

## Opinion of the European Economic and Social Committee on 'The proactive law approach: a further step towards better regulation at EU level'

(2009/C 175/05)

On 17 January 2008, the European Economic and Social Committee, acting under Rule 29(2) of its Rules of Procedure, decided to draw up an own-initiative opinion on:

*The proactive law approach: a further step towards better regulation at EU level.*

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 6 November 2008. The rapporteur was Mr PEGADO LIZ.

At its 449<sup>th</sup> plenary session, held on 3 and 4 December 2008 (meeting of 3 December), the European Economic and Social Committee adopted the following opinion by 155 votes with 5 abstentions.

### 1. Conclusions

1.1 This opinion is based on the premise that the law, rather than the legislation invented by legal experts, reflects the conduct that a given society accepts and demands as a prerequisite for social order; the law does not consist of formal concepts that last forever and are set in stone; but of rules and principles — written and unwritten — that reflect the collective legitimate interests of each and every citizen at a given point in history.

1.2 In every legal system, it is the legislator's traditional task to interpret society's collective interests, to define, in legislation, where appropriate, what constitutes lawful conduct and to sanction practices that breach this conduct. It is recognised for long that the laws promulgated in this way should not only be just and equitable; they should also be comprehensible, accessible, acceptable and enforceable. Yet in today's society, this is no longer enough.

1.3 For too long, the emphasis in the legal field has been on the past. Legislators and the judiciary have responded to deficits, disputes, missed deadlines and breaches, seeking to resolve and remedy. Disputes, proceedings, and remedies to force compliance cost too much. That cost cannot be measured in terms of money alone.

1.4 The EESC urges a paradigm shift. The time has come to give up the centuries-old reactive approach to law and to adopt a *proactive approach*. It is time to look at law in a different way: to look *forward* rather than back, to focus on *how the law is used and operates* in everyday life and how it is received in the community it seeks to regulate. While responding to and resolving problems remain important, preventing causes of problems is vital, along with serving the needs and facilitating the productive interaction of citizens and businesses.

1.5 Proactive Law is about enabling and empowering — it is done by, with and for the users of the law, individuals and businesses; the vision here is of a society where people and businesses are aware of their rights and responsibilities, can take advantage of the benefits that the law can confer, know their legal duties so as to avoid problems where possible, and can resolve unavoidable disputes early using the most appropriate methods.

1.6 The Proactive Law approach looks for a mix of methods to reach the desired objectives: the focus is not just on legal rules and their formal enforcement. To set the desired goals and to secure the most appropriate mix of means to achieve them requires involving stakeholders early, aligning objectives, creating a shared vision, and building support and guidance for successful implementation from early on. The EESC is convinced that the new way of thinking represented by the proactive approach is generally applicable to law and law-making.

1.7 By its very nature, the Community legal system is precisely the type of area in which the proactive approach should be adopted when planning, drawing up and implementing laws; against this backdrop, the EESC would argue that rules and regulations are not the only way nor always the best way to achieve the desired objectives; at times, the regulator may best support valuable goals by refraining from regulating and, where appropriate, encouraging self-regulation and co-regulation. This being the case, the fundamental principles of subsidiarity, proportionality, precaution and sustainability take on new importance and a new dimension.

1.8 The EESC believes that the single market can benefit greatly when EU law and its makers — legislators and administrators in the broadest sense — shift their focus from inward, from inside the legal system, rules and institutions, to outward, to the users of the law: to society, citizens and businesses that the legal system is intended to serve.

1.9 While the transposition and implementation of laws are important steps towards better regulation at EU level, regulatory success should be measured by how the goals are achieved at the level of the users of the law, EU citizens and businesses. The laws should be communicated in ways that are meaningful to their intended audience, first and foremost to those whose behaviour is affected and not just to the relevant institutions and administrators.

1.10 The application of the Proactive Law approach should be considered systematically in all lawmaking and implementation within the EU. The EESC strongly believes that by making this approach not only part of the Better Regulation agenda, and but also a priority for legislators and administrators at the EU, national and regional levels, it would be possible to build a strong legal foundation for individuals and businesses to prosper.

## 2. Recommendations

2.1 Legal certainty is one of the basic preconditions of a well functioning society. The users of the law must know and understand the law to make it work. This is where the EESC calls attention to the *Proactive Law approach*. It is a future-oriented approach where the goal is to promote what is desirable and *ex ante* maximise opportunities while minimising problems and risks.

