The “better regulation” agenda: a challenge to the Community method?

Introduction

A number of factors have thrown the European project into profound turmoil: the “pause for reflection” on the European Constitution, the difficulty in agreeing a 2007-2013 budget to finance an ambitious policy for Europe, an enlargement which called into question both the rules governing the European Union (EU) and the balance of power amongst Member States, and new challenges flowing from globalisation, to name but a few.

In this context, recent Communications from the European Commission on “better regulation” mark a break with the established direction of Commission policy. Even those responsible for this policy area within the Commission express the view that the aim of the Commissioners responsible (G. Verheugen and C. McCreevy), under the guidance of President Barroso, is to focus on competitiveness and to give this whole policy area a “business oriented” look. The “better regulation” agenda – also sometimes referred to as “better law-making” – has moreover become one of the Barroso Commission’s top priorities (1): “One core area...”

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(1) The Commission President, José Manuel Barroso, has always indicated a personal preference for the liberal view of Europe, preferring to give free reign to the markets and to business. In an interview with the Financial Times on 13 September 2005, he stated: “I’m not against regulation at a European level, but we are no longer in the heroic era of Jacques Delors, completing the single market with a new piece of legislation every day”.

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of the Lisbon Agenda is better regulation” (Barroso, 2005). In vain do the Commissioners protest that the aim is not to bring about a policy of deregulation: certain attitudes will, by their very nature, sow the seed of doubt as to the actual intentions of those promoting this policy agenda.

The Herculean task facing certain EU countries – France and Belgium in particular – bears witness to this. At Council after Council they seek to reintroduce references to the three pillars of sustainable development (economic, social and environmental development), to the need for harmonisation and for respecting the Community method. Are the *acquis communautaire*, the Interinstitutional Agreement and the principle of balance between these three pillars actually part of a framework of reference which should reassure, or rather a delusion which veils the true nature of a completely different agenda?

For those yet to be convinced of the relevance of the question, one has but to consider three underlying trends within the European Union:

1) The liberalisation of services of general economic interest (SGEI) is inexorable, and the demarcation line between liberalisation and gradual privatisation is becoming increasingly blurred (?), sometimes as a reaction to the market, sometimes in anticipation of events. In the wake of full liberalisation of the aviation, telecommunications and energy sectors, liberalisation is proceeding in a number of other sectors: the railways, postal services and port services (?);

2) State aids are mentioned in the Treaty as being measures deemed incompatible with the Treaty, to the extent that they distort or threaten to distort competition, with the exception of waivers authorised by the Treaty itself (?). Nevertheless, the Commission

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2 And that notwithstanding Article 295 of the Treaty (ex Article 222) which provides that European Union provisions shall in no way prejudice the rules in the Member States governing the system of property ownership.

3 NB the rejection by the European Parliament of the second proposal for a Directive seeking to liberalise port services on 18 January 2006.

4 It would appear that there is increasingly rather a narrow interpretation of Article 87(1) of the EC Treaty, which is becoming ever further removed from the concept of competition.
The “better regulation” agenda appears to be becoming more radical. All State aids are being phased out except for those deemed by the Commission, exercising its sovereign authority, to be in the common interest. Furthermore, a Member State may only have recourse to State aids to the extent that they offset a “market defect”, a concept unknown in the Treaty which recognises the primacy of the market;

3) Reliance on public procurement procedures has become the norm. The competitive tendering procedure, which is compulsory when local public service contracts are being awarded, is leading to creeping privatisation in this area. Direct public sector management or State control is becoming the exception.

In these three instances, the State is generally requested to make way for private sector investors who are thought to be more competitive and perform better economically.

The “better regulation” agenda is part of a whole range of converging policies. How could one fail to see the links between the three trends mentioned above and “better regulation”? The introduction of “better regulation” – which to its proponents means less legislation (cf. the recurring theme “less State aid but better aid”) and alternative methods of regulation (voluntary codes, co-regulation, self-regulation or deregulation) – is part of an overall context of “less State” with regulation left to market forces. It will become apparent that the proposal for a Services Directive is indeed an exemplar of the concept of “better regulation”, as are both the Directive on professional qualifications (European Parliament and Council of the European Union, 2005) and the REACH Directive.

The convergence between the overlapping and in part mutually reinforcing agendas mentioned above is a powerful tool in bringing about deregulation. In our opinion, it also threatens to bring about an unprecedented fragmentation of the acquis communautaire and the Community method. This article will focus only on the elements of “better regulation” contained in the various “packages” of initiatives put

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forward by the Commission: simplification of legislation, “screening” of Community legislation, impact assessment of the Commission’s intended legislative proposals and an estimate of administrative costs. Some tentative conclusions will then be advanced, in an attempt to identify a central theme linking different policy areas of this agenda.

1. Terms of the debate

The evolution of the European Union over the past fifty years has given rise to a considerable number of legislative texts. The acquis communautaire now encompasses some 80,000 pages covering 220 different legal bases and some 1,400 legal acts across that spectrum. This is a substantial amount, and yet it is not excessive in comparison to US legislation, which runs to greater length. EU enlargement has necessitated the translation of all these legal acts into the 20 official languages of the Community, a huge amount of work.

The principal justification for the “better regulation” agenda lies in the fact that Community and Member State regulation is often said to be too heavy-handed (6), and to constitute a major barrier to the competitiveness of the Union, stifling European companies, particularly by comparison with their US competitors but also as compared to competitors from the emerging economies.

