407TH PLENARY SESSION, 31 MARCH AND 1 APRIL 2004

Opinion of the European Economic and Social Committee on the 'communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Updating and simplifying the Community acquis'

(COM(2003) 71 final)

(2004/C 112/02)

On 11 February 2003, the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned communication.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on this subject, adopted its opinion on 10 March 2004. The rapporteur was Mr Retureau.

At its 407th plenary session of 31 March and 1 April 2004 (meeting of 31 March), the European Economic and Social Committee adopted the following opinion by 88 votes to one, with one abstention.

1. Communication and six-monthly report by the Commission and Parliament Report

1.1 At its meeting of 13 November 2003 the SMO heard the Parliament rapporteur, Mr Medina Ortega [1], and Commission representatives on the Communication on the framework action 'Updating and simplifying the Community acquis' [2], on which the Commission presented its first six-monthly interim report this year [COM(2003) 623 final].

1.2 According to this report, the key actions aimed at reducing the volume of legislation and making it simpler, more accessible and more meaningful are well underway. Measures undertaken or planned account for 4 % of the current volume of the acquis.

1.3 The Communication and the framework action aim to simplify and update the acquis in the following ways:

— consolidation, i.e. incorporating the original instrument and all subsequent amendments in a single text, with a view to making it easy to read and up to date; consolidation will thereafter be systematic whenever new regulations or legislative texts are adopted; consolidation does not create a new legal instrument, but is a technical task to be carried out by the Office for Official Publications of the European Communities (OPOCE);

— re-writing legal texts to enhance consistency and comprehensibility without altering the legal situation;

— codification, i.e. uniting scattered texts in a single text and updating them; codification does create a new legal instrument, replacing previous texts, and must follow the same legislative process as those texts which have been incorporated;

— removal of obsolete legislation;

— a more reliable and user-friendly organisation and presentation of Community law;

— in the long term, simplifying legislation and policies to replace them with more appropriate and proportionate instruments;

— possible use of alternative methods of regulation.

1.4 The rate at which work is progressing varies according to the area of simplification concerned and not all of the Commission's directorates have been involved as yet. Substantial problems in terms of methodology, personnel and budget have delayed the implementation of Phase I (February – September 2003). The Commission hopes that Phase II (October 2003 – March 2004) will advance more quickly and help make up for lost time, so that the programme as a whole will be on schedule by the start of Phase III (April 2004 – December 2004).

2. Comments: Simplification? If only it were that simple …

2.1 A distinction must be made between:

— legislative and regulatory simplification; updating;

— the simplification of administrative documents and procedures and their alignment within the single market.

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[1] FINAL report A5-0443/2002 of 6/12/2002, and second FINAL report A5-0235/2003 of 17/6/2003 of the EP Committee for Legal Affairs and the Internal Market on the Commission Communications on simplifying and improving Community legislation. These reports clarify in particular the Parliament's requests for Constitution-building on legislative and enforcement powers and monitoring powers.

[2] SEC(2003) 165 and attached working document: methodology, procedures and priorities, and detailed information on definitions and scheduled work.

This framework action is not concerned only with simplifying the Community acquis. The simplification of procedures and documents is, however, just as important for economic players.

The Committee refers to its previous opinions on this subject [1].

3. **Legislative and regulatory simplification, updating legal texts**

3.1 The Committee welcomes the inter-institutional agreement (IIA) [2] between the Parliament, the Council and the Commission with regard to simplification procedures that respect their specific powers and responsibilities; it is probable that changes will be made to the co-decision procedure in a future treaty, which should expand the Parliament's role in drawing up Community legislation and monitoring its implementation.

3.1.1 The IIA is intended to improve the coordination of the legislative process between the Parliament and the Council, on the basis of an indicative timetable for the various stages leading to the final adoption of each legislative proposal; the Commission and the Council should participate regularly, at the highest level, in the discussions of the relevant parliamentary committees.

3.1.2 During discussion on a substantive amendment, the agreement considers the possibility of carrying out an impact study before the amendment is adopted (although this could cause procedural complications and delays).

3.1.3 With regard to alternative methods of regulation, that is, co-regulation between private partners or private self-regulation, the agreement stipulates that these mechanisms will not be applicable where 'fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States.' The mechanisms must also 'ensure swift and flexible regulation which does not affect the principles of competition or the unity of the internal market.' The alternative regulation is therefore subject to a number of restrictions.

3.1.4 It should be noted that the rules agreed between European social partners (Articles 138 and 139 of the EC Treaty) should not come into the general category of co-regulation; this category covers voluntary initiatives between private partners, not implying that the Institutions have adopted any particular stance. Collective European negotiation is a specific method of regulation governed by the original law.

