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REPORT FROM THE COMMISSION

“BETTER LAWMAKING 2006”

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

(14th report)

{SEC(2007)737}

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This report is the 14th annual review of the application of the principles of subsidiarity and proportionality. It also covers progress in improving the regulatory environment in the European Union¹.

1. BETTER REGULATION

A regulatory environment that is well-devised, clear, understandable and as simple as possible is key to protecting citizens' welfare, public health and the environment. At the same time it ensures a fair market place where European business can compete effectively and with innovative products. The Better Regulation agenda sets out to achieve this at both EU and national level in a concerted effort by EU institutions and Member States and in a manner that maximises public policy benefits while minimising the costs that regulations impose on the EU economy.

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

¹ The obligation on the Commission to present an annual report on the application of the principles of subsidiarity and proportionality to the European Council and the European Parliament was enshrined by the Edinburgh European Council in December 1992. This obligation was included in a protocol annexed to the Treaty establishing the European Community (TEC) in the framework of the amendments made by the Treaty of Amsterdam in 1997. Since 1995 this report has been extended to cover measures taken to improve the quality and accessibility of legislation (for the previous report, see COM(2005) 98 and SEC(2005) 364). Some elements contributing to improve the regulatory environment are reviewed in greater detail by the 3rd Report on European governance (2004-2005) (see http://www.europa.eu.int/comm/governance/index_fr.htm).

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

³ OJ C 321, 31.12.2003, p.1.

In November 2006, the Commission presented a strategic review of the Better Regulation agenda⁴. It identifies the significant and encouraging progress already made and maps out the challenges ahead for EU institutions and Member States if Better Regulation is to have real and lasting positive impacts on business and citizens. The main challenges identified are to improve the quality of impact assessments and the use of this instrument in preparing and adopting legislation; to make progress on measuring administrative costs and eliminating unnecessary burden in European and national legislation; to continue and intensify work to achieve the ambitious programme for modernising and simplifying the stock of legislation; to continue the screening and possible withdrawal of pending proposals to ensure that what is taken forward by the Council and Parliament is still in line with Commission priorities and up to date; to reinforce the constructive dialogue between all regulators at EU and national levels and with stakeholders.

1.1. Actions taken by the Commission

The Commission, in line with its institutional role as initiator of legislation, has a special responsibility for achieving the Better Regulation objectives at the three levels of preparation, follow-up and implementation of legislation. It has taken a lead on the Better Regulation agenda and in 2006 it:

- carried out 67 impact assessments, launched an external evaluation of its impact assessment system and established an *Impact Assessment Board* as an independent quality support and control function for impact assessments prepared by Commission departments;
- continued implementation of its simplification programme, reported on the progress made and added more than 40 new items to it⁵, and integrated simplification items into its Legislative and Work Programme for 2007⁶;
- integrated the EU Standard Cost Model for the measurement of administrative costs into its impact assessment guidelines and proposed the launch of an ambitious action programme to reduce administrative burden in the EU;
- completed its screening of pending proposals dating from previous Commissions and re-launched its programme for codification and repeal of obsolete legislation.

Many of these activities are carried out in a mutually reinforcing manner, ensuring that the Better Regulation agenda is coherent, for example: measurement of administrative costs is included in the methodology for impact assessments; and simplification proposals in the Commission Legislative and Work Programme are subject to impact assessment, which in turn makes use of stakeholder consultation.

1.1.1. Consultation of interested parties

In 2006, the number of consultations held by the Commission increased significantly in comparison to the previous year, with 217 non-legislative Communications (+28 compared to 2004) and 129 internet-based consultations (+23) via the web portal “Your Voice in Europe”⁷.