A number of studies commissioned by the European Commission suggest that European firms feel they are hampered by the poor quality of regulation. The EOS/Gallup study (CEC, 2001a: 2) carried out for the Commission found that regulatory costs amounted to 4% of Community GDP. Around 15% of those costs, some 0.6% of GDP, could be avoided by better regulation, which would bring about savings of the order of €50 billion, according to EOS/Gallup. A very recent study by George M.M. Gelauff and Arjan Lejour (CEC, 2006), based on a method known as the “Standard Cost Model” (7), estimates costs for business in the Netherlands alone at €16.4 billion, or 3.7% of Dutch

6 The expressions most frequently used in this context are “Brussels red tape” and “EU over-regulation”.

7 See explanation in point d of section 2.2.3.
The "better regulation" agenda

GNP. Gelauff and Lejour estimate that 40% of this total is generated by international legislation, most particularly Community legislation. In 2002, the Dutch Government therefore decided to cut the “administrative burden” by 25%, equivalent to 0.9% of GNP (€4.1 billion). The OECD embraced this initiative which subsequently became one element of its overall strategy. The European Union in the shape of the Economic Policy Committee (EPC) followed suit, though without any critical study assessing the quality of the arguments put forward by EOS/Gallup and by the Dutch Centraal PlanBureau.

There are three facets to the “better regulation” agenda. They correspond to the “stages” of the “legislative” process: simplification and improvement of the quality of texts, screening of existing legislation (ongoing assessment) and monitoring of legislation pending. The outcome of this work is normally incorporated into the legislative programme of the Commission, which comprises only straightforward pieces of legislation meeting the needs of the EU. The assessment of how the legislation impacts on competitiveness, and the calculation of administrative and regulatory costs, are the final stage of the process, the purpose being to ease the administrative “burden” on companies and on EU competitiveness in general.

It is useful to point out at this stage that there is an inherent ambiguity here. Firstly, the simplification of texts does not necessarily equate to improvement, nor vice versa (8). These are disparate objectives, which must be seen against the backdrop of enhanced legal certainty. Secondly, a causal link is established between a level of regulation and EU competitiveness. This structural link is not directly proportional. Competitiveness depends on a whole range of factors which go far beyond the realm of regulation: for example, management (9), the level of education and training of

8 “It is this pressing need for simplicity to convey what is inherently complex that is deceptive. One cannot avoid the conclusion that it is used systematically, even dogmatically and has been elevated to the status of an indispensable rule of political engagement for some years now” (Monjal, 2003: 349).

9 See in this context the recent study by Dorgan et al. (2006: 1); “Managers are more important than the industry sector in which a company competes, the regulatory environment that constrains it [our emphasis], or the country where it operates.”
entrepreneurs, productivity, infrastructure quality, technological and non-technological innovation, creativity and inventiveness of business. It will later be appropriate to reflect on why the “better regulation” agenda has been identified as one of the key features of the competitiveness agenda, whilst it is in fact only one amongst a range of elements in a global strategy, and probably not the most crucial at that.

Within this agenda, the Commission divides the improvement of Community legislation into two parts: simplification (10) and regulatory amendment.

1.1 Simplification

The aim here is to simplify the substance of a regulation and ensure that it is more user-friendly. There are four parts to this exercise.

a. Repeal

Repeal means the withdrawal of legal acts which are “superfluous, insignificant or archaic”. Quite a number of legislative acts adopted since 1957 are now irrelevant or obsolete by virtue of technical or technological progress, developments in Union policy, changes in the way in which the general Treaty rules are applied, or the introduction of international regulations or standards. Many of the outdated legal acts have been repealed already. Some, however, continue to impose obligations, mainly of an administrative nature, on both authorities and businesses. The Commission intends to continue its efforts to repeal legal acts which are irrelevant or obsolete (11). Hence 28 of the 56

10 It should be noted in this context that the Belgian Central Economic Council finds the term “simplification” somewhat infelicitous and prefers to use the term “improvement of existing legislation” (Opinion of the Central Economic Council on “Better Law-making”, Brussels, 21 December 2005 http://www.ccecrb.fgov.be/ext/ft/doc05-1392.pdf).

11 Consideration has been given to the possibility of including “sunset clauses” in the Commission’s legislative proposals to avoid acts becoming obsolete, and more generally to oblige the legislator to check regularly the relevance, effectiveness and proportionality of regulations in force. Without precluding this option, the Commission is nevertheless of the opinion that a review clause fulfils the same objective whilst presenting a lower risk of legal lacunae.
Directives on vehicle type-approval will be repealed and replaced by regulations of the UN Economic Commission for Europe.

b. Codification/consolidation

Codification (12) is a procedure whereby all the provisions of an act and all its amendments are brought together in a new binding legal act. This act repeals the legislation it replaces, but without changing the substance of those provisions. For example, the 1976 Directive on cosmetics: 7 consecutive amendments and 37 Directives introducing amendments reflecting technical progress will be codified and simplified to form a single new Directive. The Commission will continue its codification programme (13), with a view to completing the codification of the acquis communautaire by 2007. The translation and subsequent consolidation (14) of the acts across the 20 official languages will substantially increase the number of codified texts to be adopted from the end of 2005. Codification is intended to eliminate duplication. It should however be noted that although this method is generally presented as neutral in terms of substance, a number of reservations have been expressed in this regard. Evidence of this can be seen in the way Member States reacted to the Directive on “professional qualifications” (European Parliament and Council of the European Union 2005), presented by the Commission as a consolidation of previous texts, but deemed by Member States to go beyond what could be described as a legal tidying-up exercise.

c. Recasting

Recasting is a procedure whereby a new binding act repeals and replaces certain acts, combines amendments to the substance of the legislation and codifies the remaining unamended sections. A single piece of

12 Codification is of great assistance in reducing the volume of Community legislation and simultaneously produces clearer and more readable legal texts. This in turn facilitates transparency and enforcement.

13 In November 2001, the Commission launched a major drive towards codifying all secondary Community legislation (CEC, 2001b).

14 Consolidation is a procedure whereby the provisions of an act and all its amendments are gathered together mechanically without any intervention whatsoever.
legislation is then adopted which incorporates substantial amendments, codifies both these and the unamended provisions of the previous act, and repeals the previous act. Health and safety of workers, for example, is covered by 20 Directives. The revision of these texts will allow harmonisation of the frequency of reporting. Acts which are codified, revised or simplified must be submitted to the legislature for adoption, since the structure or substance of the acts has been altered.

d. Use of Regulations

On occasion, the Commission considers the best method of simplification to be the replacement of Directives with Regulations. The latter are applicable with immediate effect, and guarantee that all parties affected are subject to the same rules at the same time. The Commission has been keen to emphasise that Directives will be replaced by Regulations on a case-by-case basis. It will encourage replacement “whenever possible”, particularly in respect of technical rules, so as to ensure better implementation of texts.

1.2 Modification of the regulatory approach

This heading covers what is modestly referred to as “alternatives to legislation”. There are essentially two variants here: self-regulation and co-regulation (15).

a. Self-regulation

Self-regulation gives economic operators, the social partners, non-governmental organisations and associations the opportunity of acting jointly. They themselves are free to adopt, for their own purposes, common guidelines at EU level, such as voluntary codes of conduct or sectoral agreements (cf. § 22 of the Interinstitutional Agreement).

b. Co-regulation

Co-regulation is a mechanism whereby a Community legal act entrusts recognised parties involved in the sector with the responsibility for

15 This article will not cover the “new approach” Directives on technical harmonisation, which combines legislative and non-legislative elements, nor the open method of coordination (OMC). On this, see Zeitlin and Pochet (2005).
achieving certain goals set down by the legislative authority, (in particular economic operators, the social partners, non-governmental organisations or associations) (cf. § 18 of the IIA). The setting of standards by independent bodies is an example of a recognised form of co-regulation. The Commission actively encourages this type of arrangement as an alternative or in addition to the legislative method (CEC, 2004a and 2005a). It has moreover indicated its wish to extend co-regulation to new areas, such as cosmetics, the automobile and tractor sector and the banking sector.

2. Role of the institutions

2.1 Role of the European Council

2.1.1 Impetus given by the Lisbon European Council (2000)

The Edinburgh European Council, in December 1992, recognised simplification and improvement of the regulatory environment as one of the main priorities for the European Union. However, it was the Lisbon European Council on 23 and 24 March 2000 which decided that the strategic goal for the decade to come was: “to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion” (European Council, 2000: point 5). The European Council observed that: “The competitiveness and dynamism of businesses are directly dependent on a regulatory climate conducive to investment, innovation, and entrepreneurship. Further efforts are required to lower the costs of doing business and remove unnecessary red tape, both of which are particularly burdensome for SMEs. The European institutions, national governments and regional and local authorities must continue to pay particular attention to the impact and compliance costs of proposed regulations, and should pursue their dialogue with business and citizens with this aim in mind” (European Council, 2000: point 14).

2.1.2 Confirmation at the Brussels European Council (2005)

The European Council regularly restated this goal in its conclusions (16), until the Brussels Summit on 15 and 16 December 2005 under the

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16 The mandate conferred by the Lisbon European Council was restated at the European Councils in Stockholm (23 and 24 March 2001), Laeken (8 and 9 December 2001) and Barcelona (15 and 16 March 2002).
British presidency, when it expressed a carefully measured view on the matter. On the one hand it gave a commitment to the countries most attached to the Community method, recalling that it was committed to the *acquis communautaire* and the Interinstitutional Agreement which underpins it: “Taking due account of the principle of subsidiarity and proportionality and the importance of respecting the acquis communautaire, the European Council stresses that an improved regulatory framework in the European Union, at Community and Member States level, is key to delivering growth and jobs. Emphasis should be placed on implementing commitments already made by all institutions, including the provisions of the Interinstitutional Agreement on Better Law-Making of 16 December 2003” (European Council, 2005: point 20). It equally makes a commitment to the more liberal countries keen to push ahead with the “better regulation” agenda: “On that basis, the European Council welcomes the significant progress made since its last meeting and agrees on the importance of further work as set out in the attached annex covering i) reducing burdens on business and citizens through simplification and screening; ii) the revised impact assessment system and iii) EU common methodology for assessing the administrative costs of legislation” (European Council, 2005: point 20).

2.2 Role of the Commission

Strengthened in its resolve by the mandate from the European Council, the European Commission now plays a pivotal role in shaping the policy agenda in this area. It translates the intent and decisions of the European Council and the Council of Ministers into actual programmes. Since the Lisbon European Council, the Commission has really taken control of the agenda here and has put forward three packages of texts for the co-legislators to consider.

2.2.1 The 2001 “package”

“Renewing the Community method” (CEC, 2001c) became the Commission’s mantra when in 2001 it published the first Communication on the subject. For the European Union executive, the renewal of the Community method is a necessary “response to globalisation and enlargement”: the world has changed. In the words of the Commission, one must therefore reflect on how the Union’s powers are used, and how to ensure compliance with the principles of subsidiarity and proportionality. Democratic legitimacy and the
efficiency of the European institutional system must be enhanced. There are four parts to the 2001 package:

- an initial interim report for the attention of the Stockholm European Council, in March 2001, assessing the situation and outlining some possible avenues for further exploration (CEC, 2001d);
- a White Paper on European governance adopted in July 2001 (CEC, 2001e);
- a Communication (17) on the future of the Union entitled “Renewing the Community method” (CEC, 2001c);
- a more political Communication, submitted to the Laeken European Council, seeking to consult the Council, the European Parliament and the Member States on the central themes of this Action Plan (CEC, 2001a).