3.1.4.1 The Commission will examine the voluntary regulation initiatives to ensure that they comply with the Treaty and will notify the Parliament of this and of the representativeness of the parties concerned. This seems slightly contradictory, and it is difficult to see what the consequences might be if the Parliament considered that the information received was not satisfactory. The Parliament's only possible step would be to ask the Commission to take a legislative initiative replacing the self-regulation. In future, the Parliament would like a formal call back procedure to be enshrined in the new Constitutional Treaty, for Community legislation to replace self-regulation initiatives.

3.1.5 Finally, the IIA covers the serious problem of transposing Community directives into national law; the institutions have undertaken to allow a time limit for transposition that is as short as possible and that does not exceed two years (the Treaty does not mention transposition periods). The Committee welcomes this undertaking, but questions its practical implementation (to be carried out by the Council) if the Treaty does not lay down that the transposition time limit stipulated in a directive must be respected, and that failure to do so will automatically result in an infringement procedure when the deadline has been passed.

3.1.6 The Committee would have liked to have had the opportunity to give its opinion while the interinstitutional agreement was still being drafted, in so far as it was concerned and had in the past given opinions on these issues; it could have brought to the discussion the suggestions of organised civil society, to which the acquis is principally addressed and which is directly concerned by simplification, transposition and alternative methods of regulation.

3.2 With regard to the number and nature of texts listed in the Commission's scoreboard, it must be pointed out that delays accumulated during Phase I will overflow into Phase II; it may therefore be optimistic to think that the objective can be met by 2005. Moreover, a large majority of the texts listed were produced by the Commission under the committee procedure [3], exercising delegated regulatory powers (although this concept is not included in the current text of the EU Treaty, which refers to powers of implementation delegated by the Council).

3.3 The rule of *nemo censitur* (ignorance of the law is no defence) has become a real legal fiction owing to the huge number and complexity of directives and regulations, and this despite welcome codification initiatives that allow for a more consistent approach in certain areas of European law. Nonetheless, diversity in transposing directives at national level can lead to annoying discrepancies and different procedures. Member States and national legislators therefore have the important responsibility of transposing Community directives logically, accessibly and clearly, respecting both the letter and the aims of the legislation: convergence and harmonisation of national law.

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[1] OJ C 14 of 16.01.2001. Simplification I, rapporteur Mr Vever.
OJ C 48 of 21.02.2002. Simplification II, rapporteur Mr Walker.
OJ C 125 of 27.05.2002. Simplification III, rapporteur Mr Walker.
OJ C 133 of 06.06.2003. Simplification IV, rapporteur Mr Simpson.

[2] Inter-institutional agreement 'Better Lawmaking' between the Parliament, the Council and the Commission, OJ C 321 of 31/12/2003; improving the quality of drafting in legislation was examined in the Inter-institutional agreement of 22/12/1998.

[3] The committee procedure is based on Article 202 of the EU Treaty; the Parliament demands that it be completely revised, to prevent the executive going astray

3.4 Legislation produced under the committee procedure often seems to be pernickety and lacking transparency. The Parliament hopes that in future the committee procedure will focus on implementing and adapting legislation (strict powers of enforcement) rather than on existing law per se; it feels that substantive changes to regulations should follow normal legislative procedure. The EESC would then be consulted on such changes.

3.5 The Committee has always backed initiatives to simplify, a posteriori, the Community acquis. However, it also believes that legislation should be simple and clear from the very beginning and in particular that, before producing a legislative or regulatory proposal, the Commission should consult all the interested parties - through questionnaires, ad hoc meetings or other methods – and the EESC itself, to ensure that all the issues are given due consideration from the start.

3.5.1 These consultations may also help produce assessments which are as realistic as possible of the impact and consequences, financial and otherwise, of a proposal. It may, although not solely, be a question of consultation on green papers or on other preparatory working documents of the Commission accompanied by a questionnaire. The Committee is prepared to contribute to the consultative process as representative of the social and economic interests of the whole of civil society and to organise hearings with the organisations representing all these interests to make its own contribution to the continuous improvement and simplification of legislation.

3.5.2 The Committee is in favour of cost-benefit analyses as well as evaluating legislative projects from the point of view of proportionality and subsidiarity.

3.5.3 However, as regards health-safety or the environment, analysing the cost-benefit implications in purely monetary terms is a rather complex and difficult exercise which in some cases could prove incomplete, when the legislation's aim is to prevent disease or protect human lives.

3.5.4 The impact in terms of cost for those to whom the legislation is addressed, particularly businesses, must also be evaluated. There is no doubt that Community legislation or transposing a directive into domestic law can be expensive for businesses or individuals, especially if it lacks legal precision, or if the presentation of the draft does not provide a clear and precise explanation of the exact scope and the aims of the proposal ([1]). If the courts are needed to interpret the legislation or regulation, the end result will be disproportionate expense for those to whom the law is addressed.

