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Information and Notices

Notice No | Contents | Page

I *Information*

. . . . . .

II *Preparatory Acts*

European Economic and Social Committee

405th plenary session, 28 and 29 January 2004

2004/C 108/01 Opinion of the European Economic and Social Committee on the 'Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation' (COM(2002) 654 final) 1

2004/C 108/02 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 - Adapting e-Business policies in a changing environment: The lessons of the Go Digital initiative and the challenges ahead' (COM(2003) 148 final) 23

2004/C 108/03 Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council on the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (recast version)' (COM(2003) 418 final – 2003/0153 (COD)) 29

2004/C 108/04 Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the measures to be taken against the emission of gaseous and particulate pollutants from compression-ignition engines for use in vehicles, and the emission of gaseous pollutants from positive-ignition engines fuelled with natural gas or liquefied petroleum gas for use in vehicles' (COM(2003) 522 final - 2003/0205 (COD)) 32

EN

Price:
22 EUR

(Continued overleaf)

Notice No	Contents (continued)	Page
2004/C 108/05	Opinion of the European Economic and Social Committee on 'preparing transport infrastructure for the future: planning and neighbouring countries - sustainable mobility - financing'	35
2004/C 108/06	Opinion of the European Economic and Social Committee on 'Promoting renewable energy: Means of action and financing instruments'	45
2004/C 108/07	Opinion of the European Economic and Social Committee on the 'proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1406/2002 establishing a European Maritime Safety Agency' (COM(2003) 440 final - 2003/0159 (COD))	52
2004/C 108/08	Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council on the regulation of the operation of aeroplanes covered by Part II, Chapter 3, Volume I of Annex 16 to the Convention on International Civil Aviation, second edition (1988)' (COM(2003) 524 final - 2003/0207 (COD))	55
2004/C 108/09	Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council on the use of vehicles hired without drivers for the carriage of goods by road' (COM(2003) 559 final - 2003/0221 (COD))	56
2004/C 108/10	Opinion of the European Economic and Social Committee on the 'proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 2320/2002 of the European Parliament and of the Council establishing common rules in the field of civil aviation security' (COM(2003) 566 final - 2003/0222 (COD))	57
2004/C 108/11	Opinion of the European Economic and Social Committee on the 'proposal for a Regulation of the European Parliament and of the Council on shipments of waste' (COM(2003) 379 final - 2003/0139 COD)	58
2004/C 108/12	Opinion of the European Economic and Social Committee on the 'proposal for a Regulation of the European Parliament and of the Council on certain fluorinated greenhouse gases' (COM(2003) 492 final – 0189/2003 COD)	62
2004/C 108/13	Opinion of the European Economic and Social Committee on the 'proposal for a Council Regulation on the establishment of a regime of local border traffic at the external land borders of the Member States' and the 'proposal for a Council Regulation on the establishment of a regime of local border traffic at the temporary external land borders between Member States' (COM(2003) 502 final – 2003/0193 (CNS) – 2003/0194 (CNS))	65
2004/C 108/14	Opinion of the European Economic and Social Committee on 'Europe's Creative Industries'	68
2004/C 108/15	Opinion of the European Economic and Social Committee on the 'proposal for a Council Directive amending Directive 77/388/EEC to extend the facility allowing Member States to apply reduced rates of VAT to certain labour-intensive services' (COM(2003) 825 final – 2003/0317 (CNS))	78
2004/C 108/16	Opinion of the European Economic and Social Committee on the 'proposal for a Council Regulation amending Regulation (EC) No. 1673/2000 on the common organisation of the markets in flax and hemp grown for fibre' (COM(2003) 701 final - 2003/0275 CNS)	80

EN

(Continued on inside back cover)

Notice No	Contents (continued)	Page
2004/C 108/17	Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)' — COM(2003) 356 final - 2003/0134 (COD)	81
2004/C 108/18	Opinion of the European Economic and Social Committee on the 'proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the regulation on consumer protection cooperation")' (COM(2003) 443 final – 2003/0162 (COD))	86
2004/C 108/19	Opinion of the European Economic and Social Committee on the 'Commission Report XXXIInd Competition Policy Report 2002' — SEC(2003) 467 final	90
2004/C 108/20	Opinion of the European Economic and Social Committee on the 'proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders' (COM(2003) 687 final - 2003/0273(CNS))	97
2004/C 108/21	Opinion of the European Economic and Social Committee on 'the agricultural employment situation in the EU and the accession countries: options for action for 2010'	101

EN

II

(Preparatory Acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

405TH PLENARY SESSION, 28 AND 29 JANUARY 2004

Opinion of the European Economic and Social Committee on the 'Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation'

(COM(2002) 654 final)

On 14 January 2003 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned Green Paper.

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 12 November 2003. The rapporteur was Mr Pegado Liz.

At its 405th plenary session of 28 and 29 January 2004 (meeting of 29 January), the Economic and Social Committee adopted the following opinion by 65 votes with one abstention.

I. INTRODUCTION

A. Objectives, reasons and appropriateness of the Commission's initiative

1.1 The Commission's main purpose in presenting the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation [COM(2002) 654 final of 14 January 2003], henceforth referred to as the 'green paper', was 'to launch a wide-ranging consultation of interested parties on a number of legal questions' concerning conversion and modernisation, formally declaring that it 'has neither taken a decision in respect of the necessary to modernise the Rome Convention nor in respect of its conversion into a Community instrument'.

1.2 In contrast the Committee, acting within the scope of its consultative powers, wishes at this stage to express its approval of the principle of converting the Rome Convention into a Community instrument, and of the modernisation of its provisions. In so doing, it is aware that it is fulfilling its consultative role in an area which is vital not only to the regulation of key aspects of the completion of the internal market, but also to the creation of a European civil society with regard to an essential aspect of an area of freedom, security and justice ([1]).

([1]) See question 2 of the Green Paper.

1.3 In a number of earlier opinions, the Committee called for a debate on the relevance of the provisions of the Rome Convention and on the various difficulties encountered in its implementation concerning several general or sectoral aspects ([2]).

1.4 By the same token, with regard to conversion into a Community instrument by virtue of the new possibilities provided by the Treaty of Amsterdam for the creation of an area of freedom, security and justice, which were set out in the Vienna action plan, adopted by the Council in 1998 ([3]) and fleshed out at the Tampere European Council in October 1999, the Committee can only repeat the views it expressed in its earlier opinions on conversion into a Community instrument, on the current Regulation 44/2001 of 22 January 2000 ([4]), and on the Communication from the Commission on European contract law ([5]).

1.4.1 In the first of these opinions, the Committee welcomed the Commission's decision to convert the Convention into a draft regulation, as 'a regulation with direct application' representing 'significant progress, in particular insofar as it will create greater legal certainty' and since 'the Court of Justice will be able to ensure uniform application of the provisions set out in the regulation in all Member States'.