In the first package, the Commission’s basic premise is that the legislative method is often only one part of a wider solution which combines formal rules with other, non-binding, rules such as recommendations, guidelines or even self-regulation within an agreed common framework. It makes the case for an increased use of Regulations in cases where uniform implementation and legal certainty are required throughout the Union. The more frequent use of “Framework Directives” would be advisable. Irrespective of the type of legislative instrument selected, greater use should be made of “primary” legislation, pared down to the bare essentials (basic rights and obligations), so that the executive retains the responsibility for

17 This very brief 9 page document is interesting to the extent that it contains several statements of fact: “(EU) overall coherence has gradually been lost” and “the world has changed”. The Commission goes on to observe that if “the collective interest requires that the results and overall coherence of 50 years of European integration should not be called into question, we are fully justified (…) in examining closely the current situation with regard to our powers in order to refocus them if necessary. It would in any event be worthwhile seeking a rational presentation as possible of the respective responsibilities of the Union and the Member States and clarifying them (…). The Commission therefore recommends paying particular attention to monitoring the principles of proportionality and subsidiarity which require action to be taken at the most appropriate level” (CEC, 2001c: 6).
monitoring technical compliance through the application of rules of secondary law.

The Commission’s view is that implementing measures may on occasion be part of a co-regulation framework (18). This combines binding legislative or regulatory measures with measures implemented by those most involved in the sector, taking advantage of their practical experience (19).

2.2.2 The June 2002 “package”

Following its initial Communications in 2001, the Commission confirmed its approach through a set of three documents, which formed the basis for the Community’s work over three years:

- a Communication on European governance (CEC, 2002a)
- a Communication on impact assessment (CEC, 2002b)
- an Action Plan entitled “Simplifying and improving the regulatory environment” (CEC, 2002c).

18 It is interesting to observe that the Commission takes great care to provide for the use of co-regulation: “Co-regulation implies that a framework of overall objectives, basic rights, enforcement and appeal mechanisms, and conditions for monitoring compliance is set in the legislation. It should only be used where it clearly adds value and serves the general interest. It is only suited to cases where fundamental rights or major political choices are not called into question. It should not be used in situations where rules need to apply in a uniform way in every Member State. Equally, the organisations participating must be representative, accountable and capable of following open procedures in formulating and applying agreed rules. This will be a key factor in deciding the added value of a co-regulatory approach in a given case. Additionally, the resulting co-operation must be compatible with European competition rules and the rules agreed must be sufficiently visible so that people are aware of the rules that apply and the rights they enjoy. Where co-regulation fails to deliver the desired result or where certain private actors do not commit to the agreed rules, it will always remain possible for public authorities to intervene by establishing the specific rules needed” (CEC, 2001e: 21).

19 Co-regulation has already been used in areas such as the internal market (adoption of product standards via Directives using the so-called “new approach”) and the environment (reduction of pollutant emissions from automobiles).
The particularly new aspect to this package is the Commission Communication on impact assessment and the adoption of the Action Plan, the fundamentals of which were established in 2001.

2.2.3 The 2005 “package”

The Commission continued in the same vein with the publication of a package of four Communications on:

- a strategy for the simplification of the regulatory environment (CEC, 2005b)
- impact assessment guidelines applicable prior to the adoption of any major new legislation (CEC, 2005c);
- outcome of the screening of legislative proposals pending before the legislator (CEC, 2005d).
- an EU common methodology for assessing administrative costs imposed by legislation (CEC, 2005e).

a. Communication on the simplification of the regulatory environment, October 2005

This Communication (CEC, 2005b) is the result of extensive consultation amongst Member States and stakeholders plus internet-based consultation. The Communication is the beginning of an evolving process which is to be taken forward beyond the three-year working programme established by the Commission. The simplification programme comprises 220 basic texts. The Commission envisages five methods of simplification:

- repeal (10);
- codification (25 texts);
- recasting of texts with a view to ensuring coherence and effectiveness (140 measures);
- revision of texts in order to simplify them (30 texts);
- modification/update of texts to ensure compatibility with “modern management” (20) (15 texts).

The Commission has stated that it will incorporate measures to enhance competitiveness into its simplification proposals. This aim emerges clearly from the internet consultation. The Commission adds, however, that it will have to face up to the consequences of this approach, particularly in terms of social and environmental objectives and consumer protection.

It is interesting to observe that the Commission underlines in its document that “Better regulation is (...) not de-regulation” and that “The review of the acquis must become a continuous and systematic process” (CEC, 2005b: 3). One should note furthermore that “To pursue the evaluation of the acquis beyond the present simplification programme, the Commission will identify the need for simplification from a sectoral perspective. It will include an analysis of the benefits and the costs, administrative and others, of the legislation in question” (CEC, 2005b: 5). In contrast, the Commission observes that “It is important that the repeal of Community instruments are followed by the repeal of the corresponding national implementing measures in order to have the desired practical effect. It needs to be ensured that the advantages of a lighter Community regulatory environment are not cancelled out by new national rules and new technical barriers. In this regard, the Commission sees its proposal to repeal the pre-packaging directive as a test of the political willingness of the co-legislator to take up the simplification challenge” (CEC, 2005b: 6). This last proposal (CEC, 2004b) effectively embodies a mechanism which prevents Member States from regulating at national level matters which are deregulated at Community level. Some observers have reacted critically to this provision, to the extent that it restricts the regulatory powers of Member States.

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20 For example compatibility with modern electronic methods in the customs sector or public procurement.
b. Communication on impact assessment, March 2005

In its Communication issued in March 2005 (CEC, 2005f), the Commission defines a new approach aimed at improving regulation still further with a view to enhancing competitiveness. It concentrates on three points:

1) improving and extending the use of impact assessment for new proposals, including the establishment of a method for quantifying administrative costs (CEC, 2005d);

2) screening of pending legislative proposals;

3) introducing a new method for simplifying existing legislation.

This Communication is intended to be a direct follow-up to the mid-term review (CEC, 2005g) of the Lisbon strategy; its priority objective is “improving European and national legislation in order to promote European competitiveness and thus stimulate growth and employment” (CEC, 2005f: 3).

