the conviction in Bavaria and Germany that the initial 'information' was true.

---

95 See Amendment 18, European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on the assessment and management of floods (COM(2006) 15 – C6-20/2006 – 2006/0005(COD)).

96 Common Position (EC) No 33/2006 of 23 November 2006.

97 COM(2006) 775. The Commission rejected on grounds of subsidiarity a number of amendments introduced by Parliament in its first reading, but indicated that it could accept the reformulation presented by the Common position adopted unanimously by the Council. Considering the Common Position as an improvement on the flood risk management plans, the Commission decided to support it.

98 For the original proposal, see COM(1992) 560 and for the amended proposal, see COM(1994) 284.

99 The issue of natural radiation came to the front because, among other things, the number of skin cancers in the construction sector is on the rise.

On 21 October 2005, the Commission decided to withdraw the part dealing with radiation from natural sources because it was not backed by a fully-fledged impact assessment. The Directive on artificial radiation was eventually adopted on 5 April 2006[100], but the rumour lived on.

3.2.5. Demonstrating compliance with the proportionality principle through proportionate analysis

The *support scheme for cotton* case (see section 3.3.2) shows that insufficient information can lead to annulment of a decision for infringement of the proportionality principle. Ensuring that an action does not go beyond what is necessary to achieve the objectives of the Treaty presupposes that all the relevant factors and circumstances of the situation have been taken into account. Therefore, if the institutions cannot produce the basic facts they took into account before adopting a measure, they cannot prove either that they comply with the principle.

Conversely, disproportionate requirements and expectations in terms of fact-finding and analysis would end up paralysing the Union's capacity to decide and act. For example, in the debate on the INSPIRE initiative (*INfrastructure for SPatial InfoRmation in the European Union*) the question arose as to the level of analysis needed to demonstrate compliance with the proportionality principle. Parliament and the Commission argued that additional information requirements demanded by the Council were disproportionate.

The directive proposed in 2004 calls on Member States to put geographical information on a publicly accessible electronic network and to progressively harmonise it[101]. INSPIRE would cover a very wide range of spatial data ranging from basic mapping information, such as geographical names and administrative units, to key environmental information such as emissions, environmental quality and location of protected sites. Such a knowledge base would be of great value for environmental protection policies as well as infrastructure development, agriculture and maritime navigation.

In its common position of January 2006, the Council sought to impose systematic cost-benefit analysis on the Commission before proposing implementing measures under comitology procedures[102]. The Commission considered that approach over-burdensome and could not support it[103]. Parliament confirmed on 13 June its opposition to "interminable analyses and additional feasibility conditions"[104]. The conciliation committee was convened at the end of the second reading of the proposal. On 22 November the latter reached agreement on a joint text opting for a more efficient implementation process. The directive should be formally adopted in early 2007.

---

100 Directive 2006/25/EC of the European Parliament and of the Council of 5 April 2006 on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).

101 COM(2004) 516.

102 In the Common Position (EC) No 5/2006 of 23 January 2006, Article 7 (2) provides that the Commission shall undertake "analyses to ensure that the results are feasible and proportionate in their likely costs and benefits and shall share the results of such analysis with the Committee".

103 COM(2006) 51.

104 Bulletin EU 6-2006 Environment (3/18).

3.2.6. When a "new approach" directive is used to comply with proportionality

The proposal of 11 October 2005 for a directive on the placing on the market of pyrotechnic articles raised a number of questions regarding subsidiarity and proportionality in the Council's preliminary discussions[105].

The Commission made the case that certain elements were deliberately kept outside the scope of the proposed Directive in order to respect the principle of subsidiarity. On the one hand, the proposed Directive is without prejudice to Member States legislation on the licensing of manufacturers or distributors. On the other hand, it also allows Member States to maintain higher minimum age limits for the sale of fireworks to consumers again on grounds of public security or safety. As for proportionality, the Commission underlined that the proposed measure was a "new approach" Directive[106], only setting essential safety requirements. Most technical details will be tackled by CEN standards (European Committee for Standardisation).

None of the amendments introduced by Parliament in its opinion concerned the principles of subsidiarity or proportionality. The proposed Directive is likely to be adopted in first reading in early 2007.