1.4.2 In the second opinion, the Committee argued that 'it is undeniable that international traders feel the need for a universal, workable, stable, predictable framework to promote secure and fair transactions and compliance with the relevant provisions and principles of international public law contained in major international conventions and common law'.

1.4.3 With regard to the present initiative, therefore, the Committee would repeat the support it expressed for converting the Brussels Convention into a Community regulation. It would also draw attention to the need for legal consistency, which in turn suggests that a similar approach would be appropriate.

1.5 The Committee also considers that the Commission already has sufficient data compiled from a number of sources ([6]), including the above-mentioned EESC opinions, to enable it to press ahead with a fully-justified initiative which should not be delayed in view of the forthcoming accession of ten more Member States.

([2]) In particular, the opinions on the Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJ C 117 of 26.4.2000); on the Initiative of the Federal Republic of Germany with a view to adopting a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (OJ C 139 of 11.5.2001); on the Proposal for a Council Decision establishing a European Judicial Network in civil and commercial matters (OJ C 139 of 11.5.2001); on the Proposal for a Council Directive on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ C 368 of 20.12.1999); on the Proposal for a Council Regulation creating a European Enforcement Order (OJ C 85 of 8.4.2003); on the Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ C 116 of 20.4.2001); and on the Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation (COM(2000) 746 final) (OJ C 220/2, 16.9.03).

([3]) OJ C 19 of 23.1.1999.

([4]) OJ C 117 of 26.4.2000.

([5]) OJ C 241 of 7.10.2000.

([6]) Including the work of the European Group for Private International Law (http://www.drt.ucl.ac.be/gedip).

1.6 In view of the advances in substantive and procedural areas already made or in the pipeline, such as, amongst others ([7]), the Communication from the Commission on European contract law ([8]) and the Rome II instrument on the law applicable to non-contractual obligations ([9]), it would be advisable, as a minimum, for all aspects of private international law contained in the various above instruments and documents mentioned to be systematically linked in a single instrument, directly applicable in all Member States, as a means of ensuring uniform application of standardised rules of conflict of laws in all the Member States.

B. **The socio-economic impact of the initiative**

1.7 In addition to the highly technical and legal aspects relating to the modernisation and conversion of the Rome Convention into a Community instrument, the Commission is quite rightly concerned about the socio-economic impact of the initiative and a number of questions are raised in relation to the application of various provisions of the instrument.

1.8 The Committee shares the Commission's concern and, in assessing the proposals to modernise the Convention's content, takes account of available data on the impact of the measures, particularly concerning sectors and areas such as insurance, leasing arrangements, labour law, businesses – especially SMEs – and consumers.

1.9 The Committee wishes, from the outset, to express its general belief that modernisation of private international law arrangements, by consolidation into a single Community instrument, will have a highly beneficial effect on economic and social relations within the EC area, since it will help to standardise conflict rules and thereby generate certainty and confidence.

1.10 If the internal market is to function properly, and particularly freedom of movement and of establishment for natural or legal persons, legal certainty must be increased. Since this involves stability of legal relations, such relations must receive equal treatment in all the EU Member States (although, of course, subject to the constraints of public policy in each country).

1.10.1 This aim will be reflected in the protection of the legitimate expectations of parties to contractual relations involving multiple locations, which will also entail ensuring that there is certainty as to which law is applicable to such relations. Such stability will always be valuable when uniformity is achieved in evaluating legal situations and contractual relations in the various EU Member States. Progress towards such uniformity is without question facilitated by unifying the conflict rules, rules which prevent or resolve territorial conflicts of law.

([7]) Including Regulations (EC) Nos 1346, 1347 and 1348 of 29 May 2000 on insolvency proceedings, on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and parental responsibility, and on the service of judicial and extrajudicial documents in civil or commercial matters (OJ L 160 of 30.6.2000); Regulation (EC) No 1206/2001 of 28 May 2001 on the taking of evidence in civil or commercial matters (OJ L 174 of 27.6.2001); the Proposal for a Council Regulation creating a European enforcement order (COM(2002) 159 final); the Green Paper on alternative dispute resolution in civil and commercial law (COM(2002) 196 final of 19 April 2002); the Green Paper on liability for defective products (COM(1999) 396 final of 28 July 1999); Directive 2000/35/EC of 29 June 2000 on combating late payment in commercial transactions (OJ L 200 of 8.8.2000); Directive 2002/65/EC of 23 September 2002 concerning distance marketing of consumer financial services (OJ L 271 of 9.10.2002); Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171 of 7.7.1999); Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144 of 4.6.1997); the Communication from the Commission on the codification of the acquis communautaire (COM(2001) 645 final); Council Decision 2003/48/JHA of 19 December 2002 on police and judicial cooperation to combat terrorism (OJ L 16 of 22.1.2003); Directive 2002/8/EC of 27 January 2003 on access to justice in cross-border disputes (OJ L 26 of 31.1.2003); and Directive 98/27/EC of 19 May 1998 on injunctions (OJ L 166 of 11.6.1998).

([8]) See the Communication from the Commission – A more coherent European contract law: an action plan (COM(2003) 68 final of 12 February 2003.

([9]) See COM(2003) 427 final of 22 July 2003 - http://europa.eu.int/comm/dgs/justice_home/index_en.htm.

1.10.2 This provides a single vision of such relations, increasing legal certainty regarding the way in which they should be governed, with clear benefits for the planning of commercial life and its geographical extension, freed from concern about shifts in the rules governing contractual relations ([10]). This also avoids 'forum shopping' ([11]).

1.10.3 Moreover, unification of the conflict rules will provide greater predictability as to which system governs contractual relations between natural persons, in turn facilitating and boosting commercial life, since the players involved will be more ambitious if less concerned about the future of their relations ([12]).

C. **Methodological issues: the questions**

1.11 The Green Paper is intended primarily for legal specialists, especially universities and judges, companies and associations protecting and upholding the interests of citizens, especially consumers. The questions were drawn up with this in mind, covering almost exhaustively the issues raised by the application of the Rome Convention.

1.12 The Committee, for its part, plans to group the issues raised into major themes, making a distinction between general and specific questions, and to organise the present opinion accordingly.

1.13 In view of the ample academic and case-law information provided by the Green Paper in support of the questions the Rome Convention may raise and the alternative solutions put forward, in the interests of brevity the Committee does not reproduce all the possible arguments, sometimes simply listing the advantages of the solutions proposed.

1.14 However, in a concluding synthesis, the Committee attempts to provide a specific answer to each of the questions asked by the Commission and also raising further questions and making recommendations concerning the future work of the Commission, with the aim of contributing to the formulation and adoption of an instrument meeting current needs in this area.

([10]) The formal approach of private international law is propitious to unification, since effective rules to govern it are often independent of the specific circumstances of each national community. This applies even more in the field of contracts, where the views of those involve tend to converge, regardless of their geographical location. This may be to the detriment of certain legal-substantive objectives, but there is widespread agreement in the Community as to these objectives. The question remains whether existing laws match the desired substantive results, as will be the case of protection of the party considered to be weaker. Recent comments on the Brussels I Regulation could, mutatis mutandis, be brought to bear on this question.

