

White Paper on European Governance

Work Area n° 2

Handling the Process of Producing and Implementing
Community Rules

REPORT OF THE WORKING GROUP

« **BETTER REGULATION** »

(Group 2c)

Co-Pilots : A. PANTELOURI
S.M. BINNS

Rapporteurs : C. COTTER
M.T. FABREGAS

MAY 2001

TABLE OF CONTENTS

<u>INTRODUCTION</u>	3
<u>FIRST PART: CO-REGULATION – A BETTER POLICY MIX AT EU LEVEL</u>	6
1. WHAT IS MEANT BY CO-REGULATION	6
2. WHAT MAKES FOR THE RIGHT MIX?.....	6
3. WHICH TOOL FOR WHICH JOB?	7
4. ADVANTAGES AND VARIANTS OF CO-REGULATION	8
<u>SECOND PART: BETTER REGULATION – IMPROVING THE TOOLS AVAILABLE AT EU LEVEL</u>	10
1. UNDERTAKE BROAD CONSULTATION AND IMPACT ANALYSIS	10
2. MAKE BETTER USE OF REGULATORY INSTRUMENTS	11
3. BETTER USE OF THE MIX OF INSTRUMENTS	13
4. ENSURE RAPID TRANSPOSITION AND EFFECTIVE ENFORCEMENT	17
5. EVALUATION	18
6. SIMPLIFICATION AND CODIFICATION	19
7. COMMISSION STRUCTURE FOR BETTER REGULATION	21
<u>CONCLUSIONS</u>	22

INTRODUCTION

No review of governance would be complete without an examination of the regulatory function and how this function can be better exercised. In the present governance review, there are additional reasons for a close focus on better regulation. A first reason is the nature of the European Union itself. Its means of action derive above all from its legal framework and regulation thus plays a more important part in the pursuit of its objectives than it does, for example, in a Member State, which has a wider choice of instruments at its disposal.

A second reason is a more topical one. The Lisbon European Council asked the Commission, the Council and the Member States “to set out by 2001 a strategy for further co-ordinated action to simplify the regulatory environment”. The Commission presented an interim report on improving and simplifying the regulatory environment to the Stockholm European Council, which concluded that “the Commission, in co-operation with all relevant bodies, will present a strategy for regulatory simplification and quality” (our underlining). It is the Commission’s intention to present a detailed action plan in time for the European Council at Laeken. Against the background of the interim report, the present report is a further contribution towards drawing up that action plan.

For the European Council, “better regulation” is clearly part of the effort the EU needs to make to become “the most competitive economy in the world”. But behind the Lisbon mandate also lies a series of criticisms about the existing situation and dissatisfaction with previous efforts to improve the Community regulatory system. Community regulatory texts have been criticised – not always with justification - as too voluminous, too complex, too slow to adapt, too difficult to influence and impenetrable for the end user. Practical steps need to be taken to address these problems.

In keeping with the overall approach adopted in the preparation of the Commission’s White Paper on European Governance, this report puts particular emphasis on the involvement of civil society in the regulatory process. This links in with the reference in the Lisbon conclusions to “new and more flexible regulatory approaches”. The effectiveness of traditional instruments and procedures are increasingly challenged by the diminishing relevance of physical borders in the global/digital economy and by the speed with which technological change produces new or different problems to be addressed in the marketplace. At the same time, these changes are throwing up new problems for public policy and citizens have increasingly high expectations about the transparency and accessibility of regulatory processes and the quality of the results they produce. These new challenges are driving all stakeholders – government, industry, NGOs and citizens– to create new partnerships and develop innovative solutions. This report looks *inter alia* at how such solutions can contribute to solving the problems of the EU’s regulatory system. We should rather say “contribute further” because non-traditional approaches to regulating are already in operation at Community level; and the legal framework of the Internal Market represents a coherent first response to the challenges of the promotion of sustainable development, innovation and globalisation.

For the purposes of determining what action needs to be taken to achieve “better regulation” for the Community, better regulation is assumed to be regulation that respects (at least) the following principles:

- **Proportionality:** regulation which achieves the stated public policy objectives without imposing unnecessary or disproportionate regulatory burdens;
- **Proximity:** regulation which is recognisable to and recognised by stakeholders in the policy area concerned (because they have participated in the process, can understand the text and see its relevance for specific problems that they face, and/or feel some responsibility for it and its enforcement);
- **Coherence:** regulation which fits in with other parts of the regulatory picture and not just in the same policy area, but across the board, producing synergies rather than conflicts;
- **Legal certainty:** regulation which is clear and reliable in its legal effects (which for example does not require court cases to interpret and clarify) - which is not to say that everything needs to be the subject of legal certainty: this would be at odds with proportionality and is one of the sources of over-complexity;
- **Timeliness:** regulation which is adopted in good time and which can be adapted efficiently so that it is not over-taken by technological and other events;
- **High standards:** Community regulation which picks the solution offering the best protection for the public interest at stake, not just the one that represents the lowest common denominator of Member State positions;
- **Enforceability:** regulation which is capable of achieving high levels of compliance, which is not just a question of designing surveillance mechanisms and sanctions, but is also the result of applying the proportionality and proximity principles correctly.

It goes (almost) without saying that regulation needs to be subject to the appropriate measure of democratic control and to respect the subsidiarity principle as set out in the Treaty and in the Amsterdam protocol¹. It is assumed that the regulatory processes provided for in the Treaty assure this. It remains to ensure that these processes are fully applied where they need to be and that any processes that take place outside the institutional framework either only concern matters of a purely technical or administrative nature, or that the results of such processes are verified and endorsed by the democratically sound Treaty process before being generally applied.

In the search for better regulation in the EU context, it needs to be borne in mind that action at Community level alone - and *a fortiori* by the Commission alone - is certain not to succeed. The regulations which are applicable directly to citizens and economic operators are rarely Community texts, but more often national laws or regulations transposing those texts. Improvements can only be sought successfully, therefore, with the co-operation of all actors in the regulatory chain.