3.3. Opinions, contributions and ex post control of the application of the principles in 2005

3.3.1. Opinions and contributions in 2006

In 2006 the Committee of the Regions (CoR) reinforced its monitoring of the application of the principles of subsidiarity and proportionality[107]. In particular, the CoR conducted between November and December 2006 a second test phase of its Subsidiarity Monitoring Network[108]. The partners were asked to analyse the proposal for a recommendation of the European

---

105 COM(2005) 457.

106 The "New Approach", defined in a Council Resolution of May 1985, represents an innovative way of technical harmonisation. It introduces, among other things, a clear separation of responsibilities between the EC legislator and the European standards bodies CEN, CENELEC and ETSI in the legal framework allowing for the free movement of goods. In this division of labour, EC directives define the essential requirements, e.g., protection of health and safety, that goods must meet when they are placed on the market; whereas the European standards bodies draw up the technical specifications meeting these essential requirements. Compliance with the technical specifications provides a presumption of conformity with the essential requirements.

107 In parallel to the test, the CoR continued to review the application of the principles in its opinions. Most were positive: see, for instance, European strategy for a sure, competitive and durable energy Communication of the Commission; "Action plan in the field of the biomass"; "Strategy of the EU in favour of the biocarburants" (DEVE-007), "Towards a durable European wine sector" (DEVE-012). However, on a number of occasions, the CoR has complained about weaknesses of arguments demonstrating compliance with subsidiarity: "Revision with semi-course of the White Paper on the European transport policy by 2010" (COTER-004)"Proposal for a Directive of the European Parliament and the Council defining a framework for the protection of the grounds and modifying directive 2004/35/CE" (DEVE-005) .

108 The first test took place in 2005. A network of 21 external partners (regional governments and parliaments, local authorities and regional and local associations) analysed the Thematic strategy on air pollution (COM(2005) 446) and the Proposal for a directive on ambient air quality and cleaner air for Europe (COM(2005) 447). Most of the documents submitted have been officially approved by a political body after thorough administrative preparation, which is remarkable. The overall conclusion of the test was that the documents analysed comply broadly with the principles of subsidiarity and proportionality. However, the accompanying impact assessments were criticised for lacking sufficient depth both at national level and from the point of view of regional and local authorities.

Parliament and of the Council on the establishment of the European Qualifications Framework for lifelong learning[109] and the Communication on efficiency and equity in European education and training systems[110]. Forty-nine external partners took part. The results of the test will be published in January 2007.

Building on the 2005 and 2006 test phases, the CoR plans to launch an interactive Subsidiarity Monitoring Network in the first half of 2007, which will be progressively opened to more external partners[111]. This electronic platform will, among other things, contribute to the implementation of the cooperation agreement between the European Commission and the CoR (17 November 2005) according to which the two parties will identify priorities necessitating a specific follow-up in the field of subsidiarity and proportionality (Article 15(3)).

In 2006, most of the opinions adopted by the European Economic and Social Committee (EESC) on Commission proposals did not criticise the application of the principles of subsidiarity and proportionality[112]. By contrast, the EESC considered that excise duty on tobacco must remain strictly the responsibility of Member States and saw measures in the field of copyright and related issues as premature[113]. It expressed concern with the forestry strategy and transport policy[114].

On 5 September the Commission started to transmit its new proposals and consultation papers to the National Parliaments and put in place the procedure for replying to opinions coming from the National Parliaments[115]. As of the end of December 2006, the Commission had received more than 50 opinions from the national parliaments. Thirteen of them were concerned with the proposal for a Council Regulation as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters[116]. Nine were positive regarding compliance of the proposal with the principles of subsidiarity and proportionality[117]. Other opinions commenting on compliance with these principles include the German Bundesrat on the Commission report "Better Lawmaking 2005"[118]; seven opinions of the French Senate[119];

---

109 COM(2006) 479.

110 COM(2006) 481.

111 http://www.cor.europa.eu/en/activities/sub_mon.htm.

112 See, in particular, opinion on 'The territorial governance of industrial change: the role of the social partners and the contribution of the Competitiveness and Innovation Programme' CES 1144/2006 of 13 September 2006; opinion on the impact and consequences of structural policies on EU cohesion CES 973/2006 of 6 July 2006; opinion on the harmonisation of conflict-of-law rules in the field of contractual obligations CES 1153/2006 of 22 September 2006; opinion on the proposal "Towards a sustainable European wine sector" CES 1569 of 20 December 2006

113 Opinion of the European Economic and Social Committee on the proposal for a Council Directive on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries, CES 970/2006 of 12 July 2006. See a strategy to improve the fight against fiscal fraud 2006/C 309/22.

114 EESC NAT/278 Forestry strategy of 02.10.2005; EESC 1252/2005 – OJ C28 of 3.2.2006 p. 57-65. Opinion of the European Economic and Social Committee on the paneuropeans corridors of transport 2004-2006, OJ C 318 of the 23.12.2006, p. 180-184, items 2 and 3.

