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Annex to the

**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)**

{COM(2006) 289 final}

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1. INTRODUCTION

The first part of this working document is mainly concerned with the progress made in 2005 in implementing the Commission action plan on better regulation as revised in March 2005[1] and the Inter-institutional Agreement (IIA) on "Better Lawmaking" of December 2003[2]. Progress in the individual Member States is covered in a succinct manner.

The second part of the document relates to the application of the principles of subsidiarity and proportionality. Describing firstly the legal and institutional framework in place 2005, it goes on to review the way in which the principles have been interpreted and applied by the Commission, Parliament and Council during the past year. Finally, it examines action taken by the Committee of the Regions and national parliaments and also looks at the case law of the Court of Justice of the European Communities.

2. BETTER REGULATION

Owing to the division of responsibilities within the Union, improvement of the regulatory environment requires joint efforts on the part of the European Parliament, the Council, the Commission and the Member States. The following sections analyse the main developments in 2005, with reference to the various players (Commission, other EU institutions, Member States).

2.1. Actions taken by the Commission

In its 2005 Communication to the spring European Council entitled "Working together for growth and jobs - A new start for the Lisbon Strategy"[3], the Commission proposed to give fresh impetus to the Lisbon Strategy by channelling its efforts into two main goals: achieving stronger and lasting growth and creating more and better jobs. Improving European regulation (i.e. in particular create the right incentives for business, cut unnecessary costs and remove obstacles to adaptability and innovation) was identified as one of the key priorities in that perspective. The Communication of March 2005, "Better regulation for growth and jobs in the European Union" further stressed that point.

Since then, the Commission in line with its Action Plan:

– endorsed revised impact assessment guidelines[4];

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1 "Better regulation for growth and jobs in the European Union" COM(2005)97, March 2005, referred to subsequently as the "action plan". This Communication updates and completes the Action Plan set in 2002 ("Simplifying and improving the regulatory environment", COM(2002) 278, 5 June 2002). The action plan follows up the White Paper on European Governance (COM(2001) 727, 25 June 2001). It takes into account the recommendations made by the Group on Regulatory Quality chaired by D. Mandelkern, presented to the Laeken European Council in December 2001. For more information on the eight specific communications detailing its objectives, see the annual report "Better Lawmaking 2003", COM(2003)770, 12 December 2003. For the previous annual report, see COM (2005)98 and SEC (2005)364.

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

3 COM(2005)24.

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

– adopted a Communication on an EU common methodology for assessing administrative costs imposed by legislation[5];

– adopted a Communication on the outcome of the screening of pending legislative proposals[6];

– adopted a Communication on a strategy for the simplification of the regulatory environment[7].

– launched the group of high-level national regulatory experts[8].

The Commission has special responsibility at three levels: legislative preparation and proposal (with exclusive right of initiative for EC policies); participation in legislative deliberation; and implementation of the legislation. Progress made within the 'better lawmaking' framework is presented in that order.

2.1.1. Consultation of interested parties

The Commission has consulted extensively in 2005, as the figures in the box below show.

In 2005**,** the Commission produced **14 Green Papers** (+8 compared to 2004)**, 2 White Papers** (+1) and **187 non-legislative Communications** (+28). It also published **92 reports** (-18) and organised **106 internet-based consultations** (+11) via the web portal "Your Voice in Europe"[9]– the Commission's single access point for consultation[10].

The consultation process normally spreads over a long period of time and is based on a combination of tools (e.g. open as well as targeted internet consultations, workshops, hearings and advisory groups). For instance, the preparation of the "thematic strategies" in the environmental field (e.g. air pollution, marine environment) involved a variety of consultations techniques.

Compliance with most minimum standards for public consultation has been good.[11] Services reported very few problems. The preparation of major policy initiatives (those requiring an impact assessment) has been specifically reviewed by central services. That review did not reveal either major or numerous infringements. There was a particularly high level of compliance with obligations regarding the use of 'Your Voice in Europe', on time limits for responses and on consultation feedback and on reporting on the consultation process.

One area where further progress is needed is feedback on how comments were taken into account in a proposal or why they were discarded. In some targeted consultations (for instance, via conferences and hearings), information provided on the parties consulted was

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5 COM(2005)518.
6 COM(2005)462.
7 COM(2005)535.
8 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.
9 http://europa.eu.int/yourvoice/index_en.htm.
10 For a detailed assessment on public consultation in 2005, see Annex 2.
11 These standards have been introduced in 2003 (COM(2002)704, 11 December 2002).

relatively vague. While the 'Your Voice in Europe' web portal was widely used to publicise new consultations, there were some cases where the Commission did not publish the comments received. In other cases, a period of less than eight weeks was allowed for consultation. This was generally due to the urgency of the matter or because consultations had already been carried out on the same issues.

In a few consultations, the range of responses was not sufficiently representative because of the small number of contributions received or high mobilisation in a specific country. The availability of the questionnaire and/or background documents in a limited number of linguistic versions had also an impact on participation in the consultation.

The Commission services widely recognised that the consultation of stakeholders improves the quality of the end product (i.e. the policy proposal).

All in all, the Commission still needs to make additional efforts in providing general feedback and further improving transparency.

2.1.2. Impact assessment

In 2005, the Commission further improved its methodological framework for assessing the potential impacts of its proposals and boosted the number and quality of Impact Assessments (IA) accompanying its most important initiatives.

The Commission's internal Impact Assessment guidelines were revised, building on the preparatory work done in the previous year[12] and were endorsed by the Commission on 15 June 2005[13]. These second generation guidelines have been widely welcomed for their improved readability, 'user-friendliness' and sharper focus on the types of impacts that ought to be addressed.

The Commission also prepared the launch of an independent evaluation of the impact assessment system, as foreseen in the March 2005 Communication on Better Regulation. It will review experience with regard to the implementation and results of the Commission's approach to impact assessment and draw lessons on any need for further development or refinement of the approach. The results of the evaluation, expected in early 2007, will be made public.

Besides work on the procedural and methodological framework, the Commission substantially increased the number of IAs completed in a year (see box below). The fact that all items on the Commission's annual Legislative and Work Programme normally have to be based on an impact assessment was a major challenge in terms of time and resources. A limited number of IAs were also carried out on non-Work Programme items, even though not formally required[14].

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12 SEC(2004)1377.

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

14 See, for instance, the IA on White Paper on Financial Services Policy http://europa.eu.int/comm/secretariat_general/regexp/index.cfm?lang=EN.

Of 91 items adopted in 2005, 10 were initially exempted from IA because of their nature (9 Green Papers and 1 proposal for consultation with Social Partners)[15]. This left 81 items requiring an IA. Out of these, 77 were presented[16] (~ 95%), which represents a significant step forward compared to 29 IAs delivered in 2004 and 21 in 2003. The 4 remaining items were eventually adopted without formal IA due to their broad nature and/or the fact that a separate study had been prepared.

Progress was also made in terms of IA quality. In particular, the definition of the problem calling for action was generally judged to be of a high standard. Special efforts were made to quantify the problem and the likely impacts of different policy options. Upstream inter-service co-operation and consultation with stakeholders were also confirmed as key elements to ensure high quality assessments. IAs clearly helped to improve the quality of a significant number of proposals[17] and in some cases affected the choice of instruments[18]. In some cases, preliminary analysis even led the Commission to conclude that intervention would be premature or unnecessary[19]. The independent evaluation to be launched in 2006 will provide more specific data on the evolution in the overall quality of Commission's IAs.

However, there is no room for complacency and the Commission recognises that more needs to be done to ensure that impact assessments are as comprehensive and rigorous as possible[20]. The identification and assessment of alternative policy options is one area in need of greater attention. Greater efforts are also necessary to ensure that the impact assessment work starts early enough in the policy development process.

2.1.3. Collection and use of expertise

2005 saw the operational launch of SINAPSE (Scientific INformAtion for Policy Support in Europe), a new interface between experts and (EU) policy makers[21]. Once the registration phase completed, this web application will offer: (1) a library of scientific advice and opinion; (2) an EC consultation module complementing existing scientific consultation mechanisms

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15 The 2005 Legislative and Work Programme had more than 91 items, but the adoption of some has been postponed to 2006 or removed from the Programme in the mid-term review, to allow further preparatory work.

16 This figure includes some cases where the Roadmaps were considered to be sufficient as 'proportionate' impact assessments. N.B. each item of the Work Programme is accompanied by a 'Roadmap' providing a number of key data, including a statement on the likely impacts of each policy option and on who is likely to be affected.

17 The IA preparing the Thematic Strategy on Air Pollution is a clear example of 'best practice'. Based on a thorough options analysis, it was fully used in the policy debate and helped identify the most appropriate ambition level in terms of pollution cuts, ensuring a fair balance between costs and benefits.

18 For instance, as a result of the IA on cross-border management of copyright and related rights in the online music sector, it was decided to opt for a recommendation instead of a draft directive. A number of prescriptive and detailed measures to double bio-energy use were eventually not included in the Biomass action plan presented in December 2005 (COM(2005)628). Similarly the preparatory Communication for the Thematic Strategy on Urban Environment was envisaging framework directives. On the basis of the IA, the Commission opted for a voluntary approach (COM(2005)718).

19 Having analysed the 1500 reactions to the Green Paper on equality and non-discrimination in the EU (COM(2004)379), the Commission made known that no new legislative proposals based on article 13 TEC were envisaged at this stage.

20 For example, the European Consensus for Development adopted by the Parliament, the Council and the Commission on 20 December 2005 (COM(2005)311) reaffirms the need for taking better account of developmental concerns in the context of impact assessment.

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

(expert groups); (3) an early warning system that communities of experts can use to raise awareness of policy makers on incoming (scientific) challenges and dangers; (4) "Yellow Pages" of expertise for quickly identifying and contacting scientists or scientific organisations with specific expertise. More than 300 European and international scientific organisations such as the European Science Foundation or European Mathematical Society registered in 2005. This tool will contribute to 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 experts[22].

In addition, initiatives aimed at widening and systematising the collection of expertise in specific domains have been taken[23].

Following the commitments made in July 2004 by President Barroso to the European Parliament, the Commission has taken major steps for improving transparency on its expert groups. This has in particular resulted in the launching, in October 2005, of a register providing the Parliament and the public at large with standard information on approximately 1200 expert groups advising the Commission[24]. The register covers formal bodies established by Commission decisions and informal advisory bodies set up by the Commission services. It provides key information on those groups, such as the lead service in the Commission, the group's tasks as well as the category of participants. The register also contains direct links to Commission departments' websites where more detailed information is available.

2.1.4. Explanatory memorandum

In 2005 the Commission worked further on improving the content and presentation of the explanatory memorandum accompanying each of its legislative proposals. The explanatory memorandum is particularly important because it allows the legislator and the citizen to see at a glance why an initiative has been taken. It contributes directly to greater transparency and accountability in the Union.

In order to improve compliance with the standard explanatory memorandum adopted in December 2003 for its legislative proposals, the Commission has put an informatics tool in place which structures the required information and reminds services of key obligations. As a result, the consistency and coverage of explanatory memoranda accompanying legislative proposals transmitted to the legislator in the second part of 2005 have markedly improved. This was in particular true for sections demonstrating how the proposal complies with the principles of subsidiarity and proportionality.

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22 COM(2002) 713, 11 December 2002.

23 For example, in order to prevent the repetition of catastrophes similar to those provoked by the Erika in Brittany or the "Prestige" in Galicia and apply most properly the principle of precaution, special efforts have been made to collect the expertise from Member States, the European Maritime Safety Agency, the International Maritime Organisation and other international organisations (OECD, HELCOM, CBSS, etc.). Collected expertise was used to draft the third package of legislative measures on maritime safety in the European Union (COM(2005)585). Special efforts were also made for the future revision of Directive 2001/23 on the cross-border dimension of transfers of undertakings; as well as for the three framework programmes for the period 2007-2013 on "Fundamental Rights and Justice", on "Solidarity and Management of Migration Flows" and on "Security and Safeguarding Liberties" (COM(2005)122, 123 and 124).

