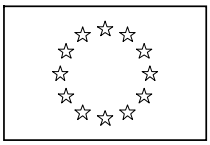

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.11.2000
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COMMISSION REPORT TO THE EUROPEAN COUNCIL

BETTER LAWMAKING 2000
(pursuant to Article 9 of the Protocol to the EC Treaty on the application of the principles of subsidiarity and proportionality)

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Introduction

In this report for the year 2000, the Commission has placed the stress on how the principle of subsidiarity is applied. This section has been strengthened compared with the previous year for two reasons:

- on the one hand, because the Commission itself wishes to explore all possible avenues on the subsidiarity issue;

- on the other, because of comments made by certain Member States and the European Parliament on the 1998 and 1999 reports.

Article 5 of the EC Treaty is backed up by a protocol on subsidiarity and proportionality. The forthcoming adoption of a Charter of Fundamental Rights, which will focus on diversities and how to respect them, will require more attention to be paid to subsidiarity. Taken together, these various provisions, along with the current interinstitutional agreements, have enabled the Commission to focus on improving compliance with the subsidiarity principle. As the European Parliament pointed out in its resolutions on the Better Lawmaking reports, the subsidiarity principle is a binding legal norm which does not rule out the legitimate exercise of the EU's competences.

The Better Lawmaking report 2000 gives pride of place to examining how the principle is put into practice. The report gives examples from the explanatory memoranda accompanying legislative proposals, but of course also discusses the principle of proportionality, the quality of legislative texts and their codification and simplification, these being vital elements if we are to have a lawmaking system which is easier for the practitioners to understand.

The need to achieve balanced application of this principle has been highlighted by a number of Member States, by the European Parliament in its debate on the Better Lawmaking reports 1998 and 1999, by the Committee of the Regions and the Economic and Social Committee, and by the Commission itself in its documents on enlargement. Enlargement enhances the need for strict application of the subsidiarity principle, given that society in the applicant countries is even more differentiated than in the present Member States, and in the light of the new policies designed to ease the integration of the new Member States.

In certain sectors for which the Amsterdam Treaty introduces new responsibilities (e.g. for creating a European area of freedom, security and justice, and in the fields of social policy and non-discrimination), there is a need for “active subsidiarity” as a means of achieving the new objectives set out in the Amsterdam Treaty. In other sectors, the Commission is seeking greater cooperation with the Member States, the local and regional authorities and civil society, with a view to the shared application of Community and national instruments in order to achieve a common goal.

In areas in which the Community has particularly strong powers because its normative input is so marked, e.g. in certain aspects of freedom of movement and competition policy, the Commission is using fairly innovative procedures to ensure that its initiatives are not disproportionate to the requirements of the Treaty and to the growing capacity of public and private partners to achieve the EU's objectives themselves.

A further aspect of subsidiarity has recently come to light: it concerns the position of the European Union and of the Member States in terms of international relations. There are certain tasks which can only be carried out in a broader context than that of the European Union.

Clearly, the effective application of the subsidiarity principle can never be cast in stone; with so many changes happening to society, the Member States' institutional structures, the international environment and technology, the EU's response will likewise have to change constantly. Preparing legislative proposals by way of communications and Green and White Papers is a way of organising the ongoing consultation of civil society and institutions at all levels on the expediency, level and content of legislative instruments, pursuant to the Protocol on the application of the principles of subsidiarity and proportionality. The debate on good governance, which goes well beyond the subsidiarity question, is likewise an opportunity for the Commission to call for calm and balanced debate, with a longer-term perspective, on the way the various principles dealt with in this report are put into practice. The same should hold true for the other institutions and for the Member States in whatever action they take to promote Community activity.

1. EFFECTIVE AND MODULATED LAWMAKING

1.1. The subsidiarity principle

As our society changes, we are having to make continual adjustments to existing models and introduce new targets for coping with a global environment.

There are repercussions for civil society, businesses, and, undoubtedly, legislative systems, at Community, national, regional and local levels.

As models and practices change, we need (in certain areas) a regulatory system which can legislate by laying down objectives and the broad lines of policy, spelling out the most appropriate level for the adoption of other rules.

1.1.1. Wide-ranging action to achieve the Treaty's objectives

The Protocol, appended to the Amsterdam Treaty, on the application of the principles of subsidiarity and proportionality underlines the dynamic nature of the concept of subsidiarity: on the one hand, it allows Community action to be restricted or discontinued where it is no longer justified; on the other, it allows it to be expanded within the limits of its powers.

The Amsterdam Treaty has created new objectives in certain areas in response to the way our society is changing. In seeking to help achieve these objectives, the Commission has put in a great deal of legislative effort, within the limits of its powers, to regulating these new policy areas or making Commission action more effective.

Such is the case with **environment policy** objectives and **health protection policy** objectives. In the latter case, action at Community level seeks to implement strategies and guidelines so as to achieve the same level of safety and public health throughout the European Union[1].

Two proposals have been made in the field of **social policy**, with a view to implementing the new powers introduced under the new Article 13 of the EC Treaty. The first is concerned with equal treatment between persons irrespective of racial or ethnic origin, and the second is concerned with the creation of a general framework for equal treatment in terms of employment and work[2].