115 See above, section 3.1.2.

116 COM(2006) 399. This proposal was subject to a subsidiarity and proportionality test carried in the framework of COSAC

117 See above, section 3.1.2.

118 COM(2006) 289.

119 Green Paper on detection technologies in the work of law enforcement, customs and other security authorities COM (2006) 474; Proposal for a Recommendation on the establishment of the European Qualifications Framework for lifelong learning COM(2006)479; proposal for a Directive as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of

and the proposed directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (Lithuanian Seimas)[120]. The Dutch Parliament also sent opinions before the launch of this new procedure.

On 18 and 19 April 2006, the Austrian presidency of the Council organised in St Pölten a European Conference on Subsidiarity "Europe begins at home"[121]. The conference focused on the contribution of the regions and local authorities to citizen-based policies, the role of national Parliaments concerning subsidiarity and proportionality, as well as the interaction between subsidiarity and proportionality[122]. The European Council of June 2006 welcomed the initiative and encouraged future Presidencies to carry this work forward.

3.3.2. Ex post control in 2006

As regards ex-post judicial control[123], the principle of subsidiarity was referred to in two judgements delivered by the Court of First Instance of the European Communities[124], which confirm the Courts' previous case law. In neither case did the Court find that the principle of subsidiarity had been infringed. It is however interesting to note that, in Case T-253/02, the Court considered that the subsidiarity principle "cannot be relied on in the sphere of application of Articles 60 EC and 301 EC, even on the assumption that it does not fall within the exclusive competence of the Community" (paragraph 108)[125]. This case is under appeal and the Court might come back on possible limitations to the scope of the principle of subsidiarity.

As of 31 December 2006, the case law of the Court of Justice and the Court of First Instance did not include any judgements to the effect that the principle of subsidiarity had been contravened or that there was a lack of motivation in applying this principle.

---

shareholdings in the financial sector COM (2006) 507 and SEC (2006) 1117; proposal for a Directive establishing a framework for the protection of soil and amending Directive 2004/35/EC - COM(2006) 232 and Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Thematic Strategy for Soil Protection COM(2006) 231 and SEC(2006) 1165; proposal for a Directive on road infrastructure safety management COM(2006) 569 and SEC(2006) 1232; proposal for a Directive on the retrofitting of mirrors to heavy goods vehicles registered in the Community COM(2006) 570 and SEC(2006) 1239; Green Paper on improving the efficiency of the enforcement of judgements in the European Union: the attachment of bank accounts COM (2006) 618 and SEC(2006) 1341.

120 COM(2006) 168 final.

121 This conference is the follow-up of the subsidiarity conference "Sharing power in Europe" co-organised by the Netherlands and the UK in The Hague on 17 November 2005

122 http://www.eu2006.at/en/The_Council_Presidency/subsidiarity/index.html.

123 Number of judgments and orders of the Court of Justice and the Court of First Instance referring to the principle of subsidiarity since the entry into force of the Maastricht Treaty: 2 in 2006; 4 in 2005, 6 in 2004, 7 in 2003, 3 in 2002, 2 in 2001, 4 in 2000, 0 in 1999, 4 in 1998, 2 in 1997, 5 in 1996, 4 in 1995 and 2 in 1994.

124 See Case T-168/01 GlaxoSmithKline Services v Commission, judgment of 27 September 2006, not yet Reported, paragraph 196 et seq. and Case T-253/02 Chafiq Ayadi v Council, judgment of 12 July 2006, not yet reported, paragraph 105 et seq. (appeal pending, Case C-403/06P).

125 The possibility of limitations on the principle of subsidiarity was also briefly raised in the Opinion of Advocate-General Jacobs in Case C-426/93 Germany v Council, and in the discussions surrounding the applicability of the principle of subsidiarity to the collection of community statistics (cf. paragraphs 23 et seq.).

As to the ex-post control of the principle of proportionality, this issue was raised in several judgements[126] and in some cases the Community measures in question were annulled in full or in part[127].

The judgement on Case C-380/03[128] provides a good example of the detailed analysis carried out by the Court as regards the correct application of the principle of proportionality. In this case, Germany made an application for annulment against certain articles of the European Parliament and Council Directive 2003/33/EC concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. Amongst other things, the applicant claimed that the directive was infringing the principle of proportionality by prohibiting, in extremely broad terms, the advertising of tobacco products in printed publications and on the radio.

The Court recalled that the principle of proportionality requires the means employed by a Community provision to be appropriate for attaining the objective pursued and not to go beyond what is necessary to achieve it. The Court also noted that the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. It further noted that the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.

