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REPORT FROM THE COMMISSION

“BETTER LAWMAKING 2005”

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

(13th report)

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This report is the 13th annual review of the application of the principles of subsidiarity and proportionality. It also covers progress in improving the regulatory environment in the European Union¹.

1. BETTER REGULATION

Improvement of the regulatory environment is crucial to enhancing competitiveness, growth and employment and to promoting sustainable development and a better quality of life for European citizens. This improvement requires joint efforts on the part of the European Parliament, the Council, the Commission and the Member States.

The main objectives and actions in favour of better regulation of the EU institutions are set out in two documents: the Commission action plan on better regulation, as revised in March 2005², and the Inter-Institutional Agreement (IIA) on Better Lawmaking signed by the European Parliament, the Council and the Commission in December 2003³.

In 2005, the interest in improving regulatory quality continued to grow. A variety of initiatives have been launched in different fora, reflecting the importance attached to the issue.

¹ 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 covered measures taken to improve the quality and accessibility of legislation (for the previous report, see COM(2005) 98). Some elements contributing to improve the regulatory environment are reviewed in greater detail by the 3rd Report on European governance (2004-2005) (see http://www.europa.eu.int/comm/governance/index_fr.htm).

² “Better regulation for growth and jobs in the European Union” COM(2005) 97, March 2005, referred to subsequently as the “Action Plan”. This Communication updates and completes the Action Plan set in 2002 (“Simplifying and improving the regulatory environment”, COM(2002) 278, 5 June 2002). The action plan follows up the White Paper on European Governance (COM(2001) 727, 25 June 2001).

³ OJ C 321, 31 December 2003, p.1.

1.1. Actions taken by the Commission

In 2005, the new Commission identified as its central goal the achievement of stronger, lasting growth and creation of more and better jobs. In announcing a new start for the “Lisbon Strategy”⁴ it stressed a number of key actions - putting in place regulatory incentives for business, cutting unnecessary costs and removing regulatory obstacles to adaptability and innovation. These points were reinforced in the March 2005 Communication entitled “Better regulation for growth and jobs in the European Union”⁵.

Since then, the Commission has, in line with its revised Action Plan of March 2005:

- endorsed revised impact assessment guidelines⁶;
- adopted a Communication on an EU common methodology for assessing administrative costs imposed by legislation⁷;
- adopted a Communication on the outcome of the screening of pending legislative proposals⁸;
- adopted a Communication on a strategy for the simplification of the regulatory environment⁹;
- launched the group of high-level national regulatory experts¹⁰.

Consultation of interested parties

In 2005, the number of consultations increased significantly, with 187 non-legislative Communications (+28 compared to 2004) and 106 internet-based consultations (+11) via the web portal “Your Voice in Europe”. Overall compliance with the minimum standards for public consultation has been good.¹¹ Experience has shown that there is room for further improvement in (1) providing general feedback on how comments were taken into account in a proposal or why they were discarded; and (2) ensuring that comments received are systematically published.

⁴ COM(2005) 24.

⁵ COM(2005) 97.

⁶ SEC(2005) 791. See http://www.europa.eu.int/comm/secretariat_general/impact/docs_en.htm.

⁷ COM(2005) 518.

⁸ COM(2005) 462.

⁹ COM(2005) 535.

¹⁰ The two meetings (November and December) were essentially devoted to better regulation in the Lisbon national programmes. The mandate of the group is to advise the Commission on better regulation issues in general, but also to provide an efficient interface between the Commission and key governmental authorities for the development of better regulation at EU and national levels.

¹¹ These standards have been introduced in 2003 (COM(2002) 704, 11 December 2002).

Impact assessment

In 2005, the Commission further improved its methodological framework for assessing the potential impacts of its proposals¹², and increased the number¹³ and quality¹⁴ of actual impact assessments accompanying its most important initiatives. Particular attention needs to be paid to ensuring that alternative policy options are thoroughly examined, starting early in the policy development cycle, as part of a strengthened quality support and control framework.