The Commission makes an ever closer link between the level of legislation and competitiveness, which in our view is likely to lay the whole exercise open to abuse. Whilst it may be clear that an excess of ill-judged legislation will have an adverse impact on competitiveness, it is harder to see that clearer and more transparent legislation or the use of alternative methods will necessarily enhance competitiveness, since that depends in the first instance on factors such as management, productivity, innovation, the quality of infrastructure, and the tax system. Moreover, many open questions remain. What elements will be taken into account for the purpose of impact assessment and cost analysis of a piece of legislation? How will the economic factors be weighted as against social and environmental considerations? Who will be responsible in practice for carrying out this analysis, and for subsequent dispute resolution? An unsustainable link is sometimes made between “bureaucratic administrative burdens” and the “necessary level of regulation”. There is inevitably a risk that

21 The Commission’s major independent review of the impact assessment system is due to start in March 2006 and to be completed towards the end of that same year, despite the cumulative delays.
methodological expedients may be used in the collection and collation of data, especially if the assessor makes assumptions or uses a false premise in his or her research. Moreover, this reform seems to be driven by considerations of short-term competitiveness.

c. Outcome of the screening of legislative proposals pending before the legislator

In its Communication of 16 March 2005 (CEC, 2005f) (22), the Commission indicated that it intended to select legislative proposals which it had adopted prior to 1 January 2004 and which remained pending. This it did in on 27 September 2005, in the Communication entitled “Outcome of the screening of legislative proposals pending before the legislator” (CEC, 2005d) (23). After reviewing 183 proposals pending before the European Parliament and the Council, the Commission announced that it intended to withdraw one third of these measures: 68 legislative proposals. Its view was that a number of these proposals either no longer chimed with the objectives of the New Partnership for Growth and Jobs (the Lisbon Strategy) or did not meet the standards required for better regulation. A number of texts were withdrawn from the list, such as the proposal on banning heavy goods vehicle traffic at the weekend, or the protection of workers from over-exposure to the sun’s rays. In other cases the Commission’s view was that the legislative process was not moving ahead rapidly enough or that the proposals were simply no longer relevant.

The publication of the 68 measures withdrawn by the Commission was discussed at the Competitiveness Council on 29 November 2005, when France and Belgium took issue with the withdrawal of two proposals

22 The Commission Communication and the comprehensive list of proposals to be withdrawn are available on the following site: http://europa.eu.int/comm/enterprise/regulation/better_regulation/docs/en_br_final.pdf.

23 The tidying-up of the acquis communautaire has been underway for some time. The most recent edition dates from the period 2004-2005. It is not unusual for the Commission to carry out a tidying-up exercise of this type. What has changed however, is the publicity given to it, and also the fact that the terms of reference appear to be different from those in previous editions.
respectively on European associations and European mutual societies. This initiative also aroused suspicion amongst MEPs, who had not been consulted on which proposals were to be withdrawn (24). Hence, of the 68 texts, 20 were obsolete or null and void, but 40 were blocked in the Council due to opposition by one or more Member State. Only seven texts met with opposition from the European Parliament. Many other proposals for legislation at European level, which would unquestionably have been useful and indeed desirable in the opinion of those involved in the sector, were abandoned: for example, provisions on the use of diesel for business purposes, working conditions for temporary workers, protection of cod and herring stocks in the North Sea, and the ban on heavy goods traffic at weekends. It would therefore appear that the Commission joined forces with the Council against the European Parliament. Does this approach on the part of the Commission herald a shift in alliances within the institutional triangle of the Union? It is still too early to say for sure.

c. Proposal for a Regulation establishing a statute for the European Mutual Society (25)

Even though Council work on this text had effectively ground to a halt in 1996, the Commission’s withdrawal of the proposal for a Regulation on the European Mutual Society was immediately opposed. The withdrawal of the text appeared unjustified to backers of mutual societies and to the progressively-minded, but also to France and Belgium. With the recent introduction of the European Company and the European Cooperative, the regulation on the European Mutual Society was really necessary in order to complete the legal framework within which companies are authorised to operate in the internal market.

Mutual societies indeed appear to be a structural part of the internal market. This statute exists in twenty of the 25 Member States of the

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24 The Commission, which alone has the right to initiate legislation, may withdraw its text so long as it has not received final approval by the European Parliament and the Council.

25 1991/0390/COD.
Union (26). Mutual societies account for a substantial part of the European market. In insurance for example, they represent almost 20% of the European market.

Secondly, these companies must be able to benefit from the advantages of the internal market in the same way as others with a discrete statute. The lack of a European Statute places these companies at a competitive disadvantage by comparison with, for example, limited companies. A merger of mutual societies at European level, or the creation of European-scale groups of mutual societies are in practice hindered by the lack of common rules.

Finally, the draft Directive on cross-border mergers does not appear to take this situation into account, particularly because it does not provide clear and discrete rules for mutual societies. A European Regulation would enable harmonisation of the rules which would in turn pave the way for consolidation of mutual societies.

At the Competitiveness Council on 29 November 2005, France and Belgium intervened in order to explain to the Commission that they did not wish this text to be withdrawn, and to request that fresh discussions be initiated on the matter. Finally Vice-President Verheugen promised that the Commission would draft a new proposal (27).

The cost of a piece of legislation is very difficult to determine. Some experts, including the Commission, believe that the analysis of Dutch legislation was done in an “approximate” way, using the interview method. Is this a scientific method?

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26 This statute does not exist in Estonia, Lithuania, the Czech Republic, Slovakia or Greece.

27 To date, consultations are still underway between the Commission and the EP. The list has not yet been published in the OJ, which means that the proposals on the European Mutual Society and the European Association remain on the table.
d. Communication on an EU common methodology for assessing administrative costs imposed by the 2005 legislation

Besides impact assessment, the Commission engaged on a second front, namely calculating the impact of legislation on competitiveness and on companies (28). On 21 October 2005, it presented favourable conclusions on the pilot study it had carried out between April and September 2005 on a common methodology for assessing administrative costs imposed by legislation (29).