The analysis of the Directive led the Court to find that Articles 3 and 4 of the Directive were measures appropriate for achieving the objective pursued by the institutions, given the obligation on the Community legislature to ensure a high level of human health protection. The Court held that it was not possible for the Community legislature to adopt less restrictive measures[129]. Doing so would have rendered the field of application of the prohibition on the advertising of tobacco products unsure and uncertain, which would have prevented the Directive from achieving its objective of harmonisation of national law on the advertising of tobacco products. As to freedom of expression, the Court underlined that it may be subject to certain limitations justified by objectives in the public interest[130]. In this case it was held that the institutions had exercised their discretion within these limits. Contrary to the applicant's views, the Court ruled that the measures were not disproportionate, and dismissed the action.

---

126 See e.g. Case T-59/02 Archer Daniel Midland v Commission, judgment of 27 September 2006, not yet reported, paragraph 98 et seq.

127 See also Case C-310/04 Spain v Council, judgment of 7 September 2006, not yet reported, at paragraphs 119 et seq.

128 Case C-380/03 Germany v. European Parliament and Council, judgment of 12 December 2006, not yet reported, paragraphs 144 et seq.

129 The Directive does not prohibit the advertising of tobacco products in publications intended for professionals in the tobacco trade, or publications which are published in third countries and not intended principally for the Community market.

130 Insofar as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, and, in particular, proportionate to the legitimate aim pursued (Article 10(2) of the European Convention on Human Rights).

In case C-310/04 Spain v Council (judgement of 7 September 2006) concerning a Council regulation amending the support scheme for cotton, the Court followed a similar reasoning, found that the principle of proportionality had been infringed and annulled the act in question. The Court started by restating the limits of judicial review in such matters, referring to manifest error[131] and the broad discretion[132] that the Community legislature must enjoy. It then considered that Community institutions must nevertheless "be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate" (paragraph 122). The institutions must therefore be able "to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended" (paragraph 123). The Court ruled that such basic facts were missing.

131 Paragraph 120. Where the Community legislature "has to assess the future effects of legislation to be enacted although those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the legislation in question" (§ 120).

132 Paragraph 121. "… Community legislature's broad discretion, which implies limited judicial review of its exercise, applies not only to the nature and scope of the measures to be taken but also, to some extent, to the finding of the basic facts (see, inter alia, Case C-120/99 Italy v Council [2001] ECR1-7997, paragraph 44).

Annex 1: Legislative activity in 2006

Legislative activity cannot be solely determined by reference to 'regulations' and 'directives', because Article 249 TEC makes no terminological distinction between legislative and executive acts[133]. When acting as the executive branch of the Union and implementing EU legislation, the Commission also adopts regulations and directives[134]. Identifying legislation is further complicated by the fact that some 'decisions' create general rights and obligations and have therefore been assimilated to 'regulations' by the European Court of Justice[135].

Legislative activity cannot be automatically determined on the basis of the institutional origin of proposals/acts, because of the type of separation of powers in the EU. For instance, the Council at times acts as a legislative branch, at others as an executive branch. Some of its 'regulations' and 'decisions' are of an executive nature[136].

Finally, legislative activity should be understood in the broad sense, i.e. covering both legislative and legal acts. Legislative acts (regulations, directives and decisions without addressee) emanate from the legislator and establish general obligations and rights. When the legislator adopts a recommendation, the latter still emanates from the legislator, a legal authority, but does not create rights and obligations. It is therefore not a legislative act but a legal act.

Figures provided below should therefore be read with the above classifications and limitations in mind. These figures actually refer to new proposals adopted by the Commission during the year and transmitted to the other institutions for adoption in the inter-institutional law making process. It should also be noted that a majority of the proposed regulations and directives concerned fairly limited and technical amendments to existing legislation, sometimes aimed at simplification.

Generally, the number of legislative proposals[137] increased slightly in 2006 by 8 percent compared to 2005, but is 2.4% lower than the 2004-2005 average. Certain types of proposal remained almost at the same level - namely proposals for regulation which increased slightly

---

133 "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions."

134 Under the so called comitology procedures for the exercise of implementing powers conferred on the Commission, see Council Decision 1999/468/EC of 28 June 1999.

