



COMMISSION OF THE EUROPEAN COMMUNITIES

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**REPORT FROM THE COMMISSION**

**“BETTER LAWMAKING 2004”**

**pursuant to Article 9 of the Protocol  
on the application of the principles of subsidiarity and proportionality**

**(12th report)**

**{SEC(2005) 364}**

The obligation on the Commission to present an annual report on the application of the principles of subsidiarity and proportionality to the European Council and the European Parliament was enshrined by the Edinburgh European Council in December 1992. This obligation was included in a protocol annexed to the Treaty establishing the European Community (TEC) in the framework of the amendments made by the Treaty of Amsterdam in 1997. Since 1995 this report has also applied to measures taken to improve the quality and accessibility of legislation.

Subsidiarity, proportionality and improvement of the regulatory environment are closely linked. In compliance with the subsidiarity principle, the Union restricts its actions to those that are necessary and effective. In compliance with the proportionality principle, the Union opts for the simplest possible methods. Besides, measures relating to the consultation of the parties concerned, the accumulation of expertise and impact analysis, the development of alternative methods and the exchange of “good regulatory practices”, contribute to defining and fleshing out what is necessary, effective and moderate. The efforts concerning the quality of drafting, the delivery of texts, monitoring of the implementation of the rules and simplification of the *acquis* also contribute to this end.

This report is the 12th of its kind. It reviews the situation in 2004. A detailed analysis, including references to relevant documents, is presented in the Commission Staff Working Document which accompanies this Communication.

## **1. BETTER REGULATION**

Improvement of the regulatory environment is an absolute must both with a view to enhancing competitiveness, growth and employment and to promoting sustainable development and a better quality of life for European citizens. Because of the division of responsibilities within the Union, this improvement requires a joint effort on the part of the European Parliament, the Council, the Commission and the Member States.

In this connection the Union's strategy is based on two documents: the Commission action plan "Simplifying and improving the regulatory environment" of June 2002<sup>1</sup> and the Inter-Institutional Agreement (IIA) on Better Lawmaking signed by the European Parliament, the Council and the Commission in December 2003<sup>2</sup>. A similar and partly complementary strategy is applied at the level of the Member States via the intergovernmental programme adopted in May 2002 by the Ministers responsible for public administration<sup>3</sup>.

The implementation of these three elements continued in 2004, with progress varying from one area to another and at different levels of responsibility. A global reassessment of the needs and available resources is required. There is a need to consolidate the achievements made so far but also to define supplementary actions on the basis of the experience gained

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<sup>1</sup> (COM(2002)278, 5 June 2002). This action plan is a follow-up to the White Paper on European Governance (COM(2001)727, 25 June 2001). It also takes into account the recommendations made by the Group on Regulatory Quality created in November 2000 by the Ministers responsible for public administration and chaired by D. Mandelkern (the Mandelkern report, adopted in November 2001). For more information on the eight specific communications detailing its objectives, see the annual report "Better Lawmaking 2003", COM(2003)770, 12 December 2003.

<sup>2</sup> OJ C 321, 31 December 2003, p.1.

<sup>3</sup> This action programme is also partly based on the above-mentioned Mandelkern report.

during the past three years. The creation of a new Commission with a new agenda and new priorities offers an ideal window of opportunity in this connection.

Although performances were mixed, all the parties concerned have at any rate expressed their growing interest in actions to improve regulatory quality. However, partly because of this increasing interest, the problems of coordinating the different initiatives and respect for the prerogatives of each institution have grown. Hence the Commission considers that the rationalisation of structures and procedures is an issue which must be addressed as soon as possible.

### **1.1. Actions taken by the Commission**

While far from being complacent, the Commission believes it is important to note that the progress made in the relatively short period of time since the adoption of the Action Plan has been considerable and compares favourably with that made by many Member States over the same period.

#### *Consultation of interested parties*

In 2004, the number of consultations increased significantly. This was achieved while complying with most of the minimum standards for consultation introduced in 2003. The Commission still needs to make additional efforts on feedback to respondents and, to a lesser extent, on transparency. "Consultation fatigue" on the part of some stakeholders and having to apportion limited advertising and analytical resources among too many consultations have become real risks in some sectors. All institutions should keep that in mind for the coming years when deciding on the number of consultations and the level of detail required. Constant vigilance is also needed to engage all parts of society at the consultation stage.

#### *Impact assessment*

Assessing the potential impacts of often highly complex scenarios across 25 Member States and beyond is particularly difficult. The Commission managed nevertheless to increase the number of Extended Impact Assessments completed in 2004 (29 against 21 in 2003) as well as their overall quality. Delivery remained a problem, with fewer impact assessments completed than initially planned. While initial experience shows that the methodology used is sound, there needs to be a more systematic application of the current methodology across Commission services and greater focus on competitiveness issues. New guidelines and technical aids are under development. They will contribute to address these questions and improve quality and quantity. Additional resources will also be needed to meet growing internal ambitions and external expectations.

#### *Collection and use of expertise*

In 2004, the collection of expertise in specific domains has been systematised thanks to the sixth Framework Programme for R&D. The technical development of a web application allowing for greater dissemination and use of scientific advice (SINAPSE e-network - Scientific INformAtion for Policy Support in Europe) has been completed. The scientific community has been invited to register, the official launch being scheduled for March 2005. Work also started to improve transparency on expert groups established by the Commission. It will result in the publication, early 2005, of a list of these groups and in the launch, later

that year, of a register providing Parliament and the public with standard information on all expert groups.

### *Updating and simplifying the acquis*

Simplification of the *acquis* remains a top priority, in particular for the Lisbon Strategy. The Commission actively pursued its rolling programme on simplification. The Commission has also started examining the priority list submitted by the Council in November 2004 and will decide in the course of 2005 on the appropriate follow-up. In addition, the Commission is considering reinforcing the mechanisms for identifying legislation which is disproportionately burdensome for EU manufacturers in relation to the public interests that it aims to safeguard. This exercise could lead to the launch of a new phase of the Commission's simplification programme.

The reduction of the volume of Community legislation remains a relatively weak point (codification and elimination of outdated legislation). The Commission needs to find original solutions to overcome the serious translation delays and pre-empt their return on the occasion of future enlargements. Upgrading the Inter-institutional Agreement of 1994 on codification should also be envisaged.

Accessibility to documents was greatly improved in 2004 with the opening of the new EUR-Lex. The database offers access, free of charge, to EU and EC treaties, international agreements binding the Union, EC legislation in force (incl. consolidated texts), preparatory acts, parliamentary questions, case law and European Court reports, as well as all sections of the Official Journal.

### *Choice of instruments*

The Commission has prepared an inventory of the co-regulation mechanisms put in place by the Union and the forms of self-regulation with a Community dimension. This inventory will be used as a basis for the first report on the possibilities of growing use of these regulatory alternatives, which will be presented in 2005.

Moreover, the Commission continued to argue and act in favour of decentralising some highly detailed executive tasks to European regulatory agencies. The total number of Community / EU agencies at the end of 2004 amounted to 26. The adoption of a trilateral Interinstitutional Agreement setting an operating framework for European Regulatory Agencies will be a major objective for the Commission in 2005.

Finally, progress was made on target-based tripartite contracts and agreements between the Community, the States and regional or local authorities, with the signature of the first agreement by the Commission, the Italian State and the Lombardy region. As for the other central, regional and local authorities concerned, the Commission believes that a more sustained commitment on their part would be desirable.

### *Monitoring the application of Community law*

The new Member States have been fully integrated into the system for the control of the application of Community law (on-line notification of national measures transposing

directives, etc). A procedure has also been established to ensure monitoring and review of the overall impact of enlargement.

Problems citizens and businesses encounter with the application of Community law have been better addressed thanks to measures such as SOLVIT, the Internal Market's problem-solving network. Moreover the Commission has prepared the launch in 2005 of a new internet-based tool to facilitate the filing of complaints by citizens and businesses concerning non-respect of Community law.

## **1.2. Actions taken at the level of EU institutions**

In 2004, the Council and its Presidency were proactive on a number of better regulation items. The January 2004 Joint Initiative of Member States holding the presidency in 2004-2005 (Ireland, the Netherlands, Luxembourg and the UK) and its December 2004 update (endorsed also by Finland and Austria which will hold the presidency in 2006) have called for special efforts on the reduction of administrative burden, impact assessment, simplification and greater use of regulatory alternatives (such as self- and co-regulation). A noteworthy achievement was the Council's endorsement of a list of 15 priorities for simplification which the Commission is invited to take into consideration and the launch of its first ever impact assessment prior to the adoption of substantial amendments (relating to the proposed directive on batteries and accumulators). It is however regrettable that, out of 30 proposals for simplification tabled by the Commission, the Council adopted only 10 and that too many amendments were not transparently analysed.

The implementation of the interinstitutional agreement 'better lawmaking' started in 2004 but should gather momentum. The adaptation of the working methods of the European Parliament and the Council to speed up the adoption of pending proposals for simplification is particularly urgent.

## **1.3. Actions taken by the Member States**

The regulatory burden on European operators still is mainly due to national legislation. Further progress is therefore necessary at Member States level. The Commission however welcomes the efforts deployed by Member States in response to the recommendations of the Commission and of the Mandelkern Group. While most Member States have now put in place initiatives to improve their regulatory environment, implementation remains uneven.

The Commission calls in particular on Member States to consult and to assess impact before adopting national legislation transposing EC acts. By analogy with what is required from EU institutions, it also stresses the need to do so before submitting EU legislative proposals. Finally it recommends the introduction of comparable, or at least compatible, regulatory quality indicators at EU and Member State level in order to monitor progress and facilitate the identification of best practices.

## **2. APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY**

The Commission took its procedural obligations regarding subsidiarity and proportionality very seriously. Efforts to consult widely before proposing legislation reached record levels<sup>4</sup>.

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<sup>4</sup> See sub-section 2.1.1 of the annexed Commission Staff Working Document

Besides, the decrease in the number of regulations and directives compared to the number of decisions and recommendations, both in absolute and relative terms, indicates how careful the Commission has been to choose the lightest instrument<sup>5</sup>.

In a number of cases, however, the Commission was criticised for not addressing the principles in more precise terms and for the way it assessed the burden put on certain stakeholders<sup>6</sup>. In order to better explain reasons for concluding that its proposals comply with these principles and to facilitate compliance monitoring, the Commission developed and tested a new software application for drafting explanatory memoranda<sup>7</sup>. This application will ensure that all requested information on the principles is provided in a systematic way. It will be used by all services in 2005. As for burden assessment, the Commission wishes to underline that this is a fairly complex matter in a Union so large and so diverse. Providing precise forecasting on each and every possible impact is not always possible; when it is feasible, it is often very costly and long. Attempting to be exhaustive could result in legislative paralysis at the very time the Union is confronted with urgent challenges. The Commission therefore thinks that the principle of proportionate analysis should continue to prevail. This being said, the Commission will revise or even withdraw its proposals whenever important elements have been overlooked, or to take into account significant developments occurring after the introduction of its proposals.

On the whole, the European Parliament and the Council introduced relatively few amendments referring explicitly to subsidiarity and proportionality. This consensual interpretation is not surprising considering that consultation reached record levels, but also that a very large proportion of the Commission's proposals were in fact responding to invitations made by the European Council, the Council and the European Parliament.

While Parliament usually provided a justification for its amendments, anecdotal evidence suggests that this was rarely the case for Council's amendments. When Member States exercised their right of initiative for police and judicial cooperation in criminal matters and made formal proposals, compliance with the principles of subsidiarity and proportionality was more often stated than demonstrated. A review of the contents of the most salient debates on the matter confirms established trends. More often than not, Parliament's amendments have called for broader EU action and argued that stronger instruments are required to guarantee success, while Council's amendments were asking to narrow down the scope of the action envisaged or adopt a lighter form of intervention. In most cases, the three institutions eventually managed to come to a common interpretation of subsidiarity and proportionality.

EU institutions must remain aware of the risk of resorting to mere bargaining in their negotiations. Subsidiarity and proportionality would suffer in the process, undermining policy coherence, acceptance and effectiveness. Conversely, these principles cannot be used as a pretext to ignore competences given to the Union or twist the principles and rules set by the Treaties, in order to match the political mood of the hour or the sensitivity of a particular file. In a Union of 25, deliberation based on facts and sound arguments is more important than ever.

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<sup>5</sup> See Annex 1 of the Commission Staff Working Document.

<sup>6</sup> Section 3.2 of the Commission Staff Working Document provides exemplary cases of 2004 developments in the application of the principles.

<sup>7</sup> See sub-section 2.1.4 of the Commission Staff Working Document.

As regards political monitoring of the Union's legislative process, the Committee of the Regions has recognised, in the great majority of its opinions, the legitimacy of Union action. However in two cases it invited the European Commission to reconsider its choice of instruments in order to comply more faithfully with the proportionality principle. These recommendations have culminated in an approach that provides for the closer involvement of local and regional authorities in implementing Community legislation. Besides, the Committee of the Regions has announced that it intends to systematise its assessment of compliance with the subsidiarity principle in 2005 by preparing a subsidiarity evaluation grid annexed to its opinions and, on the other hand, progressively to create a network of local and regional authorities with a view to monitoring subsidiarity. For its part, COSAC<sup>8</sup> and certain national parliaments have begun to examine new models of monitoring application of the subsidiarity principle, with a view to the future entry into force of the Constitutional Treaty<sup>9</sup>.

As regards ex-post judicial review, the subsidiarity principle has been referred to on six occasions by the European Court of Justice. No judgment has concluded that the rules of the Treaty have been badly applied in this connection.

The Commission welcomes these developments because vigilance is needed on all sides to ensure that the Union's intervention is truly needed and takes the most appropriate approach.

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<sup>8</sup> "Community and European Affairs Committees of the Parliaments of the European Union"

<sup>9</sup> As to the new framework proposed by the Constitutional Treaty concerning subsidiarity, see Commission Staff Working Document subsection 3.1.3.