One particularly important aspect of legislative action concerns the creation of an "**area of freedom, security and justice**" as provided for in the Amsterdam Treaty, and as urged in the conclusions of the Tampere European Council of 15 and 16 October 1999.
To this end, the Commission, which shares the right of initiative in this field with the Member States[3], came up with a Communication to the Council and the European Parliament setting out a scoreboard[4] to chart progress on creating an area of "freedom, security and justice" in the European Union.
In 2000, legislative instruments proposed by the Commission relate to four proposals for directives and regulations[5].

The main thrust of work is on regulating various aspects of the right of asylum with a view to creating a joint European asylum regime. This whole matter is linked to regulatory aspects concerning the procedure for granting and withdrawing refugee status in the Member States. Recent events in countries close to the territory of the European Union have demonstrated a need to take measures connected with the provision of temporary protection in the event of a mass influx of displaced persons.

1.1.2. Acting more effectively at Community level

The Protocol underlines the importance of action which would produce clear benefits by reason of its effects if taken at Community level.

This is the general context for this year's legislative measures in terms of **social policy**.

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1 Commission Communication on a health strategy, COM(2000) 285, adopted in May 2000; White Paper on food safety, COM(99) 719 of 12.1.2000.

2 Council Directive 2000/43/EC of 29.6.2000; proposal for a Council Directive COM(1999) 565 of 25.11.1999.

3 Where Member States' legislative initiatives are based on Title IV of the EC Treaty, the principles of subsidiarity, proportionality and good drafting apply to them just as they do to proposals presented by the Commission. The Commission will go into this point in more detail in forthcoming annual reports.

4 COM(2000) 167.

5 Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2000) 27 of 26.1.2000; proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, COM(2000) 303 of 24.5.2000; proposal for a Council Regulation extending the programme of incentives and exchanges for legal practitioners in the area of civil law, COM(2000) 516 of 6.9.2000; proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (asylum), COM(2000) 578 of 20.9.2000.

The importance which the Amsterdam Treaty gives to employment policy, and the need – as expressed in the conclusions of the Lisbon European Council – to continue with the work under the European Employment Strategy, have to find expression in the **open coordination method** and in operational measures at European level in the field of social policy.

This is a field which is characterised by constant change as the employment market strives to adapt to economic and social realities. It is nonetheless necessary to take account (even in terms of applying European Council guidelines) of ongoing changes in society and of the different ways in which such change expresses itself in the various national, regional and local contexts.

At the same time, there is a perceived need for a regulatory framework at Community level, with a view to facilitating and guaranteeing equal treatment in terms of access to work and working conditions, so as to strengthen economic and social cohesion and structure the new forms of work organisation and working time for certain groups of workers (e.g. transport personnel[6]). As regards the organisation of working time for civil aviation personnel, the recently adopted directive has its origins in Article 139 of the EC Treaty, which refers to the dialogue between the social partners at Community level, and makes provision for collective agreements to be implemented by way of a Council instrument. In the same field, there is also the legislative instrument relating to certain aspects of the organisation of working time in sectors and activities which were excluded from the earlier legislation[7].

This confirms the added value of action taken at Community level, and which could not have been taken effectively at the level of the Member States.

The context is the same for the implementation of the principle of equal treatment between men and women in terms of employment, vocational training and working conditions[8].

This shared legislative activity arises from the objectives laid down by the Treaty, but can be explained at this stage by the lack of progress in securing collective agreements in the sectors concerned.

The Commission's new initiatives[9] in the field of **research policy** are intended to underpin Community interests. The point is to facilitate and coordinate work agreed by the Member States in the same field with a view to achieving shared objectives.

1.1.3. Transnational action

The Protocol mentions the importance of bearing in mind the general objectives concerning transnational action.

Where the intention is to have an impact throughout the EU, Community-level action is undoubtedly the best way of ensuring homogeneous treatment within national systems and stimulating effective cooperation between the Member States.

Legislative texts concerning **energy and transport policy** come into the same category.

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6 Proposal for a Council Directive, COM(2000) 382.

7 EP and Council Directive 2000/34/EC of 22 June 2000, amending Directive 93/104 EC, legal basis Article 137.

8 Proposal for an EP and Council Directive amending Directive 76/207/EEC, COM(2000) 334 of 7 June 2000, legal basis Article 141(3).

9 COM(2000) 6 of 18.1.2000 "Towards a European Research Area"; COM(2000) 612 of 4.10.2000.

Implementation of these policies (trans-European transport and energy networks) requires Community action to coordinate the various national activities and so complete the internal market and facilitate interconnection and interoperability in the transport sector. As far as energy is concerned, Community-level cooperation is very important in terms of security of supply and market transparency.

One example of the linkage between organisational framework, regulatory framework and implementation measures is the Commission proposal on the development of an integrated satellite navigation system, known as **GALILEO**[10]. In this context, it is of strategic importance for the Community to define the regulatory framework, make the right arrangements for practical implementation and devise a funding system in conjunction with industry.