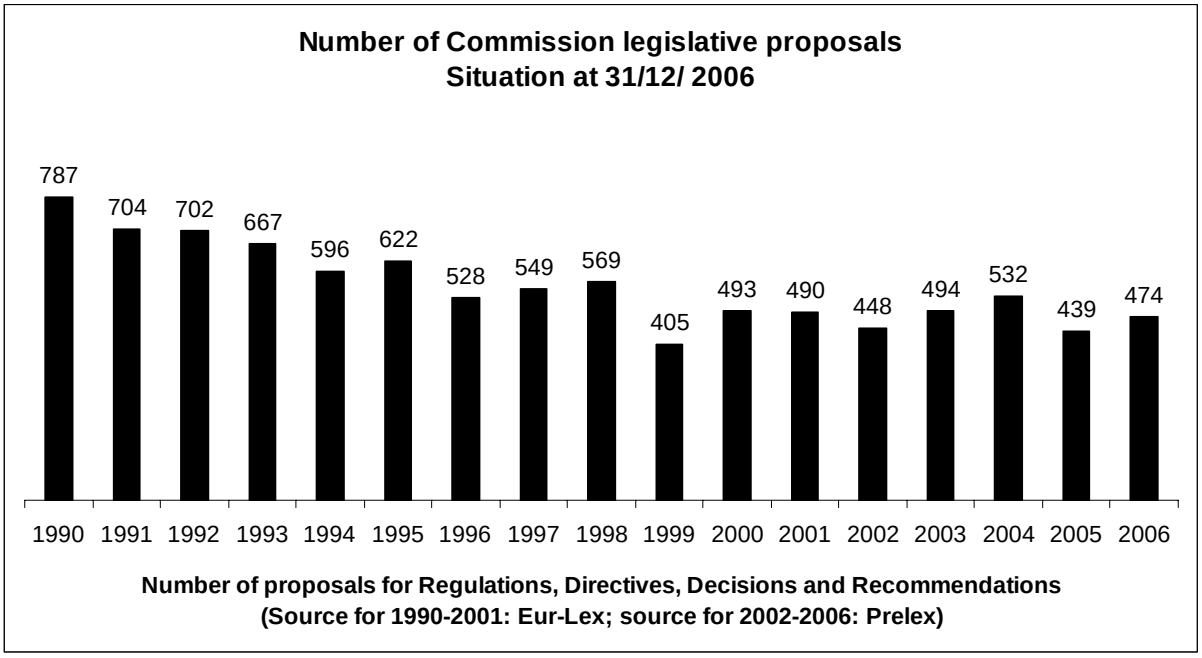
135 Practitioners often refer to this kind of decision without addressee as a *Beschluss*, while decision with a designated addressee (i.e. in the sense of Art. 249 TEC) is called *Entscheidung*.

136 For instance the Council acts as the executive branch when it adopts a 'regulation' imposing anti-dumping duty on imports of specific commodities or a 'decision' concerning the placing on the market, in accordance with a – legislative – Directive of a genetically modified product.