One of the challenges of achieving better regulation – especially bearing in mind the principles of proximity and timeliness mentioned above - is to identify when and where it is possible to develop new forms of co-operation between public authorities and private sector

¹ Protocol on the application of the principles of subsidiarity and proportionality

actors. Such solutions are worth exploring in so far as they can deliver both flexibility and the necessary degree of legal certainty. They can only be developed of course in ways which fully respect the need for democratic legitimacy and for binding rules of general application to be issued only by representative public authorities.

This report should be read together with the reports of other working groups dealing directly or indirectly with regulatory issues, in particular groups 2a and 2b. The parts of this report dealing with consultation, enforcement and impact evaluation are therefore not very detailed, in the expectation that these issues will be dealt with in greater depth by the reports of those groups.

The working group fervently hopes that decision-makers at all levels will rise to the challenge it sets. The European Union will only fulfil its ambition of becoming "the most competitive knowledge-based economy ensuring more and better jobs and social cohesion" if it takes better regulation seriously.

FIRST PART: CO-REGULATION – A BETTER POLICY MIX AT EU LEVEL

1. WHAT IS MEANT BY CO-REGULATION

Before coming to its recommendations for improvements, the working group thinks it useful to set out its approach to co-regulation. This is not intended to give disproportionate weight or prominence to co-regulation, but rather to set its subsequent recommendations in context.

Community policy-makers have at their disposal a range of different tools, notably primary and secondary legislation and other public policy actions (information campaigns, funding etc). They can also decide not to act themselves and instead to rely on self-regulation or on market forces. Co-regulation is an approach in which a mixture of instruments is brought to bear on a specific problem, typically involving both primary legislation and self-regulation, or if not self-regulation, at least some form of direct participation of bodies representing civil society in the rule-making process. The art of regulation is in the mix - in applying the right tool to the different parts of each problem. The anti-thesis of “better regulation” is to take a rigidly compartmentalised approach, thus depriving regulators of full use of the rich “palette” of tools available. The working party would consider it a success if its work were to contribute in the longer run to the wider use of a co-regulatory approach to rule-making which involves an integrated and balanced mix of the different tools available.

Regulation will always be necessary and indeed desirable. But regulation at EU level should be limited to those areas and cases where it is really necessary to achieve public policy goals established in the Treaty. Hence the importance of developing policy tools as alternatives or complements to regulation, to ensure that there is a real choice of instruments. The policy maker should use the least disruptive and most effective means to achieve the relevant policy objective. For example, the open method of co-ordination which is currently being used in a number of policy fields including employment and social inclusion, may in some circumstances be the best way forward.

2. WHAT MAKES FOR THE RIGHT MIX?

When seeking the right balance, policy-makers will need to bear in mind in particular the possible tensions between all the principles of better regulation but especially:

- Legitimacy and efficiency (including timeliness);
- A high degree of legal certainty and high levels of protection on the one hand and flexibility (in terms of both options for economic operators and ease of modifying the rules) on the other hand.

Any set of rules is only as good as the level of compliance with them. This does not always mean that laws are the right answer. A badly framed or badly designed law in

which little attention has been paid to the requirements of enforcement may be less effective than a well-prepared and widely accepted code of conduct. Effective enforcement depends not only on the quality of the rules to be applied, but also on the resources available. Administrative co-operation and monitoring by public authorities are an example of actions that can be undertaken to obtain a good level of compliance, whether or not the rules are legally binding.

3. WHICH TOOL FOR WHICH JOB?

Bearing in mind the need to avoid too rigid a classification of each tool, the following offers some first guidance as to which tool is suitable for which part of the public policy problem:

- 3.1 Primary legislation is a normative act adopted in application of a competence and a procedure laid down in the Treaty. It is clearly to be applied when the legislator wants to establish principles, general rights and obligations and the procedures to implement them, especially where these may imply major societal choices and thus require democratic legitimisation at Community level. It is one, but not the only, way of achieving a high degree of legal certainty, though the degree of certainty achieved depends to some extent on the level of detail of the text and uniformity of application will depend on the choice of instrument (Regulation or Directive). Primary legislation can only be modified and up-dated through a repetition of the full legislative procedure (which is slow and often unpredictable), except when the act specifies that certain implementing provisions or details can be added or changed by secondary legislation. In practice, is often an unavoidable choice at Community level: if there is divergent legislation at Member State level and the divergences go beyond what is tolerable under a mutual recognition approach, approximation of member State law can only be achieved by primary legislation at Community level.
- 3.2 Secondary legislation is a normative act for which the legal base is found in an act of primary legislation. Its use is limited to providing “implementing provisions” for the primary act. The procedure is particularly useful (because quicker) for elements likely to change frequently over time and for sector-specific detailed provisions.
- 3.3 Other public policy actions are used by public authorities when a change of behaviour can be induced, rather than regulated. They can be in the form of incentives, or information actions for the “education” of a specific target groups or of civil society as such. This approach works best for issues where there is substantial overlap between the interests of stakeholders and public policy. Any coincidence between self-interest and public interest can be further enhanced by Community action, such as awareness campaigns or financial support. Tax incentives can, for example, be an efficient instrument for shifting market behaviour in a specified direction, or to speed the take-up of new technologies. Generally speaking, the possibilities for using such instruments at Community level are more limited than at national level.
- 3.4 Self-regulation is a tool of the private sector. Much of self-regulation has nothing to do with public policy. Businesses are doing something voluntarily for their own ends and there is not necessarily any overlap with regulation. In some cases,

regulation and self-regulation co-exist in the same area. A group of economic operators may promise to adhere to a code, which goes beyond the requirements of the law, without of course contradicting it, to gain a competitive advantage, or to render legislation superfluous, or to provide for the more concrete, detailed implementation of general regulatory guidelines or directives. Self-regulation is a collaborative effort. Unlike individual responses from companies, self-regulatory tools such as codes of conduct, standards or certification imply collaboration between industry partners at various (sectoral, national, regional etc) levels. Industry is also increasingly seeking to involve other groups, in particular consumer associations and environmental bodies. The ability to use self-regulation thus depends largely on the availability of bodies and processes to carry out the various parts of the job – building up a consensus on the content or rules, enforcement etc. With the notable exception of the European standardisation bodies (CEN, CENELEC and ETSI) and a handful of others, there is a lack of EU-wide bodies capable of or interested in delivering self-regulation at the EU level.