The Commission has produced a White Paper on the **common transport policy** with a view to stimulating ideas on how to distinguish between (a) measures which are proper to the Community, e.g. technical harmonisation, trans-European networks, social legislation and road safety and (b) measures which affect urban policy and land-use planning, which are more a matter for the Member States.

- Proposal to amend Decision No 1692/96 on guidelines concerning trans-European transport networks[11].
- Proposal to amend Decision No 1254/96/EC on guidelines concerning trans-European energy networks[12].

Still in the context of transnational action, the regulatory model used in the proposal for a decision[13], which seeks to establish a legislative framework for electronic communications networks and services, provides for moves to facilitate the flexibility needed to achieve the common objectives in the various Member States.

1.2. Proportionality

Although the twin concepts of proportionality and subsidiarity are closely linked, both in legal texts and in purely logical terms, they do have to be kept apart. In the two cases — that of exclusive competence (where there is, by definition, no need for any specific examination of subsidiarity) and where there is joint competence — the important thing is to ensure that legislation does not impose on national, regional or local authorities or on civil society any constraints which are illogical, superfluous or excessive given the objective. One immediate corollary concerns the effectiveness of legislation: any ineffective legislation — ineffective by reason of excessive detail or excessively rapid obsolescence — imposes, by definition, pointless constraints on society. Clearly, the Commission is duty-bound to propose whatever measures are necessary to supplement Member States' efforts to achieve the Treaty's objectives. The Commission has made a special effort in terms of the single market. It has used, in its proposals, such methods as the reciprocal recognition of norms drawn up by

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10 This measure was proposed in 1999: "Galileo – Involving Europe in a new generation of satellite navigation services" COM(1999) 54. In the course of 2000, the Commission launched the Galileo project definition phase.

11 COM(1999) 277.

12 1047/97/EC, OJ L 151 of 11.6.1997 and 1741/99/EC, OJ L 207 of 6.8.1999.

13 Proposal for a Decision of the European Parliament and the Council on a common regulatory framework for electronic communications networks and services, COM(2000) 407.

Member States' authorities, or the stipulation of objectives, leaving it to others to decide on the practical arrangements. The Commission is at present reviewing this policy on the basis of two criteria designed to guarantee that fixed objectives are complied with in both political and legal terms: the ability of national and regional authorities, and of civil society, to act to achieve the objectives laid down in a Community provision; and the compatibility or conformity of these objectives with national or sectoral practices. It is important to bear in mind here the precautionary principle which, as far as the lawmaker is concerned, is a matter of achieving a balance between the freedoms and rights of individuals, sectors of activity and organisations, on the one hand, and the need to reduce the risk of negative effects on the environment and on human, animal and plant health, on the other[14].

Two examples will serve to clarify how the principle of proportionality is applied.

At its extraordinary meeting in Tampere in 1999, the European Council called on the Commission to present, as quickly as possible, proposals for implementing Article 13 of the EC Treaty on racism and xenophobia. This is the backdrop to the proposal for a directive[15] concerning the creation of a general framework for equal treatment in employment and occupation. The Member States have themselves adopted a wide range of measures, including statute law, designed to affirm the right of persons to non-discriminatory treatment. Some Member States have even integrated the articles on non-discrimination into their constitutions. In these circumstances, the directive (proposed by the Commission and already adopted by the Community's lawmakers) will help to lay down common means to protect people throughout the EU, but it will be restricted to strengthening and supplementing existing protection in the Member States and supporting Member States' efforts.

Switching to competition policy, the proposal for a regulation concerning the implementation of competition rules rests on the principle that the national competition authorities will apply Articles 81 and 82 of the EC Treaty in conformity with the procedural rules in place in their countries. In terms of reform implementation, then, there has been no obvious need for any integral harmonisation of national procedural rules. At Community level, the intention is to regulate a limited number of aspects which have a direct impact on the way the proposed system operates (cf. 1.4 below).

1.3. Civil society: an indispensable partner

Both "civil society" and business are having to cope with change brought upon them by a global environment which calls for new and increasingly high-powered strategies and mechanisms.

An evolving society creates new social balances which warrant the attention of lawmakers at both Community and national level.

This is reflected in the **Social Agenda**, which was the subject of a proposal in June 2000, and which is concerned not with policy harmonisation, but with moving towards European objectives and making social policy coordination more effective. The Social Agenda postulates a policy framework in which all parties (the Community institutions, the Member States' national, regional and local authorities, the social partners and the NGOs) can play an active part, at the same time respecting Member States' diversity of systems and policies. In such cases, the Commission thinks it important to launch initiatives with a view to facilitating

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[14] Commission Communication on the precautionary principle, COM(2000) 1 of 2.2.2000.

[15] Council Directive COM(1999) 565 of 25.11.1999.

interaction between the Community level, on the one hand, and the national, regional and local levels on the other.