⁴ COM(2006)689 final

⁵ "First progress report on the strategy for the simplification of the regulatory environment" - COM(2006)690

⁶ COM(2006)629

In the context of the European Transparency Initiative⁸ the Commission carried out an open public consultation on its minimum standards for consultation of interested parties⁹, which showed that stakeholders were generally positive in their assessment of the manner in which the Commission carries out its consultations.¹⁰ Further improvements were desired in relation to giving general feedback on input received through consultations, to achieving a better balance of participants in targeted consultations and to keeping to minimum time limits. For Commission departments, complying with minimum standards for consultations has an effect on workload but also adds value to the final versions of the initiatives.

1.1.2. Collection and use of expertise

The Commission will continue its efforts in line with the principles and standards on the collection and use of advice from external experts¹¹. In particular it intends to promote greater use of SINAPSE (Scientific INformation for Policy Support in Europe), the interface between experts and (EU) policy makers¹². The initial take-up has been encouraging, and should be fostered in 2007. New forms of governance and the ever-growing complexity of many policy issues means that the traditional advisory systems need support from EU-wide and rapid consultation of scientist/experts and more efficient communication between experts throughout Europe and beyond. This can be facilitated by the further development and a more generalised use of the SINAPSE e-network.

1.1.3. Impact assessment

In 2006, Commission departments produced 67 impact assessments. This included impact assessments for all major legislative and policy-defining initiatives in the annual Legislative and Work Programme, as required since 2005, and, in addition, a number of 'voluntary' impact assessments for other initiatives with significant potential impacts. Experience shows that in a growing number of cases impact assessment has significantly changed the approach, the nature of the legal instrument, or even led to the abandonment of a foreseen proposal.¹³ The Commission also enhanced its approach to the integrated assessment of the economic, social and environmental impacts of its proposals by integrating into its guidelines for impact assessments a methodology for the measurement of administrative costs.¹⁴

To further improve the overall quality of its impact assessments also in practice, the President of the Commission has set up an *Impact Assessment Board*, which operates under his direct authority and independently of Commission departments. It scrutinises draft impact assessments and provides opinions on their quality, offering advice and quality support where needed.

⁷ <http://ec.europa.eu/yourvoice/>

⁸ Cf. Green Paper on the European Transparency Initiative: COM(2006)194.

⁹ These standards have been introduced in 2003 (COM(2002)704, 11.12.2002).

¹⁰ The Commission received more than 100 contributions to the consultation, which are published at: <http://ec.europa.eu/comm/eti/contributions.htm>

¹¹ COM(2002)713, 11.12.2002.

¹² <http://europa.eu.int/sinapse>

¹³ For examples, see annex to this report, point 2.1.3, footnotes 18-20.

¹⁴ SEC(2005)791.

Further measures to enhance the overall approach and raise the quality of Commission impact assessments are likely in the follow-up to the external evaluation of the impact assessment system, which was launched in 2006 and concluded in spring 2007.

1.1.4. Choice of instruments (self-regulation and co-regulation)

The Commission is committed to checking, when preparing its proposals, whether alternatives to 'classical' regulation are more suitable to reach the Treaty objectives.¹⁵ To encourage the use of alternative regulatory instruments, the Commission and the European Economic and Social Committee (EESC) have jointly developed a database of "EU self-regulation and co-regulation".¹⁶ It facilitates exchange of information and identification of best practices on initiatives for self- and co-regulation with an EU dimension (i.e. involving more than one Member State). Its main objective is to encourage and support private parties willing to develop or improve self-regulatory schemes, and it can also assist regulators responsible for co-regulatory design. At the same time, the Commission consulted stakeholders on the appropriate use of self- and co-regulation as part of its Impact Assessments but also through roundtables and studies¹⁷.

At sectoral level, a number of important self- and co-regulatory mechanisms were set up in 2006. The Commission invited the development of specific codes of conduct at Community and/or Member State levels. Several legislative acts also provided for more co-regulation with interested parties.¹⁸ However, 2006 also saw instances of industry request to turn self-regulatory practices into co-regulatory schemes or even classic legislation.¹⁹ While insisting on the potential of regulatory alternatives, the Commission's approach also recognises that, in many cases, regulations remain the simplest way to reach EU objectives and provide business and citizens with legislative certainty.