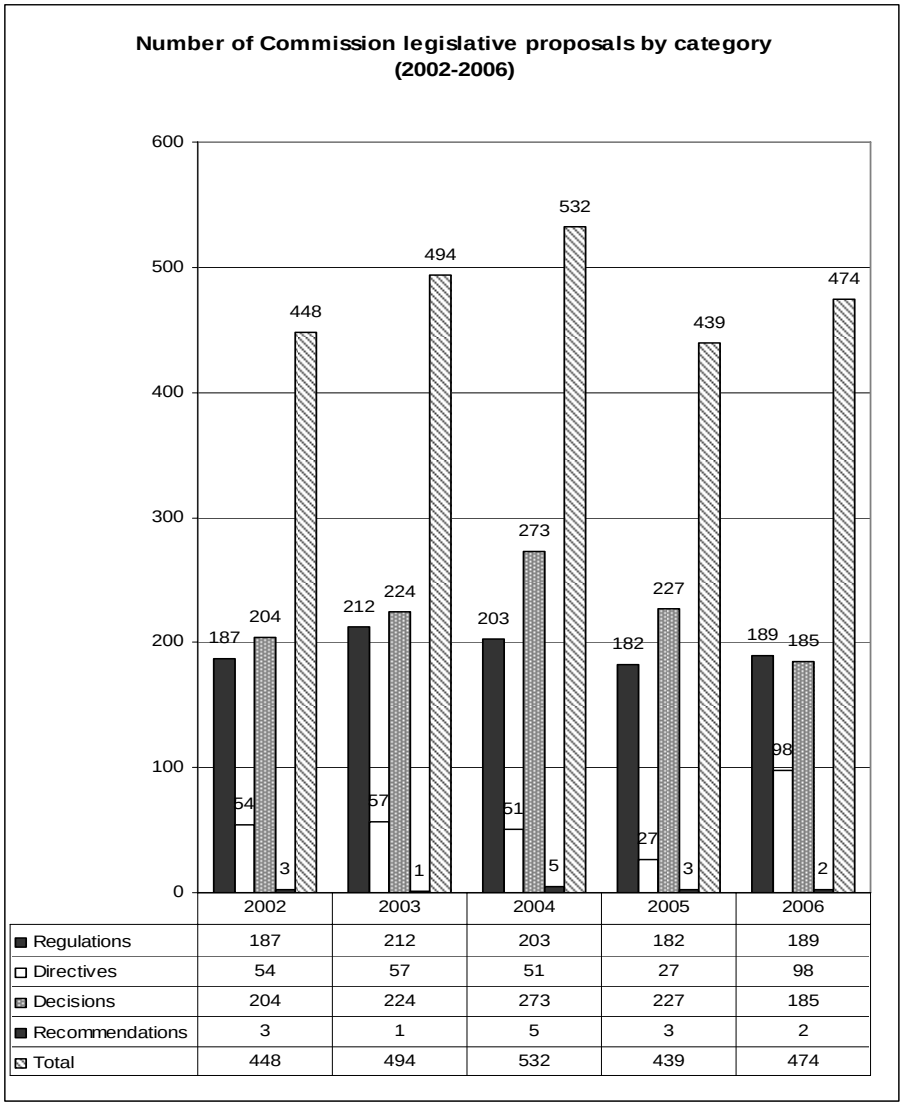
137 From 2003 onwards figures are based on the Prelex database using the following search keys under advanced search: "events: Adoption by Commission", "between 1.1.yyyy and 31.12.yyyy", "Type of file: Proposal for a regulation + proposal for a directive + proposal for a decision + proposal for a recommendation". (http://ec.europa.eu/prelex/rech_avancee.cfm?CL=en). The Treaties have established a different set of instruments for each of its so-called pillars: one for the Community pillar (Treaty establishing the European Community), one for the Common Foreign and Security Policy (Treaty on European Union – TEU), and one for the Police and Judicial Cooperation in Criminal Matters (TEU). If 'decisions' may be adopted in all pillars, their definition widely varies between pillars. These differences therefore need to be taken into account when interpreting the total number of proposals for a decision. "Fields of activity: CFSP or Justice, freedom, …" can be used to distinguish between first, second and third pillars proposals.

from 182 to 189, and proposals for recommendations which dropped from 3 to 2. Others decreased markedly – namely proposals for decisions, which dropped from 227 to 185. The main rise was in proposals for directives, from 27 to 98, partly to prepare for enlargement with Romania and Bulgaria (15) and because there were more codification proposals (22).

The most active sector was, as in 2005, trade policy with 73 proposals (mostly regulations). Next came in descending order: transport and energy, justice freedom and security, agriculture, fisheries (these four all at the same level), taxation, health and consumer protection, external relations, enlargement, environment, development, statistics and economic and financial affairs. The number of proposals from all the other policy areas remained marginal, with 10 proposals or less[138].



138 To see how that pattern has evolved, refer to the previous annual reports: COM(1993)545 of 24 November 1993; COM(1994) 533 of 25 November 1994; COM(1995) 580 of 20 November 1995; ESC(1996) 7 of 27 November 1996; COM(1997) 626 of 26 November 1997; COM(1998) 715 of 1 December 1998; COM(1999) 562 of 3 November 1999; COM(2000) 772 of 30 November 2000; COM(2001) 728 of 7 December 2001; COM(2002) 715 of 11 December 2002; and COM(2003) 770 of 12 December 2003; COM(2005) 98 of 21 March 2005; and COM(2006) 289 of 16 June 2006. Out of a total of 479 legislative proposals for 2006, 62 have not been classified according to policy area (either adopted by special procedure or codifications).



	2002	2003	2004	2005	2006
Regulations	187	212	203	182	189
Directives	54	57	51	27	98
Decisions	204	224	273	227	185
Recommendations	3	1	5	3	2
Total	448	494	532	439	474

The number – in absolute and relative terms – of legislative acts adopted in first reading under the codecision procedure has clearly increased over the years. The full extent of this evolution will have to be assessed at the end of this legislature.