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

2.1.5. Updating and simplifying the Community acquis

The Commission adopted in October 2005 a strategy for simplification of existing rules[25], which builds on the first comprehensive simplification programme launched in February 2003[26]. Based on input from the Member States[27] and stakeholders[28], 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 indeed foresees the repeal, codification[29], recasting[30] or modification of over 220 pieces of legislation (with knock on effects on more than 1.400 related legal acts).

This programme will be regularly updated. The Commission will develop its simplification priorities by means of:

– a comprehensive analysis of impact of legislation on selected sectors, including economic, environmental and social aspects;

– techniques such as repeal, codification, recasting and a different approach to implementation;

– legislative methods entailing a clear preference for essential requirements rather than technical specifications, the increased use of co-regulation, review/sunset clauses and increased use of information technologies;

– increased use, as appropriate and on a case-by-case basis, of regulations instead of directives.

The codification and recasting efforts predating the new strategy have also been pursued. In November 2001 the Commission launched a major programme for the codification of all Community legislation, which was scheduled tobe completed by the end of 2005. This timetable has not been achieved because delays occurred in the translation[31] and publication processes. These delays were compounded by technical difficulties experienced by the Office for Official Publications in the production of consolidated texts in the new official languages.

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25 COM(2005)535. The Commission also announced its intention to issue complementary communications indicating in more detail how simplification work will be brought forward or integrated in various sectors. This was the case in particular for agriculture ("Simplification and Better Regulation for the Common Agricultural Policy" COM(2005)509) and environment ("Better Regulation and the Thematic Strategies for the Environment" COM(2005)466).

26 COM(2003)71.

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

28 The Commission launched on 1 June of 2005 a public consultation on internet "10 Minutes to improve the business environment" (http://europa.eu.int/comm/secretariat_general/regexp/index.cfm?lang=EN).

29 Codification is a textual exercise implying no change in policy. It consists of the adoption of a new instrument which incorporates and repeals the previous instruments (i.e. the basic act and all intervening amending instruments).

30 Recasting refers to a mix of substantial amendment and codification. The legislator uses the opportunity provided by a substantial amendment to the basic instrument to codify that instrument and all subsequent amendments.

31 New Member States have to translate the acquis in their official language(s).

Delivery of consolidated texts[32] in the new languages began in July 2005 and by the end of the year some 500 texts – of which 400 were on the priority list for codification – had been delivered. With the resolution of technical problems and consolidated texts in the 9 new languages becoming available, it should be possible in 2006 to move forward with a great number of codification proposals[33]. A concerted effort has been made to finalise 250 acts in the new languages (having already been finalised in 11 languages, and of which 120 are pending before the legislative authority in 11 languages) and to have them adopted by the legislative authority in 2006. 415 acts already exist in a finalised French or English version (mastercopy) and these are in the course of being published by OPOCE in order to facilitate public access to the provisional results of the codification project. The Commission will make every effort to ensure that a maximum of codifiable acts is adopted prior to the enlargement of the Union to Bulgaria and Romania.

As for recasting, the Commission has submitted 12 proposals to the legislative authority, of which two have been adopted as of end 2005[34].

2.1.6. Estimation of administrative costs imposed by EU legislation

In its Communication of March 2005 on Better Regulation for Growth and Jobs[35], the Commission announced its intention to look into the possibility of developing a common approach for assessing administrative costs associated with existing and proposed Community legislation. A prototype approach called "EU net administrative cost model" was outlined in the Staff Working Document annexed to the Communication[36] and put to the test from April to September. At the end of that pilot phase, the Commission concluded that a common approach at EU level was feasible and would have clear added value. The prototype was revised on the basis of the pilot phase findings and the best practices at Member State level.

The methodology validated by the pilot phase (common definition, common core equation and common reporting sheet) was presented in a Communication adopted on 21 October 2005[37]. The Commission also announced the inclusion of that methodology in its impact assessment guidelines and evaluation guidelines[38]. Furthermore, it invited the Council to

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32 Consolidation consists of editorial assembling, outside any legislative procedure, of the scattered parts of legislation on a specific issue (in other words, bringing into a single text the original act and subsequent amendments). This clarification exercise does not entail the adoption of a new instrument and the resulting text therefore has no formal legal effect. Consolidated texts, converted into the informatics tool, Legiswrite Codification/Refonte, constitute the raw material required for the preparation of a codified version to begin.

33 The main limitations to the rate of progress in 2006 will be (i) the capacity of the subcontractor to prepare linguistic versions in the languages other than the mastercopy and (ii) the capacity of the legislative authority to process the Commission's proposals.

34 Council Regulation (EC) 139/2004 on merger controls and Directive 2005/55/EC of the European Parliament and of the Council on measures to be taken against the emission of gazeous pollutants from vehicle engines. As of 1 March 2006, the number of pending simplification proposals rose to 20.

35 COM(2005)97.

36 SEC(2005)1329.

37 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)*.

38 The Communication specifies 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

reach an agreement with the Commission on a common methodology, in line with the European Council conclusions of March 2005 requesting the Commission and the Council to do so before the end of 2005.

For the longer term, the same Communication declared the Commission's intention to explore whether the proposed EU common methodology could be used to assess cumulative administrative burden at sectoral level[39]. It also referred to the optimisation of the methodology with the help of the high level group of national experts on better regulation. This work is due to start in early 2006.

2.1.7. Choice of instruments (self and coregulation)

In its 2005 Action Plan, the Commission stressed the need to pay more attention to the choice of instruments for pursuing Treaty objectives and implementing Community policies, including the use of alternative regulatory instruments (self-regulation and co-regulation), the decentralisation of tasks to agencies and the conclusion of tripartite contracts between the Community, the States and regional or local authorities. The two last items are covered by the 3rd Report on European Governance[40].

In order to map where and how regulatory alternatives are used, the Commission started an inventory of existing cases of EU self-regulation and coregulation[41]. Schemes set up after the entry into force of the IIA on "Better Lawmaking" were listed and reviewed to assess compliance with the general principles and conditions laid down by the Agreement. The Commission listed 20 schemes set up between 1 January 2004 and 30 November 2005 (coregulation: 14; self-regulation: 6). A detailed analysis concluded that conditions laid in the IIA were complied with[42]. In a limited number of cases, the choice of coregulation should have been justified more explicitly or in greater detail. This inventory will be updated on an ongoing basis.

In 2005 the European Economic and Social Committee (EESC) and the Commission examined how to develop synergy to gather operational knowledge on EU self- and co-regulation, facilitate exchange of information and identify best practices. The main objective is to encourage and support private parties willing to set up or improve self-regulatory schemes, as well as to help regulators responsible for designing co-regulatory schemes. Joint analysis led to conclude that the redesign of the EESC database, PRISM II, was the best approach for maximising synergy. A memorandum of understanding should be signed in 2006

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the EU common methodology; and (c) the availability of an adequate level of staffing and financial resources".

39 In the Annual Progress Report on the Lisbon strategy adopted in January 2006, the Commission announced that it will launch "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).

40 These topics are covered in detail by the 3rd Report on European governance (2004-2005), to be adopted in March 2006. See http://www.europa.eu.int/comm/governance/index_fr.htm.

41 Co-regulation is often used to develop EU standards: the Commission regularly requests ('mandates') the European Standards Organisations to produce such standards, following the procedure laid down in Directive 98/34/EC.

42 The Commission is required to verify that self-regulation and co-regulation cases meet a number of substantive and procedural conditions (non applicability where fundamental rights are at stake, added value for the general interest, transparency, representativeness of parties involved, etc.). The Commission also has to notify certain information to the European Parliament and the Council.

defining the division of work and rules for the development, maintenance and update of the new EU Self and Coregulation Database, as well as the status of its contents and its ownership. The public launch of the database is scheduled for mid 2006.

2.1.8. Monitoring the application of EU 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 properly transposed and applied within deadlines (Article 211 TEC). The Commission is therefore monitoring the transposition of directives, checking the conformity of national execution measures, examining complaints, initiating infringement procedures and reporting on the all previous tasks. In 2002, the Commission adopted a Communication setting a series of actions aimed at improving the effectiveness of that work[43].

Progress with transposition monitoring and conformity check relies mainly on the availability of standard concordance tables[44], the systematic use of electronic notification of transposed measures, early identification of likely problems and technical assistance[45], as well as the use of reminders. In 2005, the new Member States were fully integrated into the regular monitoring process. They are performing comparatively well with regard to the notification of national measures transposing directives. By 4 November 2005 only one of them had notified fewer measures than the average for all the Member States (i.e. notification for 98.92% of all directives). The conformity check of their national execution measures (more than 10,000 measures) has continued.

Advances concerning concordance tables were more limited. The Commission has systematically included in its proposed directives a provision requiring Member States to provide such tables. On a number of occasions, the Council decided to replace that requirement by a simple invitation (see 2.2).

The management of complaints and infringements was improved at different levels. Complaints are an important means of detecting infringements of Community law. Throughout 2005 the Commission prepared for the launch in 2006 of a new on-line facility to assist interested parties filing complaints and to give relevant information on the procedure and context of infringement proceedings. As for infringements, the Commission sought to boost cooperation with the Member States by means of informal, complementary or alternative methods to resolve problems[46]. In order to further improve the pre-litigation stage (prior to starting the formal infringement proceedings), the Commission has invited all Member States, plus Bulgaria and Romania, to answer a questionnaire on cooperation between the Commission and the Member States on the application of Community law. The Commission plans to organise in 2006 a meeting with national experts to discuss the information collected.

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43 Commission Communication on Better monitoring of the application of Community law (COM (2002)725)

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

45 Technical assistance included interpretative guidelines and training programmes (for instance, the Commission has organised an extensive training program for national enforcement agencies to prepare them for the correct application of the provisions of the new general food legislation coming into force on 1 January 2006).

46 The emphasis on less formal procedures is consistent with the primary objective of infringement proceedings, particularly in the pre-litigation stage, that is, to encourage the Member States to comply voluntarily with Community law as quickly as possible.

In the meantime, the use of less formal measures instead of or alongside formal proceedings has increased in 2005. One of the instruments is SOLVIT, the Internal Market's problem solving network, established in 2002[47]. The number of cases referred to SOLVIT rises year by year. In 2005, it was in the vicinity of 500. On average, 80% of the cases are solved. The average resolution time is 65 days and 70% of the cases are resolved within the deadline of 10 weeks[48].

Non-sensitive complaints and infringement cases at the pre-contentious phase were also tabled at so-called 'package meetings' organised by several Commission' services. Package meetings (i.e. meetings where a package of related measures are discussed and reviewed with the national authorities concerned) are very useful to clarify facts and legal positions in a co-operative atmosphere. Roughly estimated, around 45% of cases discussed tend to be resolved in the follow-up to meetings.

The 2002 Commission's criteria for assigning priority to implementation issues proved useful to manage the Commission's monitoring work and conduct actions against infringements rapidly and fairly[49]. Such criteria for instance allowed the Commission to pay extra attention to the follow up by Member States of Court rulings. This led the Commission to strengthen its policy on the calculation of appropriate financial sanction against Member States failing to comply with the Court's judgments, in the context of Article 228 TEC[50].

All in all, in 2005, 40% of infringement cases launched were for non-communication of national measures implementing directives, 44% were initiated as a result of complaints and 16% were cases launched on the own-initiative of the Commission as a result of information received by other means.

Reporting activities in 2005 included the regular up-date of the calendar for transposition of directives addressed to the Member States and the tables on progress in notification of national measures implementing directives. These data are on-line[51] and the site registered well over 10,000 hits per month. Beside reports reviewing the state of implementation of Community legislation in specific policy sectors, the Commission also drew up its general report on the monitoring of the application of Community law in 2004[52]. These activities have a crucial importance for building up common trust and the sense of solidarity in the Union.

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47 See : http://europa.eu.int/solvit/site/about/index_en.htm.