2.2 By adopting this own-initiative Opinion, the EESC emphasises that 'better regulation' should be geared towards an optimal mix of regulatory means which best promote societal objectives and a well functioning, citizen- and business-friendly legal environment.

2.3 The purpose of this opinion is to show how the Proactive Law approach can favour better regulation by providing a new way of thinking which takes as its starting point the real-life needs and aspirations of individuals and businesses.

2.4 When drafting laws, the legislator should be concerned about producing operationally efficient rules that reflect real-life needs and are implemented in such a manner that the ultimate objectives of those rules are accomplished.

2.5 The life cycle of a piece of legislation does not begin with the drafting of a proposal or end when it has been formally adopted. A piece of legislation is not the goal; its successful implementation is. Nor does implementation just mean enforcement by institutions, it also means adoption, acceptance and, where necessary, a change of behaviour on the part of the intended individuals and organisations.

2.6 We can anticipate some consequences of this approach — including practical ones:

- the active and effective participation, rather than mere consultation, of stakeholders before and during the drafting of any proposals and throughout the decision-making process,
- impact assessments would take into consideration not only economic but also social and ethical aspects; not only the business environment but also consumers, not only the opinions of organised civil society, but also the voice of the anonymous citizen,
- anticipating solutions rather than problems, and using the law to achieve and enforce goals and to make rights and freedoms a reality in a given cultural context,
- drafting laws as straightforwardly as possible and as closely as possible to their users, ensuring that the language used is readily comprehensible and straightforward,
- eliminating redundant, inconsistent, outdated and non-applicable laws, and harmonising the understanding of terms, definitions, descriptions, limitations and interpretations into common frames of reference,
- pressing for the introduction of new areas of contractual freedom, self-regulation and co-regulation and areas which may be covered by standards or codes of conduct at national and European level,
- focusing on the 'model laws' approach to legislating ('28th regimes') rather than on overly detailed and unnecessary total harmonisation.

2.7 The way of doing this could be initiated through research projects and dialogue with stakeholders on the specific role of the Proactive Law approach throughout the life-cycle and at all levels of regulation.

2.8 The EESC thus recommends that the Commission, the Council and the European Parliament adopt the proactive approach when planning, drawing up, revising and implementing Community law and encourage Member States also to do so wherever appropriate.

## 3. Introduction: a pinch of legal theory

3.1 In the field of rules or 'what should be', what characterises 'legal' provisions, as opposed to moral or aesthetic rules, is forcibility; the possibility that compliance can be demanded by the courts and that a breach can be sanctioned. One typical feature of the 'ius cogens' or 'compelling law' is the possibility of 'enforcement', in principle by means of a judicial mechanism, to ensure that the law is applied, or, in the event it is not, that those in breach are penalised.

3.2 At the very heart of 'what should be', however, is the concept that compliance with laws is, generally speaking, voluntary and that recourse to legal proceedings is the exception — the 'ultima ratio'. Without the voluntary and widespread agreement of the public to comply with the duties imposed by the rules, their effectiveness would be irremediably compromised.

3.3 Hence the legislator's responsibility to lay down laws that by and large encourage people to observe them voluntarily and to comply with them spontaneously. These responses are, in fact, prerequisites for everyone's rights to be respected and are a cornerstone of living as part of society. Against this backdrop, the concern for 'good lawmaking' and 'better lawmaking' <sup>(1)</sup> takes on particular significance and has major implications for the interpretation, integration and application of laws.

3.4 This means that, in addition to being equitable or 'just' <sup>(2)</sup>, the law must be:

- comprehensible,
- accessible,
- acceptable <sup>(3)</sup>, and
- enforceable.

Unless these criteria are met, the law tends to be rejected by those it is intended to apply to, is not implemented by those whose duty it is to ensure it is observed and falls into disuse, with the 'force' of justice being unable to apply it effectively.

3.5 Whilst this is an important issue for national legal systems, it assumes even greater importance in a legal system such as the European Union's, in which the two 'halves' of the rule of law are

<sup>(1)</sup> The meaning of 'better lawmaking' for the use of EC institutions can be found in EESC Opinion on *Better lawmaking*, CESE, OJ C 24, 31.1.2006, p. 39, rapp. Mr RETUREAU. The 'legal' content of this notion can be found in the *Inter-Institutional Agreement* of 2003, OJ C 321, 31.12.2003.

<sup>(2)</sup> Whatever this may mean in light of the predominant values in a given society and at a particular point in history; a large number of Greek tragedies examine this conflict between 'legislated' law and 'just' law.