3.5.5 Therefore, the preliminary phase of consultation must be primarily directed at those bodies which are truly representative of the interests of those to whom the law is principally addressed, including professionals and qualified experts; but it must also consult the European Economic and Social Committee or the Committee of the Regions.

3.6 The EESC also very much hopes to be regularly involved in ex post impact assessments of Community legislation, and in the review of the periodic reports required by the legislation, so that it may express the views of those who use and practise the law on the effectiveness of these rules; indeed, the law is weakened if it is not useful, effective and correctly applied or if it must be interpreted by the courts before being applied.

3.7 Follow-up, which can be difficult, consists of assessing the real impact of legislation - whether direct (regulations) or indirect (transposition of directives) - at national, regional and local level.

3.8 The EESC has suggested setting up an independent European body to follow-up and promote regulatory and administrative simplification, and a provision of this nature should be considered as soon as possible. At all events, simplification should be extended as far as possible to all areas of the acquis, and this is far from being achieved. This is all the more urgent because simplification will support and accelerate the effective implementation of the acquis in the new Member States, and should spur on those who are lagging behind to clear their backlog.

3.8.1 Environmental and safety legislation in relation to business activities might be a particularly promising area for simplification. In the long run, the issue could be recast more consistently and accessibly in a European Environment code. The Committee notes that some private publishers periodically produce unofficial European codes which bring together and gives glosses on certain subjects, such as a European social code or a business code, illustrated and explained by case-law and legal commentators. These initiatives prove the usefulness of codifying or reformulating the acquis for users and professionals in Community law.

3.9 Simplification is directly linked to the principle of good governance ([2]); it brings to the fore the issues of proportionality and subsidiarity which have to be resolved first. Depending on the legal texts in question, a procedure for assessing each specific stage (conception, drafting, adoption and publication) and for monitoring implementation should be introduced. This procedure can only enhance the legal certainty of those to whom the law is addressed and their respect for it.

([1]) For example, the presentation of the draft directive on computer-implemented inventions gave rise to total confusion as to the exact nature, scope and objectives of the draft submitted by the Commission.

([2]) See the 2001 white paper on governance, and the better legislation action plan drawn up by a Council working group (Mandelkern Group on better legislation).

3.10 It is clear that the users of Community law, which today accounts for a significant proportion if not most of the legal texts applicable in the Member States, are calling for wording that is less complex, devoid of ambiguity and easier to transpose and implement. The proliferation of legislation has an adverse effect on businesses, in particular smaller enterprises that lack their own legal services, and consumers, who seek certainty regarding their rights and the remedies open to them.

3.11 Single market regulation must be able to adapt to change while at the same time offering social and economic players sufficient legal certainty and security. Such regulation must be warranted and appropriate, and must not create unnecessary difficulties or obstacles. However, simplification must not be confused with deregulation ([1]). Codification is a form of simplification that concerns the consistency and comprehensibility of applicable law, but does not make substantive changes. Simplification and periodic evaluation of the effectiveness of the acquis could also, where appropriate, lead to a reformulation of the law, through amendments or a draft replacement if necessary.

3.12 EU harmonisation and Community texts have already simplified the single market, preventing a proliferation of national texts and thereby making it easier for all European players to know the law.

3.13 Information and its channels are important in acquiring knowledge about applicable law and changes to it, and should therefore be targeted (limitations of simply publishing in official journals, the importance of possible conduits or alternative means). The websites of the Community institutions provide information for the public from the preliminary stages onwards, and the legislation pages of the Parliament's website give clear information about how dossiers are progressing. Finally, Community brochures for the general public also play a useful role, as do press releases, which are generally well written, although sometimes badly explained to readers by journalists.

3.13.1 A number of professional organisations and associations (e.g. national Bars) publish relevant texts for their members, as well as explanations and advice.

3.13.2 Information is also often distributed by Member States or teachers. University textbooks, legal commentators and student exchanges all contribute to the training of lawyers and future European legislators.

3.13.3 The Committee suggests to the Commission that a review should be carried out of how those to whom legislation is addressed and Community law professionals are best informed in practice, so as to determine whether the current means of conveying information are used effectively and whether or not they are sufficient, with a view to developing a better strategy for communication and training on Community law.

4. **Administrative procedures and documents**

4.1 It should be emphasised that many regulations lay down the procedures to follow and provide specimens of the documents to be used. The Committee encourages this method which simplifies administrative formalities in the single market and reduces transaction costs.

4.2 As regards administrative documents and procedures currently in use, harmonisation is becoming a serious problem for operators, when each country has different requirements. There is much scope for harmonisation here. This will genuinely simplify trade and must be exploited to the full.