48 Other informal instruments include the Consumer Complaints Network for Financial Services FINNET which aims to provide easy access to out-of-court complaint procedures in cross-border cases (http://finnet.jrc.it/en/); the Public Procurement Network PPN, an informal network for cross-border cases (see for instance the French site http://www.minefi.gouv.fr/daj/marches_publics/ppn/ppn-anglais/); and the MACHEX exchange network (national labour inspectors share their experiences and opinions concerning problems arising in practice with CE marked machinery) and the European Consumer Centres Network.

49 COM 2002(725). The priority criteria are mainly based on the seriousness of the failure to comply with Community law.

50 SEC 2005(1658). The ruling of the Court on 12 July 2005 on the application of lump sum in addition to penalty payments (C-304/02 Commission/France) also contributed to the revision of the Commission's policy.

51 http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm 'The application of Community law'.

52 22nd annual report from the Commission on monitoring the application of Community law (COM (2005)570). The report provides detailed statistics on the notification of national transposition measures of directives by Member States as well as on infringement proceedings. It also covers developments in each of the areas of the application of Community law.

2.1.9. Regulatory indicators

In 2005 the Commission took several concrete steps to improve regulatory indicators. Explanatory memoranda using the new system (see subsection 2.1.4) fed several key indicators on the quality of the proposals presented by the Commission. The Commission has also discussed with Member States the introduction of other types of regulatory indicators in the context of the High Level Group of national experts on better regulation[53].

2.1.10. Other actions

Quality of drafting

In order to improve drafting quality when texts are still in early draft form, the legal revisers intervene in the inter-service consultation procedure. In 2005 this covered some 1 300 legislative acts subsequently published in the *Official Journal.* In an increasing number of cases the legal revisers start working on drafts even before the inter-service consultation stage. This makes it possible for the early drafts to be substantially improved, thus smoothing subsequent internal consultations and translation.

Collaboration between the Legal Revisers of the three institutions involved in the legislative process has been extended in preparation for the next enlargement of the EU, insofar as they share responsibility for finalisation of the Community *acquis* in the new official languages.

Cooperation with the Member States has been maintained in particular by the series of seminars on legislative quality for officials involved in the legislative process from the Commission and the other Community institutions and from Member States. In October 2005, the seminar on *Quality of legislation: Estonian perspectives* attracted 250 participants.

Review, revision and sunset clauses

As foreseen in the Action Plan, the Commission paid particular attention to the need for review, revision or automatic suppression of legislation[54]. The Commission has integrated in the explanatory memorandum system (see 2.1.4) a mechanism that automatically reminds its services of the need to consider the inclusion of such clauses.

A sample of 129 legislative proposals transmitted by the Commission in the second semester of 2005 has been reviewed to map the use of such clauses. 22% of them included at least one clause of this type (16 review clauses; 8 revision clauses; 10 sunset clauses). The combination of review and revision clauses is the most frequent. One proposal combines the three types of clauses[55].

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53 That work is based on the findings of the "Study on indicators of regulatory quality" conducted for the Commission by the Centre for European Studies of the University of Bradford. The conference concluding the study was held on 24 January 2005.

54 This is particularly necessary where there is scientific uncertainty and significant risk (cf. Communication on the precautionary principle COM(2000) 1).

55 Proposal for a Council decision on the conclusion of an agreement between the European Community and the Government of Ukraine on trade in certain steel products (COM(2005)270

Review and revision were frequently proposed in policy areas or sectors such as transport, justice, freedom and security, enterprise and industry, and internal market and services[56]. Sunset clauses, although rarer, were also proposed in various sectors[57]. The European Parliament and the Council have restated the importance of sunset clauses. For instance the Parliament did so in relation to provisions concerning implementing powers in financial markets legislation[58].

Screening and withdrawal of pending proposals

The action plan of March 2005 provided for screening of pending proposals, with regard to their general relevance and their impact on competitiveness[59]. Pending proposals transmitted to the legislator before 1st January 2004 were all screened (183 proposals). This initiative was an innovation, as it went beyond the regular withdrawal exercise of proposals no longer topical (technical withdrawals). With due regard to the prerogatives of the other institutions, each pending proposal was carefully assessed.

In its September Communication, the Commission envisaged the withdrawal of 68 proposals[60]. These were found to be not consistent with the Lisbon objectives and/or better regulation principles, not to have a real chance to be finally adopted or to have become obsolete[61]. Another 5 proposals were maintained in the legislative process, but additional information on their potential impacts was to be presented to the legislative authority.

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56 For transport, see e.g. proposal for a regulation concerning the rights of persons with reduced mobility when travelling by air (COM(2005)47); proposal for a Regulation on the identity of the operating carrier and on communication of safety (COM(2005) 48); proposal for a Regulation on public passenger transport services (COM(2005)319); 3rd package for maritime safety (COM(2005)585). For justice, see e.g. proposal for a Regulation establishing a European Institute for Gender Equality (COM(2005)81) and Proposal for a Directive on the retention of data processed in connection with the provision of public electronic communication services (COM(2005)438). For the other sectors, see e.g. Directive 2005/69/EC of the 16 November 2005 related to polycyclic aromatic hydrocarbons; Directive 2005/84/EC of 14 December 2005 related to phthalates in toys and childcare articles; proposal for a Regulation on advanced therapy medicinal products (COM(2005)567); commission recommendation on collective cross-border management of copyright and related rights for legitimate online music services (OJ L 276, 21.10.2005, p. 54-57.); or proposal for a Regulation on type approval of motor vehicles with respect to emissions.

57 Sunset clauses are mainly used in measures containing derogations. See proposal for a Regulation opening and providing for the administration of autonomous Community tariff quotas for certain agricultural and industrial products (COM(2005) 254); proposal for a Council Decision on the conclusion of an agreement between the European Community and the Government of Ukraine on trade in certain steel products (COM(2005)270), or proposal for a Council Decision authorising the Kingdom of the Netherlands to apply a measure derogating from Article 11 of the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (COM(2005)285).

58 European Parliament: Report on current state of integration of EU financial markets (Committee on Economic and Monetary Affairs), A6-0087/2005, 7.4.2005.

59 COM(2005)97.

60 COM(2005)462.

61 The Commission did not exclude, in some cases, the possibility of presenting new proposals based on a comprehensive and up-to-date impact assessment. By example, the Commission will reconsider EU action on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities. It was in the meantime decided to withdraw the proposal made in 2001 (COM(2001)386. The withdrawal took place on 17 March 2006 (OJ C64/3).

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

The importance of better regulation for the Union in general and for the re-launch of the Lisbon strategy in particular is recognised by all EU institutions as well as by the Economic and Social Committee and the Committee of the Regions. The European Parliament and the Council have acknowledged that better regulation is a joint responsibility that requires a shared effort[62].

In 2005, the **European Parliament** started working on several reports looking at various aspects of Better Regulation, most being due for adoption in April 2006. Besides, it did its first impact assessment on amendments concerning the proposal for a directive laying down rules on nominal quantities for pre-packed products[63].

In 2005, **the Council and its presidency** were proactive on a number of "better regulation" items. The presidency priorities on Better Regulation for 2005 have been set in a joint statement *Advancing regulatory reform in Europe* released on 7 December 2004[64]. The presidencies were calling for special efforts on the reduction of administrative burden, impact assessment of new measures, simplification of existing legislation, greater use of regulatory alternatives (self- and co-regulation) and risk-based enforcement. In November 2005, the UK, Austrian and Finnish Presidencies submitted a discussion paper called "Advancing Better Regulation in Europe"[65] that was examined by the Council (of Economic and Finance Ministers) on 6 December.

Steps were taken towards the use of Commission's Impact Assessment in the deliberations of the Council[66]. The Council presented in June 2005 the results of its first ever impact assessment prior to the adoption of substantial amendments (pilot project on the proposed directive on batteries and accumulators[67]). It also undertook the assessment of substantive amendments to the Proposal for a Council Directive on the control of potato cyst nematodes[68] and to the Proposal for a Council Regulation concerning the establishment of a voluntary FLEGT (Forest Law Enforcement, Governance and Trade) licensing scheme for imports of timber into the European Community[69].

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62 See e.g. Conclusions of the Competitiveness Council of 29 November 2005; conclusions of the Economic and Financial Affairs Council (8 November 2005); Presidency conclusions of the European Council of 22/23 March and 15/16 December 2005.

63 COM(2004)708.

64 That statement was updating and prolonging the *Joint initiative on regulatory reform* released on 26 January 2004 by the Ministers of Economy of the countries holding the presidency in 2004-5 (Ireland, the Netherlands, Luxembourg and the UK). The December 2004 was also signed by Finland and Austria (the Member States holding the presidency in 2006).

65 Council, Doc. 15140/05, 29 November 2005.

66 The Council decided in July 2004 that Working Parties examining Commission proposals should take into account the Commission's impact assessments, and in reporting to Coreper, should include a reference to their examination of all aspects of the impact assessments.

67 COM(2003)723, 21 November 2003.

68 COM(2005)151.

69 COM(2004)515.

The clear commitment taken by the Ministers in the Council "to provide, on request and in a proportionate manner, the information needed to carry out assessments of EU administrative burdens" was also a welcome development[70].

On the other side, none of the proposals put forward by Member State(s) concerning police and judicial cooperation in criminal matters (the so-called third pillar) were accompanied by an impact assessment. In many cases, these proposals were not preceded either by some form of explanatory memorandum[71]. Moreover the pace of adoption of codification and simplification proposals remained slow. In December 2005, 11 (out of 40) simplification proposals related with the simplification initiative launched in 2003 were still pending before the legislator. Finally the Council did not answer the European Council invitation (see 2.1.6) to indicate if the EU methodology proposed by the Commission to assess administrative costs could become common to the 2 institutions.

At trilateral level, Parliament, the Council and the Commission further pursued the implementation of the **Inter-Institutional Agreement on Better Lawmaking** (IIA) adopted in December 2003. In line with the mandate set by article 37 of the IIA, the High Level Technical Group for Inter-Institutional Cooperation (HLTG) held three meetings in 2005 to take stock of progress mainly with regard to programming, impact assessment, transposition of EU legislation, simplification and regulatory alternatives.

A noteworthy development was the agreement in November 2005 of an Inter-Institutional 'Common Approach to Impact Assessment'. This 'Common Approach' can be seen as the first step in the elaboration of the common methodology for impact assessment foreseen in the IIA. It sets out some basic 'traffic rules' for impact assessment throughout the legislative process. All three Institutions agree that impact assessments – of Commission proposals and substantive amendments by Parliament and Council – should consider potential impacts in an integrated and balanced way across the social, environmental and economic dimensions. Parliament and the Council will be responsible for assessing the impacts of their own 'substantive amendments', where appropriate, and in doing so they will 'as a general rule, take the Commission's impact assessment as the starting point for further work'.

On regulatory alternatives, the HLTG examined on two occasions the information provided by the Commission on the development of EU co-regulation and self-regulation (see 2.1.7).

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

71 The proposals drafted by Member States concerning organised crime were among the exceptions (Initiative of the Republic of Austria, Belgium and Finland with a view to the adoption of a Council Decision concerning arrangements for cooperation between Asset Recovery Offices of the Member States, 8 December 2005; and proposal of Austria, Finland, Greece, Hungary, Lithuania, Luxembourg and Slovakia for a Council Decision concerning the setting up of a European Anti-Corruption Network, 29 November 2005). Explanatory notes should however go beyond merely stating that the draft Decision does not contravene the subsidiarity principle and the principle of proportionality or that it may have financial consequences for the Member States.

Implementation of the IIA provisions on simplification and coordination of legislative programming was by contrast rather limited. Despite commitment to the contrary, the Parliament and the Council did not manage to modify their working methods for the adoption of simplification proposals[72]. Insofar as this is a key element for the success of any simplification programme, it is desirable that the legislator will rapidly define suitable methods for the adoption of simplification proposals. Better coordination of the annual legislative timetables of the three institutions proved difficult as the Council could not commit itself.