([11]) Furthermore, unification in the field of conflicts of laws would, by reducing forum shopping on the basis of the law deemed competent by each country's system of private international law, enable further steps to be taken towards uniform rules on international jurisdiction: there is nothing to choose between different forums available for an action, at least from the point of view of the law that is to be applied in a given forum, thereby increasing market unity and boosting commercial activity in the single market. This is a further reason for proposing complementarity between the two branches of conflict in private international law, even if the diversity of values and objectives which they seek to pursue is confirmed, and they address problems which are also distinct and raise a number of legal issues. Irrelevance of the location in which an action takes place will always have the effect of facilitating the movement and establishment of persons and interests in different places, fostering real mobility within the common market on the basis of real needs and uninfluenced by the consideration that a law may be more favourable in one country than in another.
Cf. M. Giuliano and P. Lagarde, op.cit., pointing out that unification of the rules of conflict in contractual matters would be 'a natural sequel to the Convention on jurisdiction and enforcement of judgments', and M. Giuliano, 'Osservazioni introduttive in Verso una disciplina comunitaria della legge applicabile ai contratti, Padova, 1983, p. XXI', emphasising that the Rome Convention would be a natural supplement to the 1968 Brussels Convention, as it would prevent the forum shopping loophole left by the Brussels Convention in the field of contracts.

([12]) Cf. M. Giuliano and P. Lagarde, Report on the Convention on the law applicable to contractual obligations, 19 June 1980, OJ C 282 of 31.10.1980, p.4 et seq.; and M. Giuliano, op.cit., loc.cit.,, where the author suggests that the Rome Convention should be seen as a kind of 'membership card' for a common legal area, designed to ensure that natural and legal persons operating within the Community enjoy a high level of legal certainty in their contractual relations, both internally and externally, thereby facilitating the operation of the common market.

II. LEGAL BASIS AND THE LEGAL INSTRUMENT TO BE USED

2.1 The Committee agrees with the Commission's suggestion that the legal basis for the present initiative should be Articles 61(c) and 65(b) of the Treaty, and with its reasons for doing so, since the initiative is not in conflict, but rather in full keeping, with the principles of subsidiarity and proportionality.

2.2 The Committee's preference for the Community instrument to be used is, unambiguously, for a regulation, since this more closely matches the nature of the rules in question and the objective of ensuring certainty of interpretation and implementation by both the different national courts and businesses and private individuals in their transactions.

III. PRINCIPLES UNDERPINNING THE CONVENTION AND THEIR REAFFIRMATION

3.1 The Rome Convention is based on a number of fundamental principles and values which form the historical foundation and shared heritage of the legal systems embodying the rule of law. These include:

— the principle of freedom of private individuals under private international law, meaning recognition of the choice of the parties as the main connecting element;

— the importance of certain mandatory rules designed to safeguard public policy interests;

— the value of stability in international legal affairs: the aim of unification (with effects on uniform interpretation) and the principle of favor negotii or favor validitatis, in the area of form of contracts and capacity; the value of protection of appearance/trust;

— protection of expectations and of legal certainty: the trend to consider the applicable law to be that most closely connected with the contract (an approach of universal scope facilitating harmony of judgments; the importance of the law of the economic and social environment of the parties (Umweltsrecht), with the ensuing additional or alternative choice (relating to the existence and validity of the contract) of the law of the place of residence of one or both of the parties.

3.2 Since at substantive level national legal systems lay down rules to protect consumers or the party considered to be weaker (workers, insured persons or policy-holders) – not so much in order to favour them with increased benefits beyond what would in fairness be due to them, but rather to restore the balance and proportion inherent in the obligation-related aim of all contractual relations – the objective of the approach to protection of the weaker party may, also in the field of private international law, has been strictly limited to ensuring real adherence to the purpose of the conflict rules in this area, thereby preventing the distortion of conflict law which could arise from choice of the applicable law where such choice, under the guise of freedom of choice in the area, serves to conceal what is actually a unilateral choice of lex contractus made by the stronger partner (e.g. business operator, employer, etc.).

3.3 By invoking the rules of necessary and immediate implementation, it is intended to ensure not only the implementation of the commutative justice inherent to contracts, but also that certain substantive public objectives, which may conflict with European countries' economic and social organisation, are not put aside; aims deriving from distributive justice may also be achieved.

3.4 These approaches, which are more or less deeply rooted in private international law, reflect a desire for legal certainty, and in general do not stand in the way of harmony of judgments, even in relation to third countries, as well as the desire for a general trend toward the universality of the connections chosen. In spite of the reservation consisting of the need to ensure compliance with certain public policy interests, or to apply certain protective rules whether or not arising from the incorporation of Community law ([13]), the Committee considers that the new Community regulation on this matter should still be essentially based on these principles and values.

IV. **MAIN COMMENTS AND PROPOSALS**

4.1 The questions raised with regard to the application of the Rome Convention and its future may be divided into those generated internally and those of external origin. The former result from the Rome Convention's own rules and their underlying value-based choices, and from the methodologies followed; the latter from, for example, the Convention's relation with Community law and other public international law instruments, particularly those intended to unify the conflict rules or substantive law in the field of contracts (whether already concluded or in preparation) ([14]), and the future relation between the Convention of Rome and the Brussels I Regulation ([15]).

4.2 *Structure*

4.2.1 The structure of the Rome Convention fits within the traditional mould of conventions for the unification of conflict rules. Following a definition of its scope and a declaration of its application to non-contracting states – continuing to apply when its rules indicate that the law of a non-contracting state has jurisdiction – the conflict rules are set out. However, the systematic inclusion of certain provisions raises some reservations.

4.2.2 Thus firstly, after Article 3, the general rule set out in Article 4 already contains a number of special rules concerning contracts for immovable property and for carriage of goods. Since certain contracts merit treatment in separate articles, this dual criterion for distribution of special rules, at least regarding carriage of goods (in deciding to maintain this rule – cf. below), should be reviewed in recognition of the different level of specialisation involved.

4.2.3 Secondly, general rules on transitory law and uniform interpretation appear among rules closer to questions more narrowly related to private international law. The systematic inclusion of these rules should be reconsidered.

4.3 *Scope (Article 1(2))*

4.3.1 The Convention did not seek to extend unification to all conflict-related areas in the field of contracts. Thus contractual obligations arising from family relations and succession, from credit instruments, company matters, activities of representatives or agents, trusts and insurance contracts covering risks situated in Community territory are excluded from its scope.

([13]) Possibly to the benefit of the underlying aims of the conflict rules, as in the case of the protection of certain categories of person, since even while assuring a substantive minimum level of protection by implementing domestic or Community legislative policies the aim is, as has been seen, not to render meaningless the concept of choice in conflicts which flows from the freedom of choice of both parties.