Although the principle of equal treatment for men and women constitutes one of the European Union's fundamental values, the new social fabric imposes a different approach to promoting gender equality by way of Community policy mainstreaming[16]. If it is to achieve this aim within the next five years, the Community feels it must strengthen cooperation with the Member States and, above all, with the social partners and the NGOs. The contribution the representatives of European civil society make will be of fundamental value in setting up effective strategies both nationally and at Community level.

Markets need new forms of regulation to cope with the rapid and ongoing changes generated by the new technologies.

The Lisbon European Council underlined the importance of markets and the need to support them by creating a business-friendly environment and by establishing administrative systems which are better geared to the needs of market players.

The kind of market changes which were pinpointed in the conclusions of the Lisbon European Council have lead to a rethinking of European legislation ***pertaining to markets***, either with a view to taking measures at European level or, where appropriate, with a view to national or regional decisions which will achieve the same objectives.

Simplification[17] has a highly useful role to play here, both at European level and nationally (since firms are subject to many layers of decision-making); at the same time, though, there is a need for thought to be given to a different regulatory approach.

With a view to producing legislative instruments geared to users' real needs, the Commission's analysis seeks to identify general objectives to be achieved and, by evaluating the situation at intervals, to test the impact of these objectives.

Additionally, firms can play a part in defining technical aspects, standards and the most appropriate technical solutions, more especially by getting institutions to adapt the rules to market changes brought on by the new technologies.

In acting to keep the European economy competitive in world markets, the Community maintains the objective of contributing to a high level of consumer protection and confidence and high-quality services of general interest[18]. **Services of general interest** have an important role to play in achieving these objectives. The new Article 16 of the EC Treaty explicitly recognises the role played by services of general economic interest in promoting economic, social and territorial cohesion. The importance of these provisions was underlined by the Lisbon European Council. In pursuing these objectives, the Community bears in mind that the Member States are free to define what constitutes a service of general interest, and is mindful of the appropriate roles played by the various geographical levels of government in regulating such services.

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16 Commission Communication COM(2000) 335 "Towards a Community framework strategy on gender equality (2001-2005)".

17 See Chapter 2.3.

18 COM(2000) 580 "Services of general interest in Europe".

It is important to mention current thinking (referred to earlier) on the ***common transport policy*** and ***environment policy***, where the Commission intends to increasingly propose voluntary agreements with industry, more especially with a view to developing clean vehicles.

Still in the field of ***environment policy***, proposals will set out to achieve the European Union's environmental objectives by way of an appeal for more responsibility on the part of economic operators. The result will be to make it easier to lay down the main objectives in this field, as indicated in the proposal for a directive on waste from electrical and electronic equipment[19].

The proposal for a directive on the assessment and management of environmental noise[20] makes provision for close cooperation with all players at the levels of the Member States and of the regional and local authorities. The proposal pinpoints the main objectives, and it is up to the national, regional and local authorities to come up with the most appropriate methods and approaches for achieving them.

1.4. Adapting Community action

To make Community legislation more modulated and more effective, the Commission has adopted a new general approach which is applied, by way of the example, to **Articles 81 and 82 of the EC Treaty**.

The point to note here is that, in an area which is not in itself "legislative", the implementation of rules falling within the exclusive competence of the Community can be assigned to Member States' authorities and courts. This is the case for the general rules in application of Article 81 and 82 of the EC Treaty, which are concerned with competition-restricting agreements and abuses of a dominant position. These rules, which date from 1962, are characterised by the Commission's exclusive power to exempt competition-restricting agreements from the general ban. These rules are well geared to a Community of six Member States, which was characterised by a relatively under-developed "competition culture", but it is no longer the case today. In effect, the situation has changed radically: the 15 Member States have set up national competition authorities to put into effect their own national competition law which, in many, takes its cue from Community law — and, in most of the Member States, Community competition law. The conditions under which exemptions are granted are developed from the Commission's own decision-making practices and from the Court of Justice's judgments. These factors have prompted the Commission to consider a different way of applying Articles 81 and 82 of the EC Treaty. The need for profound change will be even more keenly felt in a future enlarged EU, where the Commission will no longer be able to assume sole responsibility for compliance with competition rules throughout the EU. In the interests of more effective protection for competition, the proposal for a Council Regulation provides for a new approach whereby Article 81 of the EC Treaty in its entirety becomes applicable by the Commission, the Member States' competition authorities and national courts alike. In so doing, this proposal[21] sets out to create homogeneous competition

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19 Proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment, COM(2000) 347.

20 Proposal for a Directive of the European Parliament and of the Council relating to the assessment and management of environmental noise, COM(2000) 468.

21 Proposal for a Council Regulation concerning the implementation of the competition rules laid down in Articles 81/82 of the Treaty, amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87.

conditions throughout the Community, at the same time endeavouring to ensure that measures are taken at the most appropriate levels.

2. QUALITY LAWMAKING

2.1. Consolidation, codification and recasting

Applying the principles of subsidiarity and proportionality gives the European Union's citizens high-quality legislation centred on transparency and clarity.

To this end, the Commission this year adopted **five** proposals for **codification**, with a view to replacing 78 legislative instruments, and proposed a further **five** to replace 43 existing instruments.