1.1.5. Minimising administrative costs resulting from by EU legislation

Based on preparatory work carried out in 2005, the Commission has introduced a common methodology for assessing administrative costs of (proposed) legislation. This EU Standard Cost Model has been applied to a number of impact assessments drafted and/or completed since March 2006. The Commission will pursue its efforts to reach the greatest possible methodological convergence with and among Member States.

¹⁵ The impact assessment Guidelines make checking the feasibility of alternative regulatory instruments an obligatory elements of Commission impact assessments.

¹⁶ <http://www.eesc.europa.eu/smo/prism/presentation/index.asp>

¹⁷ See for instance "Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties", July 2006 (http://ec.europa.eu/consumers/overview/report_advertising_en.pdf); "Self and co-regulatory practices in the European Union", October 2006 (http://europa.eu/staging.entrc.ec.eu.int/enterprise/regulation/better_regulation/docs/simplification/Final-report-SCR2.pdf); or the Study on co-regulation measures in the media sector (http://ec.europa.eu/comm/avpolicy/info_centre/library/studies/index_en.htm#finalised).

¹⁸ For examples, see annex to this report, point 2.1.4.

¹⁹ This was for example the case when the European Fruit Juice Association (AIJN) called for the inclusion into EU legislation of a fruit juice norm which was previously defined by a voluntary code of practice of AIJN members concluded in implementation of Council Directive 2001/112.

In its Strategic Review on Better Regulation and the related working document on "Measuring administrative costs and reducing administrative burdens in the European Union" from November 2006²⁰ the Commission announced for 2007 an ambitious action plan for the reduction of administrative burden and invited the Council to set a common reduction target of 25%, to be achieved jointly by the EU and Member States by 2012. As a first stage, the Commission announced its intention to begin a large scale measurement exercise of the administrative burdens in selected priority areas and to present a series of fast-track actions designed to demonstrate how administrative burden can be reduced without affecting the overriding political objectives of the legislation concerned.

1.1.6. Screening and withdrawal of pending proposals

As part of its efforts on Better Regulation, the Commission regularly screens legislative proposals pending before the legislator to check that they are still relevant and up to date. In 2006, the Commission completed the screening of all pending proposals adopted by the previous Commissions. Resulting from the 2005 screening of 183 pending proposals from before 2004, 68 proposals were withdrawn in 2006. In the same year, the Commission screened more than 80 further pending proposals adopted by the Commission in 2004 before the present Commission took office, on 22 November 2004, and decided to withdraw another 10 proposals. These proposals are included in the Commission's Legislative and Work Programme for 2007²¹. In accordance with article 32 of the Framework Agreement on relations between the European Parliament and the Commission (May 2005), Parliament has been informed of the Commission's intention to withdraw those proposals and that withdrawal will take effect when published in the Official Journal.

The Commission recommends that any new Commission carry out a similar exercise within the first months of taking office to verify whether previously adopted proposals are still in line with its priorities and to confirm its political ownership of these proposals.

1.1.7. Simplifying and updating the Community acquis

Of the three-year rolling simplification programme presented in October 2005²², the Commission in 2006 adopted 27 items foreseen for 2006 and 6 items which were carried over from 2005. A further 23 initiatives foreseen for 2006 were postponed to 2007 to allow further analysis supporting these proposals.

As part of its Strategic Review of Better Regulation, in November 2006 the Commission presented the first progress report on the strategy for the simplification of the regulatory environment²³, and announced 43 new initiatives, which will enhance the ambitious rolling simplification programme covering the period 2006-2009. 47 major simplification initiatives are for the first time included in the Commission Legislative and Work Programme for 2007. The report also presents an updated programme to complete the codification of the stock of legislation by 2008.