Collection and use of expertise

2005 saw the operational launch of SINAPSE (Scientific INformAtion for Policy Support in Europe), a new and powerful interface between experts and (EU) policy makers¹⁵. More than 300 European and international scientific organisations registered in 2005. This tool will help further progress on the quality, openness and effectiveness of collection of expertise, in line with the principles and standards set by the Commission in its 2002 Communication on the collection and use of advice from external experts¹⁶.

Following the commitments made in July 2004 by President Barroso to the European Parliament, the Commission has taken major steps to improve transparency in respect of its expert groups. In particular, since October 2005, a register provides Parliament and the public at large with standard information on approximately 1200 expert groups advising the Commission¹⁷.

Updating and simplifying the acquis

In October 2005, the Commission adopted a new phase of its strategy for simplification of existing rules¹⁸, which continues and reinforces the first comprehensive simplification programme launched in February 2003¹⁹. Based on input from the Member States²⁰ and stakeholders²¹, the new strategy proposed a 3-year rolling programme which will be regularly updated. The number of simplification proposals presented by the Commission will significantly increase: the rolling programme foresees the repeal, codification, recasting or modification of 222 legal acts (with significant knock-on effects on more than 1 400 related acts).

¹² The Commission's internal Impact Assessment guidelines were revised in June 2005. They have been widely welcomed for their improved readability and their reinforced analytical framework of economic, environmental and social impacts.

¹³ 77 Impact Assessments were completed in 2005, against 29 in 2004.

¹⁴ The result of the independent evaluation to be launched in 2006 will provide more specific data on the overall quality of Commission's IAs and its evolution.

¹⁵ http://europa.eu.int/comm/secretariat_general/regexp/index.cfm?lang=EN.

¹⁶ COM(2002) 713, 11 December 2002.

¹⁷ Register access http://europa.eu.int/comm/secretariat_general/regexp/index.cfm?lang=EN.

¹⁸ COM(2005) 535.

¹⁹ COM(2003) 71.

²⁰ Including simplification priorities identified by the Council in November 2004.

²¹ The Commission launched on 1 June of 2005 a public consultation on internet "10 Minutes to improve the business environment" (<http://europa.eu.int/yourvoice/forms/dispatch?form=418&lang=EN>).

Estimation of administrative costs

In 2005, the Commission tested, validated and presented a methodology for estimating administrative costs imposed by EU legislation²². It also concluded that a common approach at EU level was feasible and would have clear added value.

The Commission announced the inclusion of that methodology in its impact assessment guidelines and evaluation guidelines²³. It undertook to explore whether the EU common methodology could be used to assess cumulative administrative burden at sectoral level²⁴. It also announced its intention to further refine the methodology with the help of the high level group of national experts on better regulation.

Choice of instruments

In its revised 2005 Action Plan, the Commission reiterated the need to pay more attention to the choice of instruments for pursuing Treaty objectives and implementing EU policies. Policy-makers should always strive to explore a range of legislative and non-legislative options which could potentially meet these objectives. In order to increase awareness and contribute to a more favourable environment for the use of alternative regulatory instruments, the Commission started an inventory of existing cases of EU self-regulation and coregulation. The European Economic and Social Committee (EESC) and the Commission have examined how to gather operational knowledge on EU self- and co-regulation, facilitate exchange of information and identify best practices. They decided to launch a new database in 2006.

While insisting on the potential of regulatory alternatives, the Commission's approach also recognises that, in many cases, regulations remain the simplest way to reach EU objectives. This was for instance underlined by the Single Market Observatory of the European Economic and Social Committee.

Monitoring the application of Community law

Primary responsibility for applying Community law lies with the national administrations (and courts) in the Member States. The role of the Commission is to ensure that Community law is diligently and properly transposed and applied.

²² Communication on an EU common methodology for assessing administrative costs imposed by legislation (COM(2005) 518, accompanied by Commission Staff Working Document SEC(2005) 1329 *Outline of the proposed EU common methodology and Report on the Pilot Phase (April – September 2005)*.