There are in any case clear limitations to the usefulness of self-regulation at the EU level. Often deeply rooted in national traditions, self-regulation may create barriers to the free circulation of goods and services within the Internal Market. More generally, it may not always prevent abuses. While the majority of businesses will comply in good faith, “free riders” will use loopholes or ignore codes altogether. A major concern is therefore to know that monitoring and enforcement are taken seriously and that (in areas where breaches may involve damage to individual citizens) there is access to an easy and fair redress mechanism if codes of conduct are broken. The effectiveness of redress measures and sanctions depends on the willingness of those on whom they are imposed to comply.

- 3.5 Leave to the market and general competition policy. In many cases the market creates problems of public concern, but also develops its own solutions. The effectiveness of the market in responding to different social and societal values, or to public opinion, should not be underestimated, though this may more often be the case at national rather than at EU level. As a result of competitive behaviour, many of the problems created by the market are solved automatically by the pressure exercised by all groups of interest involved (consumers, NGOs, enterprises). The driver behind these market responses is the self-interest of enterprises, either to protect their brands and labels or to enhance their appeal to the consumer in various ways.

4. ADVANTAGES AND VARIANTS OF CO-REGULATION

Co-regulation aims at combining the advantages of the predictability and binding nature of legislation and the more flexible self-regulatory approach. The advantage for the regulator will often be the contribution of expertise from stakeholders of a kind beyond the normal reach of public authorities and which it would not be efficient for public authorities to try to recruit directly. In a well-judged mix of these different tools, it is possible to define and protect the essential public policy goals at stake, while providing for greater technical quality and more flexibility in their implementation. The mere consultation of interest groups is replaced by the participation of stakeholders who

assume some measure of responsibility in ensuring that the combined actions of the partners achieve their desired objectives. Co-regulation thus involves self-regulation and regulation working together, mutually reinforcing each other.

The regulatory effort can precede or follow the self-regulatory process (“top down” and “bottom up” types). In either case, the advantages are the same: the legitimacy and transparency of the public process combined with the expertise and flexibility of the self-regulation process and the assuming of responsibility by stakeholder bodies. In practice, the intervention of public authorities is often present both before and after the stakeholders have done their job: for example, in a “top-down” approach, the legislator sets the legal framework, the stakeholders fill in the details and public authorities either monitor the outcome or sometimes validate those more detailed rules by turning them into binding regulation. In a “bottom-up” approach, it is unlikely that stakeholders will make the necessary effort to set up or activate a representative body to formulate codes or standards, unless they have been invited to do so by public authorities and have some reasonably firm assurance that the results of their work will be endorsed, provided it meets the conditions set in advance by public authorities.

The best example of co-regulation (“top down”) at EU level is the so-called “New Approach” in the area of the free movement of goods, where essential requirements are defined by law, while the stakeholders are invited to elaborate the technical harmonised standards which provide a “presumption of conformity”. The legal framework is technology-neutral, fixing essential objectives of protection and giving a free choice to the stakeholders sector to find the appropriate technical solution, either individually, or in a collaborative effort - the self-regulatory process. In this case, the self-regulatory process is used in a well-defined manner in support of public law.

Another example of co-regulation (“bottom up”) is the Commission Recommendation on the reduction of CO₂ emissions from passenger cars following voluntary commitments from associations of vehicle manufacturers. Another example is the social dialogue process to be found in Articles 138-139 of the Treaty, by which the European social partners have been empowered to negotiate agreements in order to regulate social policy matters governing working conditions. The success of this process (the final product of which is Community Directives) is due to the existence of well-established representative bodies at national and European level, ready and able to take responsibility in the negotiation process and at the implementation stage.

Co-regulation cannot be imposed. It is a co-operative arrangement between public authorities and stakeholders. Stakeholder bodies will only participate in co-regulation if credible results can be achieved, in a way that safeguards their interests at least as well as other available options. The stakeholders may favour regulation over co-regulation in some cases where self-regulatory efforts would risk being disproportionate to the achievable results, for example because of organisational difficulties or of fundamental differences of opinion among the different stakeholders involved in the process.

SECOND PART: BETTER REGULATION – IMPROVING THE TOOLS AVAILABLE AT EU LEVEL

This chapter contributes ideas towards an overall co-ordinated strategy to improve the regulatory process. It follows the sequence of that process. Most of the following elements are already present in Commission/EU practices. But they need to become a systematically applied set of disciplines, rather than a vague list of good ideas. Unless otherwise indicated, these proposals can be pursued without changes to the Treaty.

1. UNDERTAKE BROAD CONSULTATION AND IMPACT ANALYSIS

The first step in establishing whether regulation is necessary is to be clear about the objectives of the action envisaged and to identify the public interest at stake. Information needs to be put together in a systematic way to allow a thorough analysis of the causes of the identified problem (including the impact of existing regulations and other initiatives), the availability and possible contributions of different policy instruments and the existing and likely future behaviour of the stakeholders. The Economic and Social Committee's proposal that the Commission should consult it prior to making proposals would in many cases help achieve the desired result here. This analysis will in turn allow the definition of feasible policy objectives and subsequently the determination by public authorities of the most appropriate solution – regulation, co-regulation (i.e. a mixture of regulation and self-regulation) or other means.

It is important that these decisions are enlightened through impact analysis, including consultation with stakeholders, especially but not only where the latter could be directly involved in the approach chosen to protect the public interest. A first consequence will be to broaden the dialogue with stakeholders, developing more open and transparent consultation mechanisms with civil society.

Different forms of consultation may be appropriate for different policy areas and for different stages in the process. Green papers or other forms of consultation addressed to civil society and the public at large may be suitable for the preliminary stage of the policy-making process (though the difficulties of handling thousands of pages of free-text responses make this an inefficient instrument in many cases), while the drafting stage of a legislative proposal is likely to require close collaboration with a more narrowly targeted group of stakeholders. A transparent consultation is one which gives access to the replies to the consultation as well as to the consultation document(s). Policy-makers should, in addition to conducting specific consultations, also make use of mechanisms that produce permanent feedback. In its Inter-Active Policy Making Initiative, the Commission is setting up a multi-policy data base to collect and analyse the spontaneous reactions of businesses and citizens in the marketplace. The same instrument is also being used for structured consultations.