([14]) In some fields, there is already a well-established history of successful substantive unification, but its partial nature continues to point to the need for unification in the area of conflict of laws. On unification and harmonisation of substantive contract law, see the Commission's action plan referred to in footnote 8, and the Opinion of the European Economic and Social Committee on the Communication from the Commission to the Council and the European Parliament on European contract law, OJ C 241 of 7.10.2002.

([15]) In analysing this question, careful account is taken of the judicious proposals for amendments made during the protracted debate within GEDIP, and its suggestions are frequently taken on board.

4.3.1.1 Some of these exclusions resulted from the existence of other regulatory instruments already providing international unification, or from current preparations for specific measures to bring about unification.

4.3.1.2 Work in progress should therefore be outlined and a new assessment made of the regulation's scope.

4.3.2 In view of the unifying purpose and the general character of the rules contained in the future regulation, it is recommended that the scope is extended as far as possible, for example to all insurance contracts, and consequently deleting Article 1(3) and (4), leaving it to Community law and national systems to match these rules with any mandatory provisions regarding transposition, in the field of insurance ([16]).

4.4 *Application of law of non-contracting states (Article 2)*

4.4.1 The regulation sees fit to adopt the universal character of the Rome Convention, providing that its conflict rules are applicable, even when specifying a law of a third country. A different choice could entail altering the scope of the regulation, for example by limiting it to the resolution of conflicts of laws in certain contracts, which would make it difficult to determine what constitutes a Community contract or a contract influencing or possibly having an effect on the legal and economic life of the Community or on Community territory.

4.4.2 Neither would it suffice, from the point of view of the objectives of Community legislative policy, to apply only the unified conflict rules if these should specify the applicable law as being that of a Member State, and refraining in other cases, even if the contract may have strong effects on the territory or in the life of the Community, leaving the task of ensuring the pursuit of certain Community objectives regarding protection to the internal laws of the Member States and to other Community rules.

4.5 *Freedom of choice (Article 3)* ([17])

4.5.1 Regarding the possibility of choosing a non-state set of rules, whether the general principles of law or, in the field of lex mercatoria, customary commercial practices or usages, whether or not written down and whether or not systematically arranged by international collective entities, and given the complexity involved in studying such sets of rules, the reluctance to accept a description of this type, as well as practice as established in case-law together with the general sense of national laws and the current state of development of such sets of rules and their fragmentary nature, it would be advisable to retain the approach adopted by the Rome Convention to the effect that freedom of choice must relate to a set of laws of state origin ([18]).

([16]) See question 7 of the Green Paper.
([17]) Discussed, inter alia, in questions 8 and 9 of the Green Paper.
([18]) Clearly, this will not prevent substantive reference to such bodies of rules which although depending on the position of lex contractus, would be considered to form part of the contractual content, especially since some of these rules will be in force in certain countries. Filtering recourse to such bodies of substantive rules through national conflict laws does not seem to seriously obstruct international trade, and may be a way of boosting legal certainty (although individual countries can retain a considerable degree of autonomy for the parties in this area, and there is the possibility of dépeçage of the contract within certain limits). In fact, even though such a choice may be permitted, states can block the application of some of these international rules by drawing up rules of necessary and immediate implementation.

4.5.2 With regard to the possibility of choosing the system contained in an international convention, it should be made clear that it is acceptable for this choice to be a valid resolution of a conflict of laws provided that the convention in question stipulates that the agreement of both parties is a precondition for its application ([19]). Such a choice would be subject to the usual constraints imposed by other international obligations upon the forum, by its rules of necessary and immediate implementation, and by international public policy ([20]).

When a convention to which the forum is a party is chosen and which provides that it shall be applicable by virtue of the choice of the parties, the question will be different: the regulation must ensure that it does not prejudice the application of special conventions to which the states may be, or become, bound at international level (cf. Articles 21 and 24).

4.5.3 Turning to agreements on the choice of court and arbitration clauses, the close link between procedural questions (to be governed by lex fori and, provided that the case falls within the scope of the Brussels I Regulation, by its rules, and possibly by other international rules) and contractual questions means that the continued exclusion of this matter is acceptable, at the cost of some erosion of the ambition of uniformity.

4.5.3.1 However, if it is decided to adopt a rule on this matter, care will have to be taken to safeguard the existing provisions of Community law or international treaties, whether general or specific, and the specifically contractual aspects which are to be submitted to such a conflict rule will have to be carefully defined, leaving the regulation of procedural aspects and effects to the individual states, since these aspects invariably affect their judicial systems.

4.5.3.2 Provided that the scope of any such rule is clearly defined, its choice of law in the event of conflict of laws could indicate the lex contractus, the law which would be applicable in governing the contract, provided the contract exists and is valid.

4.5.4 Given the specific nature of the problems involved in determining the tacit choice of the parties and their dependence on the particular circumstances, it would seem appropriate to leave such determination in the hands of the judge and evidential procedures within the terms of the procedural rules.

([19]) Moreover, the argument exists in such cases that, even in the light of the existing version of the Rome Convention, it should be accepted that reference be made to a body of rules contained in an international convention in order to resolve conflicts of law, even if the state of the forum is not a party to that convention, provided that provision is made for this type of electio iuris.

([20]) From this point of view, this would amount to no more than a clarification, although this may be controversial. The overall aims of the Rome Convention not only do not rule out this conclusion; indeed, they would appear to encourage it. Thus basing the electio iuris directly on a convention would amount to an indirect choice, i.e. choosing (explicitly or tacitly) a national system providing for such referral to the system contained in an international convention – which would, in principle, be the case of the law of a country bound by the convention which explicitly allowed the parties to trigger its implementation through an option provision, a profession iuris (cf. the case of the Hague-Visby Rules of 1968 and the Hamburg Convention of 1978 on the carriage of goods by sea).
The objectives of the Rome Convention and the basic values of private international law point to this conclusion. Firstly, the Rome Convention urges scrupulous respect for the wishes of the parties; secondly, it is clear that accepting the referral made by the parties regarding conflict of laws to international arrangements of this kind (provided the real agreement of the parties has been ascertained) will always be the best way to safeguard legal certainty and predictability, i.e. to uphold the expectations of the parties who have given their agreement and the contractual content, while reflecting the rules laid down by the international convention. This conclusion would also serve to prevent forum shopping.
Lastly, this solution could eventually help to encourage unity of international law, especially where there are different versions of a single convention which has been revised and the parties do not agree on these versions. In this case, unless it is obliged to apply an earlier version of the convention in question on account of the objective connection arising in the case, the forum may agree to apply a different version to that by which it is bound, specifically because it has been chosen by the parties who could always have chosen the law of a country bound by the new version, which might provide for its application in accordance with the wishes of the parties.
Referral by the parties to a convention which does not consider private autonomy as a connection liable to triger its applicability may always be interpreted as a substantive referral, i.e. as a substantive incorporation of the rules of the international system into the contract.