The **other trilateral inter-institutional agreements** of importance to better regulation had different fortunes in 2005. The implementation of the Inter-institutional Agreement of 22 December 1998 on common guidelines for the **quality of drafting** of Community legislation was satisfactory (see 2.1.10). The results of the Inter-institutional Agreement of 20 December 1994 on an accelerated working method for official **codification** of legislative texts remained limited[73]. Only the committee procedures within the European Parliament and the Council have been streamlined. The operation of the Inter-institutional Agreement of March 2002 on a more structured use of the **recasting** technique for legal acts[74] was reviewed by the Legal Services of the European Parliament, Council and Parliament. The resulting report was adopted on 16 September 2005. Since the entry into force of the agreement, the Commission submitted 12 recast proposals to the legislative authority, of which just 2 have been adopted so far[75]. These three interinstitutional agreements should be complemented by fast-track inter-institutional procedures for the repeal of obsolete acts.

It is also worth noting that the number – in absolute and relative terms – of legislative acts adopted in 1st reading under the codecision procedure has sharply increased over the years. This development is in line with the speeding up of agreement between legislators called for in the Better Regulation Action Plan adopted in 2002[76].

The **Committee of the Regions** (CoR) and the **European Economic and Social Committee** (EESC) have taken an active part in the Better Regulation debate in 2005. The CoR requested systematic consultation of local and regional authorities early in the preparation of European legislation ; involvement in impact assessment work to ensure that financial or administrative burden put on local and regional authorities are proportionate to the objectives pursued by EU action; involvement in the cooperation set up by the Inter-institutional Agreement on Better Lawmaking; and the inclusion of a regional dimension in the national Action Plans for the simplification of legislation.

The need to better assess the impact of EU legislation on local and regional levels led to reinforce cooperation between the CoR and the European Commission. The new cooperation agreement signed on 17 November 2005 indeed foresees that "in the context of the annual planning, the Commission may ask the Committee to become involved (a) in studies pertaining to the impact of certain proposals on the local and regional authorities and (b) in exceptional cases, downstream, in the local and regional impact reports on certain directives."

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72 The deadline was within 6 months of its entry into force, i.e. end of June 2004.

73 OJ C 102, 04 April 1996, pp. 2-3.

74 OJ C 077, 28 March 2002, pp. 1-3. Recasting legislation means combining amendment to the substance with codification.

75 Council Regulation (EC) 139/2004 on merger controls and Directive 2005/55/EC on measures to be taken against the emission of gazeous pollutants from vehicle engines.

76 For details, see Annex 1.

In 2005 the EESC drew up an exploratory opinion on Better Lawmaking (on the request of the UK presidency of the EU Council) and adopted an own-initiative opinion on "How to improve the implementation and enforcement of EU legislation" (CESE 1069/2005). Because of its make-up, the EESC looks more particularly at legislation from the viewpoint of the consumer of legal services. It argued that better lawmaking and implementation and enforcement are closely linked: "a good law is an enforceable and enforced law". Replies to its questionnaire used to prepared the own-initiative opinion, as well as the two public hearings organised by the Single Market Observatory (SMO), allowed to better identify shortcomings that characterise the implementation of EU legislation at national level and undermine the coherence of the single market.

2.3. Actions taken by the Member States

Member States have an essential role to play in better regulation insofar as they are responsible for applying and, in the case of directives, transposing EU legislation at national level. The March 2005 Communication on Better Regulation[77] therefore invited the Member States to pursue their own better regulation initiatives as a complement to EU action. Recognising the link between better regulation and achieving stronger growth and more and better jobs, the Commission further proposed that "Better Regulation" becomes part of the national "Lisbon" programmes and recommended that Member States report on their current activities, and those actions that they intend to take. This dimension has been covered in the Annual Progress Report on Growth and Jobs[78] published in January 2006 (for a summary of the state of play, see Annex 3).

Various informal intergovernmental structures and networks have continued to develop their activities on Better regulation, often engaging in useful methodological and policy benchmarking. This was the case of the European Public Administration Network (EPAN) and the Directors & Experts on Better Regulation (DEBR). The activity of thematic groups such as the SCM (Standard Cost Model) Network to reduce administrative burden must also be acknowledged[79]. As for the High Level Meetings on Governance, they have discussed better regulation from the viewpoint of local authorities[80].

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77 COM(2005)97.

78 COM(2006)30.

79 On this issue, it is worth noting that, in the Annual Progress Report on the Lisbon strategy adopted in January 2006, the Commission stated that "by the end of 2007, all Member States should adopt and implement a methodology for measuring administrative costs (for national rules and regulations)" (COM(2006)30, 25 January 2006).

80 This topic is covered by the 3rd Report on European governance (2004-2005), to be adopted in March 2006. See http://www.europa.eu.int/comm/governance/index_fr.htm.

3. APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

3.1. The legal and institutional framework

3.1.1. The definition given by the Treaties

Subsidiarity and proportionality, indicating respectively when and how the Community should act, are among the main organising principles of the Union. According to the Treaty on European Union, any action taken by the Union must be in accordance with the principle of subsidiarity[81]. The general definition of both principles is provided in Article 5 of the Treaty establishing the European Community (TEC).

Subsidiarity is a guiding principle for defining the boundary between Member State and EU responsibilities (*Who should intervene?*). If the area concerned is under the exclusive competence of the Community, there is no doubt as to who should intervene and subsidiarity does not apply. If competence is shared between the Community and the Member States, the principle clearly establishes a presumption in favour of decentralisation: the Community shall take action only if the objectives of the proposed action cannot be sufficiently achieved by the Member States (necessity test)[82] and can be better achieved by the Community (value-added test or compared effectiveness).

Subsidiarity is a dynamic concept, allowing EU action "to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified"[83]. In other words, subsidiarity refers to the most appropriate level of action. It should therefore not be confused with the 'proximity principle', even if the application of the subsidiarity principle may lead to bring action close to citizens.

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81 Article 2 of the Treaty on European Union states that "the objectives of the Union shall be achieved as provided in this Treaty … while respecting the principle of subsidiarity".

82 The Protocol introduced by the Treaty of Amsterdam and now annexed to the TEC provides guidelines for examining whether the necessity condition is fulfilled. It states that Community action is justified whether there are transnational aspects which cannot be satisfactorily regulated by national measures; whether national measures alone or lack of Community action would otherwise significantly damage Member States' interests; or whether action at Community level would produce clear benefits by reason of its scale. The Protocol also mentions that Community action is justified whether national measures alone or lack of Community action would conflict with the requirements of the EC Treaty. It must be underlined, however, that acting in order to comply with the requirements of the Treaty is a general obligation which, *per se*, is not linked with subsidiarity. It is therefore not helpful to refer to this obligation when defining the essence of subsidiarity. (Protocol (No 30) on the application of the principles of subsidiarity and proportionality, http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html#0173010078, OJ C 340, 10.11.1997, p. 105).

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

Proportionality is a guiding principle when defining how the Union should exercise its – exclusive and shared – competences (*what should be the form and nature of EU action?*). Article 5 TEC provides that the action shall not go beyond what is necessary to achieve the objectives of the Treaty. In other words, it is not enough to establish a correspondence between actions and objectives. The decision must lean in favour of the least demanding option. This is confirmed by the Protocol's guidelines[84]. Although 'minimal proportionality' is obviously more restrictive than 'proportionality', this principle still leaves considerable discretion to the Union's legislature[85]. In most cases, there will be a range of minimal options with different trade-offs (i.e. where minimising the burden for one group would increase the burden put on another group). Decision-makers will then have to make a political choice.

3.1.2. Modes of application, comment and control

While all institutions of the Union are requested to comply with both principles when exercising their powers, some of them are subject to specific procedural obligations. These obligations have been set out in the Interinstitutional Agreement of 1993 on subsidiarity[86] and the above-mentioned Protocol of 1997.

Among other things, the Commission is required – without prejudice to its right of initiative – to consult widely before proposing legislation; to state in the explanatory memorandum of each legislative proposal the reasons for concluding that the proposal complies with subsidiarity and proportionality[87]; and to take into account the burden falling upon the Community, national governments, local authorities, economic operators and citizens.

The European Parliament and the Council have to ensure that the amendments they make are consistent with the principles of subsidiarity and proportionality. If one of their amendments affects the scope of Community action, they must provide a justification regarding subsidiarity[88].When the consultation procedure or the cooperation procedure applies, the Council has to inform the European Parliament of its position on the application of subsidiarity and proportionality in a statement of reasons[89]. In other words, the current system puts the burden of proof on the institutions involved in the Union's legislative process.

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84 Firstly the Protocol states that "the form of Community action shall be as simple as possible" and, whenever legislating appears necessary, "directives should be preferred to regulations". Secondly, the need to minimise the financial or administrative burden for all levels of government, economic operators and citizens should be taken into account. Thirdly "while respecting Community law, care should be taken to respect well established national arrangements".

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

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

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

88 Section 2, point 3 of the Interinstitutional Agreement on subsidiarity of 1993.

89 Article 12 of the Protocol.

Each of these institutions has, in addition, to examine if the other two apply the principles properly. The European Parliament and the Council must consider whether the Commission's proposals[90] and each other's amendments are consistent with Article 5 TEC, and oppose any violation of the principles. The Commission must do the same with the amendments of the legislator, if need be by withdrawing its proposal. The Commission must also submit an annual report on compliance with both principles (i.e. the present report). This report has to be discussed by the other institutions and taken into account by the European Council for its own report on the state of the Union.

The application of these principles can also be commented on during the legislative procedure by the different players, for example the European Economic and Social Committee and the Committee of the Regions, either when they are consulted or in own-initiative opinions. The 'Conference of European Community Affairs Committees' (COSAC) can also express an opinion on the application of the principle of subsidiarity[91].

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

3.2. Application of the principles in 2005

The European Parliament and the Council introduced relatively few amendments referring explicitly to subsidiarity and proportionality[92]. As it is impossible here to review all proposals and acts adopted in the light of the conditions and obligations summarised in section 3.1.2, the working document limits itself to a selection of exemplary cases.

3.2.1. When subsidiarity calls for EU action even if the problem does not concern all Member States

The Union's revised Lisbon Strategy[93] and Social Agenda[94] stress how important mobility is to improving the adaptability of workers and the business sector and augmenting labour market flexibility. Supplementary pension schemes are increasingly used and some of their provisions have become an obstacle to workers' mobility within the EU. In some circumstances, workers stand to lose a substantial part of their supplementary pension rights when they change jobs, because of current differences in the conditions of acquisition of pension rights, the conditions of preservation of dormant pension rights and the transferability

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

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

92 For instance, in 2005, the Parliament referred explicitly to subsidiarity to justify its legislative amendments in 13 of its reports (+4 compared to 2004). As for the proportionality principle, the Parliament used it to justify its legislative amendments in 12 reports (+7 compared to 2004).

93 COM(2005)24.

94 COM(2005)33.

of acquired rights. The Commission therefore proposed in November 2005 the adoption of a directive improving the portability of supplementary pension rights[95].

Some Member States in the Council have objected to the appropriateness of EU minimum standards in this field, partly because they do not have supplementary pensions schemes. For the Commission, the proposed action is in line with the conditions set by the subsidiarity principle. Indeed Article 5 of TEC does not prescribe that EU action can only be taken if all Member States are concerned[96]. EU action can be envisaged whenever there is an added value. In the present case, the non applicability of the proposed directive to some workers does not diminish the considerable advantages for the others. The proposed directive clearly has a net benefit for the Union as a whole.

3.2.2. When subsidiarity calls for the scope of a (proposed) measure to be extended to cross-border and domestic cases

Article 5 TEC provides among other things that the Community shall take action only if and "in so far as" the objectives of the proposed action cannot be sufficiently achieved by the Member States. "In so far as" refers to the scope of the proposed action rather than to the intensity of that action[97]. That scope of action must be determined on the basis of the objectives pursued.