Correct identification of the categories of stakeholders to be consulted not only provides input which can improve the content of the proposal, but also means that those stakeholders will be more likely to comply with the resulting rules, because they have been able to contribute to their shaping and will feel a sense of ownership. Such consultations must of course be managed efficiently to avoid slowing down the

regulatory process unnecessarily. But time spent in an effective upstream consultation will often be recovered later in the process. It is badly/too hastily prepared proposals that most often get stuck in the Council or Parliament.

Open and transparent procedures require an active and constructive approach from stakeholders. Interest groups need to organise themselves at European level and be able to demonstrate that they are representative (see also the “box” in section 3.3 on page 15 below), to present consensual viewpoints, backed by rational arguments based on reliable technical expertise, to develop a European perspective and to play an active role in the implementation process.

Regulators need to take both a qualitative and quantitative approach to the impact assessment of legislation to seek the right balance between the possible burdens and advantages to society. The Business Impact Assessment was developed to ensure that Community legislation does not impose undue burdens on economic operators. A broader approach is needed. Regulators should conduct independent and in so far as possible evidence-based analysis of the impact of their intended actions in all relevant policy areas (environment, social cohesion, health and safety etc.) and on all affected groups (administration, business, consumers, citizens, third countries etc). Impact assessment should not stop with the issuing of a Commission proposal. It should continue throughout the legislative process, especially where changes are introduced, and after adoption. The need to be able to assess the impact and effectiveness of a measure after its entry into force should be taken into account in its design.

2. MAKE BETTER USE OF REGULATORY INSTRUMENTS

Once it has been decided to regulate at Community level, the next step is to decide what instrument or combination of instruments is the most appropriate. According to Article 249 of the Treaty, Community action can take different forms: regulation, directive, decision, recommendation and opinion. According to the Protocol on the application of the principles of proportionality and subsidiarity, the form of Community action must be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement.

2.1 Greater use of Regulations as opposed to Directives

The Protocol encourages the use of Directives as a general rule, but this choice is increasingly being called into question. The need to transpose Directives into national law (for which Member States typically are allowed 18 months to 3 years) slows down the process of regulating. And the added flexibility which Directives allow to Member States results in a less uniform and more complex legal framework. It is not surprising that business organisations, while generally calling for less regulation, say at the same time they prefer Regulations to Directives.

The group considers that the requirements of “better regulation” point clearly towards the Commission’s more often exercising the option of proposing Regulations as opposed to Directives, especially where time and/or uniformity of treatment are at a premium. The likely obstacles to this are political (Member State reticence) rather than strictly juridical.

2.2 Greater use of secondary legislation

The efficiency of the regulatory process can also be improved by more use of secondary legislation. The greater use of delegated executive powers, in accordance with Article 202 of the Treaty, could not just ease the process of up-dating and adapting to experience the more detailed aspects of certain legislation, but also unburden the legislature of the need to discuss and adopt provisions which are of a largely technical nature, thus freeing time and resources for debate of a truly political nature. The division of tasks between legislatures and executives is (not surprisingly) better established and more easily accepted at national level, but the relatively under-developed state of executive authority at Community level results in serious and unnecessary inefficiencies in the European regulatory system. These inefficiencies will become more pronounced and damaging after enlargement.

The use of executive powers must of course be subject to adequate safeguards. In Member States, these are mainly transparency and appropriate measures of oversight by the legislature. At Community level, the main safeguard under existing Treaty rules is that executive powers are always the result of explicit provisions in primary legislation, so the legislature determines the scope of executive powers in each case, as well as the conditions under which they can be exercised. These conditions (collected together in the “comitology” decision of 1999²) provide additional safeguards in the form of an active role for the Member States through regulatory and management committees and information rights plus the possibility to call the Commission to order for exceeding its powers for the Parliament. These arrangements have served their purpose up to a point, allowing in particular for very speedy decisions where necessary, against the background of discussion among the relevant experts. In many cases, however, they provide for control which is disproportionate to the political or other importance of the content of the decisions. In other case, they are considered by one or other branch of the legislature not to guarantee enough control, with the result that executive powers are simply not granted. This means that primary legislation becomes more detailed than is strictly necessary and the legal framework is excessively difficult to modify.

The Treaty has not specified how detailed primary legislative acts must be or how much discretion the Council and, where appropriate, the Parliament can delegate to the Commission in their transfer of implementing powers. The ECJ has said that “essential elements” are a matter for primary legislation, but has left the legislator a considerable margin to determine the dividing line between the powers of the legislator and the executive. Where this line is currently drawn is thus a political choice, as much as a legal imperative. This means that there is room for a greater use of executive powers under the existing Treaty on a case by case basis. Provided that the Commission, the Council and the Parliament agree, primary acts could be less detailed, confining themselves to the essential elements of the legislative framework in question and leaving the more detailed and technical implementing rules to be drawn up under comitology procedures. To make this possible, the Commission needs to be scrupulously careful and correct in its use of its executive powers and particularly respectful of its information obligations *vis-à-vis* the Parliament. In many instances, the Commission could follow a generally more transparent approach than it has traditionally. The new public access to documents rules mean that confidentiality can in any case only be maintained in justified cases, and the Commission should establish

² OJ L 184, 17.07.1999, p.23

the general practice of making documents widely available in other cases, rather than waiting to be asked.