²³ The Communication specified that actual implementation and use of the methodology will be “subject to (a) the principle of proportionate analysis (the Commission retaining responsibility for judging the costs of its proposals); (b) the availability of sufficient, reliable and representative data, compatible with the EU common methodology; and (c) the availability of an adequate level of staffing and financial resources”.

²⁴ In the Annual Progress Report on the Lisbon strategy adopted in January 2006, the Commission confirmed this by announcing the launch of “a major exercise to measure the administrative cost arising from Community rules (or the way in which they have been implemented) in specific policy areas as part of the ongoing work on legislative simplification, with a special emphasis on SMEs” (COM(2006) 30, 25 January 2006).

Progress with transposition monitoring and conformity checking depends mainly on the availability of standard concordance tables²⁵, the systematic use of electronic notification of transposed measures, early identification of likely problems and technical assistance, as well as the use of reminders. In 2005, the new Member States were fully integrated into the regular monitoring process. The new Member States are performing comparatively well with regard to the notification of national measures transposing directives. Progress on concordance tables was more limited. In its proposed directives, the Commission has systematically included a provision requiring Member States to provide such tables but this provision has not always been agreed by the Council.

The management of complaints and infringements, another key element for ensuring proper application of EU law, was improved at different levels. The use of less formal measures has also grown in 2005.

Screening and withdrawal of pending proposals

The revised Action Plan of March 2005 provided for screening of pending proposals, with regard to their general relevance and their impact on competitiveness²⁶. Pending proposals transmitted to the legislator before 1 January 2004 were all screened (183 proposals). This initiative was an innovation, as it went beyond a technical exercise (i.e. the regular withdrawal of proposals which are no longer topical).

In September 2005, the Commission announced its intention to withdraw 68 proposals²⁷. These were found to be not consistent with the Lisbon objectives and/or better regulation principles, had little chance of being adopted or to have become obsolete for objectives reasons. After having given Parliament and the Council time to express their views and having examined their comments, the Commission formally withdrew its proposals by publishing their list in 2006 in the Official Journal.

1.2. Actions taken by the European Parliament, the Council, the Committee of the Regions and the European Economic and Social Committee

In 2005, the European Parliament started working on several reports looking at various aspects of better regulation, most being due for adoption in 2006. The Council and its Presidency were equally keen to keep momentum high on better regulation²⁸. The Committee of the Regions and the European Economic and Social Committee also took an active part in the better regulation debate.

²⁵ Concordance tables indicate which national measure transposes which provision of the directive.

²⁶ COM(2005) 97.

²⁷ COM(2005) 462.

²⁸ In November 2005, the UK, Austrian and Finnish Presidencies submitted a discussion paper entitled "Advancing Better Regulation in Europe". Council Doc. 15140/05, 29 November 2005.

There were promising developments on impact assessments. The European Parliament completed its first impact assessment on amendments to a Commission proposal, as did the Council, in the form of a pilot project. The challenge will be to move from a test phase to more widespread application. A noteworthy development was the agreement in November 2005 of an Inter-Institutional ‘Common Approach to Impact Assessment’, setting out some basic ‘traffic rules’ for impact assessment throughout the legislative process. The ‘Common Approach’ can be seen as the first step in the elaboration of the common methodology for impact assessment foreseen in the Inter-Institutional Agreement on Better Lawmaking (IIA).

More needs to be done by the other Institutions. For example, the Commission would like to see a commitment from the Member States to carry out impact assessments of proposals they present for police and judicial cooperation in criminal matters (the so-called third pillar). In this area, the Commission and Member States share the right of initiative. Although the Commission analyses the possible impact of its ‘third-pillar’ proposals, the Member States do not. In many cases, their proposals do not include a proper explanatory memorandum either.

On administrative costs imposed by EU legislation, the clear commitment taken by the Ministers in the Council to provide, on request and in a proportionate manner, the information needed to assess these costs was a welcome development²⁹. The Council did not respond however to the European Council’s invitation of March 2005 to reach an agreement with the Commission on a common methodology³⁰.