<sup>(3)</sup> The two main conditions for regulations to be acceptable are that they are 'relevant and proportionate' (Cf. EESC OJ C 48, 21.2.2002, p. 130 Opinion on *Simplification* of 29.11.2001, point 1.6, rapp. Mr WALKER).

usually separate: the 'obligation' inherent in lawmaking is a Community competence, whereas application and the related sanctions rely in principle on national legal systems' power of coercion.

3.6 This perhaps explains why the concern for 'better lawmaking' that exists in all Member States, and which is by no means new, has recently assumed particular significance for the Community institutions.

3.7 Predictability, sustainability and foreseeability are basic requirements for a well functioning, citizen- and business-friendly legal environment. Stakeholders need a reasonable amount of legal certainty to set their goals, to implement their plans and to achieve predictable results. Legislators, in the broadest sense, should be concerned about securing such certainty and providing a stable legal infrastructure, while accomplishing what legislation is intended to do.

3.8 This is the background to this own-initiative opinion, which aims to highlight an innovative approach to law, originating in the *Nordic School of Proactive Law* and its predecessors <sup>(4)</sup>, and to see to what extent this could represent a further step towards better regulation at the EU level. Due consideration has been taken of all the many Opinions of the Committee on this subject, which represent already a very important body of doctrine and whose heritage is included and welcomed in this Opinion.

#### 4. A glimpse into better regulation, better implementation and better enforcement of EU legislation

4.1 The concept of better lawmaking, which focuses on the perspective of the users of legislation <sup>(5)</sup>, encompasses a number of principles that have gained momentum over the last few years: preliminary consultation, combating legislative inflation,

<sup>(4)</sup> Additional information can be found in Helena HAAPIO, *An Ounce of Prevention — Proactive Legal Care for Corporate Contracting Success*, published in the Finnish legal journal JFT, Tidskrift utgiven av Juridiska Föreningen i Finland, issue 1/2007, as well as in Helena HAAPIO (Ed.): *A Proactive Approach to Contracting and Law*, Turku 2008, and in Peter WAHLGREN & Cecilia MAGNUSSON SJÖBERG (Eds): *A Proactive Approach*, Volume 49 of Scandinavian Studies in Law, Stockholm 2006; see <http://www.cenneth.com/sisl/tom.php?choice=volumes&page=49.html>.

<sup>(5)</sup> As it has been very correctly stated in the EESC Opinion on *Better Regulation* (OJ C 24, 31.1.2006, p. 39, point 1.1.2., rapp. Mr RETUREAU), 'Better lawmaking means primarily, looking at a situation from the viewpoint of the user of the legal instrument. This explains the importance of a participatory approach, involving preliminary consultation and taking account of the representative nature of civil society organisations and social partners...'

removing obsolete legislation or proposals, reducing the administrative burden and costs, simplifying the Community acquis, better drafting of legislative proposals including ex ante and ex post impact assessments, reducing legislation to its essentials and concentrating on the objectives and the sustainability of legislation while keeping it flexible.

#### 4.2 The European Commission <sup>(6)</sup>, the European Parliament <sup>(7)</sup> and the European Economic and Social Committee <sup>(8)</sup>

##### (6) Main Commission documents on the topic:

- *EU Sustainable Development Strategy*, COM(2001) 264 final
- *Communication on Impact Assessment*, COM(2002) 276 final
- *Better Regulation Action Plan — Simplifying and improving the regulatory environment*, COM(2002) 278 final
- *Collection and use of expertise*, COM(2002) 713 final
- *Updating and simplifying the Community acquis*, COM(2003) 71 final
- *Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment*, COM(2005) 535 final
- *A strategic review of Better Regulation in the European Union*, COM(2006) 689
- *First progress report on the strategy for the simplification of the regulatory environment*, COM(2006) 690 final
- *Second progress report on the strategy for the simplification of the regulatory environment*, COM(2008) 33 final
- *Joint Practical Guide for the drafting of Community legislation (for persons involved in the drafting of legislation within the EU institutions)*.