4.5.5 Although subsequent choice or subsequent variation of the law chosen by the parties (Article 3(2)) is based on the interpretation of the rules and objectives of the conflict rule of the Rome Convention, it should be made clear that making such a choice at a later stage may have ex tunc effects, since the position of third parties is safeguarded.

4.6 *Additional criterion for determining applicable law (Article 4)*

4.6.1 Principle of proximity (Article 4(1)) ([21])

4.6.1.1 Question

Debate continues on whether the degree of flexibility in determining the applicable law should be reduced where there is no electio legis or, at least, the appearance of flexibility should be reduced which in the final analysis is not wanted by the Rome Convention itself, when the presumptions of Article 4(2) are interpreted in a certain way.

4.6.1.2 Proposal

This could be achieved, for example, by choosing to delete the enunciation of the principle of closest connection in Article 4(1). It is clear that the additional conflict options are based on the principle of the 'most significant relationship' or 'engste Beziehung': this would remain equally clear if the rule set out in Article 4(1) were to be deleted.

This measure might also serve to clarify the quality of the rules contained in the following provisions, helping to reduce differences regarding the quality of the presumptions of Article 4(2), (3) and (4). Consequently, the relevant connections would no longer be indicated by these rules as presumptions identifying the closest connection, but they would be considered as additional general or specific connections and no more, at all times subject to the final exception clause.

The exception clause in Article 4(5) should therefore be left unaltered, and the possibility could be added for a judge to perform dépeçage of the contract, as currently set out in the second part of Article 4(1).

4.6.2 Concept of characteristic performance (Article 4(2)) ([22])

4.6.2.1 Question

There are suggestions that the concept of characteristic performance, which is the key to determining the additional applicable law, should be clarified. However, not only are there differing theoretical conceptions of the determining criterion, but there are also cases in which observation of the specific circumstances of the case contributes significantly to such determination, taking account in particular of the recent nature of certain contractual contents of varying degrees of complexity.

([21]) See question 10 of the Green Paper.
([22]) Ibidem.

4.6.2.2 Proposal

Independently of the reliance that must be placed on the sound judgment of the judge, the Committee believes it would be helpful to draw up a list, purely by way of example, of characteristic performances, for the least controversial cases. It must be recognised that such a list may in fact already be known, as well as the fact that judges may always have recourse to the exception clause in Article 4 (although it should be pointed out that, when such a list exists, a judge who decides not to take account of it must provide even greater grounds for his decision than he must already give if he wishes to make use of the exception clause). However, the advantage of such a list lies in the possible strengthening of legal certainty, arising from predictability, itself tied in with the prescriptive value always attached to such an indication, although this is reduced to some extent by its purely exemplary quality and the possibility that it is of a typically general nature.

4.6.3 Short-term leasing agreements ([23])

4.6.3.1 Question

At present, the law of the place of the immovable property is in principle applicable to these contracts in a suppletive capacity (Article 4(3)). However, such short-term contracts (holiday leasing agreements) are often concluded between parties who do not reside and are not established in the country in which the object of the contract is located; moreover, the tenant is less likely to have a sound knowledge of the provisions of the lex rei sitae, the same not applying to the other party. It may be that the law of conflict of laws of the country in which the property is located decides that the lex rei sitae is applicable, since it lies outside the scope of the regulation. On the other hand, however, it may be necessary to comply with mandatory or public policy rules of lex rei sitae.

4.6.3.2 Proposal

Consideration should be given to the possibility of applying not the lex rei sitaei to such contracts, but rather the lex domicilii communis, also thereby identifying the law applicable in a suppletive capacity, through an accumulation of connections which point to the law of the economic and social environment of both parties, provided the tenant is a natural person (bearing in mind that the Brussels I Regulation also awards jurisdiction to the courts of the Member State in which both parties are domiciled – Article 22(1)). It may be necessary to take account of or apply certain mandatory public policy provisions of the lex rei sitae, if it is thought that compliance with them is not adequately safeguarded by the provisions of Article 7 (although the lex rei sitae may always be invoked under the terms of the general exception clause).

4.6.4 Contract for the carriage of goods (Article 4(4))

4.6.4.1 Question

It has been questioned if these contracts need to be dealt with separately, since the law applicable in a suppletive capacity is based on a series of connection revolving around the connection involving the place of establishment of the carrier, even if this refers to the principal place of business.

4.6.4.2 Proposal

Although this question has not been raised by the Commission, in the light of the safeguard provided by the exception clause in the current Article 4(5), it would not be inappropriate to remove the provision of Article 4(4) regarding carriage of goods, which would be subject to the general suppletive rule. Moreover, the aim of protecting carriers, which is implicit in several uniform substantive arrangements for various types of carriage of goods, does not require the present wording of the provisions, since if the accumulation of connections cannot be materialised, recourse will have to be had to either paragraph (1) or paragraph (2).

([23]) See question 11 of the Green Paper.

4.7 *Certain consumer contracts* ([24])

4.7.1 Questions

4.7.1.1 It is broadly recognised that it was not the fundamental concern of the constant provisions of the Rome Convention to protect consumers or other 'weak parties' in contractual relations and that, in consequence, the ensuing system is not overall best suited to provide effective consumer protection ([25]).

4.7.1.2 A number of questions must therefore be resolved in order for the system resulting from the new regulation to take proper account of the particularly disadvantageous position of individual consumers in international contracts, especially when confronted with pre-established, standard-form contracts, most particularly in highly specialist fields, such as financial services or contracts for electronic services. Prominent among these questions is the concept of consumers and of consumer contracts which may be covered by the provisions of Article 5 (the current exclusion of certain 'movable' or 'active' consumers; the non-inclusion of certain contracts concerning immovable property and possible services relating to the use of such property – timesharing; the problem of its application to contracts concluded by means of the same new electronic media through which the relevant advertising and/or provisional offer was communicated); the appropriateness of the suppletive connection chosen in the current Rome Convention; the need to ensure compatibility between the provisions of Article 4, 5 and 9; the present exclusion of straightforward contracts of carriage; the relation with the Brussels I Regulation; without, at the same time, overlooking the need to ensure that the regulation is not weighted in turn against the position of a seller entering into a contract with a consumer, given that in private international law the expectations and security of the former must also be protected.

4.7.2 Proposals

4.7.2.1 Article 5(1) and (2). It is recommended that 'mobile' or 'active' consumers also be covered by this special rule governing consumer contracts.

4.7.2.1.1 In view of the important issue of electronic media, there should be a single rule of conflicts for consumer contracts, whether or not electronic commerce is involved, in order to avoid possibly discouraging the use of electronic media.

4.7.2.1.2 Consequently, in order to achieve these two objectives, no account should be taken in defining the scope of Article 5 of the location of certain elements at present considered to be significant, such as the provisional offer and advertising for the product or service, or the issuing of a declaration of negotiations or, in general, the steps required for the conclusion of a contract.