The scope for enlarging the use of executive powers under the existing Treaty is nevertheless limited. Recent discussions on the follow-up to the Lamfalussy Report on regulating in the area of the securities markets have shown the sensitivities on this subject among the institutions, if the negotiations leading up to the 1999 decision were not already sufficient evidence of this. Any attempts to achieve substantial increases would be likely to meet understandable opposition from the Parliament. The Parliament would tend to seek closer parity with the Member States than provided for in the existing comitology arrangements, but there would be legal obstacles to this, given that the Treaty has not conferred executive powers on the Parliament, but only on the Council. A significantly more extensive use of executive powers will therefore need to await the next round of Treaty amendments after the 2004 IGC. Such an extension needs to be the subject of intensive prior discussion between the institutions. The margin for improvement is significant without even coming close to the extent of executive power exercised within Member States. That margin needs to be better exploited if the regulatory system is not to become hopelessly inefficient after enlargement.

3. BETTER USE OF THE MIX OF INSTRUMENTS

Deciding to opt for primary legislation is not a decision to exclude the use of other instruments. One or more other instruments may be used at the same time or foreseen for use at a later stage. The right mix will need to be decided on a case by case basis – there is no “one size fits all” solution and the richer the colour variations in the palette the better. Some guidelines are suggested here which may contribute to a wider and better use of a co-regulatory approach, with clear advantages compared with the use of “pure regulation” in terms of flexibility, proximity and (possibly) timeliness. These concern not only the conditions under which specific instruments may be expected to work best, or not work well, but also the links and/or transitions between the different instruments.

3.1 Avoid a co-regulatory approach where it is inappropriate. The greater use of co-regulation will depend to some extent on creating confidence by removing fears about its use in inappropriate circumstances. The protection of the public interest is primarily a matter for action by public authorities. Clearly, no political choices can be left to the private sector. Areas where the definition of basic rights is concerned are not *prima facie* suitable for co-regulation. This is also the case if policy objectives have to be met in an exclusive manner, leaving no room for different implementation strategies. In the area of economic policy, competition policy, for example, is not an area where co-regulation could usefully be applied. However, any exclusions should be made with caution. In the area of data protection, for example, where fundamental rights are at stake, European legislation lays down the general principles in an equal and binding way for all sectors, yet encourages the private sector to specify and implement these principles in codes of conduct, which can be endorsed (i.e. found to be in conformity with the Directive’s requirements) by the advisory group of data protection commissioners set up by the Directive.

3.2 **Provide stakeholders with a clear legal or policy framework.** Policy objectives need to be clearly identified and democratically legitimised. . In a top-down approach, empowering instruments (e.g. directives, resolutions, recommendations or standardisation mandates) will in most cases be adopted by the legislature. Where such acts call for the participation of the relevant stakeholder bodies in a supporting self-regulatory process, they should ideally include commonly agreed targets, operational objectives, verifiable milestones and deadlines. The invitation to participate should be open, transparent and neutral. The legislator must avoid the temptation to try to “micro-manage” self-regulation – self-regulation must remain voluntary and stakeholder -led and should be judged on its results and outcomes. But strong and specific policy guidelines are a necessary framework without which “co-regulation” will not achieve maximum efficiency, not least because stakeholders need to have a guarantee that, provided they fulfil the established conditions, the results of their efforts will be respected and recognised.

3.3 **Identify partners that are capable of building consensus at EU level.** Public authorities can only rely on self-regulation as a partner in co-regulation, when it results from an open and non-discriminatory process. These conditions are essential not only to ensure the quality of the outcome and its acceptability among the stakeholders, but also to ensure respect for competition rules (see below) and to avoid the creation of barriers which might be incompatible with internal market rules or WTO obligations. The development of codes at EU level, rather than at Member State level, is indeed essential to avoid any re-fragmentation of the internal market.

All this requires a structured consensus-building process at Community level. In order for their deliverables to be acceptable to public authorities, the private sector organisations and their processes will need to conform to certain principles:

- *inclusiveness*: the process must be open to the participation of all interested parties under non-discriminatory and fair conditions at technical and policy level;
- *transparency*: clear and publicly known procedures , wide access from the earliest moment to appropriate documents and public access to the outcome;
- *efficiency and accountability*: ability to deliver what is required on time and in a form that guarantees the commitment of the relevant stakeholders throughout the Community.

The working group considered whether *representativity* was another necessary criterion which partner bodies would need to meet. It is clearly important in some circumstances. For example, if rules being drawn up through self-regulation will at some stage lead to obligations that affect certain categories of stakeholders, all relevant stakeholders must participate in the process through a body or bodies that are representative. In cases where obligations will be undertaken voluntarily, the process will need to be capable of delivering a critical mass of operators in the sector concerned. In cases where the rules are endorsed by public authorities and acquire

the force of law, on the other hand, the endorsement process provides a safeguard against “unrepresentative” rules; but failure to ensure proper representation of all interests and opinions will limit the ability of co-regulation to contribute.

Where the representation of public interests is at stake, it is important that the relevant opinions be heard, but less important that the bodies concerned be representative. Experience shows that certain types of associations, notably those representing consumers or those devoted to protecting the environment, cannot be representative in the same way as industry associations: their membership is always a minute percentage of the population. But that does not affect their usefulness and their participation in the preparation of rules should not be impeded by a generally applicable representativity requirement that is un-meetable in their case.

Given the difficulties with “representativity” as such, some other criterion could be considered which fulfils a similar function, i.e. to ensure that the process takes into account the full range of relevant opinions and that the end result has a high level of acceptability. One possibility would be to require that EU-level bodies which, by their nature, cannot be “representative” in the democratic sense are composed of bodies recognised as interlocutors in the policy area concerned at Member State level.

3.4 Make it worthwhile for stakeholders to make the effort. For the stakeholders to agree to make the effort to contribute to the co-regulatory process, the benefits for them will need to be clear. A clear legal and/or political framework is a necessary but not a sufficient condition to ensure this. It will be necessary to create a “win-win situation”: incentives (e.g. presumption of conformity, tax breaks, R&D funds...) for stakeholders are indispensable. Mutual trust is also a must, because stakeholders cannot be expected to be the only players to commit themselves and their resources to this process. In many cases, it will be necessary for public authorities to provide financial resources to bodies participating in the process. Adequate resources are needed to make sure that all interests and opinions are represented. Without intervention from the Commission, both of an exhortatory and a financial kind, well-organised parts of civil society will tend to reinforce their already strong position at the expense of other, less well-organised parts. It will be necessary, but not easy, for the Commission to strike the balance between too much and too little intervention.