The common approach would be based on the Standard Cost Model, which has attracted interest from an increasing number of Member States (30). This method, used for the first time in the Netherlands in 2002, was conceived as a tool which could be used to quantify progress in reducing administrative burdens at national level. It consists of a detailed evaluation of the different legislative texts, based mainly on direct discussions with business and expert opinion (micro-evaluation). This method requires the collection of data on the time and wage costs involved in meeting the information obligations imposed by a legislative act, as well as data on the number of entities concerned. It should be noted that the “standard cost” method focuses exclusively on wage costs incurred by the company in order to comply with legislative obligations, without factoring in any possible favourable impact of the legislation in terms for example of legal certainty.

28 The issue of reducing administrative costs for business is being addressed under the auspices of the Ecofin Council on the basis of texts forwarded to it from the Economic Policy Committee. Ecofin has discussed this issue on several occasions.

29 The importance of quantifying these costs has been highlighted regularly by the Ecofin Council and the European Council.

30 For instance, the Netherlands and Denmark have assessed all their legislation and systematically analyse the impact of all new measures. The UK and the Czech Republic are preparing to follow suit, and at least seven other Member States have taken measures to test the Standard Cost method in one or two sectors.
The Commission has reached a favourable conclusion regarding the feasibility of an EU-wide common method. Fortunately, it has accompanied its recommendation with a number of caveats, namely that (1) all EU Institutions and Member States use the same definition, core equation and reporting sheet when assessing administrative costs at EU level; (2) the EU common methodology is applied in a proportionate manner, (3) that more Member States coming from all parts of the Union are willing to contribute and (4) adequate level of staffing and financial resources are available within the Commission for assessment and evaluation. The Commission nevertheless states in its document that “a number of methodological points could not be fully addressed and there were problems with the availability and accuracy of basic data” (CEC, 2005e: 4). This admission by the Commission itself should surely inspire caution on the part of its co-legislators.

Finally, the Commission is proposing to work on the assessment of net administrative costs (new costs imposed by an act minus costs eliminated by that same act), in order to avoid the need for costly periodic evaluation. At this stage, the Commission has not yet decided to add the assessment of administrative costs to the impact assessment of each new legislative provision. It will do so once certain sectors have been identified for simplification purposes. To this end, the Commission has embarked on a pilot study (31) to test methods for the quantitative assessment of burdens imposed by both existing and proposed Community legislation. First results should be available in early 2006.

2.2.4 Legislative programme for 2006

In 2005, the Commission increased the pace of work on improving the regulatory environment. It intends to continue with this in 2006 and to roll out implementation of better regulation. In the new legislative programme for 2006 (CEC, 2005h), it undertakes to achieve the following progress:

- Subsidiarity and proportionality (act only where necessary and using the “lightest possible touch”).

31 See SEC (2005) 175. The pilot projects will include areas such as statistics and construction materials.
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- **Consultation** (use of existing tools to involve citizens in the decision making process and will encourage new forms of consultation),

- **Impact assessment** (to be implemented systematically for all legislative and policy-defining proposals contained in the Work Programme for 2006; impact assessments conducted during 2006 will be preparatory work for the 2007 programme) (32).

- **Legislative simplification** (new phase in simplifying legislation launched in October 2005; setting out a 3-year rolling programme to examine legislation. In the first phase, the focus will be on the automotive, construction and waste sectors).

- **Administrative simplification** (review of internal procedures of the Commission to deliver significant internal simplification, notably regarding administrative, financial management, and tendering and public procurement).

In 2006, the “better regulation” agenda will be central to the Commission’s activities. Its work programme will be subject to a mid-term review in the summer of 2006, and will be subject to amendment at that point if necessary.

An observer cannot fail to be struck by the drastic reduction in the number of legislative initiatives proposed by the Commission in its 2006 work programme, and the resultant “pride” on the part of both Commission President José Manuel Barroso and Commissioner McCreevy.

### 2.3 Role of the EU Council

The EU Internal Market Council played an important role as intermediary and coordinator firstly in approving the final report (33) of the high-level advisory group known as the “Mandelkern Group” which was established by Civil Service Ministers in November 2000.

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32 The sole cases where impact assessment is not required are Green Papers and consultation with the social partners. In these cases impact assessment is carried out at a later stage if the initiative is to be taken forward.

33 Final report by the high-level advisory group chaired by Mr Mandelkern, published on 13 November 2001 under the Belgian Presidency.
The so-called “Mandelkern report” was drafted by an advisory group consisting of experts at European Union level. The group was established in order to give effect to the conclusions of the European Councils of Lisbon and Feira in 2000. The conclusions from both of these summits highlighted the importance of high-quality regulation in the EU, and asked the Commission, the Council and the Member States to coordinate efforts in order to define a strategy for simplifying the regulatory environment, including public administration, at both national and Community level. This group’s report identifies areas conducive to a coordinated approach and defines a common method for assessing quality of regulation. Similarly, the group was also given the remit of studying the systematic use of impact assessment, transparency in the consultation process when texts are being drafted, simplification of legislation in force, the more widespread use of codification and the establishment of structures intended to guarantee the implementation of high-quality regulation. Its remit covered both national and Community levels.

Thereafter, in the wake of the reform of configurations of the Council introduced under the Spanish presidency (2000), the Competitiveness Council inherited overall responsibility for piloting proposals under heading of “better regulation”. In December 2004, the Ministers of Finance and Economic Affairs of six Member States (34), representing their countries in the Ecofin and Competitiveness Councils, signed a joint letter seeking to impart fresh impetus into the process of improving regulation. Since then, the Ecofin Council has been dealing with the budgetary aspects, whilst the Competitiveness Council retains overall responsibility for the management of this agenda. Under each EU Presidency, the latter has adopted Council conclusions calling on the Commission to continue its work, bearing in mind a series of political imperatives: respect for the *acquis communautaire*, the Community method, the Interinstitutional Agreement, the principles of subsidiarity and proportionality, the balance between the three pillars of sustainable development etc.

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34 The four original members (Ireland, the Netherlands, Luxembourg and the United Kingdom) have been joined by Austria and Finland, the Member States holding the Presidency in 2006.
2.4 The European Parliament: in retreat?

In the motion for a resolution on the European Parliament report by Sylvia Kaufmann MEP (GUE), which was adopted on 28 November 2001, the European Parliament “considers that the drafting of an “action plan for better regulation” by a Council working party (Mandelkern group on better regulation) and, at the same time, by a Commission working party with a similar brief, represents a serious breach of the Community method [our emphasis], for Parliament, as co-legislator, was neither informed of, nor involved in, the work of these working parties” (European Parliament, 2001: point 30).

Since then the European Parliament has considered the matter on several occasions (35). When the parliamentary committees were consulted for their views on the Commission’s priorities for simplification in 2006, they stressed that “this approach should not lead to a re-writing of the acquis communautaire outwith the scope of democratic accountability”. They pointed out that “simplification should not be used as a pretext for calling into question policies which have been adopted, and stand by the distinction between technical simplification and simplification of policy”. Finally, some committees “deplored the lack of analysis of the true impact of simplification in real terms, since it could imply changes of substance which should be subject to democratic scrutiny, however minor” (36).

In conclusion, it is appropriate to look at two draft reports currently under discussion. The first (European Parliament, 2006a) is by the Italian MEP Giuseppe Gargani (PPE-DE). He endorses, inter alia, the Commission’s view that “the repeal of irrelevant and obsolete acts” should go hand in hand with a Community act “to prevent Member States regulating matters that have been deregulated at Community level” (point 3). The other report (European Parliament, 2006b), by the Dutch MEP Bert Doorn (PPE-DE), “notes that much secondary legislation comes into being via the ‘comitology procedure’; considers that such legislation must meet the same quality requirements as primary legislation and that it must therefore also be subject to impact assessment” (point 6).


2.5 The Interinstitutional Agreement of 23 September 2003

An Interinstitutional Agreement (IIA) on Better Law-making (37), adopted in December 2003 by the three European institutions (European Parliament, Council, Commission), establishes a global strategy for better regulation within the framework of the overall legislative process of the EU. While recalling the undertakings made by the Commission in its Action Plan for improving regulation, the IIA also sets out the commitments made by Parliament and the Council in terms of improving the legislative process. Amongst the principal features are improved coordination and greater transparency in interinstitutional arrangements and the creation of a stable framework for “non-binding instruments” (38), which should facilitate their future use, increased use of impact assessment in Community decision-making, and changes by Parliament and Council to their working methods so as to accelerate the adoption of legislative proposals on simplification. It is worth noting that the IIA is very cautious in respect of alternatives to legislation: “The three Institutions (...) recognise the need to use, in suitable cases [our emphasis] or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms” (39).

Follow-up to the Interinstitutional Agreement

The Interinstitutional Agreement sowed important seeds in terms of improving legislative cooperation. The Irish and Dutch presidencies embarked on follow-up work, which during the second half of 2004 focused particularly on two aspects of the Interinstitutional Agreement, namely impact assessment and simplification.

In terms of impact assessment, a wide-ranging consensus has emerged behind the view that the Council should discuss the Commission’s impact assessment more systematically. The Commission is called upon to flag up, in its impact assessment, any probable substantive modifications and

38 The “non-binding instruments” are co-regulation and self-regulation.
amendments, so as to restrict the number of impact assessments required whilst the other institutions are carrying out their legislative role (to avoid delay and duplication). Henceforth, impact assessment at Council level should be coordinated by the respective presidencies in close cooperation with the Commission (in particular as concerns technical and methodological support), the General Secretariat of the Council and the Member States.

The Council believes that the Commission’s impact assessment should as a rule form the basis and the reference point for impact assessments generated by the other institutions, and that in general, and in broad terms at least, these should follow Commission methodology, so as to ensure a degree of comparability for the purpose of assessing the various options for political decision-making.

As to simplifying and reducing the volume of legislation, the Interinstitutional Agreement provides for close coordination between the three institutions on the adoption of simplified proposals. After a first “round” in which priorities were identified, the Luxembourg and British presidencies embarked on a second phase of consultations with Member States in the wake of the European Council of spring 2005. The presidency of the Council gave priority within Council bodies to the 23 simplified proposals pending in January 2005, independently of the fact that a pilot project was underway (2nd Company Law Directive) aimed at adopting the simplified proposal before the end of 2005.

3. The Services Directive: an illustration of “better regulation”?

Much has been said in the context of the Services Directive about the aspects relating to the country of origin principle (COP), introduced by the Commission in Article 16 of its original proposal. The original version of Article 16 provides that “Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field” (CEC, 2004c: 55) (40). The COP thus defined

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40 This related to national provisions on access to and provision of a service, in particular those governing the conduct of the service provider, the quality or content of the service, advertising, contracts and service provider liability.
would naturally tend to bring about liberalisation in the services sector. As it stands, it is effectively an illustration of a potential form of competitive deregulation. The legislation of the country of origin becomes de jure the standard applying in the country of destination. At least as far as the coordinated field is concerned, the way ahead is clear for competitive deregulation since companies might be tempted to establish their base in countries with less stringent regulations and to operate their services from there. In this scenario, the most stringently-regulated countries would be penalised by comparison with those which had more lax requirements, and this could lead to a form of deregulation on the basis of the “lowest common denominator” (on this point see Van den Abeele, 2005).

The effect of the section of the Directive dealing with freedom of establishment may perhaps have been underestimated. This section will undoubtedly have much further-reaching effects than the country of origin principle in terms of the “better regulation” agenda. Notwithstanding the European Parliament’s extensive amendments to the “Establishment” section of the draft Directive during its first reading on 16 February 2006, this chapter nonetheless bears the hallmark of “less regulation”.

Article 9 (41) stipulates that “Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied”:

a) the authorisation scheme does not discriminate against the provider in question;

b) the need for an authorisation scheme is objectively justified by an overriding reason relating to the public interest;

c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection might take place too late to be genuinely effective.

41 The European Parliament replaced the negative wording (“shall not”) with a positive (“shall”).
Article 10 requires that authorisation schemes comply with criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary or discretionary manner. Schemes must be non-discriminatory; objectively justified by an overriding reason relating to the public interest; proportionate to this overriding public interest; precise and unambiguous; objective and made public in advance.

Article 13(4) (42), which covers authorisation procedures, provides specifically that if no reply is forthcoming within a reasonable period fixed and published in advance, then the authorisation shall be deemed to have been granted.

Article 15 requires Member States to “screen” (43) their legal system in order to ensure that it complies with the principles of non-discrimination; necessity (measures must be objectively justified by overriding considerations of public interest) and proportionality. It should be noted that Article 15(6) requires Member States to notify the Commission of any new legislative, regulatory or administrative provisions which set requirements such as fixed minimum or maximum tariffs, requirements fixing the number of employees, or an obligation on a provider to take a specific legal form, in particular to be a legal person or a non-profit-making organisation.

Article 31 sets out accompanying measures to encourage providers to take action on a voluntary basis in order to ensure the quality of service provision, in particular by having their activities certified or assessed by independent bodies, or by drawing up their own quality charter or participating in quality charters or labels drawn up by professional bodies at European level.

42 This paragraph was deleted by the European Parliament and replaced with a less binding form of words.

43 This “screening” was upheld by the EP, but it was set aside in respect of services of general economic interest (SGEI). Paragraphs 5 (”standstill clause”) and 6 (compulsory notification of new provisions) were withdrawn by the EP.
Article 39 (44) provides that “Member States shall, in cooperation with the Commission, take accompanying measures to encourage the drawing up of codes of conduct at Community level, in conformity with Community law, in particular in the following areas: the content of and detailed rules for commercial communications relating to regulated professions, as appropriate to the specific nature of each profession; the rules of professional ethics and conduct of the regulated professions which aim in particular at ensuring, as appropriate to the specific nature of each profession, independence, impartiality and professional secrecy; the conditions to which the activities of estate agents are subject”.

It is only in Article 40 that mention is made of a provision on additional harmonisation, stipulating that “The Commission shall assess, by [one year after the entry into force of this Directive] at the latest, the possibility of presenting proposals for harmonisation ... subjects: the detailed rules for the exercise of cash-in-transit services; gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions, in the light of a report by the Commission and a wide consultation of interested parties; access to the activity of judicial recovery of debts”.

Thus it is clear that the Services Directive is a “deregulation machine”: it increases exponentially the prohibitions on authorisations and legislative, regulatory and administrative requirements, and restricts harmonisation to sectors which, although not insignificant, are not the most sensitive.

44 The EP has retained the principle of codes of conduct but has deleted all references to the areas listed.
4. Risks flowing from the “better regulation” agenda

The following table is an attempt to summarise the current situation and the risks for the future.

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Conclusions

The stakes are high where the competitiveness of the European economy is concerned. That is self-evident. However, the quality of regulation is no less important. Quality is best gauged by looking at the objective underlying each piece of legislation and the impact it will have on each of the areas identified by the Lisbon strategy: economic, social and environmental. However, one must not overlook the environmental and social costs, the indirect costs nor the costs of non-regulation in terms of risk for business and citizens alike. In opting for an approach based on business costs (cf. the net model based on the Standard Cost Model), the Community runs the risk of overturning the traditional equilibrium between efficiency, competitiveness, productivity and global security and social cohesion in the widest sense of the term. The public interest must prevail over individual interests.

It is unquestionably right to seek to legislate better and to eliminate bureaucratic hurdles. That too is self-evident. So it is perfectly appropriate to take pride in efforts made to simplify and improve legislation. It is also vital that the objectives, scope and extent of the overall drive for better regulation be made more transparent. However, the objective of the “better regulation” agenda cannot be to question the very principle of Community regulation nor the need to use it to achieve public interest objectives, especially a high level of social and environmental protection as required under the EC Treaty. In this respect the use of “alternatives” to regulation (self-regulation and co-regulation) should, in our opinion, be secondary to the Community method, and care should be taken to ensure that they are subject to democratic scrutiny by the EP.

The “better regulation” agenda must not be used to challenge the acquis communautaire in the guise of “simplification”. National public authorities must retain their power to act. The principles of subsidiarity and proportionality underlying the acts of the Union and enshrined in the EC Treaty must be respected.

Particular attention should be devoted to the interinstitutional balance at Community level, to the powers and the specific role of each institution. The power of Council and Parliament to make decisions and
to amend must remain intact, even where an impact assessment proves unfavourable. The legitimacy of the co-legislators is at stake. The various compositions of the Council (Environment, Employment, Social Affairs, etc.) must retain their independence and their specific remit, even if it is right that a role of arbiter and an appeal function be devolved to the General Affairs Council.

The involvement of “outside expertise” or “independent consultants” to assess progress made by the institutions is an issue which requires careful consideration. There is no doubt that both have a useful role to play, but they cannot be a substitute for the Commission’s right of initiative nor for the decision-making powers of the other two institutions.

Simplification and improvement of the *acquis communautaire* must go hand in hand with a rethink of harmonisation. It is not a question of less legislation, but of better legislation (45). As was said during a working session by one well-informed participant, “The EU must remain a relevant framework for both regulation and solidarity”.

**References**


45 Paragraph 3 of the conclusions of the Competitiveness Council on 29 November 2005 reads as follows: “Calls on the Commission to build upon this legislative screening process to also clearly identify where further harmonisation is needed, and take this into account in its future proposals”.

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European Council (2005), Brussels European Council, Presidency Conclusions, 15 and 16 December 2005.


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