4.7.2.1.3 Therefore cases where the consumer, without being so advised or encouraged by the supplier, travels to the latter's country or should or actually does take receipt of the product or service in that country, should nevertheless remain outside the scope of the provision.

4.7.2.2 Article 5(1). This provision should be extended to contracts the object of which is immovable property – right in rem of periodic occupation or time-share contract.

4.7.2.3 Article 5(3). Consideration should be given to applying the suppletive rule of Article 4 and replacing the present suppletive criterion for application of the law of the place of residence of the consumer. This approach would continue to safeguard the security and the expectations of both parties; moreover, it is far from certain that the law of the place of residence of the consumer is in fact more favourable to him.

([24]) See question 12 of the Green Paper.

([25]) This applies in particular to the principle of freedom of choice given the lack of real equality between the parties, especially in 'standard-form contracts'; it applies to the general presumption of Article 4(2) insofar as in most cases it points to the law of the business operator: it also applies to a narrow interpretation of Article 7, which does not include consumer protection provisions as 'administrative law'.

4.7.2.4 Article 5(2) and (3). The substantive minimum level of protection of the consumer must continue to be assured by the mandatory provisions of the law of the consumer's habitual place of residence, which would prevail over the system dictated by the competent law in the light of Articles 3, 4 and 9, unless the supplier were to provide sufficient evidence that in spite of having been reasonably diligent, he was unaware of the place of residence of the consumer.

4.7.2.5 Article 5(2). With regard to contracts entered into remotely through electronic media and the inclusion of mobile consumers vis-à-vis the protection of the legitimate expectations of the business operator, it must be established that the minimum level of protection under the lex domicilii cannot be invoked if the supplier proves that he was unaware of the place of residence of the consumer, or that he was unaware of it without such unawareness being attributable to his negligence, or that it was a consequence of a holding back of information on the part of the consumer, i.e. if such unawareness is attributable to the consumer (which would not be the case, for example, if the supplier had not given the consumer the opportunity, in a contract concluded by electronic means, to send him data concerning his place of residence).

4.7.2.6 Article 5(2) and (3). It is not considered necessary to maximise the substantive protection of the consumer, for example by means of a rule of alternative multiple connection, as this would run counter to what has been said with regard to the present understanding of the principle of protection of the weaker party. It is enough that a minimum level of protection be guaranteed. It is equally important not to unnecessarily jeopardise the value of the security and certainty of both parties or to entirely negate the importance of the wishes of the parties, even in this field.

Consumer contracts could therefore be subject to the general rules of conflict of laws (present Articles 3, 4 and 9), with the proviso that the protection afforded to a consumer by the mandatory provisions of their country of residence may not be reduced, unless the supplier was, in good faith, unaware of the consumer's place of residence; it always being incumbent upon the supplier to prove unawareness in spite of reasonable diligence.

4.7.2.7 Article 5(4) and (5). The exclusion of simple contracts of carriage from the scope of Article 5 is unjustified, although this entails invoking different laws for different credits (it would seem more reasonable for such an exclusion to be retained in Article 15 of the Brussels I Regulation in order to bring proceedings under a single jurisdiction).

4.7.2.8 There is perhaps no need for this article to include inevitable recourse to certain mandatory provisions of a Member State, provided that the contract contains a close connection with that Member State which is not the Member State in which the consumer is resident (the connection could be the place of publication of an offer or of advertising – cf. German legislation of 27 June 2000 ([26])), having regard to both current proposals for 'intra-Community' contracts and the provisions of Article 7(1), although, in this case, the decision to apply such rules may always lie with the judge (quite apart from the well-known doubts concerning the type of rules under this provision).

4.7.2.9 Since the reasons justifying the favor personae under the Rome Convention and the Brussels I Regulation are the same – in spite of the fact that rules of conflict contain differing stipulations on account of the differing objectives of these two legal texts – the extension which may be made to consumer contracts under Article 5 should be brought into line with Article 15 of the Brussels I Regulation, especially if account is no longer taken of the location of certain steps prior to the contract or which are necessary for it to be concluded (cf. Article 15(1)(c) of the regulation).

([26]) Law of 27 June 2000, Bundesgesetzblatt, a.2000, part I, No 28 of 29 June 2000.

4.8 *Employment contracts* ([27])

4.8.1 Questions

Similarly, a number of questions arise with regard to employment contracts, including: matching the Rome Convention with the Community rules on temporary employment and differing definitions of 'postings'; the question of whether or not the signing of a new contract with a member of the original employer's group terminates the posting for the purposes of application of the respective conflict rule; the problem of the necessary implementation of the rules of transposition of Community law in the field of postings; the issue of work on board certain modes of international transport which are subject to registration and on maritime platforms; and the role of collective agreements in international labour relations together with the question of international collective agreements.

4.8.2 Proposals

4.8.2.1 Without prejudice to the free choice of applicable law under the terms set out in the current Article 6, the Committee believes that the competence of the law of the place in which the work is habitually carried out should be confirmed, provided that a temporary placement is involved, it being made clear that the conclusion, in the host country, of a contract with an employer belonging to the same group as the original employer does not prevent continuation of the placement.

4.8.2.2 Thought should however also be given to whether it is necessary to include a rule ensuring implementation in the host country of the transposal provisions of Directive 96/71 ([28]).

4.8.2.3 Regarding temporary postings, in spite of attempts at definition, and in view of the wide range of possible scenarios and circumstances in the business world, it might be better to continue without a rigid definition of the concept (either ex ante or ex post), leaving the judge to decide on the existence of a temporary posting in each specific case.

4.8.2.4 Notwithstanding the contribution made by the Report on the Rome Convention, mentioned above, and the trend towards agreement within international legal theory, this opportunity could be taken to provide an explicit solution for work carried out on board vessels or aircraft regularly making international journeys, and on maritime platforms. They could be covered by the suppletive criterion contained in Article 6(2)(b), with the exception clause in Article 6(2) in fine being permanently retained.

4.8.2.4.1 This would also go some way to countering the temptation to grant a degree of extraterritoriality to these modes of transport and to apply the law of the flag state which, as is known, does not always have the most substantial connection, particularly in light of the use of flags of convenience.

([27]) See questions 14 and 15 of the Green Paper.
([28]) The Committee will soon issue an opinion on the Communication from the Commission on the implementation of Directive 96/71/EC in the Member States (COM(2003) 458 final of 25 July 2003).

4.8.2.4.2 Thus, without prejudice to the present Article 6(1), the law of the place of the body having hired the worker would be applicable, if the worker did not habitually carry out his work in that country, or if he carried it out on board a means of transport subject to registration and not travelling in the same country, on a maritime platform, or in a territory not subject to state sovereignty, unless another law displayed a closer connection, the specific circumstances of the case having been considered.

4.8.2.5 It should be remembered, concerning collective agreements in force in countries in contact with a given multi-location employment relation that, in keeping with consistent international legal theory, and in spite of the debate on the authoritative nature of such agreements, the provisions of collective agreements are applicable provided they have the nature of mandatory rules in the field of one of the relevant laws, in the light of either Article 6 (involving an agreement in the country of the law chosen, lex loci laboris or the law of the place of the body hiring the worker) or Article 7.