The scope of action proposed by the Commission was challenged on a number of occasions. This was the case for the proposed directive on the certification of train drivers[98]. Some argued that the certification scheme should only apply to crews operating on cross-border trains. The Commission, on the contrary, proposed to apply the scheme to all train crews because one of the objectives of the proposal is to maintain or even increase the level of safety on the Community rail network. And this can only be ensured if all train drivers have *inter alia* the same level of skills required to ensure a safe operation on the entire network within the Community, whether national or international. National and international services share indeed the same tracks[99].

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95 COM(2005)507.

96 Pursuing such a logic would be quite counterproductive for the common good of the Union. The fact that a number of Member States are landlocked would then be an obstacle to the development of fisheries policy. The fact that Luxembourg is not a member of the European Space Agency and, more generally, has no spatial activity would be an obstacle to the development of EU cooperation with ESA. Or the Common Agricultural Policy could not cover alpine farming because it does not concern the Netherlands.

97 The scope of action is at the heart of the subsidiarity principle. For some, that principle was indeed introduced to prevent undue extension of EU action. Moreover the intensity of the proposed action (prescriptive action versus incentive, etc.) is a question covered by the principle of proportionality.

98 COM(2004)142.

99 Companies such as Eurostar or Thalys use the local network when leaving from or arriving to Brussels, Paris or London. The fact that in 2004 a local commuter train and a Eurostar avoided a frontal collision near London illustrates the need for all train drivers to share the same safety background.

Certain aspects of mediation in civil and commercial matters provided another interesting example. With the single market, the number of cross-border transactions have tremendously increased, and with it the number of cross-border disputes. Mediation offers many advantages in terms of dispute settlement. Furthering the use of mediation however is complicated by a number of disincentives. The Commission therefore proposed two types of provisions: first, provisions establishing minimum common rules in the Community on a number of key aspects of civil procedure, to ensure a sound relationship between mediation and judicial proceedings; secondly, provisions providing the necessary tools for the courts of the Member States to actively promote the use of mediation, without making mediation compulsory or subject to specific sanctions[100]. For reasons of legal certainty and predictability, but also because proper functioning of the internal market requires coherent rules, it has been proposed to apply these provisions in cross-border and domestic cases. Despite the Commission's limited approach, some Member States have argued that the directive should be limited to trans-border mediation services.

3.2.3. When international obligations frame the application of the principles of subsidiarity and proportionality

The Commission presented in 2004 a proposal for a directive[101] implementing the international agreement concluded between the European Community, Canada and Russia concerning humane trapping standards of certain animal species[102]. Some Member States argued in the Council that the proposal was too detailed and that derogations did not sufficiently take account of specific regional and local problems. In this case, however, the Commission does not have the liberty to amend a provision arising from an international agreement . Article 6 of the proposed directive basically reproduced article 10 of the international agreement. Such amendment on the ground of subsidiarity or proportionality would require some form of renegotiation with countries which have signed the agreement.

3.2.4. When proportionality demands more prescriptive action

Over the past ten years the European Institutions have drafted guidelines and recommendations to simplify the portability of supplementary pension rights across Member States. However, this approach based on soft law did not bring about significative approximation of national laws. Furthermore, there is a risk that divergences in this sector will increase in the enlarged European Union. In order to reach the Treaty objective, i.e. to remove obstacles to the free movement of workers, a Directive is needed to provide a common reference framework for supplementary pensions rights[103].

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100 COM(2004)718 and http://europa.eu.int/comm/justice_home/ejn/adr/adr_ec_en.htm.

101 COM(2004)532.

102 Council decision of 26 January 1998 concerning the conclusion of an Agreement on international humane trapping standards between the European Community, Canada and the Russian Federation and of an Agreed Minute between Canada and the European Community concerning the signing of the said Agreement (98/142/EC), OJ L 042, 14/02/1998 pp.43–57.

103 COM(2005)507. For more details, see sub-section "3.2.1. When subsidiarity calls for EU action even if the problem does not concern all Member States".

3.2.5. When proportionality calls for regulatory alternatives such as co-regulation

Differences in national regulations applying to audiovisual services could create barriers to competition in the internal market. The Commission's impact assessment foresees that, without a harmonised European approach, pan-European offers of non-linear (i.e. on-demand) services would suffer from a lack of legal certainty and may go offshore, which would in the medium-term harm Member State economies.

Thus the Commission proposed in December 2005 to revise the "Television without Frontiers" Directive, in order to coordinate certain provisions or administrative action in Member States concerning the pursuit of television broadcasting activities[104]. The Commission looked for the lightest form of intervention likely to reach the set objectives. It concluded that harmonising minimum rules for non-linear services, applying the principle of the country of origin and inviting Member States to encourage co-regulatory regimes would be the best mix in that respect.

3.2.6. When proportionality calls for strict administrative obligations

EU institutions sometimes differ on the minimum level of obligations required for achieving Treaty objectives. In order for the European electricity and gas market to function effectively, adequate infrastructure linking the Member States must be developed. Thus, the Commission proposed a target of 10 % interconnection for electricity and a priority funding for some Trans-European Network projects (TENs)[105]. In June 2005, the Council reached a political agreement rejecting the introduction of a separate category for priority projects of European interest for cross-border networks. One of the Council's arguments was based on the excessive bureaucratic burden that proposed reporting requirements for "priority projects of European interest" would cause to national administrations. These requirements were considered as disproportionate because the projects would mainly be undertaken by the private sector and would benefit only from limited Community funding.

The Commission maintained that a coordinated approach in the field of TENs is an important priority, which could only be achieved through precise reporting. It was supported in that by the Parliament's first reading. The issue of excessive burden in reporting on priority "projects of European interest" remained central in the subsequent stages of the legislative procedure[106].

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104 COM(2005)646.

105 COM(2003)742 final.

106 The issue remained central during the second reading of the Commission proposal. However, in the context of a compromise agreed with the European Parliament, Member States accepted to fulfil the information requirements stemming from the Treaty. This compromise was approved by the Parliament in its vote on 4 April 2006 and will enable the adoption of the TENs energy guidelines proposal in second reading.

3.2.7. When proportionality calls for the suppression of most administrative obligations

Conversely, when the speed of action is of essence, the proportionality principle may lead to lift most administrative obligations. This was the line followed for the redesigning of the 'European Union Solidarity Fund' Regulation[107]. The aim of the new Fund is to help Member States and eligible candidate countries to respond to a range of major disasters, including public health emergencies. Obligations imposed on beneficiary States would be limited to the absolute minimum[108], reflecting the emergency situation under which aid is granted. The full amount of aid would be granted upfront, the implementation of the grant being left entirely to the authorities of the beneficiary State. Other than the conclusion of an implementation agreement between the beneficiary State and the Commission, there would be no programming obligations or any formalised monitoring procedures. The beneficiary State would only be required to present a report justifying the use made of the grant, including a statement at the end of the operation. The administrative burden falling upon the Community, national, regional and local authorities would therefore be extremely limited.

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

3.3.1. Opinions and contributions in 2005

In 2005, the opinions adopted by the Committee of the Regions paid particular attention to the application of the principles of subsidiarity and proportionality. Most of them recognised that EU action was legitimate with regard to the set objectives[109]. By contrast, the CoR considered that the proposal for a directive on market access to port services was not in full compliance with the principles of subsidiarity and proportionality[110]. In the eyes of the Committee, this proposal was not taking sufficiently into account the current level of market competition between European ports. As a consequence, the proposed rules were not seen as indispensable, both in terms of scope and shape.

Moreover the CoR adopted on 16 November 2005 guidelines for the application and monitoring of the subsidiarity and proportionality principles and held on 29 November its second annual conference on subsidiarity, co-organised with the House of Lords in London. The opinion presenting the guidelines mainly requests the immediate set up of the subsidiarity control mechanism foreseen by the Constitutional Treaty. It underlines that wide consultations had to be organised before the adoption of any legislative act, in order to take more into account the regional and local dimension in the EU[111]. The opinion also includes a grid aimed

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107 COM(2005)108, meant to replace Regulation (EC) No 2012/2002.

108 I.e. limited to what is required to allow the Commission to exercise its overall responsibility for the execution of the Community budget.

109 See, in particular, opinion 76/2005 of 7 July 2005 on "Draft Community guidelines on financing of airports and start-up aid to airlines departing from regional airports"; opinion 82/2005 of 7 July 2005 on the "Green Paper on an EU approach to managing economic migration"; and opinion 150/2005 of 16 November 2005 on the "Proposal for a Decision of the European Parliament and of the Council establishing a Competitiveness and Innovation Framework Programme (2007-2013)".

110 COM(2004)654.

111 Other opinions made the request for a better appraisal of the local and regional dimension in the Impact Assessments: CoR 255/2004 (Proposal for a Council regulation on support for rural development by the European Agricultural Fund for Rural Development) ; CoR 225/2005 (State Aid Action Plan) ; and CoR 82/2005 (Green Paper on an EU approach to managing economic migration).

at ensuring systematic review of subsidiarity and proportionality in the opinions of the Committee.

In 2005, the COSAC tested the subsidiarity early warning mechanism foreseen in the Constitutional Treaty. The 3rd Railway Package proposed by the Commission was chosen for a pilot project[112]. National parliamentary chambers were invited to examine whether that package complied with the subsidiarity principle, report on their scrutiny process and send a reasoned opinion to COSAC on possible breaches. Thirty-one chambers out of 37 participated. Twenty considered that the analysis and motivation of the Commission were insufficient regarding subsidiarity and proportionality. Fourteen concluded that at least one aspect of the package breached the subsidiarity principle. Some of these criticisms were later shared by the European Parliament. They led the Commission's position to evolve on the compensation in cases of non-compliance with contractual quality requirements for rail freight services[113].

COSAC concluded that it was a useful experiment and called on the Commission to produce more in-depth arguments in future. Moreover it considered that further work was needed to clarify the distinction between the principles of subsidiarity and proportionality; that 6 weeks were too short to produce a reasoned opinion; and that the absence of translation in all languages was a considerable handicap[114].

It is worth noting that some national Parliaments concluded on the existence of a subsidiarity breach on the basis of arguments not linked to the conditions set by that principle. Several arguments in fact concerned the principle of conferral (absence of a legal basis for action) or the principle of proportionality. Some criticisms were also based on factual inaccuracy[115]. This demonstrates the need for a common understanding of the meaning of the subsidiarity principle as well as the need for new efforts by the Commission to provide explicit and detailed justification of all aspects of its proposals.

On 17 November 2005, the presidency of the Council (the United Kingdom) and the Netherlands co-organised in The Hague a conference entitled "Sharing power in Europe" and aimed mainly at finding ways to improve monitoring and control of subsidiarity. The debate focused in particular on the possible contribution of national Parliaments on the basis of existing Treaties and Protocols. Austria indicated its intention to come back to this issue during its presidency of the Council by organising a follow-up conference in April 2006 and by presenting operational conclusions to the European Council of June 2006.

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112 COM(2004)139, COM(2004)142, COM(2004)143 and COM(2004)144.

113 COM(2004)144.

114 Contribution adopted by the XXXIII COSAC (Luxembourg, 17th and 18th May 2005) http://www.cosac.org/en/documents/contributions/.

115 For instance, the European scrutiny Committee of the House of Commons was of the opinion that the proposed directive on the licensing of train crews operating on the Community's rail network (COM(2004)142) breaches the principle of subsidiarity because the vast majority of train crews are employed to provide services within the UK only and should therefore not be submitted to EU certification. The Czech Senate used a similar argument. This argument overlooks the fact that one of the objectives of the proposal is to increase the level of security on the Community rail network and that international services through the Eurotunnel also use the local network when leaving from or arriving in Brussels, Paris or London (see section 3.2.2).

3.3.2. Ex post control in 2005

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[116], which in essence confirm the Courts' previous case law. No judgment has concluded that the Treaty provisions on this subject have been wrongly applied[117]. As of 31 December 2005, the case law of the Court of Justice and the Court of First Instance did not include any judgments to the effect that the principle of subsidiarity had been contravened or that there was a lack of motivation in applying this principle.