Stages of adoption of legislative acts under the codecision procedure:

	2002	*%*	2003	*%*	2004	*%*	2005	*%*	**2006**	*%*
First reading	18	*23,4*	38	*36,5*	47	*56,6*	53	*64,6*	**48**	*60*
Second reading	40	*51,9*	49	*47,1*	30	*36,1*	24	*29,3*	**26**	*32,5*
Conciliation	19	*24,7*	17	*16,3*	6	*7,2*	5	*6,1*	**6**	*7,5*
Total	77	*100*	104	*100*	83	*100*	82	*100*	**80**	*100*

Annex 2: Public Consultation and information in 2006

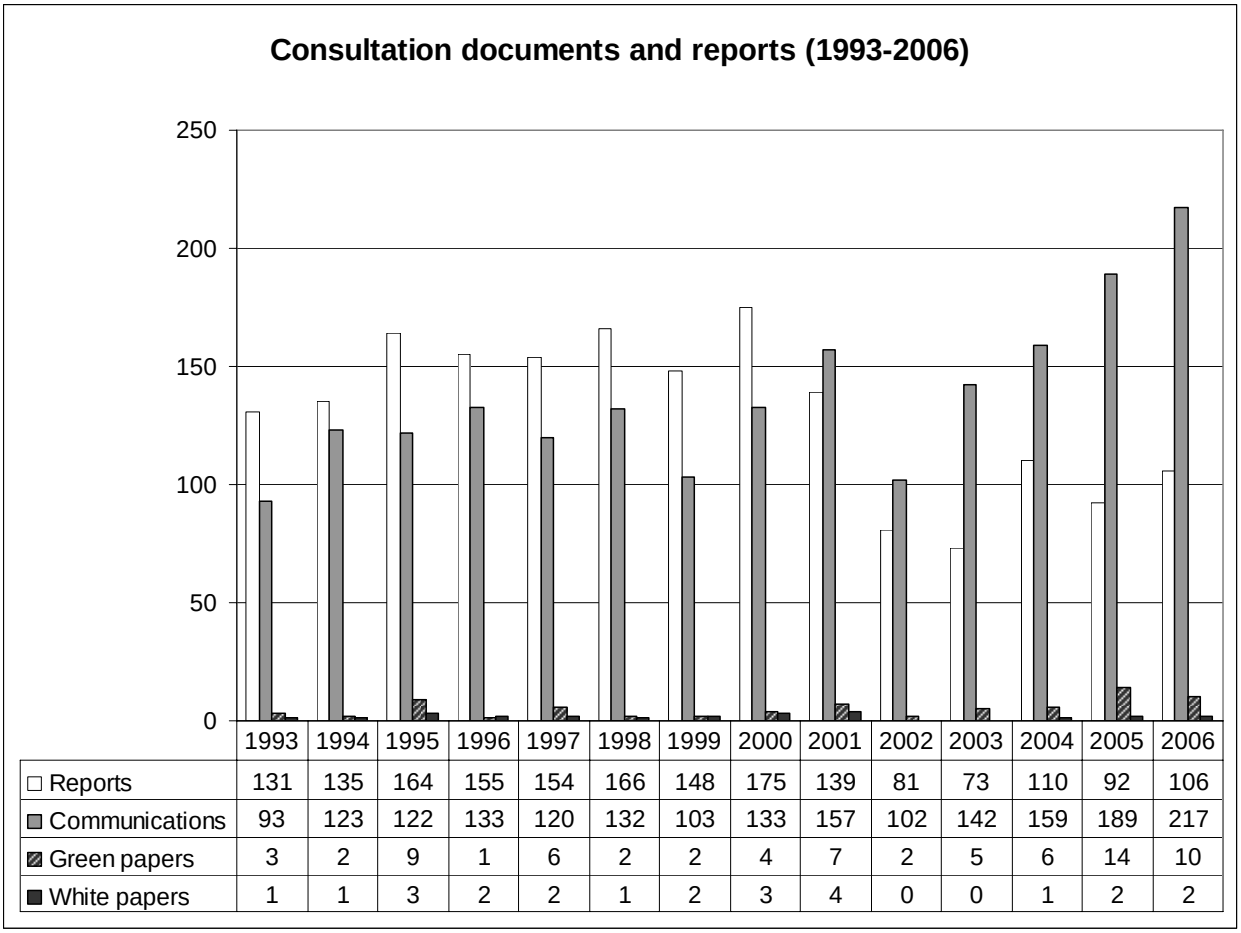
The Commission has a long tradition of extensive consultation[139] through various channels: Green Papers, White Papers, communications, forums (such as the European Energy and Transport Forum or the European Health Forum), workshops, permanent consultative groups[140] and consultations on the Internet[141]. The dialogue between the Commission and organisations from civil society takes many forms, and methods for consultation and dialogue are adapted to different policy fields. The Commission is also engaged in various forms of institutionalised dialogue with interested parties in specific domains, the most developed being the social dialogue. In 2006, consultation and information activity on the basis of communications, strategic, and reflection documents, action plans, reports and documents launching public debates was intensified in comparison with 2005; the number of Green Papers, White Papers, Communications and reports went up by 12 per cent from 297 to 335. The most active areas of policy in terms of consultation and information were, in descending order: justice freedom and security, environment, agriculture, economic and financial affairs, internal coordination of the activities of the Commission , information society, transport, heath and consumer protection, development, taxation, employment and social affairs, external relations, enterprise and industry, budget, enlargement, education and culture, fisheries, regional development, internal market and services and trade. Due to the specific nature of diverse activities, there is no correspondence (co-variation) between the number of consultations and the number of proposals in the various policy areas. For instance, in trade policy, a large part of proposals concerned decisions to amend partnership and cooperation agreements or trade defence measures of a technical nature. Public consultation would have made little sense in these areas.