3.5 Enforce competition rules. Article 81 of the Treaty prohibits agreements or concerted practices between companies that aim at “the prevention, restriction or distortion of competition within the common market”. Exceptions may be made where they lead to economic benefits shared with consumers, contain only indispensable restrictions and do not lead to the substantial elimination of competition. The Guidelines on the applicability of Article 81 of the Treaty to horizontal co-operation agreements³ examine, amongst other things, the situation of standardisation and environmental agreements. They establish that “where participation in standard setting is unrestricted and transparent, standardisation agreements, which set no obligation to comply with the

³ OJ C 3, 06.01.2001, p.2

standard or which are parts of a wider agreement to ensure compatibility of products, do not restrict competition. This normally applies to standards adopted by recognised standards bodies which are based on non-discriminatory, open and transparent procedures.”

- 3.6 **Set the conditions for endorsement up front.** If compliance with self-regulation remains voluntary or limited to those who have participated in their preparation and this is sufficient to meet the policy objectives of the overall co-regulatory effort, further endorsement of the self-regulation rules by a public authority is not necessary. If on the other hand, the rules need to be generally applicable and thus create binding effects for stakeholders who have not been involved in the process, it is necessary to incorporate such rules into legislation at the appropriate level. Rules drawn up in self-regulation will almost always be of a kind that can be taken into the legislative framework via secondary legislation. Primary legislation in such cases will be the exception. (One such exception that already exists is the co-regulation process created by Articles 138 and 139 of the Treaty, under which agreements between the social partners emerge as primary legislation (Directives). The exceptional nature of this kind of process is demonstrated by the fact that it was considered necessary to write the process into the Treaty to make it possible.) In order to preserve the efficiency of the co-regulatory approach, the procedure for the endorsement of rules which have been prepared in accordance with the above principles and which meet the objectives and benchmarks laid down in primary legislation should be as automatic as possible. It is the job of the legislature when adopting the relevant primary legislation to ensure that the relevant procedural provisions, criteria and safeguards are in place. Non-compliant results must of course be rejected and, where appropriate sanctioned (e.g. by the adoption of legislation).
- 3.7 **Find other ways of enforcing self-regulation.** We have already established that rules drawn-up outside the institutions and procedures foreseen in the Treaty cannot become binding on parties other than those who have drawn them up, unless they are integrated into legislation in accordance with the appropriate procedures⁴. Experience in other countries, however, offers examples of how self-regulation can become legally enforceable for those that volunteer to subject themselves to particular codes or practices. The best-known example is Section 5 of the US Federal Trade Commission Act, which gives the FTC enforcement powers as regards “unfair and deceptive” acts, including failures by companies to respect their publicly declared adherence to codes of conduct. It is not clear how such an approach or one with an equivalent effect could be accommodated within the EU’s legal framework, but there would be clear advantages in being able to place greater reliance on self-regulation in certain areas. The idea certainly merits closer investigation.
- 3.8 **Check the results on a continuous basis and sanction failures.** The final responsibility for the protection of the public interest remains with the public

⁴ There are some exceptions to this at Member State level – the group discussed in particular some examples from The Netherlands – but it was not considered feasible or useful to try to extend such practices at EU level.

authorities. They consequently have a permanent responsibility for surveying the market to ensure a good level of compliance and to ensure that the objectives of the co-regulatory action are met. Thus, the regulator needs to set up verifiable milestones and effective monitoring systems beforehand. Assessment criteria should be established (e.g. in primary legislation). The results of a self-regulatory process acknowledged by law or which otherwise forms part of a co-regulatory approach should be periodically assessed against legal requirements or policy objectives. This should include the practical results as well as the process itself.

- 3.9 **Stand by undertakings to exercise ‘forbearance’ but make the threat of fall-back regulatory action meaningful.** Where the political choice, endorsed at the appropriate level, is not to take regulatory action, leaving space for stakeholder action, e.g. in the form of codes of conduct, that undertaking should be respected for a period long enough for the stakeholders to act. The existence of a credible regulatory threat will strengthen the bargaining position of the public authority and could even induce industry to agree on targets that lie beyond the business-as-usual trend. The legal and/or political framework must make clear under what conditions (e.g. missed deadlines, quantified objectives not met) alternative regulatory action will be triggered, following the rules and procedures of the Treaty. Mandatory external audits are another way of keeping private sector efforts up to the mark.

4. ENSURE RAPID TRANSPOSITION AND EFFECTIVE ENFORCEMENT

The Lisbon mandate included “identifying areas where further action is required by Member States to rationalise the transposition of Community legislation into national law.” Apart from the delay that transposition implies even if it is achieved in time (see section 2;1 on page 11 above), there are the problems of late transposition, bad transposition and weak enforcement. All three contribute to depriving Community law of its desired impact. Late transposition ought to be the exception: it is almost the rule. Of 83 Directives in the area of Internal Market law that should have been transposed in 2000, only 5 were in fact transposed by all 15 Member States. Their transposition should have involved 1160 national acts of transposition, but by the end of 2000, 426 (37%) of those acts had not yet been notified to the Commission. For Directives due for transposition prior to 2000, a further 154 acts of transposition are still outstanding and no Member State has a perfect record. 33 of these acts are more than 3 years late, involving 26 directives and 10 Member States. The Stockholm European Council’s target of 98.5% transposition by Spring 2002 will – it can safely be predicted - not be met by all Member States. New ways of bringing pressure on Member States to improve their performance in this respect need to be explored, the sanction of a negative European Court ruling apparently being insufficient.

There are various forms of bad transposition and the number of infringement procedures opened for this reason is an indication that once again this is not an isolated phenomenon. Even when Member States adequately implement the requirements of Community legislation, the way in which they do so can have a major impact in terms of compliance costs. Member States must not only faithfully

transpose Directives within the set deadlines and effectively apply the legislation but also resist the temptation to add new layers of complexity and red-tape – the phenomenon of “gold-plating.”