4.8.2.6 On the other hand, the opportunity should be taken to make clear whether the regulation applies to international collective agreements. The particular nature of this approach, even if not developed in international practice, together with the theoretical argument over the nature of collective agreements, is enough to justify it.

4.8.2.6.1 The approximation of regulatory solutions in the field of employment would be best carried out within the framework of Community steps to unify or align the substantive laws of the Member States. Such steps may or may not entail drafting international or Community collective agreements and defining the conditions for doing so. This work therefore will focus not so much on the strictly-defined field of rules of conflict, the subject of the regulation, but rather on approximation of substantive law.

4.9 *Timesharing rights in rem and contracts (cf. point 4.6 above)*

4.9.1 Question

In view of the broader content of the provision contained in Article 15(1)(c) of the Brussels I Regulation, which did not make exclusive reference to movable goods, and in the light of the content of such contracts and the position of the parties normally involved, the questions arises of whether the protection provided in contracts concluded with consumers should not apply, even where availability of immovable property is involved, particularly in view of the proposals to amend the suppletive criterion to determine which law should govern contracts with consumers (and consequently recourse to Article 4(3) and (5) under the current numbering).

4.9.2 Proposal

The conceptual framework of Article 5 should be extended to include mention of immovable property: the rules of rex rei sitae remain relevant, particularly those protective provisions resulting from the transposal of Community law (either because it is understood that with the new wording of Article 5, such law should remain competent in a suppletive quality, in the light of Article 4(3), or under the terms of Articles 7 and 9(6)).

4.10 *Mandatory rules, rules of necessary and immediate implementation, provisions which, whether or not they transpose Community directives, require their application regardless of the jurisdiction of their legal systems* ([29])

4.10.1 Questions

These provisions involve a series of complex questions, of which the following are among the most important: reconciling the rules contained in Articles 5, 6, 7, 9(6) and 10(2), and the different way in which these rules must be considered by judges (margin of appreciation in Article 7(1)); the difficulties encountered in attempting to specify which rules are to be included in the provisions of Article 7 and the task of the judge in this respect; discrepancies in transposition of directives into national law and the problem of non-transposition, questions which do not seem to compete with the specific field of the conflict rules, but rather with harmonisation efforts; the possible obstacle which 'mandatory rules' or rules of necessary and immediate implementation may place in the path of achieving single market objectives and its inherent freedoms; the need, where the objectives of private international law are concerned, to reconcile the solutions found with the aim of harmony of international judgments, and hence Community judgments, preventing differing assessments of identical situations, especially within Community territory.

4.10.2 Proposals

4.10.2.1 The present Article 3(3), concerning an objectively internal contract (since, even in the absence of an explicit rule, the approach will necessarily be maintained), should be replaced, because a rule of conflicts should not be brought to bear on a purely internal situation. No referral by the parties to a foreign law in connection with an objectively internal contract can ever override the application of the mandatory rules of the legal system within which all the objective connections exist.

4.10.2.1.1 In consequence, this referral should not be seen as conflict-related (kollisionsrechtliche Verweisung); it is bound to have a purely substantive value or that of a substantive transposal (materiellrechtliche Verweisung). In other words, it should be seen as the expression of private free choice in the field of internal substantive law, not as an expression of free choice of law by the parties, who can only choose which law is competent when they are parties to a contract presenting connections with more than one state.

4.10.2.1.2 The gap created by the abolition of this rule could be filled by a provision encompassing the concept of an objectively 'intra-Community' contract to which, regardless of any choice of the law of a third country, the mandatory rules of Community law or of transposal of Community law in force in the legal system which is competent in a suppletive quality must always be applied, also because this gap (matching Article 3(3)) is appropriate from the point of view of consolidation.

4.10.2.1.3 The Committee believes that this restriction should only be effective when all the objective connections set out in the contract tie it to Member States. However, particularly in the view of the possibility of a choice or change of choice of competent law after the contract was signed, conjunction of all the connections of the contract within Community territory should perhaps relate to the moment at which the law was chosen and not, as proposed in the current version of the Green Paper, the moment when the contract was signed.

4.10.2.1.4 In this way compliance with a minimum level of efficacy of Community secondary law will immediately be ensured, provided that the parties invest professio iuris in an 'intra-Community' contract.

4.10.2.2 Consideration must be given to the question of whether it is appropriate or advisable to insert a general provision governing the implementation of mandatory protective rules arising from the transposal of Community law, where the contract displays a close connection with a Member State (that Member State's transposal rules being applicable in this case), as in the example of the German law of 2000.

([29]) See questions 13 and 16 of the Green Paper.

4.10.2.2.1 However, it may suffice to recognise that the provisions of Article 7 (which always leave the judge with some margin of appreciation), together with the primacy of Community law and Articles 3(3) and 5, even with the adjustments to be made (cf. above, enabling the competent law in a suppletive capacity to be the law indicated in Article 4, subject only to the minimum level of protection) and Article 6 (compelling the application of certain transposal rules of certain legal systems and particularly that which would be objectively competent, or that of the host country of a worker on placement) are enough to lead to such implementation ([30]).

4.10.2.3 On the other hand, in addition to the comments concerning Article 3(3), it is worth restating that disparities in the transposal of directives by Member States and the issue of non-transposal do not appear to be relevant to the specific field of rules of conflict, but rather to the drive for harmonisation; it is up to the Member States, in their internal law, to ensure that the objectives of Community law in this area are achieved in those cases covered by directives.

4.10.2.4 In spite of the possibly ambiguous nature of the title, evoking a certain historical background to the concept of 'mandatory rules', the definition of the rules covered by the provisions of Article 7 should be maintained at formal level, i.e. by reference to the immediate character of their application, regardless of the law applicable by virtue of the rules of conflict, rather than opting for a substantive interpretation of these rules based on their object or content.

4.10.2.4.1 In reality, the provisions of Article 7 are another effort to harmonise judgments, but with the aim of promoting the application of certain rules for the transposal of Community law which might not be applied because of other Rome Convention rules (or possibly on account of imperfect transposal into a national legal system to be taken into account in the light of a rule of conflicts, or simply because such transposal has not occurred at all) – although this latter does not appear to be the underlying legal objective, particularly since Article 7(1) is of universal character.

4.10.2.5 With regard to the mandatory rules or of necessary and immediate implementation of third countries, it must be decided which is the best means: either the principle of international harmony of judgments, at which private international law aims, or the unifying approach underpinning the Rome Convention and the future regulation ([31]).