An interesting example of how the principle of subsidiarity can be controlled ex post by the Community courts is the ECJ judgment of 12 July 2005 in joined cases C-154/04 and C-155/04 (Alliance for Natural Health and others). The matter related to Directive 2002/46, adopted on the basis of Article 95 EC, on food supplements marketed as foodstuffs and presented as such. The claimants in the national court were an association representing distributors, retailers and consumers of food supplements and two trade associations representing some 580 companies. The claimants argued that the provisions of the Directive interfered unjustifiably with the powers of the Member States in a sensitive area involving health, social and economic policy. The claimants thought that the Member States were the best placed to determine, on their respective markets, the public health requirements which would justify a barrier to the free marketing of food supplements on their national territory.

The national court[118] asked the ECJ for a preliminary ruling on whether certain articles of the Directive were invalid by reason of infringement of the principle of subsidiarity. The ECJ did a detailed analysis of how the principle had been applied. The key question here for the ECJ was whether the objective pursued by those provisions could be better achieved by the Community. The Court noted that the objective of the Directive was to remove barriers resulting from differences between the national rules on vitamins, minerals and vitamin or mineral substances authorised or prohibited in the manufacture of food supplements, whilst ensuring, in accordance with Article 95(3) EC, a high level of human-health protection. The Court then ruled that to leave Member States the task of regulating trade in food supplements which do not comply with Directive 2002/46 would perpetuate the uncoordinated development of national rules and, consequently, obstacles to trade between Member States and distortions of competition so far as those products are concerned.

On that basis, the Court concluded that the objective pursued by Directive 2002/46 cannot be satisfactorily achieved by action taken by the Member States alone and requires action to be taken by the Community. Consequently, that objective could be best achieved at Community level and therefore the provisions of Directive 2002/46 are not invalid by reason of an infringement of the principle of subsidiarity.

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

117 Judgment of the Court of 10 March 2005, joined cases C-96/03 and C-97/03; judgment of the Court of 14 April 2005, case C-110/03; judgment of the Court of 12 July 2005, joined cases C-154/04 and C-155/05; judgment of the Court of First Instance of 21 September 2005, case T-87/05.

118 The High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court).

This case shows that the compliance of Community action with the principle of subsidiarity can be verified not only in direct actions for annulment before the ECJ but also indirectly through the preliminary rulings procedure initiated by a national court.

The same can be said for the principle of proportionality, as illustrated by the ECJ judgment of 6 December 2005 in joined cases C-453/03, C-11/04, C-12/04 and C-194/04 (ABNA and others). The judgment was a joint reply to requests from three national courts[119] questioning in essence the validity of Directive 2002/2 on the circulation of compound feedingstuffs for animals, adopted in co-decision procedure after a conciliation procedure.

Manufacturers of compound feedingstuffs for animals or representatives of that industry had in various national proceedings requested the annulment or suspension of the rules adopted for the purpose of transposing in national law the contested provisions of Directive 2002/2. Its Article 1 lays down a duty of notification of the precise composition of the feedingstuffs. The claimants thought that such obligation seriously affect their economic rights and interests and was not necessary for the protection of health in view of the legislation which already exists within the animal feedingstuff sector.

The Court examined this question on the basis of proportionality and found that certain obligations were justified as they contributed to the objective of safeguarding animal and human health. These included an obligation to indicate, via a label on the product, the *approximate* amount of each ingredient in animal feedingstuffs, subject to a tolerance of plus or minus 15%. However, the Court found that in the light of this requirement, an additional obligation laid down in the directive for the manufacturers – namely the obligation to inform customers, on request, of the *exact* quantitative composition of animal feedingstuffs – was not necessary for the purpose of pursuing that objective. Therefore the Court held that Article 1 of Directive 2002/2 was partly invalid in the light of the principle of proportionality.

[119] References for preliminary rulings under Article 234 EC were brought by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), by the Consiglio di Stato (Italy) and by the Rechtbank 's-Gravenhage (Netherlands).

Annex 1: Legislative activity in 2005

Legislative activity cannot be solely determined by reference to 'regulations' and 'directives', because Article 249 TEC makes no terminological distinction between legislative and executive acts[120]. When acting as the executive branch of the Union and implementing EU legislation, the Commission also adopts regulations and directives. Identifying legislation is further complicated by the fact that some 'decisions' create general rights and obligations and have therefore been assimilated to a 'regulation' by the European Court of Justice[121].

Legislative activity cannot be automatically determined on the basis of the institutional origin of proposals/acts, because of the type of separation of powers in the EU. For instance, the Council at times acts as a legislative branch, at others as an executive branch. Some of its 'regulations' and 'decisions' are of an executive nature[122].

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

Figures provided below should therefore be read with the above classifications and limitations in mind[123]. It should also be noted that a majority of the proposed regulations and directives concerned fairly limited and technical amendments to existing legislation, sometimes aimed at simplification.

Generally, the number of legislative proposals fell in 2005 by 17.5 percent compared to 2004 and by 10.5 percent compared to the 2003-2004 average. That decrease applies to all types of proposal: regulations (-21), directives (-24), decisions (-46) and recommendations (-2). The biggest relative drop was in the number of directives which fell by 47 percent compared to 2004.

The most active sector was trade policy with 73 proposals (mostly regulations). Next came in descending order: transport, enterprise and industry, justice freedom and security, agriculture, taxation, fisheries, personnel and administration, external relations, health and consumer protection, environment, development, enlargement and research. The number of proposals from all the other sectors remained marginal, with 10 proposals or less[124].

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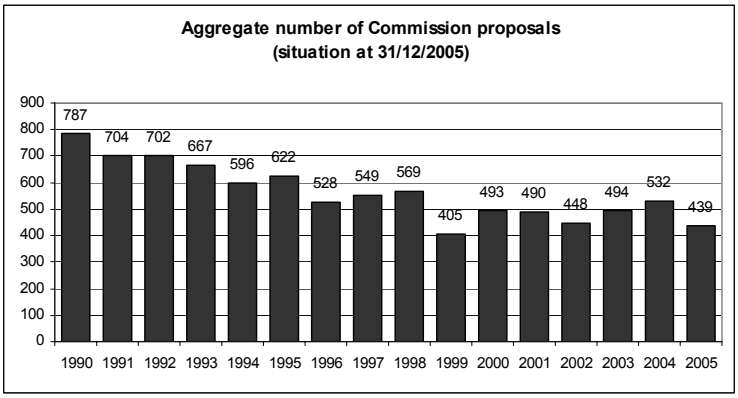
120 "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions."

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

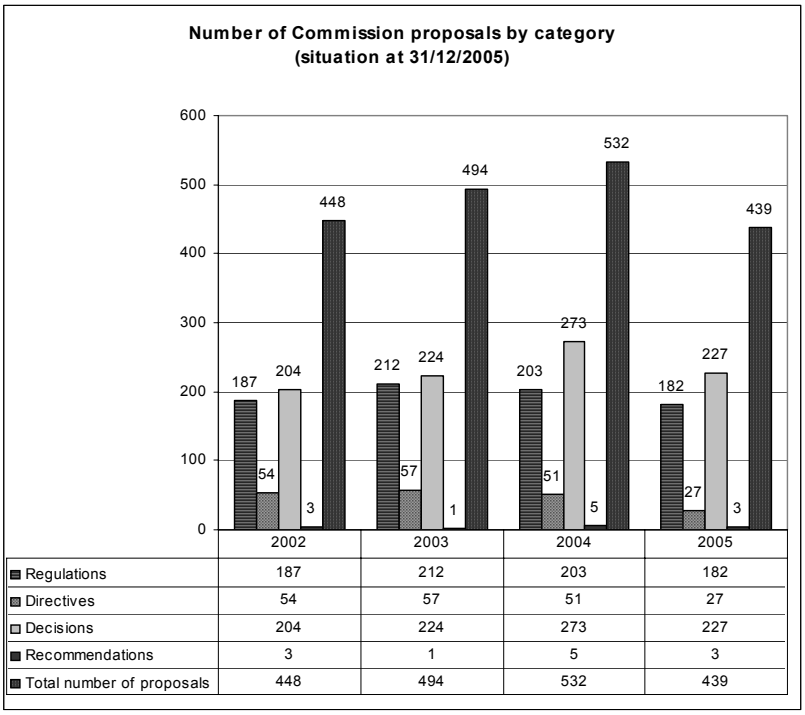
122 For instance the Council acts as the executive branch when it adopts a 'regulation' imposing anti-dumping duty on imports of specific commodities or a 'decision' concerning the placing on the market, in accordance with a – legislative – Directive of a genetically modified product.

123 The Treaty establishing a Constitution for Europe contains provisions to clarify and streamline the terminology of EU instruments.

124 To see how that pattern has evolved, refer to the previous annual reports: COM(1993)545 of 24 November 1993; COM(1994)533 of 25 November 1994; COM(1995) 580 of 20 November 1995; ESC(1996)7 of 27 November 1996; COM(1997)626 of 26 November 1997; COM(1998)715 of 1 December 1998; COM(1999)562 of 3 November 1999; COM(2000)772



(Source for 1990-2001: Eur-Lex; source for 2002-2005: Prelex)



	2002	2003	2004	2005
Regulations	187	212	203	182
Directives	54	57	51	27
Decisions	204	224	273	227
Recommendations	3	1	5	3
Total number of proposals	448	494	532	439

(Source for 1990-2001: Eur-Lex; source for 2002-2005: Prelex)

The number – in absolute and relative terms – of legislative acts adopted in 1st reading under the codecision procedure has sharply increased over the years. The full extent of this evolution will have to be assessed at the end of this legislature. The pace of adoption in the first part of 2004 was undoubtedly affected by the prospect of the EU enlargement of May and the European Parliament's elections of June.

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of 30 November 2000; COM(2001)728 of 7 December 2001; COM(2002)715 of 11 December 2002; and COM(2003)770 of 12 December 2003; and COM(2005)98 of 21 March 2005.

Stages of adoption of legislative acts under the codecision procedure

	2002	%	2003	%	2004	%	2005	%
1st reading	18	*23,38*	38	*49,35*	47	*61,04*	53	*68,83*
2nd reading	40	*51,95*	49	*47,12*	30	*36,14*	24	*29,27*
conciliation	19	*24,68*	17	*16,35*	6	*7,23*	5	*6,10*
TOTAL	77	*100,00*	104	*112,81*	83	*104,41*	82	*104,20*

(Source: European Commission - based on political agreement dates)

Annex 2: Public consultation and information in 2005

The Commission has a long tradition of extensive consultation[125] through various channels: Green Papers, White Papers, communications, forums (such as the European Energy and Transport Forum or the European Health Forum), workshops, permanent consultative groups[126] and consultations on the Internet[127]. The dialogue between the Commission and organisations from civil society takes many forms, and methods for consultation and dialogue are adapted to different policy fields. The Commission is also engaged in various forms of institutionalised dialogue with interested parties in specific domains, the most developed being the social dialogue. The European Economic and Social Committee organised stakeholder conferences ('Sustainable development' and 'How to bring Europe and its citizens closer together') in collaboration with the Commission. Last but not least, the structured dialogue between the Commission and the European and national associations of regional and local authorities[128] was pursued through four general and sectoral meetings[129].

In 2005, the most active services in terms of consultation and information (based on the number of Green Papers, White Papers, Communications and reports) were, in descending order: justice freedom and security, secretariat general, transport, environment, heath and consumer protection, economic and financial affairs, budget, information society, agriculture, enlargement, enterprise and industry, external relations, development, employment, and internal market and services. By and large, discrepancies between the number of consultations and the number of proposals result from the specific nature of some sectoral activities. For instance, in external relations, a large share of proposals concerned decisions to amend international agreements of a technical nature. Public consultation would have made little sense in these instances.

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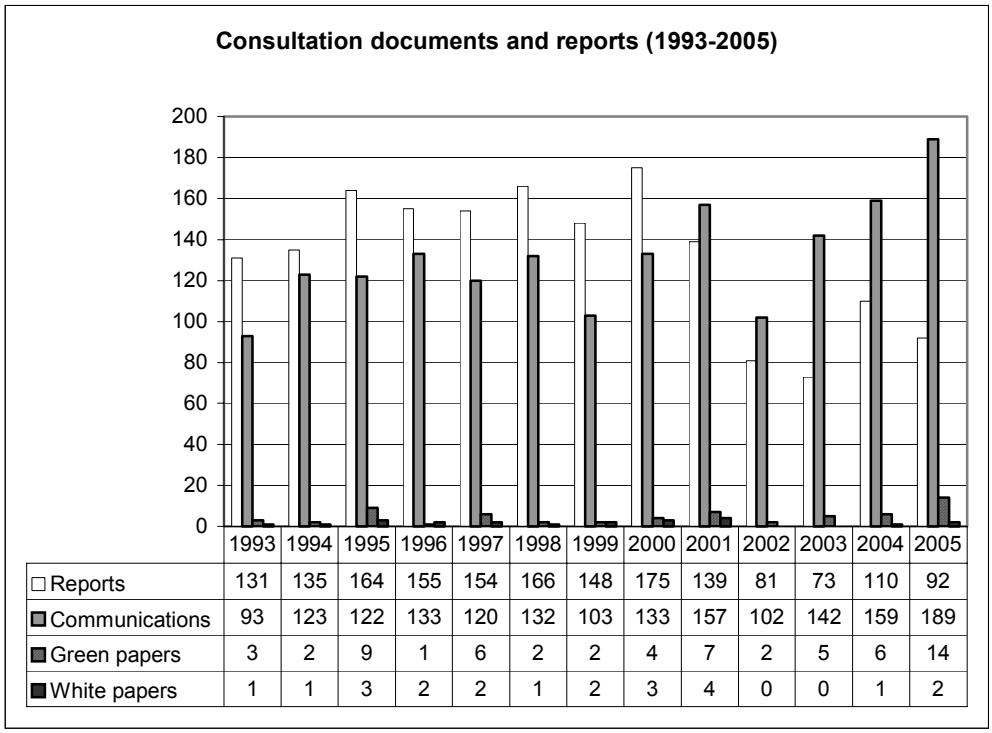
125 'Consultation' refers to the processes used by the Commission during the policy-shaping phase in order to trigger input from outside interested parties before taking a decision.

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

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

128 The dialogue was formally launched in 2004 in cooperation with the Committee of the Regions, as outlined in COM (2003)811. This topic is covered in detail by the 3rd Report on European governance (2004-2005), to be adopted in March 2006.

129 On 24 February 2005, discussion on the Strategic Policy Guidelines and the Commission Work and Legislative Programme for 2005; on 17 November, discussion on the Commission Work and Legislative Programme for 2006; on 6 October, discussion of climate change; and on 2 December, discussion of the future EU maritime policy.



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

Situation at 31/12/2005 (Source for 1990-2001: Eur-Lex; source for 2002-2005: Prelex)

Annex 3: Better Regulation actions in Member States in 2005

	Better Regulation strategy	Obligatory impact assessment of proposed legislation	Obligatory consultation of stakeholders	Programme for legislative simplification	Methodology for measuring administrative costs
Belgium	No	Yes	No	No	Yes
Czech Rep.	No	Yes	No	No	Yes
Denmark	Yes	Yes	Yes	Yes	Yes
Germany	Yes	Yes	Yes	Yes	Yes
Estonia	No	Yes	No	Yes	Yes
Greece	Yes	No	No	No	No
Spain	No	No	No	Yes	No
France	No	No	No	No	Yes
Ireland	Yes	Yes	Yes	Yes	No
Italy	No	No	Yes	Yes	Yes
Cyprus	No	No	No	No	Yes
Latvia	No	No	No	No	No
Lithuania	Yes	No	No	No	Yes
Luxembourg	No	No	No	Yes	Yes
Hungary	Yes	No	No	No	Yes
Malta	No	No	No	No	No
Netherlands	Yes	Yes	No	No	Yes
Austria	No	Yes	No	Yes	No
Poland	No	Yes	No	Yes	Yes
Portugal	No	No	No	No	No
Slovenia	No	Yes	No	Yes	Yes
Slovakia	No	No	No	No	No
Finland	Yes	No	No	No	Yes
Sweden	Yes	No	No	Yes	Yes
UK	Yes	Yes	Yes	Yes	Yes

Table based on National Reform Programmes submitted to the Commission by Member States in autumn 2005, in the context of the Lisbon Strategy. Shading indicates that implementation is expected in the near future.

Annex 4: Scoreboard 2002-5 –of the European Commission Action Plan for Better Regulation

The following table follows the structure of the Action Plan presented in June 2002 by the Commission (COM(2002)278). The Action Plan has been revised in March 2005 to further "focus on European competitiveness, growth and jobs" (COM(2005)97) and is a direct follow-up of the mid-term review of the Lisbon strategy (COM(2005)24).

Specific actions listed in the March 2005 revision are in italics. Initial target date = date mentioned in the document announcing the launch of the action. EK = European Commission; EP = European Parliament; MS = Member States; BR = Better Regulation; IA = Impact Assessment; CWLP: Commission Work and Legislative Programme; IIA BL = Inter-Institutional Agreement on Better Lawmaking.

	Objective	**Action (ref.)**	**Initial target date**	**Remit**	**Progress indicator**	**Achievement (& date)**	**Left-over (& new target date)**
ACTION TO BE TAKEN BY THE COMMISSION (PART 1)							
Improving the quality of legislative proposals (1.1)							
1	Improve participation of interested parties and society, transparency and consistency of consultations	Defining minimum standards of consultation	End 2002	EK	Official adoption of standards	Done in December 2002 COM(2002)704	None
		Implementation of minimum standards	2003		Development of computerized monitoring of compliance with standards	Done in 2004	
					High % of consultations complying with standards	In 2003-4, monitoring of consultations linked to ext. IA only reveals exceptional and minor problems of compliance	
		Publication of Impact Assessment Roadmaps	*start in 2005*		*Publication of IA roadmaps*	*Done for 2005*	

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
2	Assessing the impact of major legislative and policy initiatives and facilitating the selection of the most appropriate instrument	Implementing a consolidated and proportionate instrument for assessing the impact of legislative and policy initiatives (in the economic, social and environmental fields)	Start by end 2002 Full impl. 2004-5	EK	Adoption of new instrument for IA IA for all major initiatives	Done in June 2002 COM(2002)276 Done for 2005 CWLP	
	Strengthening the assessment of economic impacts, incl. on competition	*Revision of IA guidelines (and annexes) on economic impacts*	*April 2005*		*Revision of IA guidelines*	*Done in June 2005, incl. strengthening of env. and social impacts*	
	Improving the integration of the measurement of administrative costs in the IA	*Pilot phase to test methodologies*	*Autumn 2005*		*Completion of the pilot phase*	*Done in September 2005*	
		Development of a methodology for assessing administrative costs imposed by legislation	-		*Adoption of new methodology*	*Done in October 2005 (COM(2005)518)*	
					Update of IA guidelines with operational manual		*Update of IA guidelines on administrative costs - March 2006*
	Reinforcing the external validation of the IA system of the Commission	*Launch of a comprehensive independent evaluation*	*early 2006*		*publication of the terms of reference*		*Publication of the terms of reference – early 2006*
	Reinforcing the quality control of IA by services before releasing these for inter-services scrutiny	*Review appropriateness of internal quality control procedures and resources*	-		*conclusion of internal review*		*Conclusion of internal review – no date*
3	Ensuring that proposals are properly explained and understood	Expanding & improving the contents of the explanatory memoranda accompanying	Gradually from 2003 onwards	EK	Adoption of new Standard Expl. Memo	Done in December 2003	None

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
		legislative proposals			Development of computerized monitoring of compliance with standards	Done in 2004	
					Implementation of computerized monitoring	Done in March 2005	
4	Adjusting legislation to changes	Including a review clause in legislative proposals	Start in June 2002	EK	Instruction to services to consider the need for such clause	Done in July 2002 (SEC(2002)872) + inclusion in manual of procedures and in IA guidelines	
					Monitoring the evolution of the number of clauses	Started second half of 2005	
					Monitoring compliance with guidelines	Ad hoc monitoring for BL annual report 2003, 2004 & 2005	

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
Monitoring the adoption of legislative acts (1.2)							
5	Speeding up agreement among legislators (under codecision, during first reading)	Being active in the early stages of the negotiations between legislators	Start in June 2002	EK	Increase of acts adopted during 1st reading in absolute and relative terms	Big increase in absolute and relative terms[130]	
		Calling on the Council to resort to Qualified Majority Voting			Increase of calls in absolute and relative terms	No statistics available; no significant evolution reported	Renew political calls – No date
6	Ensuring the quality and relevance of law-making	Greater use of withdrawal of legislative proposals because they are obsolete or are denatured by amendments introduced by EP / Council	Start in June 2002	EK	Adoption of periodic lists	Technical withdrawal adopted in 2004[131]; 2005 screening concluded in October 2005	
	Ensuring that pending proposals are all backed by solid analysis & their impact on competitiveness is reasonable	*Extension of screening & withdrawal exercise to quality of IA and with regard to impact on competitiveness each year*	*start in 2005*		*completion of annual screening and withdrawal exercise*	*Done in October 2005 completion of screening exercise and information on the list of withdrawals envisaged.*	*Publication in the Official Journal of the withdrawal list – March 2006*
Monitoring the application of legislative acts (1.2)							
7	Ensuring that Community legislation is applied properly	Reinforcement of Commission's checks on the transposition of legislation, i.a. by establishing periodic table	2002	EK	Publication of periodic tables by Member state and by sector	Done on EUROPA	None

130 For details, see Annex 1.

131 Lists of pending proposals withdrawn for obsolescence: 34 proposals withdrawn in 1997, 58 in 1999, 108 in 2001 and 102 in 2004. Political withdrawal: publicly envisaged once in 2003. In order to interpret properly these figures, one needs to take into account the fact that the Commission proposals have declined in number (549 proposals in 1997 against 371 in 2003), are better built as a result of 'better regulation' efforts and are better received by the legislator due to progress in programming coordination. It therefore means that there is less need for withdrawal. The quality of the review process is more meaningful as a progress indicator than the number of actual withdrawals.

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
8	Ensuring that action is taken against perceived infringements of Community legislation	Laying down priority criteria for examining possible breaches of Community law	2002	EK	Adoption of criteria	Done in March 2002, COM(2002)141	None
General coordination and implementation (1.3)							
9	Improving the consistency of legislative proposals	Setting up an internal network for "better lawmaking" involving all DGs with regulatory responsibilities	2002	EK	Set up active network	Done in 2003 (InterService Coordination Group, monthly meeting)	None
ACTION PROPOSED TO THE EUROPEAN PARLIAMENT AND COUNCIL (PART 2)							
Making more appropriate use of legislative instruments (2.1)							
10	Ensuring that legislation sticks to the essential	Inclusion of caveats in drafting instructions instructing services to limit directives to the essential	Start in 2002	EK, EP, Council	Inclusion of caveats Decrease in the number of detailed directives proposed / adopted	Caveat included in Joint practical guide for the drafting of Community legislation Qualitative monitoring but no statistics available	
		Redesign of the delegation rules (implementing powers)	-	EK, EP, Council	Adoption of new delegation rules	New rules proposed in October 2004 by the Treaty on a Constitution for Europe / new Comitology decision proposed by EK in 2005	Ratification of the Treaty or revision of the Comitology decision – no date
11	Facilitating the use of alternative to legislation	Set up of a framework for coregulation - Early warning given by the EK to the legislator of its intention to use Coregulation (i.e. through Commission Work Programme)	Start in 2002	EK	Instructions to EK services Data collection and	Done in 2004 Done in 2005 (general reports	None

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
					notification mechanisms	to HLTG for interinstitutional cooperation + individual warning through the explanatory memorandum	
		- Definition of common definition & principles for coregulation		EK, EP, Council	Adoption of def. & principles	Done in December 2003 through IIA Better Lawmaking	
Simplifying and reducing Community legislation (2.2)							
12	Simplifying Community legislation	Set up of a simplification programme - "Institutions must jointly define a programme" for simplification	-	EK, EP, Council	(Joint) definition of a simplification programme	Integration of the list of simplifications suggested by the Council end 2004 in the EK Framework Action for simplification launched COM(2003)71	
		- Implementation of the programme / screening and proposals	Completion in 2005	EK	# of policy sectors screened ; # of acts with simplification potential identified; # of simplification proposals transmitted to the legislator	End of Framework action in December 2004. More than 40 policy sectors screened; preparation work on more than 60 acts; more than 30 simplification proposals transmitted.	
		- Adoption of simplification proposals	-	EP, Council	# of simplification acts adopted by the legislator	around 30 simplification acts adopted	By December 2005, 11 proposals still pending before the Parliament and the Council[132]

[132] See interim reports COM (2003)623 and SEC (2003) 1085; COM (2004) 432 and SEC (2004) 774.

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
		- Rolling programme for simplification and integrated sectoral action plans	*Launch in October 2005*	*EK*	*Launch of the rolling programme; timely delivery of simplification proposals*	*Launch of simplification programme 2005-8 in October 2005 COM(2005)535; timely delivery of proposals scheduled for 2005*	*Ongoing*
		- Introduction of adapted working methods for the adoption of simplification proposals	-	EP, Council	Adoption by EP and Council of adapted methods	Done in June 2003 by EP (adoption of adapted methods)	Adoption of adapted methods by Council – no date
		- Adoption of an IIA on simplification	End 2002	EK, EP, Council	Adoption of an IIA	Done in Dec. 2003 (IIA better lawmaking)	
	Strengthening mechanisms for identifying legislation that requires simplification	*Creation of a better regulation window on each DG website where interested parties can point at administrative burden*	-	*EK*	*# of DGs websites with a better regulation page; link on EK central website advertising these pages*	*On 1 June of 2005, launch of a public consultation on internet "10 Minutes to improve the business environment"; some DG created/updated web pages on better regulation*	*Creation of web pages on Better regulation by remaining DG; inclusion of a link on central website – no date*
	Promoting the use of European standards as technical support or alternative to legislation	*Unspecified*	-	*EK*	*set up of promotional actions; increase in the number of times the use of European standards is proposed and decided*	*In 2005 sectoral promotion of European standards; no data available on total number of proposals and adoptions*	
13	Reducing the volume of	Implementation of a concerted	End 2004	EK, EP,	Abrogation/repeal	Around 900 (counting in	

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
	Community legislation	consolidation and codification programme[133]		Council	of obsolete acts	progress)	
			2003	OPOCE	Consolidation of the entire acquis	Done since mid-2003 for the 11 'old' official languages. Delivery started in July 2005 for the 9 new languages (some 500 texts by end 2005)	Completion of consolidation in the 9 'new' languages - end 2006 at earliest
			End 2005	EK, EP, Council	Codification of the entire acquis	As of December 2005, adoption of 80 codified acts and 530 being processed (concerning 18000 pages of acquis	Catch up action – no date
					25% reduction of the number of pages of EC acquis	50% reduction, once consolidation in new languages & codification will be completed	Ongoing
		Introduction of fast track adoption procedures for codification proposals		EP, Council	Introduction of fast track procedures	Streamlining of adoption through ad hoc committee procedures in EP and Council	
Ensuring the quality of legislation which has been adopted (2.3)							
14	Ensuring the substantive quality of adopted acts and its compliance with the subsidiarity and proportionality principles	EP and Council conduct impact assessment of their substantial modifications to legislative proposals introduced during the 1st reading	2003 onwards gradually	EP, Council	Assessment of substantial modifications to all major proposals	Mid 2005, completion of 1st test by the Council End 2005, completion of 1st test case by the EP	Generalizing impact assessments of amendments – no date

[133] See COM (2001) 726 & COM(2002)71. The Commission's President ambitioned for the Union to reduce the volume of the *acquis* by 25% in terms of number of pages (corresponding to about 22.500 pages of the JO) by January 2005 (end of the mandate of the Prodi Commission).

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
		Commission continues delivering an opinion on the amendments	-	EK	Delivery of opinion / adoption of modified proposals	Done	
		Adoption of an IIA ensuring that EP and Council conduct IA of amendments	-	EK, EP, Council	Adoption of IIA introducing such obligation	Dec. 2003, IIA BL provides that EP and Council may do an IA of their amendments	Commitment by EP & Council to assess the impact of their amendments – no date
		Adoption of a Common Approach to assessments carried out at the different stages of the legislative process	-	*EK, EP, Council*	*Adoption of a Common Approach on Impact Assessment*	*Done in November 2005*	
15	Maintaining high drafting standards	In the case of last minute agreements, introduction of a standstill period allowing for proper editing by lawyer-linguists before final adoption	-	EP, Council	Procedural commitment of the legislator Compliance with the standstill procedure	Dec. 2003, possibility recognized by IIA BL (pt 31) No data available	
ACTION CONCERNING THE MEMBER STATES (PART 3)							
16	Ensuring that Community acts are transposed in national legislation correctly	MS introduce mechanisms ensuring that their central, regional and local authorities responsible for transposing and applying Community acts are involved as early as possible in the legislative process	-	MS	Introduction of early involvement mechanisms in all MS	Done in some MS	Introduction in remaining MS – no date
		MS establish consultation and impact assessment standards applying when proposed transposition measures go beyond what is required by EC legislation	2003 onwards grad.		Adoption of gold plating measures subjected to consultation and IA standards in all MS	Anecdotal evidence suggests that general standards are applied to gold plating cases in few MS	Application in remaining MS – no date

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
		(gold plating)					
		MS send to the Commission the results of consultations and IA concerning provisions going beyond EC requirements (together with the notification of national transposition measures)	2003 onwards grad.		Notification of results to the Commission by all MS	Large sampling suggests that it is not done	Transmission of results to the Commission – no date
		MS secure public access to the results of such consultations and IA	2003 onwards grad.		No derogation from general accessibility rules	General accessibility rules apply	
		MS should carry IA on draft national laws which they notify to the Commission (technical standards and regulations)	2003 onwards grad.		IA conducted for all draft national laws	Anecdotal evidence suggests that it is done in a minority of MS (as of 2005, obligatory in 6 MS and planned in 5 others)	Application in remaining MS – no date
		MS should carry consultations and IA when they exercise their right of initiative and make legislative proposals for CFSP or for Police and Judicial cooperation in criminal matters	2003 onwards grad.		Consultations & IA conducted for all proposals made by MS	Large sampling suggests that it is not done	consultations and IA for MS proposals – no date
16 bis	*Reinforcing better regulation as part of the national "Lisbon" programmes*	*Set up by all MS of a national better regulation strategies, including integrated impact assessment of national legislation*	*-*	*MS*	*# of MS having national BR strategies*	*In 2005, (foreseen) national BR strategy reported in 10 MS*	*Introduction of national BR strategy in 15 MS – no date*
		Set up by all MS of simplification programmes and supporting structures	*-*	*MS*	*# of MS having programmes & structures*	*In 2005, (foreseen) programmes & structures in 12 MS*	*Introduction of programmes & structures in 13 MS – no date*
		report by all MS on BR (planned)	*2005*	*MS*	*# of MS reporting*	*In 2005, BR activities were*	

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
		activities	*onwards*		*on BR activities*	*covered in all MS reports*	
		report by the Commission on MS activities in the Annual Progress Report on the Lisbon strategy	*2005 onwards*	*EK*	*Section on national BR activities in Annual Progress Report*	*Done in 2005*	
17	Improving the monitoring of the EC law transposition in national legislation and ensuring that transposition is done within deadlines	MS notify electronically their transposing measures through a standard form	-	EK	Set up by EK of electronic system	Electronic Notification database operational since May 2004	
				MS	Electronic notif. by all MS	Done by 24 MS	Notification by 1 MS
		MS send a concordance table between EC act and national transposing measures	2003 onwards grad.	EK	Requirement proposed by EK	Need for such requirement systematically examined and generally included in EK proposals	
				EP, Council	Requirement confirmed by legislator	Generally accepted by EP but rejection by Council in a limited number of cases	Get systematic confirmation of the Council – no date
				MS	Transmission of tables by MS	Large sampling suggests that most MS sent the required tables	Transmission of tables by remaining MS – no date
		MS appoint correspondents responsible for coordinating the transposition and application of Community acts	2003 onwards grad.	MS	Appointment of correspondents in all MS	Done by some MS	Appointment of correspondents in some MS – to be discussed in 2006
		Further development of preventive dialogue between EK and MS on best approach to implementation	*2005 onwards*	*EK, MS*	*Decrease in the number of infringements*	*To early to judge*	

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
Developing a common legislative culture within the Union (PART 4)							
18	Developing a common legislative culture among EU institutions	Creating a network between EU institutions responsible for the quality of legislation and implementation of the BR action Plan	2003	EK, EP, Council	Set up and proper functioning of interinstitutional network	Done by mandating the 'High Level Technical Group for interinstitutional cooperation' (1st monitoring meeting on 4 June 2004)	None
19	Developing a common legislative culture between the Commission and national authorities	Ensuring ongoing evaluation of how directives and regulations are applied	2003	EK, MS	Set up of evaluation mechanism	Done mainly through the infringement procedure.	
		Improving feedback from Member States	2003		Upgrade of feedback mech.	Done in November 2005 through the launch of the group of high-level national regulatory experts (see below)	
		Exchanging good practices	2003		Set up of exchange mech.	Done in November 2005 through the launch of the group of high-level national regulatory experts (see below)	
		Commission and MS work together to develop a joint approach to monitoring and applying Community legislation	2003		Adoption of joint monitoring and application approach	First informal contacts taken with some MS in 2004	Decision on joint approach – no date
		Set up of a group of high-level national regulatory experts	*2005*		*Set-up of the experts' group*	*First meeting in November 2005*	
		Set up of a network of technical experts (academics, practitioners, …)	*-*		*Set-up of a network*	*Logistical preparation of a network through SINAPSE*	*Setup of the network - 2006*
		Development of a set of common indicators to monitor the quality	*-*		*Adoption of a set of common indicators*		*Adoption of a set of common indicators –*

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
		of the regulatory environment at EU and MS levels					*no date*
20	Developing a common legislative culture between EU institutions and Member States	Reporting on the implementation of the Action Plan in the annual report on subsidiarity Reports on groups of Member States in turn	2003 2003	EK [134]	Specific section in the annual report	Done in 2002, 2003, 2004 & 2005 BL reports	 Replaced by reporting actions decided in March 2005 (see 16bis)
21	Making it easier to follow the progress of an act from its drafting by the Commission to its adoption and application	Expanding public access to EUR-Lex Exploring other options such as internet fora	2003 2003	EK, EP, Council	Free online access for all Concrete increase in accessibility	Done on 01/01/2002 In 2002, EK set up of Solvit network, redesigned of Prelex, put work programme of the Commission & minutes of Commission meetings on Europa site. In 2003, upgrade of the Council's Register (on-line consultation of 'partial access' documents), creation of co-decision database and upgrade of the European Parliament's 'Legislative Observatory' (links to full text documents) + single portal on Europa site with links to the registers of EU institutions and bodies.	None

[134] Commission "drawing on discussions with interinstitutional network".

	Objective	Action (ref.)	Initial target date	Remit	Progress indicator	Achievement (& date)	Left-over (& new target date)
		Wider mobilisation of info-centres and contact points for Community information	2003		Set up new mandate & actions	Improved support service, including hotlines and briefings, for contact points; preparation of 2nd generation information relais in 2004; improved Europe Direct with interactive and real-time web-assistance service	