---

139 'Consultation' refers to the processes used by the Commission during the policy-shaping phase in order to trigger input from outside interested parties before taking a decision.

140 For the list of formal or structured consultative bodies, in which civil society organisations participate, see database for Consultation, the European Commission and Civil Society (CONECCS) http://europa.eu.int/comm/civil_society/coneccs/index_en.htm.

141 See in particular the Interactive Policy Making initiative (http://europa.eu.int/yourvoice/ipm). The IPM consists of two Internet-based instruments collecting spontaneous information from citizens, consumers and businesses about their daily problems relating to different EU policies. In February 2003, the Commission-wide Feedback Mechanism was launched. Thousands of cases are collected annually and several Directorates-General have already started to use it as an input for policymaking.



	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
□ Reports	131	135	164	155	154	166	148	175	139	81	73	110	92	106
▒ Communications	93	123	122	133	120	132	103	133	157	102	142	159	189	217
▨ Green papers	3	2	9	1	6	2	2	4	7	2	5	6	14	10
■ White papers	1	1	3	2	2	1	2	3	4	0	0	1	2	2

Situation at 31/12/2006 (Source for 1990-2001: Eur-Lex; source for 2002-2006: Prelex)[142]

142 From 2002 onwards figures are based on the Prelex database using the following search keys under advanced search. For reports, "events: Adoption by Commission", "between 1.1.yyyy and 31.12.yyyy", "Type of file: REPORT"; for communications: same but for "Type of file" enter "COMMUNICATION"; for Green Papers, same but for "Type of file" enter "GREEN PAPER"; for White Papers, same but add the result of "Type of file: WHITE PAPER" and " Type of file: ACTION PLAN" (http://ec.europa.eu/prelex/rech_avancee.cfm?CL=en).

Annex 3: European Commission' standard set of questions guiding the application of the subsidiarity and proportionality principles

In December 2003, the Commission decided to introduce a standard format for the explanatory memorandum accompanying each of its legislative proposals, to improve its structure and contents. Later on it developed a computerised form integrating these standard requirements and reminding drafters of the specific conditions set by the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty establishing the European Community. The following is an extract of that computerised form.

"3) LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

-

Legal basis

-

Subsidiarity principle

1. Indicate if the proposal falls under the exclusive competence of the Community.

☐ Yes (Subsidiarity principle does not apply)

☐ No (Subsidiarity principle applies)

2. When the subsidiarity principle applies, the proposal must meet at least one of the two conditions listed under A and B, as well as the condition listed under C. If the proposal meets more than one condition, use the appropriate text area to mention it.

(a) Indicate why action by Member States would not be sufficient to achieve the objectives of the proposed action. Refer in particular to the transnational aspects that cannot be properly regulated by Member States' action.

(b) Indicate why action by Member States alone would damage significantly Member States' interests.

(c) Indicate why EU action will better achieve the objectives of the proposal, by referring to the scale and/or the effects of its action.

3. Indicate which qualitative indicators demonstrate that the objective can be better achieved by the Union.

4. Indicate which quantitative indicators demonstrate that the objective can be better achieved by the Union (*Optional).*

5. Demonstrate that the scope of the proposal is limited to what Member States cannot satisfactorily achieve and what the Union does better.

Proportionality principle

1. Show that the proposed form of action is as simple as possible and that proposed measures leave as much room for national decision as possible (for instance directives being preferred to regulations and framework directives preferred to detailed measures)

2. Indicate how financial and administrative burden falling upon the Community, national governments, regional and local authorities, economic operators and citizens is minimized and proportionate to the objective(s) of the proposal.