In 2000, the Commission presented **three** proposals for **recasting** with a view to amending 15 legislative instruments.

Documentary consolidation of Community law continues to make good progress. This year, not far short of 1 000 consolidated instruments have been made available to the public on the EUR-Lex and Celex sites, in all language versions.

Proposals for codification, adopted

- Directive 2000/13/EC of 20.3.2000 on the labelling, presentation and advertising of foodstuffs
- Directive 2000/29/EC of 8.5.2000 on organisms harmful to plants
- Directive 2000/12/EC of 20.3.2000 on credit institutions
- Regulation (EC, Euratom) No 1150/2000 of 22.5.2000 on own resources
- Directive on biological agents codifying Directive 90/679EEC

Proposals for codification, presented

- Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses – COM(2000) 259
- Directive on the minimum level of training of seafarers – COM(2000) 313
- Directive on the admission of securities to official stock exchange listing and on information to be published on those securities
- Directive establishing a Community code for medicaments for human use
- Directive establishing a Community code for veterinary medicaments

Proposals for recasting, presented

- Directive concerning life assurance – COM(2000) 398
- Directive establishing Community measures to combat classic swine fever
- Directive on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts — COM(2000)275

2.2. Quality of drafting

Efforts to make legislation clearer, simpler and more accessible remained at the top of the political agenda, both at Community level and in the Member States (the two main sources of legislation). The Commission continues to stimulate and encourage exchanges of views and dialogue with the Member States and the other institutions. An interinstitutional working

party composed of members of the EU institutions' legal services met regularly throughout 1999 to discuss the quality of drafting.

Following the adoption in 1998 of the interinstitutional agreement on the quality of drafting of Community legislation, the institutions got together to decide how to put the agreement into practice. The result is a joint practical guide for the drafters of legislative texts, which was finalised by the three legal services on 16 March 2000.

The Commission, for its part, has taken measures to put into practice the other obligations arising from the final part of the agreement, more especially in terms of training and *ex ante* control of the quality of texts.

Agreement published in OJ C 73 of 17.3.99. The agreement refers to Declaration No 39 on the quality of drafting, appended to the final act of the Amsterdam Treaty.

2.3. Simplification

For several years now, the Commission has been pursuing a policy of simplifying Community legislation.

The **SLIM initiative** (simpler legislation for the internal market) remains one of the most conspicuous and ambitious examples of the ongoing simplification work. The Commission has stepped up its efforts to improve the quality and reduce the volume of regulatory paperwork. To this end, it adopted a Communication to the Council and to the European Parliament with a view to making the initiative more effective.

COM(2000) 104 of 28.2.2000: Communication from the Commission to the EP and to the Council "Review of SLIM: Simpler legislation for the internal market".

- Experience gathered over the first three phases of SLIM has shown that the initiative's fundamental objectives as laid down in 1996 have been achieved, i.e. to identify ways of simplifying legislation on the single market. If SLIM is to be made more effective, there would seem to be a case for reformulating the objectives and saying exactly what is meant by "simplification".

- Areas of legislation currently covered are decided on the basis of proposals from the Member States, the European Parliament, the Economic and Social Committee, professional or commercial organisations and the Commission.

At present, we have no fixed criterion for selecting which legislative areas should be examined, nor do we have strict rules for deciding on particular sectors. The risk here is that certain areas might simply be "forgotten" despite the evident need for simplification. The "age" of the legislation prior to simplification is another factor which has to be borne in mind. The legislative provisions submitted to the SLIM teams are generally at least five years old, and the basic texts have often been in place for ten or 20 years.

As part of the ongoing reexamination, the Commission appreciates the need to improve the selection procedure and will call on the various players to make proposals. At the same time, the Commission will discuss with the Member States the choice of areas to be examined. Appropriate consultation mechanisms will be agreed with the European Parliament.

- The Commission proposes to enhance transparency and strengthen interaction with the sectoral committees concerned and the planned subcommittee of the Advisory Committee on the Internal Market, which will be called to meet at the start and at the end of each phase.

- Transparency is a basic requirement and, to that end, the SLIM exercises must be subject to regular and full reporting arrangements.

- Each year, the Commission will publish a working document which will focus exclusively on the follow-up to the SLIM report, and which will report on progress made with the legislative proposals and highlight any delays.

The SLIM initiative plays a very important part in simplifying enterprise policy legislation. One example of this, and of the need to create synergies between this instrument and the Commission's lawmaking productivity, is the process of examining, **over the next five years**, what has been achieved in enterprise policy, as set out in the recent Commission Communication introducing the multiannual (2001-2005) programme for companies.

Another aspect of improved lawmaking is the Commission's continuing "Business Impact Assessment" scheme.

COM(2000) 256 of 11.5.2000 "Enterprise policy in the knowledge-driven economy".

This is a particularly important approach in that it gives practical expression to the message of the Lisbon European Council, which laid down for the EU a new strategic objective for the decade to come: to develop a knowledge-based economy in Europe. From the operational point of view, what this means is creating a competitive and dynamic environment for European firms in which they can take hold, grow, innovate and gain access to markets.

If these objectives are to be attained, there is an undoubted need for making present and future rules leaner and simpler without, however, hindering the pursuit of more general policy objectives.

A five-year period represents an ambitious timescale, albeit a realistic one for evaluating what has been achieved on the strength of practical experience.

A further example of the work the Commission is putting into simplification and modernisation is the Regulation governing the coordination of social security systems, an exercise which dates from 1998.

Regulation 1408/71, COM(1998) 779 of 21 December 1998.

Making Community legislation more flexible and of a higher quality is a constant concern in many fields[22]. The proposals for a European Parliament and Council Directive amending Directives 79/267/EEC and 73/239/EEC respectively are intended to simplify and update the current rules on the margin of solvency for life assurance and non-life companies.

[22] The Commission has proposed reforms in various agricultural sectors so as to reduce the number of operational regulations and to change others with a view to relieving the administrative burden on producers and the management workload for the national authorities.

These efforts are also reflected in the participation of the pre-accession countries in Community programmes and agencies. A framework decision is likely to be presented in the course of the year and will obviate the need for a large number of proposals for individual decisions for each and every Community programme.

Legislative initiatives have also been taken on Community transit and on the Community financial regulation.

- Proposal for a Council Regulation on the financial regulation applicable to the general budget of the European Communities, COM(2000) 461.

- Proposal for a decision from the joint EC-EFTA "Common transit" committee, concerning the amendment of the agreement of 20 May 1987 on a common transit regime.

- Proposal for a decision from the joint EC-EFTA "Simplification of formalities for trade in goods", committee, concerning the amendment of the agreement on the simplification of formalities for the trade in goods.

ANNEX

JUSTIFYING A LEGAL INSTRUMENT

"For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative, or, wherever possible, quantitative indicators."

I. PLUGGING THE GAPS AND WORKING TOWARDS POSITIVE SOLUTIONS

The Commission justifies action at Community level by way of **two** criteria, which are complementary to one another:

1. **The absence of action at European level might have negative consequences for the effectiveness of instruments envisaged by the Member States and/or be contrary to the requirements of the Treaty.**

2. **"Action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States".**

For the first of these criteria, we can cite three examples to clarify how it is put into practice.

1) In its proposal for a *Directive of the European Parliament and of the Council on waste electrical and electronic equipment* (COM(2000) 347), the Commission emphasises that:

- "Different national policies on the management of waste electrical and electronic equipment (WEEE) **hamper the effectiveness of national recycling policies** as cross-border movements of WEEE to cheaper waste management systems are likely.
- Different national applications of the principle of producer responsibility lead to substantial **disparities in the financial burden for economic operators**.
- Diverging national requirements on the phasing-out of specific substances could have implications on **trade** in electrical and electronic equipment."

2) In its proposal for a *Directive of the European Parliament and of the Council establishing requirements and harmonised procedures for the safe loading and unloading of bulk carriers* (COM(2000) 179), the Commission explained the many negative consequences arising from the lack of a harmonised Community framework:

- "The cost of inaction would be that **the rate of losses of these types of ships and their crews would remain unacceptably high**.

- Furthermore, if no harmonised criteria are established within the Community concerning the suitability of bulk carriers to load or unload solid bulk cargoes, the risk of **sub-standard and over-aged bulk carrier tonnage shifting to Europe** its trade patterns from areas where strict safety policies are applied cannot be combated.

- Furthermore, inaction could entail a **risk of distortion of competition between terminals** through the application of diverging levels of safety in the cargo-handling operations and terminals procedures.

- Moreover, inaction would **do nothing to overcome the existing problems that bulk carriers experience with terminals not agreeing and adhering** to the loading or unloading plans established with a view to ensuring that the ship's structure is not over-stressed or damaged during cargo-handling operations."

3) In its proposal for a *Directive of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to institutions for occupational retirement provisions* (COM(2000) 507), the Commission explains, and backs up with figures, the lamentable situation caused by the fact that the activities of institutions for occupational retirement provision (IORPs) have never been regulated at Community level:

"There is no agreement within the Community on how IORPs can use the single market and the euro to optimise their investments in financial markets. The rules to which they must adhere vary greatly from one Member State to another. The possibility cannot be ruled out that some of these rules go beyond what is necessary to ensure the IORPs' prudential soundness. If so, this could **hinder the application of the principle of the free movement of capital and damage the IORPs' returns**. Between 1984 and 1998, average annual real return on investments by IORPs was around 6% in the Member States with strict quantitative investment rules and more than 10% in Member States with rules that give managers more freedom. Lower returns mean lower pay-outs or higher contributions. The **indirect cost of labour** rises, as does the **cost of financing retirement systems**. Investment policy in the field of supplementary pensions depends on the pension product and the contractual obligation of the pension provider. By limiting opportunities for diversification of assets, rules that are too restrictive might also **complicate risk management and reduce the security of investment portfolios**. Excessive restrictions on shares, which are usually less volatile than government bonds in the long term given their link to economic and productivity growth, can have a negative impact in this regard. It is therefore vital that an agreement be reached on investment rules that are suited to the more extensive and more liquid capital market that is the result of economic and monetary union." [...] Moreover, "In the absence of proper coordination at Community level, IORPs are the only major financial institutions unable to provide their services in a Member State other than their own on the same conditions as banks, insurance companies and investment firms. It has been calculated that, for a pan-European company, the **cost of setting up separate occupational systems** in each Member State is about € 40 million per year."

The aforementioned two criteria are complementary, which is why, in the same proposals, the Commission points out that there will also be advantages in taking action at Community level (i.e. the second criterion). More especially,

(1) In its proposal for a *Directive of the European Parliament and of the Council on waste electrical and electronic equipment* (COM(2000) 347 final), the Commission stresses that action at Community level will make the recycling of certain WEEE economically viable. As it says, "for various parts of WEEE, recycling **is economically viable only if** large quantities of waste and produced. **According to the principle of economies of scale only a few centralised installations in Europe would process these wastes.**"

(2) In its proposal for a *Directive of the European Parliament and of the Council establishing requirements and harmonised procedures for the safe loading and unloading of bulk carriers* (COM(2000) 179 final), the Commission stresses that **compulsory** harmonised action is necessary "to avoid improper cargo-handling operations that may impair the structural safety of these ships and could eventually contribute to the loss of these ships and the lives of the crew on board. Appropriate principles and procedures aimed at enhancing the safe loading and unloading of dry bulk carriers have been agreed at international level. However, as these principles and procedures are of a non-binding nature, their implementation in the Community can only be assured through the establishment of an enforceable and harmonised Community framework."

(3) In its proposal for a *Directive of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to institutions for occupational retirement provisions* (COM(2000) 507 final).

II. JUSTIFYING SUBSIDIARITY: DIFFERENT FORMULAE

In justifying the need for action at Community level, the Commission uses two main formulae, either in the recital preceding the instrument proper, or in its explanatory memorandum. One of these could be dubbed "**descriptive**", the other "**analytical**". There is a kind of questionnaire setting out a number of points, the origin of which goes back to the preparatory work for the interinstitutional agreement of 1993.

By way of example, here are two proposals, one of which uses the descriptive formula, the other the analytical one:

1. Proposal for a *Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof* (COM(2000) 303):

"Subsidiarity and proportionality: justification and value added

The insertion of the new Title IV (Visas, asylum, immigration and other policies related to free movement of persons) in the Treaty establishing the European Community demonstrates the will of the High Contracting Parties to confer powers in these matters on the European Community. But the European Community does not have exclusive powers here, and consequently, even with the political will to implement a common policy on asylum and immigration, it must act in accordance with Article 5 of the EC Treaty, that is to say if and to the extent that the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. The proposed Directive satisfies these criteria.

Subsidiarity

The establishment of an area of freedom, security and justice entails the adoption of measures relating to asylum and to refugees and displaced persons. The specific objective of this initiative is to lay down minimum standards for giving temporary protection in the event of a mass influx of displaced persons and promoting a balance of efforts between the Member States in receiving such persons and bearing the consequences thereof. These standards and measures must be capable of being applied through minimum mechanisms and principles in all Member States. The situation regarding the grant of temporary protection varies from one Member State to another. Minimum Community standards have to be laid down by the kind of action proposed here. They will help to limit the possibility that third-country nationals will decide on their country of destination merely on the basis of the more generous conditions available there. Moreover, solidarity can best be organised at European level.

Lastly, the durable absence of European rules on temporary protection would have a negative effect on the effectiveness of other instruments relating to asylum.

Proportionality

The form taken by Community action must be the simplest form allowing the proposal to attain its objective and be implemented as efficiently as possible. In this spirit, the legal instrument chosen is a Directive, which allows minimum standards to be laid down while leaving to the national authorities the choice of the most appropriate form and methods for implementing it in their national legal order and general context. Moreover, the proposed Directive does not set out to lay down standards relating, for example, to the interpretation of the Geneva Contention, subsidiary protection or other aspects of the right of residence of foreign nationals, on which there will be other proposals. It concentrates on a set of minimum standards that are strictly necessary for the coherence of the planned action."

2. Proposal for a *Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway* (COM(2000) 7):

"Justification for action at Community level

1) What are the objectives of the proposed action in relation to the Community's obligations?

The proposal aims to enhance legal certainty concerning the application of Community rules on exclusive rights and state aids in the context of the emerging single market in public passenger transport.

It will achieve this through clear rules guaranteeing the proportionality of exclusive rights (notably relating to their duration and the methods of awarding them) and the proportionality of the provision of financial compensation to operators for their compliance with authorities' public service requirements (public service obligations, under the terms of Article 73 of the Treaty).

At the same time, the proposal will encourage efficiency and effectiveness in public transport. This has an important role to play in fulfilling the Community's objectives in relation to global warming, reduction of carbon dioxide emissions, reduction of pollution, underpinning Community economic growth and supporting social inclusion. If the present trend of increasing use of cars and falling use of public transport is not halted, these objectives will not be achieved. Public transport use will continue to decline unless a substantial increase in its efficiency and the attractiveness of the services it offers is achieved.