The Commission has the responsibility for controlling enforcement measures, in particular using its powers under Article 226 of the Treaty and, in some cases, as laid down in specific legislative acts (e.g. safeguard clause procedures on national measures taken against industrial products). To deal with cases where a Member State’s action falls short of its obligations under Community law, the Commission has developed a series of instruments to back up its actions under Article 226 and to avoid overloading the Court (notably “package meetings” with each Member State) and these can certainly be made even more effective. But the area in which no action is currently taken – in particular for lack of a legal base – is that of gold-plating, which can nevertheless be almost as harmful as shortfalls to efforts to achieve a good quality regulatory environment. The development and publication of indicators of the complexity of transposition legislation would help to build peer pressure. Another solution would of course be a greater use of regulations instead of directives (section 2.1 above).

Legislation cannot be efficient if there is not a good level of compliance. Member States are in charge of the enforcing Community legislation in their territories, but in order to ensure a uniform and coherent level of compliance throughout the Community, specific measures and instruments need to be included in legislation, such as sanctions, administrative co-operation and market surveillance. In some areas the Commission has received powers to carry out a Community control of national measures, as is the case for safeguard clause procedures. Administrative co-operation tends to be under-valued and under-exploited in the Community: a lot more could be done in this way to solve specific problems and improve compliance generally.

The Commission is taking steps to improve feedback at EU level on how citizens and businesses perceive that laws are being enforced (Inter-Active Policy Making Initiative). The correct analysis of this feedback should help to improve the quality of regulation and its application. It should in particular help to avoid the wrong response: reacting to poor levels of compliance by piling on more and more complex obligations is almost always the wrong response.

5. EVALUATION

It is important to ensure that regulation can be monitored during its implementation and the question of how best to evaluate, if possible quantitatively, its effectiveness is one that needs to be addressed at the design stage. Instruments for monitoring/evaluation need to be built into the regulation so that impact assessment in effect continues throughout the lifecycle of the regulatory initiative, which will provide the basis for further adaptations, amendments or repealing of the legislation. A more systematic approach to reviewing legislation could be considered, with more emphasis on objective impact assessment and less on reporting for the sake of reporting. The question “Can this regulation/directive be made simpler?” should form a systematic part of every review and be answered transparently.

6. SIMPLIFICATION AND CODIFICATION

6.1 Simplifying existing legislation

Not only new legislation, but also regulatory solutions developed in the past need to be made appropriate for today's competitive and rapidly changing environment. Different initiatives, such as SLIM and BEST⁵ have been put into place in order to simplify the *acquis communautaire*. Their impact has been limited, however, and it is clear that this task needs *inter alia* a higher political profile. A coherent overall rolling programme of simplification would gain greater visibility and "critical mass" and avoid the weaknesses that have resulted from the burgeoning of distinct initiatives operating independently. The Interim Report to the Stockholm European Council already presented the Commission's intentions in this regard, but the impact will be limited unless a similar effort is applied to Member States' legislation.

One action proposed in the interim report and already mentioned in section 5 above is that scheduled reviews of existing legislation should automatically include review of the need for/possibility of simplification. New legislation should contain a clause requiring periodic review and referring explicitly to simplification. With certain acts, it may be appropriate to provide for their expiry within a set timeframe unless there is an explicit decision to renew them.

The process of planning for simplification should be linked with the Commission's overall planning procedures - Strategic Planning and Programming and preparation of Work Programme. Services should plan up to three years ahead and be required to have made arrangements for their entire pre-1999 *acquis* to have been reviewed for simplification by 2005. The Secretariat General-led "better regulation" team (see below) should develop a methodology for selecting legislation for simplification, though *a priori* the recommendations of the services responsible for the legislation in question should be accepted. Criteria for selection will be needed in case services are slow to come forward. Various forms of feedback from the marketplace (complaints registered, read-outs from the Inter-Active Policy-Making database) may help to provide guidance in this case. As to how the simplification review should be carried out, the SLIM method (dedicated panels of officials and "users" working to a strict timetable) has already proved its worth and has recently been reviewed and improved, but other approaches (provided that they are sufficiently objective and offer adequate opportunities for stakeholders to express their views) may be more appropriate in some cases.

Acquiring a higher political profile for simplification work means involving the Council and Parliament in the planning and programming too. The three-year rolling programme should be the subject of an annual agreement among the three institutions. This agreement needs to incorporate also the rules of the game. Simplification exercises which are just that (i.e. which are not part of more far-reaching reviews) must not be hi-jacked by Member States or political groups that are seeking substantive changes for other purposes. Simplification proposals (which will have to pass through the full legislative process) should in principle be given fast

⁵ Simpler Legislation for the Internal Market (SLIM) and Business Environment Simplification Task Force (BEST)

track treatment (e.g. adoption of co-decision acts on the basis of a single reading), though the desire for speed should not override the need to maintain a high level of ambition for simplification proposals. Simplification often means tackling issues of substance, not only “tidying up” the texts.

6.2 Making new legislation simpler and more accessible

The “accessibility” of Community law for citizens and business remains a major political objective of the Community, and has been since as long ago as the European Council of Edinburgh (December 1992). The accessibility of legislation depends on the quality of the drafting and for this purpose an inter-institutional agreement between the European Parliament, the Council and the Commission was concluded in 1998 establishing common guidelines. Existing guidelines on legislative drafting need to be made better known and be more systematically used within the Commission. All institutions need to be readier to reject texts that do not match these known standards. The Commission’s readiness to exercise its right to withdraw legislative proposals when redrafting in Council or Parliament has made them unnecessarily complex (see interim report to Stockholm) is welcome.

6.3 Codification

The accessibility of legislation also depends on acts that have been amended, sometimes several times, being available in a single consolidated form. It is desirable but not essential that such consolidated texts be authoritative, but they do at least need to be reliable. In order to achieve this, the regular maintenance and updating of the *acquis* are indispensable. Reducing the *acquis* to a more manageable number of pages is a more than usually worthwhile project this side of enlargement. Four instruments of legislative technique are currently available to achieve this objective (see “box” below) and all should be exploited to the full. Those which offer the highest degree of legal security are those which are most vulnerable to hi-jacking by interests that wish to make real changes to the acts concerned. The risks of hi-jacking can be reduced – but experience suggest not removed entirely - by inter-institutional agreements:

Consolidation: gathers in a single text the scattered fragments of a regulation. The consolidation avoids work of research and of comparison of an often high number of acts. Nevertheless, being done apart from any legislative procedure, the consolidated act does not produce legal effects. The consolidation has an informal character and constitutes the preparatory phase for the other three instruments.