##### (7) Main EP documents:

- *Report on Better lawmaking 2004: application of the principle of subsidiarity — 12<sup>th</sup> annual report*, A6-0082/2006
- *Report on the Commission's 21<sup>st</sup> and 22<sup>nd</sup> Annual reports on monitoring the application of Community law (2003 and 2004)*, A6-0089/2006
- *Report on institutional and legal implications of the use of 'soft law' instruments*, A6-0259/2007
- *Report on Better regulation in European Union*, A6-0273/2007
- *Report on minimising administrative costs imposed by legislation*, A6-0275/2007
- *Report on Better lawmaking 2005: application of the principles of subsidiarity and proportionality - 13<sup>th</sup> annual report*, A6-0280/2007
- *Report on the Single Market Review: tackling barriers and inefficiencies through better implementation and enforcement*, A6-0295/2007
- *Report on the Commission's 23<sup>rd</sup> Annual report on monitoring the application of Community law (2005)*, A6-0462/2007

##### (8) Main EESC documents:

- Own-initiative opinion on *Simplifying rules in the single market*, OJ C 14, 16.1.2001, p. 1
- Own-initiative opinion on *Simplification*, OJ C 48, 21.2.2002, p. 130
- Exploratory opinion on *Simplifying and improving the regulatory environment*, COM(2001) 726 final, OJ C 125, 27.5.2002, p. 105
- Own-initiative opinion on *Simplification with particular reference to European Governance: Better lawmaking*, OJ C 133, 6.6.2003, p. 5
- Opinion on *Updating and simplifying the acquis communautaire*, COM(2003) 71 final, OJ C 112, 30.4.2004, p. 4
- Brochure entitled *What is the state of the enlarged Single Market? — 25 Findings by the Single Market Observatory* EESC C-2004-07-EN
- Information report on *The State of co-regulation and self-regulation in the Single Market*, CESE 1182/2004 fin
- Brochure entitled *Improving the EU regulatory framework — upstream and downstream of the legislative process*, EESC 2005-16-EN
- Exploratory opinion on the request of the UK Presidency on *Better lawmaking*, OJ C 24, 31.1.2006, p. 39

have long promoted and argued for *better regulation, simplification and communication* as main policy objectives in the context of the completion of the single market. Among the first documents on this subject we should not forget the important MOLITOR REPORT, from 1995, with its 18 recommendations, which are still up to date <sup>(9)</sup>.

4.3 Better lawmaking also includes proportionality and subsidiarity and may involve stakeholders in drafting legislation, i.e. by means of self- and co-regulation, under the close scrutiny of the legislator, as set out in the *Inter-Institutional Agreement on Better Law-making of 2003* <sup>(10)</sup>, and developed in successive Annual Reports from the Commission.

— Own-initiative opinion on *How to improve the implementation and enforcement of EU legislation*, OJ C 24, 31.1.2006, p. 52

— Opinion on *Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment*, COM(2005) 535 final, OJ C 309, 16.12.2006, p. 18

— Exploratory opinion on the request of the European Commission on *Simplification of the regulatory environment for machines*, OJ C 10, 15.1.2008, p. 8

<sup>(9)</sup> Report of the Group of Independent Experts on Legislation and Administrative Simplification (COM(95)0288 — C4-0255/95 — SEC(95)1379). A special reference should also be made to the MANDELKERN Report (November 2001) and to its recommendations, summarised in the EESC Opinion OJ C 125, 27.5.2002, p. 105, rapp. Mr WALKER.

<sup>(10)</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:321:0001:0005:EN:PDF>

4.4 Better lawmaking does not necessarily mean less regulation or deregulation <sup>(11)</sup> and indeed legal security is one of the essential requirements of a well-functioning Single Market <sup>(12)</sup>.

4.5 Since 2000, the EESC's Single Market Observatory (SMO) has focused on stakeholders' initiatives that anticipate better law-making from the civil society viewpoint. Closely following the work programme of the European Commission as an institutional forum of expression for organised civil society, the EESC has over the years provided the Commission with advice in a number of opinions on issues relating to better regulation <sup>(13)</sup>.

4.6 In conjunction with the European Commission, the SMO has developed a database dedicated to European Self- and Co-Regulation <sup>(14)</sup>. On the basis of the data it has collected on self-regulatory initiatives, the SMO now intends to work on models (efficiency indicators, guidelines on monitoring and enforcement, etc.) and to build a cluster with academic circles, think tanks, stakeholders and institutions on self- and co-regulation issues.

## 5. An ounce of prevention: the proactive approach

5.1 Traditionally, the focus in the legal field has been on the past. Legal research has been mainly concerned with failures — shortcomings, delays, and failures to comply with the law.

5.2 The focus of the *proactive* approach is different; it is on the future. Being *proactive* is the opposite of being *reactive* or *passive*. The approach specifically called *Proactive Law* emerged in Finland in the 1990s. In response to a need to further develop practical methods and legal theories in this emerging field, the *Nordic School of Proactive Law* (NSPL) was established in 2004 <sup>(15)</sup>.

5.3 The word *proactive* implies acting in anticipation, taking control, and self-initiation <sup>(16)</sup>. These elements are all part of the *Proactive Law* approach, which differentiates two further aspects of *proactivity*: one being the *promotive* dimension (promoting what is desirable; encouraging good behaviour) and the other being the *preventive* dimension (preventing what is not desirable, keeping legal risks from materialising).

5.4 The *Proactive Law* approach is focused on *success* rather than failure. It is about taking the initiative to promote and strengthen factors that drive success. The origins of *Proactive Law* lie in *Proactive Contracting* <sup>(17)</sup>. Originally, the goal was to provide a framework for integrating legal foresight into the tangible practice of everyday business and to merge good contract, legal, project, quality and risk management practices.

5.5 While *Proactive Law* has taken considerable inspiration from *Preventive Law* <sup>(18)</sup>, the latter looks at matters mainly from a lawyer's viewpoint, focusing on the prevention of legal risks and disputes. In *Proactive Law*, the emphasis is on *securing success* and making it possible to achieve the desired goals in the situation at hand. Using the analogy of health care and preventive medicine, the *Proactive Law* approach can be said to combine aspects of health promotion with those of disease prevention: the goal is to help individuals and businesses stay in good 'legal health' and avoid the 'disease' of legal uncertainties, disputes and litigation.

<sup>(11)</sup> Already in its Opinion CES OJ C 14, 16.1.2001, p. 1, rapp. Mr VEVEER, the EESC acknowledged that 'the aim is not drastic and simplistic deregulation which would jeopardise the quality of both products and services and the overall interest of all "users" — be they business people, workers or consumers. Both the economy and society need rules in order to enable them to operate effectively' (point 2.8). In its Opinion on Better Lawmaking, OJ C 24, 31.1.2006, p. 39 the EESC stated that 'simplifying means reducing the complexity of the law as much as possible, but it does not necessarily mean a drastic cut-back in the body of Community law or deregulation, which would run counter to civil society's expectations regarding security and the need, voiced by business, particularly SME's, for legal certainty and stability'; and, in its Opinion on the Review of the Single Market (OJ C 93, 27.4.2007, p. 25, rapp. Mr CASSIDY), the EESC remembered that 'creating fewer regulations does not necessarily produce a better regulatory framework' (point 1.1.7.).

<sup>(12)</sup> 'Less (legislation) is more', [http://bre.berr.gov.uk/regulation/news/2005/050720\\_bill.asp](http://bre.berr.gov.uk/regulation/news/2005/050720_bill.asp)

<sup>(13)</sup> The Committee has also repeatedly made contributions to the Presidencies of the Council of the EU by way of exploratory opinions OJ C 175, 27.7.2007.

<sup>(14)</sup> <http://eesc.europa.eu/self-and-coregulation/index.asp>.

<sup>(15)</sup> See <http://www.proactivelaw.org>.

<sup>(16)</sup> Dictionary definitions of the word *proactive* highlight two key elements: an *anticipatory* element, involving acting in advance of a future situation, such as 'acting in anticipation of future problems, needs, or changes' (Merriam-Webster Online Dictionary), and an element of *taking control* and *causing change*, for example: 'controlling a situation by causing something to happen rather than waiting to respond to it after it happens' (proactive. Dictionary.com. WordNet® 3.0. Princeton University). — Recent research on proactive behaviour relies on similar definitions. Parker et al. (2006) define *proactive behaviour* as self-initiated anticipatory action that aims to change and improve the situation or oneself. See the Proactivity Research in Organisations Programme, <http://proactivity.group.shef.ac.uk/>.

<sup>(17)</sup> The first book on *Proactive Contracting* was published in Finnish in 2002: Soile Pohjonen (Ed.): *Ennakoiva sopiminen*. Helsinki 2002.

<sup>(18)</sup> Louis M. BROWN was first to introduce the approach by this name in his treatise entitled *Manual of Preventive Law*, Prentice-Hall, Inc., New York 1950.

## 6. How the proactive approach can further contribute to better regulation, better implementation and better enforcement of EU legislation

6.1 One of the fundamental objectives of the European Union is to offer its citizens an area of freedom, security and justice without internal borders; an area based on the principles of transparency and democratic control. Yet justice does not materialise simply as a result of providing access to courts or remedial actions afterwards. What is needed is a strong legal foundation for individuals and businesses to succeed.

6.2 Individuals and businesses expect a reasonable amount of certainty, clarity and consistency on the part of the legislator so that they can define their goals, implement their plans, and achieve predictable results.

6.3 Legislators should surely be concerned if individuals or businesses are not sufficiently informed that they know when the law might apply to them, can find out more about their legal position should they so wish, or can avoid disputes where possible or resolve these using the most appropriate techniques<sup>(19)</sup>. Experience and research tell us that today, individuals and businesses, consumers and SMEs in particular, are not always sufficiently informed.

6.4 The European Parliament, the Council and the Commission have defined some common commitments and objectives to improve the quality of lawmaking and to promote simplicity, clarity and consistency when drafting laws and transparency in the legislative process in the *Inter-Institutional Agreement on Better Lawmaking*.

6.5 It is clear, however, that better regulation cannot be achieved by the signatory institutions alone<sup>(20)</sup>. Simplification and other programmes need to be developed and reinforced at national and regional level. Coordinated commitment is required, and national, regional and local authorities responsible for implementing EU law need to be involved, along with the users of legislation<sup>(21)</sup>.

<sup>(19)</sup> See *civiljustice.2000 — A Vision of the Civil Justice System in the Information Age 2000*. <http://www.dca.gov.uk/consult/meta/cj2000fr.htm#section1>.

<sup>(20)</sup> In the own-initiative opinion on *Simplifying Rules in the Single Market* OJ C 14, 16.1.2001, p. 1 the rapp. Mr VEVER already drew our attention 'to the fact that virtually all EU rules derive exclusively from the close circle of EU institutions which have decision making or co-decision making powers' and that 'this failure to establish a proper culture of partnership with the socio-economic players, combined with the adoption of an essential political and administrative approach to decision making, makes it difficult for civil society representatives to play a responsible role in the simplification drive' (point 3.5.).

<sup>(21)</sup> The linkages between EU and national and regional administration have been highlighted in the EESC Opinion CESE OJ C 325, 30.12.2006, p. 3 rapp. Mr van IERSEL.

6.6 The European Union has already taken steps in the direction of the proactive approach. In this respect, the EESC welcomes:

- the decision to create a Single Market and later on, a Single Currency;
- the fact that, under the Treaty, the social partners can negotiate legislation in the social field;
- the 'Small Business Act' (SBA)/ 'think small first' (COM(2008) 394 final, 25.6.2008) with its Annex: Exchanging good practice in SME policy<sup>(22)</sup>;
- the examples of good practice from Member States serving as inspiration for implementing the SBA<sup>(23)</sup>, those collected under the European Charter for Small Enterprises, and
- the European Enterprise Awards recognising excellence in promoting regional entrepreneurship;
- the Revised Impact Assessment Guidelines of the Commission;
- the Solvit on-line problem solving network;
- the IPR Help Desk service (for intellectual property rights);
- the Commission's encouragement of the development of European Standards;
- the EESC self- and co-regulation website and database.

6.7 So far, these steps seem to be somewhat disparate, and there does not appear to be much research taking place or cross-sectoral learning from the experience gained. It would be worthwhile to study the outcomes of the steps taken and their relevance, implications and value as applied to other areas. The EESC suggests that these initiatives be closely followed and used for recognising and sharing best practices.

6.8 On the other hand, some recent examples of unnecessary problems and difficulties can illustrate the need for a proactive approach:

- The directive 2006/123/EC of 12 December 2006 on services in the internal market (known as the 'Bolkestein' Directive)<sup>(24)</sup>.

<sup>(22)</sup> EESC opinion OJ C 27, 3.2.2009, p. 7, rapp. Mr CAPPELLINI, and EESC opinion, rapp. Mr MALOSSE (in progress).

<sup>(23)</sup> See Annex 1 to the above Communication.

<sup>(24)</sup> EESC Opinion CESE OJ C 175, 27.7.2007, p. 14, rapp. Ms ALLEWELDT.

- The directive 2005/29/EC of 11.05.2005, on unfair commercial practices <sup>(25)</sup>.
  
- The directive 2008/48/EC of 23 April 2008 on credit agreements for consumers <sup>(26)</sup> although already generally contested by almost all the interested stakeholders <sup>(27)</sup>.
  