2) Does competence for the planned activity lie solely with the Community or is it shared with the Member States?

The action falls under a shared competence (Article 71(1)(d) of the Treaty) and also under an exclusive competence (Article 89 of the Treaty).

3) What is the Community dimension of the problem (for example, how many Member States are involved and what solution has been used up to now)?

The regulation concerns all Member States.

In order to avoid distortion of competition, it is necessary to improve and harmonise the treatment of authorities' action to secure public service requirements where this has an impact on competition, notably by generalising in all Member States the award of public service contracts and exclusive rights following consistent non-discriminatory competitive procedures.
There is presently a wide divergence of practice in the Member States, and — with regard to exclusive rights in particular — the Community dimension has not previously been addressed.

4) What is the most effective solution taking into account the means available to the Community and those of the Member States?

Given the need to establish legal certainty in situations in which operators originating in one Member State establish themselves in a second Member State and attempt to enter the public transport market there, the most effective solution is action at Community level.

To achieve this, this proposal establishes common rules:

- for the use of contracts between authorities and operators;
- for compensating operators for the fulfilment of public service requirements;
- for the award of exclusive rights;
- for introducing and managing competition;
- on transparency.

5) What real added value will the activity proposed by the Commission provide and what would be the cost of inaction?

Given that the purpose of the action is to establish common rules applicable in all the Member States, the action can only be achieved through Community legislation and could not be achieved by action at the level of the individual Member States.

The regulation will promote the provision of efficient and attractive public transport and will enable Member States to develop specific national regulatory systems with confidence within the common standards for transparency and non-discrimination established by a clear Community framework. The regulation will also remove restrictions on Member State action that are imposed by Regulation 1191/69 and are now out of date.
The present situation is characterised by the absence of a common framework of Community rules; this could lead to the disruption of the system for regulation public transport in one or more Member States as the result of adverse court judgments.

6) What forms of action are available to the Community (recommendation, financial support, regulation, mutual recognition, etc.)?

The proposal is based, inter alia, on Article 89 of the Treaty, which leaves the Community no choice but to proceed by means of a regulation.

Neither financial support nor mutual recognition would be an appropriate way of achieving a minimum standard applicable across the Community.

7) Is it necessary to have a uniform regulation or is a directive setting out the general objectives sufficient, leaving the implementation at the level of the Member States?

To achieve the objectives of the proposal, the principles of transparency and non-discrimination which it aims to promote need to be simultaneously embodied in each of the different national regulatory frameworks in a clear, precise and compatible way. The Community has no choice but to proceed by means of a regulation (see 4.6) and a regulation is the appropriate way to achieve this. In any case the proposal establishes how the principles referred to should be applied to different regulatory mechanisms, without predetermining which of those mechanisms Member State authorities will deploy in each particular case."

III. SUBSIDIARITY: AN INTERNATIONAL DIMENSION

Globalisation imposes on the EU the need to consider how certain problems can go beyond the frontiers of the EU and require action at international level. This calls for strict coordination between the EU and the Member States on agreed guidelines. Here are two examples of the way the Commission has justified this approach:

1. Proposal for a *Decision of the European Parliament and of the Council on a regulatory framework for radio spectrum policy in the European Community* (COM(2000) 407):

"Currently, the harmonisation of the use of radio spectrum is achieved, at global level, in the International Telecommunication Union (ITU — 189 member countries) and its World Radiocommunications Conferences (WRC) and, at European level, in the CEPT[23] (43 member countries). Taking the globalisation of radio markets into account, harmonisation at the highest level possible should allow for economies of scale (i.e. lower equipment costs) and pan-European and global availability of services (i.e. international roaming) since harmonisation efforts **will reach beyond the Community borders**. […] It is also necessary that common positions be adequately promoted in all international organisations and conferences related to radio spectrum matters, notably within the ITU and World Radiocommunications Conferences[24]. In international negotiations, **Member States and the Community should develop a common action and closely cooperate during the whole negotiations process so as to safeguard the unity of the international representation of the Community**".

23 European Conference of Postal and Telecommunications Administrations.

24 The Commission highlighted the importance of the WRCs for the Community in its communications COM(1997) 304, COM(1998) 298 and COM(2000) 86.

2. *Communication from the Commission to the European Parliament and the Council, "Action against anti personnel landmines: reinforcing the contribution of the European Union"* (COM(2000) 111).

"Improved international coordination and complementarity: The multitude of financial instruments used in support of mine action poses specific problems of coordination, coherence and transparency. There is clearly a case for enhanced international coordination, rationalisation of procedures, and strengthening the consistency of Community actions. More effective and properly coordinated action by the main sponsors of mine actions both at the global level and in each of the afflicted countries will be supported by the strengthened, distinct budget line, responding to the requirements of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction. As in the past, the European Union supports the development of the UN Mine Action Service (UNMAS) within the UN structure as the focal point for data and information to assist donors and for the development of UN programmes, in consultation with donors and other stakeholders. **The Commission and Member States have played a full part in the Mine Action Support Group (MASG), and maintain close liaison with UNMAS.**"