4.3 However, if the role of the committee procedure is also to implement legislation, it should contribute towards simplifying and harmonising administrative documents and procedures, by taking into consideration the opinions of legal professionals and users.

4.4 The use of information and communication technologies (ICT) in e-administration is also an instrument for good governance which must be rapidly promoted. Its application in the area of customs, as envisaged by the Commission, would be a good way of simplifying procedures and documents (e.g. one-stop-shop, standard documents to avoid delays at Community borders). This clearly calls for consultations with the interested parties, industries, customs personnel and carriers in order to avoid pointless formalities, ensure the legal security of operations and carry out proper checks. Such checks must not hinder freedom of movement and must respect business confidentiality, providing there is no evidence of fraud or strong suspicions of fraud.

4.5 While the Committee is very much in favour of developing e-administration, providing it is accompanied by procedural and administrative simplification, it wishes to reiterate the fundamental principles that govern how it works. Strict rules governing confidentiality, the length of time that authorities can keep certain documents, and the anonymisation of data for statistical or communication purposes must be respected.

([1]) This was argued clearly in the above mentioned Committee opinions.

5. **Co-regulation and self-regulation** [1]

5.1 Until now, the possibilities have not been properly explored for less detailed and less finicky regulation, offering scope for co-regulation and self-regulation. The role of those to whom legislation is addressed must be developed, as this will make for easier and more widespread implementation. The EESC's data base PRISM (Progress Report on Initiatives in the Single Market) provides specific examples of what could be called 'contractual regulation' and 'unilateral regulation' respectively, which also require appropriate monitoring and assessment procedures (e.g. labels, certificates, private or public independent checks). Mutual recognition, consumer relations, etc. open the way for effective private regulation.

5.2 With regard to Community social and labour law, collective bargaining on working and employment conditions and social dialogue allow European employers' and employees' organisations to have a say in labour relations and Community social law.

5.2.1 Negotiated texts must, however, be the subject of a Commission initiative and Council decision if they are to become legislation. The Parliament is not really consulted in this procedure, since any amendments it might make are not taken into consideration.

5.2.2 However, if the methods of self-regulation did not give acceptable or adequate results, or if necessary, the legislator could always, under existing procedures or new procedures from the new Treaty, such as the call back procedure, transform self-regulation or co-regulation into legislation. The Committee feels however that prudence should be exercised in this matter, particularly as regards collective contracts between European social partners, whose wishes and provisions should in principle be respected.

5.3 Therefore, while public regulation (legislation) may replace private regulation (contractual and unilateral regulation, non-governmental monitoring bodies, out-of-court dispute settlement …), such legislative intervention must respond to solid political reasons or clear public requirements. In a democratic political framework, private regulation must generally further develop or apply public regulation, even replacing it in some areas, including unwritten rules originating in common law or rules of procedure which the legislator and public authority wish, explicitly or implicitly, to ensure are respected, e.g. the ethical codes of certain professions.

5.4 When quasi-judicial provisions are laid down in private rules, an appeal against a duly motivated decision by the private body (e.g. disciplinary board, admission board for a professional body) must always be admissible before a public court or, if necessary, an arbitration body agreed by the parties.

6. **Final considerations**

6.1 The EESC will follow the Commission's six-monthly interim reports with considerable attention. It supports the initiative and the framework action to simplify the Community acquis, and hopes that this simplification will spread rapidly to other areas of the acquis to facilitate and promote its practical application, both in existing and new member countries.

6.2 Through its consultative opinions, the EESC wishes to have a greater role in drawing up Community law, which presupposes that it plays a part in proceedings at a much earlier stage than is usually the case at the moment. It also wishes to participate actively in impact and follow-up assessments and in actions to promote simplification, in order to contribute to the greater accessibility and effectiveness of Community law in the enlarged Europe. These requests of course follow the principles of democracy and good governance, as well as those of bringing citizens closer to the institutions and legislation of the European Union.

6.3 Finally, the Committee welcomes the inter-institutional agreement on Better Lawmaking, adopted by the European Parliament, the Council and the Commission on 16 December 2003, which lays out the conditions for better simplification of Community legislation and in particular defines and frames, while encouraging, use of self-regulation and co-regulation by socio-occupational players. This agreement corresponds to the Committee's wishes in this area expressed in September 2000, when it adopted its own code of conduct and invited the institutions to follow its example. The Committee will contribute to the correct functioning of the agreement and will continue to promote the use of self-regulation and co-regulation, which are the subject of an information report being prepared by the Committee.

Brussels, 31 March 2004.

The President
of the European Economic and Social Committee
Roger BRIESCH

[1] This section deliberately does not go into detail, because Mr Vever is preparing a specific opinion on this topic.