Implementation of the IIA provisions on simplification and coordination of legislative programming was, by contrast, rather limited. Neither Parliament nor the Council modified their working methods for the adoption of simplification proposals³¹. Insofar as this is a key element for the success of any simplification programme, the Commission hopes that the legislator will proceed with the simplification proposals in an expeditious manner. Better coordination of the annual legislative timetables of the three Institutions proved difficult because of the noncommittal approach of the Council.

1.3. Actions taken by the Member States

The regulatory burden on European operators is mainly attributable to national legislation due to its relative importance compared to EU legislation. Moreover, Member States have an essential role to play in better regulation as they are responsible for applying and, in the case of directives, transposing EU legislation at national level. Delivery on better regulation therefore relies largely on them.

The Commission has proposed that better regulation becomes part of the national “Lisbon” programmes and recommended that the Member States report on their current activities and the actions that they intend to take. This dimension is covered in the Commission’s Annual Progress Report on Growth and Jobs of January 2006.

²⁹ *Reducing the administrative burden on business*, Conclusions of the Economic and Financial Affairs Council (8 November 2005) 13678/05.

³⁰ European Council conclusions of 22 and 23 March 2005.

³¹ The deadline was maximum six months after the entry into force of the Agreement, i.e. end of June 2004.

The Commission calls in particular on Member States which do not have a better regulation strategy, to assess the impact of proposed legislation, to systematically consult stakeholders, to set up a legislation simplification programme and to develop a methodology for the measurement of administrative costs.

2. APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

The Commission has made a special effort to explain how the measures it proposes comply with both principles. The introduction of a new system for drafting the explanatory memorandum that accompanies each legislative proposal led to more detailed and systematic justification of the need for EU action.

The European Parliament and the Council introduced relatively few amendments referring explicitly to subsidiarity and proportionality. The consensual interpretation of these principles is not surprising considering that consultation reached record levels³², 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. Differences emerged in a few cases³³, but the three Institutions eventually managed to come to a common interpretation of subsidiarity and proportionality for almost all of them.

As for the Committee of the Regions, the great majority of its opinions did not criticise the Commission's proposals on the grounds of subsidiarity. In one case, the Committee concluded that the proposal was not fully complying with that principle³⁴. The Commission has since decided to withdraw that proposal.

For its part, COSAC³⁵ organised a pilot project to test the subsidiarity early warning mechanism, provided for in the Constitutional Treaty, on a package of proposals made by the Commission in 2004. Twenty national parliamentary chambers considered that the Commission did not adequately justify its proposals in regard to subsidiarity. Fourteen concluded that at least one aspect of the package was breaching the subsidiarity principle. Some of these criticisms were shared by the European Parliament. However, some comments were motivated by arguments that were not related to subsidiarity. This demonstrates the need to work out a common understanding of the meaning of the subsidiarity principle, as well as the need for renewed efforts on the part of the Commission to provide explicit and detailed justification of its proposals in light of subsidiarity concerns.

As regards ex-post judicial control, the principle of subsidiarity was referred to in four judgments and orders delivered by the Court of Justice and the Court of First Instance of the European Communities in 2005. No judgment concluded that the principle of subsidiarity had been contravened. The principle of proportionality was also analysed in several judgments, leading the European Court of Justice to conclude that certain obligations were not necessary to reach the objectives set by a contested directive.

³² See Annex 2 of the accompanying Commission Staff Working Document.

³³ See Section 3.2. of the accompanying Commission Staff Working Document.

³⁴ See Section 3.3.1 of the accompanying Commission Staff Working Document.

³⁵ "Community and European Affairs Committees of the Parliaments of the European Union".

Finally, future institutional arrangements for the monitoring and control of the application of subsidiarity were discussed as part of the “period for reflection, clarification and discussion” called for by the European Council on 16 June 2005, after the negative results of the French and Dutch referenda on the Constitutional Treaty. In November 2005, the Presidency of the Council and the Netherlands co-organised a conference entitled “Sharing power in Europe”, aimed mainly at finding ways to improve the monitoring and control of compliance with the subsidiarity principle. The debate focused on the possible contribution of national Parliaments on the basis of existing Treaties and Protocols. A follow-up conference will be organised in April 2006 by the Presidency of the Council.