²⁰ COM(2006)691

²¹ Annex 4 to document COM(2006)629, of 24.10.2006.

²² COM(2005)535

²³ COM (2006)690

However, implementing the simplification programme successfully and in good time requires careful consultation of stakeholders, assessment of likely impacts of initiatives, and shared responsibility with legislators at Community and national levels. At EU level, inter-institutional dialogue to speed up the adoption of simplification items should be pursued. In the Member States, national simplification programmes need to be developed to prevent the positive effects of simplifying EU legislation being cancelled out by excessive national rules that are not adapted accordingly.

1.1.8. Monitoring the application of EU law

The correct application of EU law is an important element of achieving Better Regulation objectives. Simplifying and improving the regulatory environment can only produce the expected benefits for business and citizens if Member States transpose EU law swiftly and correctly.²⁴ To help avoid that transposition gaps evolve which may lead to infringement cases, Commission departments are required by the Impact Assessment Guidelines to take potential transposition difficulties into account already during the preparation of their legislative proposals. Furthermore, the Commission is working to adapt its monitoring methods in co-operation with Member States. This includes the production of correlation tables, clearly linking provisions in directives and national rules, as well as full implementation of the electronic notification system for national transposition measures. The system has been fully in place for all Member States since early 2006 and the Commission promoted its use in 2006 by various activities.

1.2. Actions by EU institutions, the European Economic and Social Committee and the Committee of the Regions

Better Regulation and its implementation was a priority for all institutions in 2006. Apart from the Commission, the European Parliament was particularly active. It held a plenary discussion in April, and in May 2006 it adopted a package of five resolutions on Better Regulation, which include a wide range of proposals for action and improvements of existing tools and procedures. These were mainly directed at the Commission but also at the Council and Member States.

In response to the European Parliament's call for reinforced quality control of Commission impact assessments, the President of the Commission announced that an independent quality check would be established under his personal authority, which led to the Commission setting up the Impact Assessment Board in November 2006.

2006 also saw the political endorsement by the European Parliament²⁵ of the Inter-Institutional "Common Approach to Impact Assessment"²⁶, which had been negotiated in November 2005. It came in response to a provision in the Inter-Institutional Agreement on Better Lawmaking of 2003 and sets out "traffic rules" on how Commission impact assessments should be used in the legislative process and on European Parliament and Council impact assessments of their substantive amendments.

²⁴ See the annual report from the Commission on Monitoring the Application of Community Law for 2005, COM(2006)416.

²⁵ It had already been endorsed by Council and the Commission in late 2005.

²⁶ Council Document No 14901/05.

Both Parliament and Council have stepped up their use of Commission impact assessments when examining Commission proposals, thus consolidating impact assessment as a tool to ensure that political decisions are taken in the light of the best available evidence of potential impacts. During the Austrian Presidency the Council drew up an indicative guide for working parties on handling impact assessments in the Council²⁷. Parliament and its committees are increasingly requesting that studies and impact analyses on certain subjects²⁸ or substantive amendments to Commission proposals²⁹ are carried out. The Committee of the Regions (CoR) and the European Economic and Social Committee (EESC) also took an active part in the Better Regulation debate in 2006, especially on subsidiarity issues. The CoR requested systematic consultation and involvement in Commission impact assessment work of local and regional authorities to ensure that financial or administrative burden put on local and regional authorities in implementing EU legislation are proportionate to the objectives pursued by EU action. To support this, the CoR set up in 2006 a subsidiarity monitoring network³⁰ as a tool for exchange of information between European territorial actors on Commission proposals which will have an impact on local and regional authorities and the policies for which they are responsible. The European Economic and Social Committee adopted an own-initiative report on "EU and national administration practices" in 2006 and its Single Market Observatory launched work on the integration of social impacts in Commission impact assessments, the results of which are expected in 2007.

2. APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

The Commission continued efforts to better explain how the measures it proposes comply with both principles, through impact assessments and explanatory memoranda³¹. In May 2006, it decided to transmit its new proposals and consultation papers directly to the national parliaments, inviting them to react so as to improve the process of policy formulation³². The move was welcomed by the European Council in June 2006. Heads of State and Government asked the Commission to duly consider comments by the national parliaments, in particular with regard to the subsidiarity and proportionality principles.

As in previous years, the European Parliament and the Council introduced relatively few amendments to Commission proposals referring explicitly to subsidiarity and proportionality³³. The vast majority of opinions from the Committee of the Regions (CoR) and the European Economic and Social Committee had no criticism regarding the application of the subsidiarity principle. Proportionality problems were raised slightly more often. This was also the conclusion of the two test cases of the CoR's Subsidiarity Monitoring Network³⁴.

²⁷ Council document 9382/06, 15.5.2006

²⁸ For example, on the inclusion of social impacts in Commission impact assessments.

²⁹ For example, ENVI Committee impact analysis on amendments to the proposal for a Directive on Air Quality.

³⁰ http://www.cor.europa.eu/en/activities/sub_mon.htm.

³¹ In December 2003, the Commission decided to set a standard format for the explanatory memorandum accompanying each of its legislative proposals, to improve its structure and content; cf. [C\(2003\)4555](#), adopted by the Commission on 13 December 2003.

³² "A Citizens' Agenda - Delivering Results For Europe", COM(2006)211.

³³ For instance, in 2006, the Parliament referred explicitly to subsidiarity and proportionality principles in 11 legislative reports and 3 own initiative.

³⁴ The CoR conducted these tests on the proposal for a recommendation of the European Parliament and of the Council on the establishment of the European Qualifications Framework for lifelong learning

Several opinions sent by national parliaments asked for Commission arguments to be clarified or backed by more detailed data. A minority of them concluded that the proposals transmitted by the Commission were considered in some respects to go against the principles. The Commission is responding to these submissions individually.

These divergences of views underline the need for a common understanding of the conditions set by the two principles as defined in the Treaties. The Commission hopes that the presentation of the standard set of questions used for drafting the explanatory memoranda accompanying Commission proposals will contribute to such understanding³⁵. Convergent interpretation would avoid confusion with for instance the principle of "conferral of competences" and counter misapprehension that occasionally feed the perception of subsidiarity infringements.

As regards ex-post judicial control in 2006, the principle of subsidiarity was referred to in two judgments delivered by the Court of First Instance of the European Communities, which confirmed previous case law. In neither case did the Court find that the principle of subsidiarity had been infringed.³⁶ As of 31 December 2006, the case law of the Court of Justice and the Court of First Instance did not include any judgements to the effect that the principle of subsidiarity had been contravened or that compliance with the principle had insufficiently been substantiated.

Possible infringements of the principle of proportionality were analysed in several judgments and, in some cases, the Community measures were annulled in full or in part on that ground. For example, in case C-310/04 Spain v Council concerning a Council Regulation amending the support scheme for cotton, the Court ruled that "the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their [the EU institutions'] discretion depended" were missing³⁷. It found that the principle of proportionality had been infringed and annulled the contested act.

(COM(2006)479) and on the Communication on Efficiency and equity in European education and training systems (COM(2006)481). The CoR will publish the results in 2007.

³⁵ See Annex 3 of the Commission Staff Working Document attached to this Communication.

³⁶ See Case T-168/01 GlaxoSmithKline Services v Commission, judgment of 27 September 2006, not yet Reported, paragraph 196 et seq. and Case T-253/02 Chafiq Ayadi v Council, judgment of 12 July 2006, not yet reported, paragraph 105 et seq. (appeal pending, Case C-403/06P).

³⁷ Judgement of 7 September 2006, paragraph 123.

ANNEX:
Commission legislative proposals,
and consultation documents and reports:

