Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Smart Regulation in the European Union'

COM(2010) 543 final

(2011/C 248/15)

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On 8 October 2010 the European Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Smart Regulation in the European Union

COM(2010) 543 final.

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 26 May 2011.

At its 472nd plenary session, held on 15 and 16 June 2011 (meeting of 15 June), the European Economic and Social Committee adopted the following opinion by 128 votes to 1, with 5 abstentions.

1. **Conclusions and recommendations**

1.1 The EESC welcomes the interest the Commission has shown, not only in this communication but also in its documents on the 2020 Strategy and the Single Market Act, on strengthening political, legislative and administrative procedures to ensure that Community law is devised and applied in a more rational, appropriate manner throughout the policy cycle, from design to implementation by the competent Member State bodies and the final evaluation of compliance with such law by its ultimate beneficiaries.

1.2 The Committee fails, however, to understand the need for the new term used to replace 'Better lawmaking'; unless it is because the communication under consideration is merely a policy document.

1.3 The EESC is pleased to see that a number of the suggestions it has made in its opinions on the matter have been taken on board and consequently welcomes the stated intentions to improve monitoring of subsidiarity and proportionality, make impact studies more rigorous, ensure ex-post assessments are to be more strategic and integrated and involve the Member States and their parliaments more actively, giving them greater responsibility and offering support for their own work on the legislative arena. The Committee is particularly satisfied to note the proposal to ensure greater participation by the public and other stakeholders in drafting, transposing and implementing Community legislation, specifically by extending public consultation periods and by streamlining infringement proceedings and making them more effective.

1.4 The Committee considers, however, that the communication falls short of what might be hoped for in terms of providing an adequate means of formalising the legislative aspects of implementing the 2020 Strategy, or simply of applying the measures that are priorities under the Single Market Act.

1.5 The EESC deems it crucial that the communication be followed up by a genuine action plan that sets objectives, puts forward measures, identifies instruments, assesses impact, defines options and establishes the cost/benefit ratio, which will require extensive prior discussion with civil society at Community, national, regional and local levels.

1.6 The Committee therefore urges the Commission, in future versions of the communication, to take particular account of the general guidelines set out in this opinion and justify the positions it has held in this area for some years now.

1.7 In particular, the EESC considers that aspects such as the way in which ex ante impact assessments are carried out by all Community institutions responsible for implementing them, the nature and membership of the body responsible for monitoring impact assessments, the parameters used, especially as regards the impact on fundamental rights, and the ways and means of ensuring greater transparency, should be more clearly defined. The financial, health and social security sectors should also be addressed on a more detailed, sector-specific basis and the criteria for deciding on priorities, the mechanisms for evaluating and processing complaints, the instruments for automatically detecting infringements and the means of improving the workings of national courts and other complementary instruments also need to be more clearly defined.

1.8 Lastly, the Committee takes the view that the Commission has overlooked a number of important aspects and calls for these to be properly discussed and specifically included. This applies to: the indices and parameters for gauging the quality of legal texts; practical measures for simplifying legislation; the inexplicable failure to opt clearly for 'regulation' instruments, especially for achieving full harmonisation in matters relating to the completion of the internal market; the unforgiveable omission of the option of

optional schemes; the role of self-regulation and co-regulation; the surprising omission of any reference to the extremely important work carried out under the CFR; and the proposals currently under discussion on greater harmonisation of European contract law.

1.9 The area where the EESC considers the communication to be weakest, however, concerns the proper application of Community legislation. The Committee therefore urges the Commission to examine closely the root causes of the universally poor application of the Community *acquis*, which is confirmed anew every year in the reports on this issue. The EESC would also like the Commission to take due account of the numerous contributions and recommendations made by the Committee in different opinions and carry out a systematic study of the measures needed to effect a sea-change in the current situation.

2. **Introduction: concept and background**

2.1 According to the communication under consideration, 'smart regulation' should be understood to mean regulation:

— that is about the whole policy cycle - from the design of a piece of legislation, to implementation, enforcement, evaluation and revision;

— that must remain a shared responsibility of the European institutions and of Member States;

— in which the views of those most affected by regulation have a key role to play, requiring the voice of citizens and stakeholders to be further strengthened.

2.2 The Commission considers that, as repeatedly and insistently stated by its representative at the preparatory meetings for this EESC opinion, this is merely a policy document and not a technical one, which means that it is pointless to expect it to provide a firm definition of 'smart regulation'.

2.3 The current initiative on 'smart regulation' is the successor, however, to the 'better regulation' exercise, to which the Community institutions in general and the Commission in particular have, with marked success, devoted considerable efforts in the last 10 years, as has the EESC, which has always supported and encouraged the initiative, as clearly demonstrated in a number of opinions [1].

3. **General comments**

3.1 The current Community legislative landscape requires an in-depth consideration of the design, drafting, transposal and implementation of laws, and the same consideration should be given to revision and streamlining.

3.2 The EESC therefore considers that the issue warrants in-depth discussion, involving civil society, not only because the consequences of Community legislation impact on civil society, but also because its involvement could make a decisive contribution to the improvement in the existing regulatory framework that everyone wishes to see.

3.3 Against such a backdrop, the Communication, being merely a policy document, appears to fall short of what is required. Whilst it offers more than enough fine proposals and good intentions, it lacks tangible measures and effective instruments.

3.4 Broadly speaking, it could be said that, because this is merely a policy document, it will need to be complemented by a real programme that states the aims, gives form to the measures proposed, identifies the instruments needed and assesses the potential impacts. The programme should set out the options and establish the cost/benefit ratio.

3.5 The EESC roundly welcomes the analysis underpinning the Communication and the objectives it proposes. Unless it is because this is merely a policy document, the EESC fails to understand why the term 'better regulation' should be changed to 'smart regulation'.

3.6 The EESC therefore considers it useful to restate the positions it has put forward on this subject:

a) a stricter application of the 'better regulation' principles;

b) greater transparency at all levels of drafting legislation;

c) a better selection of legal instruments, including mechanisms for self-regulation and co-regulation;

d) the development of a more systematic monitoring system for the transposal of directives at national level;

e) the new role and greater powers of national parliaments conferred by the Treaty of Lisbon should not be overlooked;

f) the Commission should also make more regular use of its interpretative communications;

g) greater efforts will also be needed in terms of streamlining and codifying legislation.

4. **Specific comments**

A. *Aspects to be welcomed*

4.1 The specific comments must highlight a number of positive aspects of the Communication, which are to be welcomed and supported.

[1] OJ C 48, 15.2.2011, p. 107 and OJ C 175, 28.7.2009, p. 26.

4.2 There is primarily the proposal to monitor subsidiarity and proportionality more closely and to improve the quality of legal texts, specifically through more rigorous impact assessments.

4.3 There are also the intentions to continue with programmes to streamline legislation and reduce unnecessary administrative burden by at least 25 %.

4.4 The idea of a more strategic and integrated *ex-post* assessment is also to be welcomed, which takes account not only of the existing legislative framework but also of the relevant economic, social and environmental implications and is not simply carried out on a case-by-case and isolated basis for each legislative initiative.

4.5 Especially to be welcomed are all initiatives aimed at encouraging the Member States to shoulder their responsibilities in the legislative process, involving national parliaments, in line with the new powers conferred on them by the TFEU, in preparing legal texts and, in particular, as regards the provisions of Articles 8 and 13 thereof.

4.6 The EESC therefore welcomes the fact that the Commission is prepared not only to offer support to the various Member State bodies involved in transposing and implementing the Community acquis, but also to ensure the participation of the public and other stakeholders in the discussions that should take place in every Member State as part of the process of preparing Community legislation, and in transposing these laws and fitting them into national legislation.

4.7 Particularly welcome is the Commission's determination to streamline infringement procedures and to set priorities, whilst continuing to make use of SOLVIT, given the need for a new boost and greater dissemination and credibility amongst stakeholders.

4.8 Also praiseworthy is the extension of the time limit for public consultation from 8 to 12 weeks, 'to strengthen the voice of citizens and stakeholders further'. The EESC considers that this measure cannot be separated from what is now contained in Article 11 of the Treaty of Lisbon, as a contribution to achieving participatory democracy in the EU.

B. *What could be improved*

4.9 The EESC understands why the Commission takes the view that monitoring of impact assessments should continue to be carried out by the internal committee responsible for the matter. Nevertheless, account should also be taken of the views expressed in the public consultation process to the effect that monitoring should be carried out by an independent external body. Alternatively, an internal body could be set up, with representatives from all the Member States. In any event, the Impact Assessment Board's mandate needs to be strengthened through a mechanism requiring impact assessments to be carried out. Moreover, the Impact Assessment Board does not have the power to put the impact assessment report and de facto the related legislative proposal on hold should its analysis disclose major shortcomings in the research work carried out. These are issues that require more in-depth discussion, given that, as the Commission acknowledges, they are a 'key element of this system'.

4.10 Furthermore, a recent report carried out by the European Court of Auditors concludes that the European Commission does not consider it necessary to consult on draft impact assessments, despite the frequent requests by stakeholders. Consultation on the draft impact assessment reports would help improve the process from the stakeholders' point of view, thus ensuring that the 'best product' would then feed into the co-legislative process involving the Council of Ministers and the European Parliament.

4.11 The same Court of Auditors' report clearly highlighted one of the main weaknesses in the EU impact assessment system as the fact that neither the European Parliament nor the Council systematically analyse the impact of their own amendments. The EESC asks the Council and the European Parliament to produce and publish reader-friendly summaries of their own impact assessments and to adhere to the Inter-institutional Agreement ([2]).

4.12 The communication does not detail the parameters that might be used in the impact assessments it wishes to carry out ([3]).

4.13 As regards improving the system's transparency, the Commission should state how and with what means it intends to achieve this.

4.14 In terms of assessing the impact on fundamental rights, it would be useful for the Commission to specify how and with what means it intends to achieve this too.

4.15 The current economic crisis has demonstrated that the role of regulation of market players needs to be rethought, and the new exercise of 'smart regulation' should consequently be addressed on both a sector-by-sector and cross-sectoral basis, with the communication needing to pay particular attention to the sectors of finance, health and social security.

4.16 As regards how it exercises its powers concerning infringements, especially 'internal organisation measures to allow it to carry out its task effectively and impartially, in accordance with the Treaty.' ([4]), it is suggested that the Commission detail priority criteria, assessment mechanisms, examination of complaints, specific instruments to detect infringements unofficially, means to improve the action of national courts and other complementary instruments (SOLVIT, FIN-NET, ECC-NET, alternative and extra-judicial means).

([2]) OJ C 321, 31.12.2003, p. 1.
([3]) OJ C 44, 11.02.2011, p. 23.
([4]) COM(2002) 725 final.

C. *What is missing*

4.17 As for improving the quality of legal texts, no indication is given of the factors and parameters that would be used to assess this process.

4.18 As regards the issue of streamlining legislation, no reference is made to the seemingly obvious requirement for tangible measures, such as:

— work on genuine and thorough codification, and not simply a compilation of texts;

— publication of the complete texts when they have been revised and amended, instead of merely 'collating' them and referring to articles from different pieces of legislation.

4.19 No clear acknowledgement is given of the option for the 'regulation' instrument as opposed to the use of directives, despite this approach forming part of the 2020 Strategy.

4.20 No link is established with the extremely important work that has been carried out on the Common Frame of Reference (CFR) or with the Commission's recent proposals under discussion to further harmonise European contract law ([5]).

4.21 No reference is made to the need for systematic consideration to be given to the option of a '28th regime', for initiatives covered by 'Better regulation' ([6]).

4.22 It is also surprising that the communication is silent on the role of self-regulation and co-regulation and on the prior consideration needed on what could usefully be resolved under so-called 'soft law', instead of using regulation.

4.23 The area where the communication proves weakest, however, is that of the implementation of Community law. In this regard, the EESC wishes to draw attention to its opinions on the matter ([7]) and to the conclusions of the recent conference held by the Belgian presidency on the issue ([8]).

4.24 Particularly significant in this regard is the Commission report of 1 October 2010 ([9]) on the application of EU law, which shows that, despite the fact there was a smaller improvement than in the previous year, an average of 51 % of required transposition measures were late and the average time taken to complete infringement proceedings was 24 months.

4.25 In this regard, the Commission fails to mention any of the root causes of the widespread inadequate implementation of the Community acquis in the Member States, a matter on which the EESC has commented on many occasions, which can only be explained by the fact that this is merely a policy document. Nevertheless, because of its importance within the framework of smarter regulation, it is worth highlighting the following aspects:

a) the incorrect or incomplete incorporation of Community rules into national legislation, where they are often deemed to be undesirable or to run contrary to national customs and interests;

b) the lack of political will on the part of national authorities to comply and ensure compliance with rules which are not seen as fitting in with the body of national law and national traditions;

c) the persistent tendency to add new, unnecessary regulatory mechanisms to Community rules or to choose only some parts of these rules (*gold-plating* and *cherry-picking*) even making it advisable, in addition to the 'correlation tables' that the Member States have to produce, as set out in the Interinstitutional Agreement ([10]) and the Framework Agreement between the Commission and the European Parliament, for Member States also to be required to specify what provisions of their transposed legislation constitute over-regulation;

d) a degree of inadequate specific preparation on the part of national authorities in order to understand and ensure application of the Community *acquis*;

e) the sometimes insufficiently specific training of some judges and other players in the judicial system (lawyers, court officials, etc), in certain areas of Community law, which sometimes leads to erroneous application or lack of application of transposed laws and to the application of parallel rules under national legislation;

f) the need to extend administrative cooperation measures to involve civil society organisations, particularly consumer protection associations;

g) the lack of foresight and harmonisation of punitive law, which has been left up to Member States.

([5]) Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010) 348 final).

([6]) See the EESC own-initiative opinion on the '28th regime' (OJ C 21, 21.01.2011, p.26) and the references made to this method in recent key reports such as the Monti report entitled A new strategy for the single market, of 9.5.2010, the report by Felipe González entitled Project Europe 2030, of 8.5.2010, and the Lamassoure report on The citizen and the application of Community law, of 8.6.2008.

([7]) OJ C 24, 31.1.2006, p. 52, and OJ C 18, 19.01.2011, p. 100.

([8]) High Level Conference: European consumer protection enforcement day (Brussels, 22.09.2010).

([9]) See COM (2010) 538 Final, 27th Annual Report on Monitoring the Application of EU Law (2009).

([10]) OJ C 321, 31.12.2003, p. 1.

4.26 Commission action should also, as a priority, target information and training for national public authorities, in particular those with direct responsibilities for the application of Community law in the Member States. Here, better information and training should be provided for judges and other public prosecutors in general, whose responsibility it is ultimately to interpret and apply the law to specific cases which are the subject of dispute.

Brussels, 15 June 2011.

The President
of the European Economic and Social Committee
Staffan NILSSON