- The whole package of the consumer ‘acquis’ <sup>(28)</sup>, generally recognised as not having been correctly drafted, well transposed and duly implemented <sup>(29)</sup>.
  
- The exercise of the ‘common frame of reference’ (CFR) with the sound purpose of simplifying the legislation on contract law, but ending with a ‘monster’ of about 800 pages, only for the ‘general part’ <sup>(30)</sup>!
  
- The recent proposal of directive on immigration <sup>(31)</sup>
  
- The recognised failure on retail financial services and particularly on over indebtedness <sup>(32)</sup>.

<sup>(25)</sup> EESC Opinion CESE OJ C 108, 30.4.2004, p. 81, rapp. Mr HERNÁNDEZ BATALLER.

<sup>(26)</sup> OJ L 133, 22.5.2008, p. 66.

<sup>(27)</sup> EESC Opinion CESE OJ C 234, 30.9.2003, p. 1, rapp. Mr PEGADO LIZ.

<sup>(28)</sup> At least the 8 directives chosen from the 22 known as the ‘main acquis on consumer protection’, on contracts negotiated away from business premises (Directive 85/577/EEC of 20.12.85), ‘package travel, package holidays and package tours’ (Directive 90/314/EEC of 13.6.1990), ‘unfair terms in consumer contracts’ (Directive 93/13 of 5.4.1993), ‘time-share’ (Directive 94/47/EC of 26.10.1994), ‘distance contracts’ (Directive 97/7/EC of 20.5.1997, ‘indication of prices’ (Directive 98/6/EC of 16.2.1998), ‘injunctions’ (Directive 98/27/EC of 19.05.1998) and ‘sale of consumer goods and associated guarantees’ (Directive 1999/44/EC of 25.5.1999).

<sup>(29)</sup> EESC Opinion CESE OJ C 256, 27.10.2007, p. 27, rapp. Mr ADAMS.

<sup>(30)</sup> Cf. ‘EC Consumer Law Compendium — Comparative Analysis’, Bielefeld University, (12.12.2006), Profs Hans SCHULTE-NOLKE, Christian TWIG-FELSENER and Dr. Martin EBERS.

<sup>(31)</sup> EESC Opinion CESE OJ C 44, 16.2.2008, p. 91, rapp. Mr PARIZA CASTAÑOS.

<sup>(32)</sup> See ‘Single Market in Financial Services Progress Report 2006’ of 21.2.2007 and the EESC Opinions OJ C 151, 17.6.2008, p. 1 on *The Green Paper on retail financial services in the internal market*, rapp. Mr IOZIA and Ms MADER SAUSSAYE; OJ C 44, 16.2.2008, p. 74 on *Credit and social exclusion in an affluent society*, rapp. Mr PEGADO LIZ; OJ C 65, 17.3.2006, p. 113 on *The Green Paper Mortgage Credit in the EU*, rapp. Mr BURANI; OJ C 27, 3.2.2009, p. 18 on *The White Paper on the Integration of EU Mortgage Credit Markets*, rapp. Mr GRASSO.

- The growing transposition deficit in Member States, as even recognised by the Commission <sup>(33)</sup>.

6.9 The purpose of this opinion is to show how the *Proactive Law* approach can favour better regulation by providing a new way of thinking: one which takes as its starting point the real-life needs and aspirations of individuals and businesses, rather than legal tools and how they should be used.

6.10 This means that when drafting laws, the legislator should be concerned about producing operationally efficient rules that reflect real-life needs and are implemented in such a manner that the ultimate objectives of those rules are accomplished. The rules should be communicated in ways that are meaningful to their intended audience, so that they are understood and can be followed by those who are affected.

6.11 The life cycle of a piece of legislation does not begin with the drafting of a proposal or end when it has been formally adopted. A piece of legislation is not the goal; its successful implementation is. Nor does implementation just mean enforcement by institutions, it also means adoption, acceptance and, where necessary, a change of behaviour on the part of the intended individuals and organisations. Here, research shows that when the social partners are involved in negotiating agreements which subsequently become European law, implementation is more successful.

6.12 We can anticipate some consequences of this approach — including practical ones — for the decision-making process relating to EU lawmaking, implementation and enforcement.

6.12.1 Firstly, the active and effective participation, rather than mere consultation, of stakeholders before and during the drafting of any proposals and throughout the decision-making process, so that the starting point would be real-life problems and their solutions and the decision-making process would be a continuous dialogue and a mutual learning process based on achieving certain goals <sup>(34)</sup>.

<sup>(33)</sup> See the Communication from the Commission ‘A Europe of results-applying Community law’ (COM(2007) 502 final), the related OJ C 204, 9.8.2008, p. 9, rapp. Mr RETUREAU and the very impressive article on ‘Active Transposition of EU Legislation’ by Dr. Michael KAEDING (EIPASCOPE 2007/03, page 27).

<sup>(34)</sup> In its Opinion on *Simplification*, the EESC already stated that ‘the formal consultation process should not be limited to interlocutors of the Commission own choosing. There is a need to engage all stakeholders in the process (...) The consultation process should be widened by inviting submissions from all interested parties so that consultation should be effectively at the option of the consultee’ (OJ C 133, 6.6.2003, p. 5, points 4.1 and 4.1.1.1., rapp. Mr SIMPSON).

6.12.2 Secondly, impact assessments would take into consideration not only economic but also social and ethical aspects; not only the business environment but also consumers as the ultimate recipients of legal measures and initiatives; not only the opinions of organised civil society, but also the voice of the anonymous citizen <sup>(35)</sup>.

6.12.3 Thirdly, anticipating solutions rather than problems, and using the law to achieve and enforce goals and to make rights and freedoms a reality in a given cultural context, rather than concentrating on formalistic legal logic <sup>(36)</sup>.

6.12.4 Also, drafting laws as straightforwardly as possible and as closely as possible to their users, ensuring that the language used is readily comprehensible and straightforward, and communicating their contents in appropriate manner, accompanying and guiding their implementation and enforcement in all phases of their life-cycle.

6.12.5 Furthermore, eliminating redundant, inconsistent, outdated and non-applicable laws, and harmonising the understanding of terms, definitions, descriptions, limitations and interpretations into common frames of reference <sup>(37)</sup>. Also very important is to stop the creation of new terms or 'Eurospeak' of doubtful meaning, that are commonly used without the majority really knowing what they mean.

6.12.6 Also, pressing for the introduction of new areas of contractual freedom, self-regulation and co-regulation and areas which may be covered by standards or codes of conduct at national and European level <sup>(38)</sup>, and identifying and removing legislative obstacles that stand in their way.

6.12.7 Finally, focusing on the 'model laws' approach to legislating ('28<sup>th</sup> regimes') rather than on overly detailed and unnecessary total harmonisation, and leaving considerable and appropriate room for self and co-regulation whenever this is adequate.

6.13 The way of doing this could be initiated through research projects and dialogue with stakeholders on the specific role of the *Proactive Law approach* throughout the life-cycle and at all levels of regulation. The first steps could include round-table discussions or seminars with academic circles, think tanks, stakeholders and institutions in order to put up a framework and an action plan for further initiatives, the purpose of which would be to implement consideration of the proactive approach in every instance, much in the same way that consideration of subsidiarity and proportionality currently always do. In view of its clear focus on better regulation issues, the SMO might be the platform for further discussion on the *Proactive Law approach*.

Brussels, 3 December 2008.

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and Social Committee*  
Mario SEPI

*The Secretary-General of the European Economic  
and Social Committee*  
Martin WESTLAKE

<sup>(35)</sup> See, in particular, EESC Opinions on *Better Lawmaking* OJ C 24, 31.1.2006, p. 39 and on *Quality standards for the contents, procedures and methods of social impact assessments from the point of view of the social partners and other civil society players* OJ C 175, 27.7.2007, p. 21, both by the rapp. Mr RETUREAU.

<sup>(36)</sup> As it was already emphasised in the EESC Opinion on *Better implementation of EU legislation* (OJ C 24, 31.1.2006, p. 52 rapp. Mr van IERSEL) 'for a law to be enforceable it must be sufficiently clear and to be effective it must provide an appropriate response to specific problems. Bad laws lead to a proliferation of laws and excessive amounts of rules that impose an unnecessary compliance burden on businesses and confuse citizens' (point 1.6).

<sup>(37)</sup> A first approach to this method has been defined in the Communication from the Commission on 'Updating and simplifying the Community acquis' (COM(2003) 71 final), object of the EESC Opinion CESE OJ C 112, 30.4.2004, p. 4, rapp. Mr RETUREAU.

<sup>(38)</sup> Opinion on *The Priorities of the Single Market 2005-2010* (OJ C 255, 14.10.2005, p. 22), rapp. Mr CASSIDY.