Official codification: is the adoption of a new legal act which incorporates, into a single text without changing the substance, a previous basic act and its successive modifications. The new legal act replaces and repeals the previous basic act. An inter-institutional agreement instituting an accelerated working method (i.e. the proposal for codification submitted by the Commission is examined according to an expedited procedure within the European Parliament (single subcommittee and simplified procedure “without report” for its approval) and within the Council (single Working Party and procedure of ‘items I/A’ in the Coreper) for the official codification of the legislative texts was concluded in 1994. It confirmed that codification is carried out “à droit constant”. In accordance with the inter-institutional agreement, the normal legislative process of the Community is respected completely for the adoption of the codification act.

Recast: implies the adoption of a new legal act which includes, in a single text, the initial act together with the new amendments. The new legal act replaces and repeals the previous act. It is to some extent a continuous "codification". Currently (June 2001) there is no structured recourse to the recast technique due to the absence of an inter-institutional agreement. A proposal for such an agreement awaits adoption.

Amendment and simultaneous update: consists of the adoption of a legal act which modifies a previous act and provides, in an annex, the text of the previous, updated, act. The updated text replaces the previous text of the modified act, but the latter is not repealed. This legislative technique can prove extremely useful when, as it often is the case, codification or recast of a directive adopted by the legislator cannot be easily achieved because the Commission has to carry out frequent adaptations to technical progress or amendments of the annexes to the directive.

The accessibility of Community legislation cannot be achieved only by the action of the Community Institutions. In many cases, it is Member State legislation transposing Community directives that governs the activity of citizens and businesses. It is therefore necessary that Member States, according to their own legal techniques, also pull together into single texts the national provisions transposing consolidated directives, without which the impact of consolidation at the level of Community law is severely diminished.

7. COMMISSION STRUCTURE FOR BETTER REGULATION

Everybody claims to want "better regulation" but somehow it is rarely the consideration that comes out on top when difficult compromises are being sought. Other "imperatives" take over (not least supposed deadlines) and quality is sacrificed or forgotten. The working group considers that it is necessary to make organisational arrangements within the Commission to ensure that quality is never forgotten and only sacrificed where this is unavoidable. Experience in the Member States suggests that for the various principles and practices of better regulation to become part of the ingrained administrative culture of a particular administration, it is useful to arrange for a group or network of officials to have "ownership" of the problem and to be responsible for delivering results. For the Commission's purposes, a small central "cell" with an extended network or team across all Directorate-Generals is recommended. We are emphatically not recommending a large central unit with "policing" or veto powers. This network would be a supporting tool for the development of a culture of better regulation within the Commission, mainly through the exchange of best practice. The central cell would provide expertise, advice, encouragement, training etc. and thereby play a dynamic role, leading a process of change and development. The cell and the related network should also form part of a wider network covering similarly dedicated structures in the other institutions and in the Member States.

CONCLUSIONS

Concrete steps are needed to improve the consultation of stakeholders and the use of impact analysis in defining the need for public policy action and drawing up regulatory measures (see also report of group 2b).

The Commission should make greater use of Regulations, rather than Directives, in its future proposals, in particular where speed and uniform implementation are at a premium.

The Commission should also seek a greater delegation of executive powers in the legislative proposals it makes, under the existing Treaty. Primary legislative acts should be less detailed, with technical and/or sector specific details implemented through executive acts.

The next round of Treaty reform should seek to extend the legal basis for delegation of powers at EU level, so that the balance between primary and secondary legislation at EU level is closer to the situation in Member States.

“Better regulation” requires better use of the range of instruments available at EU-level. Co-regulation is a conscious approach or strategy to dealing with a public policy problem based on the recognition that certain fundamental aspects of a problem need primary legislation, while other details and sector-specific rules are better addressed either by secondary legislation or self-regulation, depending on the level of legal certainty required. Its advantages are greater flexibility and better access to the necessary expertise, thanks to input from stakeholders. There are many possible mixes of instruments and the right mix can only be decided case by case. In some cases, a mix may not be appropriate at all.

Greater use of co-regulation requires two practical steps. The first implies a greater use of framework legislation to set down basic rights and obligations, but also the arrangements for secondary legislation and self-regulation to fill in the details. Where it is necessary to integrate self-regulation into regulation, the scope, rules, criteria etc. need to be set out in the framework legislation. It also means ensuring that self-regulation commitments, although voluntary, are binding once entered into; and that public authorities can step in when self-regulation fails to resolve problems.

The second requires the Commission to ensure that EU stakeholder bodies meet key general criteria (notably that all opinions are adequately represented), that incentives and necessary resources for their participation are put in place, that competition rules are respected and that the results of self-regulation are monitored closely - for compatibility with the legal framework and so that the Commission can step in if agreed goals are not reached.

The Member States should reinforce their efforts to transpose Community Directives promptly and the Commission should publish qualitative indicators for national transposition, designed to identify 'gold-plating' by Member States.

Community legislation should place a greater emphasis on enforcement. Other groups have dealt with this in more detail. “Better regulation” requires that feedback

about enforcement failures be correctly analysed and that the reflex of tightening the rules be resisted.

Community legislation should include from the start the necessary instruments to enable evaluation and impact assessment to take place throughout the lifecycle of the regulation. It should also build in simplification reviews.

A rolling targeted simplification programme of the *acquis* is needed, with a high political profile. This should be an integral part of the Commission's overall planning process. Greater use should be made of the instruments of consolidation - codification and recasting. The proposal for an inter-institutional agreement on recasting legislation should be adopted as soon as possible.

A network for better regulation should be set up within the Commission, animated by a central supporting cell. The network should also link to the network of similar national bodies.