([30]) In this case, it is possible that the transposal rules of the law of the country where the building is located would not apply – although not necessarily in the light of Article 7 – in the event that the law of a third country has been chosen to cover the timeshare and even then, only when the consumer did not live in a Member State. In the event of residence, the minimum level of protection under lex domicilii would still be applicable, if Article 5 were to cover consumer contracts involving immovable property.
If this approach were to be followed, it must be made clear what is meant by close connection in the various directives on rules of protection, which generally establish that states must ensure implementation on their own territory of transposal rules, provided that the contract displays a close connection with a Member State, and if implementation of certain mandatory provisions of other legal systems were still possible in the light of Article 7 (it should be pointed out that even under secondary law, what constitutes a close connection liable to trigger application of the rules of protection resulting from transposal may always be determined by the judge, depending on how the directives have been transposed i.e. it would depend on knowing whether the national legislators had or had not defined this concept for the purpose of triggering application of the rules of necessary and immediate implementation of transposal).

([31]) On the one hand, it must be acknowledged that the provision contained in Article 7(1), although it could serve as a means of invoking mandatory rules for the transposal of Community law (provided they meet the requirements laid down), is not based on the intention to give importance to foreign legislative policies (whether of Member States or third countries), or the wish to examine the ways in which third-country legal systems (i.e. neither lex fori nor lex causae) give body through law to certain concepts of the socio-economic organisation of states. The purpose of such a rule must be found among the legal objectives of private international law, which is where the grounds for the consideration or application of those rules which would not be invoked through the normal functioning of the rules of conflicts lie. It therefore appears that this provision sets out to bring about uniform assessment of specific legal situations extending over different locations, while taking account of the legitimate expectations of the parties, since the relevant rules would belong to the legal system displaying a close connection with the case. This is intended to prevent a judgment in the forum differing from that which would be obtained elsewhere, and also to prevent forum shopping (and, possibly, to avoid making it possible, for example, that a judgment might clash, in the place of recognition or implementation, with the public policy reservation of a third country, because rules are involved touching upon the sphere of that country's public international policy – in this regard, it might be proper to admit that the rules of greatest concern to the judge of the forum would be none other than those which forward public interests, even though a non-substantive definition of the rules set out in Article 7 persists).
On the other hand, interference on the part of these rules may always constitute an obstacle to legal certainty, in addition – and necessarily – to problems of implementation which may arise in specific cases, especially where rules deriving from other legal systems are involved.

4.10.2.5.1 Assuming that it is preferable to take account of, or apply, such rules from third-country legal systems, in order to put the values of private international law into practice, the Committee deems it sufficient to grant a margin of appreciation to the judge, as is the case at present, bearing in mind that a decision on such consideration or application will, provided it tallies with the objectives of private international law, entail careful analysis of the circumstances of the case and the overall content of such third-country legal systems (the current text, moreover, calls for the judge to take careful account of the nature, purpose and possible consequences of not invoking these rules, which must be compared with the effects of application or consideration).

4.10.2.5.2 This margin of appreciation may be enough, especially considering that the risks to certainty and predictability have already been allowed for when consideration of the rules was first accepted. Imposing excessive detail on the conditions for application or consideration of the rules may not only prove difficult, if done in an abstract manner, but may influence the judge to the extent that he may not be able to make a proper assessment of the requirements of legal certainty in each individual case: the final result being that the details provisions would undermine their own purpose.

4.10.2.6 In view of the established primacy of Community law, it may be decided – in spite of the instructive interest of such an exercise – that it would be unnecessary to enshrine explicitly the approach taken in the Arblade case, i.e. Article 7 should contain a reminder that the application of rules of necessary and immediate implementation cannot constitute an unjustified obstacle to the freedom of movement embodied in the original law.

4.11 *Form of contracts and electronic commerce (cf. point 4.6 above)* ([32])

4.11.1 Question

In view of the difficulties in establishing location caused by the new means of communication and the need to avoid discriminating against them, given their usefulness, the question arises as to whether a single rule should be adopted, regardless of the means used by the parties to conclude the contract, and if the formal validity of contracts should be maintained.

4.11.2 Proposal

Designation of the lex causae in matters of form may depend on the choice between lex contractus, the law of the place where the parties meet at the time of declaration of negotiations and the law of the place of residence of the parties, as well as a reference to Article 5, according to which the provisions of Article 9 shall not prejudice application of the protecting rules of Article 5 (i.e. those under the law of the place of residence of the consumer).

([32]) See question 17 of the Green Paper.

4.12 *Incapacity and legal persons (Article 11)*

4.12.1 Question

In the area of capacity, by indicating application of lex loci celebrationis (not applying to contracts inter absentes), Article 11 seeks to uphold the validity of the transaction and to protect the confidence of one of the parties in the apparent capacity of the other. This rule is grounded in the 'theory of national interest'. It may, however, be wondered if this approach can be applied to legal persons (which would be contrary to their capacity in the light of a possible principle of speciality, and to aspects of organic representation), considering that the Rome Convention refers also to natural persons ([33]).

4.12.2 Proposal

If it is intended to take a legislative position on this issue, then the exception could be extended to legal persons, in the interests of clarification and harmonisation.

4.13 *Voluntary assignment and subrogation* ([34])

4.13.1 Comparative question of clarification of conceptual frameworks (e.g. case of factoring). The question is whether to introduce clarifications which, by contributing to the drive for unification, will come into conflict with the differing nuances of national legislation. Account will also have to be taken of the proximity of the two rules (Articles 12 and 13) with regard to the judgment concerning conflict of laws underpinning them, and of the connections chosen, which reflect the trilateral nature of these relations.

4.13.1.1 Since this is in reality a question of qualification, it should be left in the hands of the judge, particularly since legal certainty does not seem to be subject to an unacceptable level of risk in the light of the similar structure of the two rules of conflicts, which both eventually trigger the distributive application of different laws.

4.13.2 Question of the invocation of assignment against third parties (possible holders of rights which may be assigned to the original assignor/creditor). The problem arises of whether the regulation should expressly state which law is most appropriate to regulate this question, given the risks of forum shopping. The aim of unification would suggest unifying the rule applicable to this question, therefore deterring those involved from forum shopping. Due consideration must be given to the value of certainty and predictability, and to the risks of invoking different laws. Since predictability would not be jeopardised, and uniform treatment would be guaranteed for third parties with claims competing with those of the assignee vis-à-vis the assignor, the Committee considers that preference should be given to application of the law governing the assignment.

([33]) The existing text appears to allow three possible interpretations. Firstly, the reference to natural persons could be understood as being exclusive, ruling out application to legal persons. Secondly, it would be possible to argue for application of the provision to legal persons by analogy. Lastly, in view of the extreme prudence which must be exercised in the application by analogy of the provisions of all international instruments – which entail sovereign will and state policies – in order not to undermine the internationally accepted compromise and the degree of unification sought, and in the light of the differences which have emerged with regard to the 'theory of national interest', and of the fact that the Rome Convention did not set out to govern either the question of capacity or matters relating to legal persons, then it may be concluded that the Rome Convention intended to address the question of capacity only to this limited extent and that the agreement on unification of the contracting states went no further; in consequence, it may be concluded that any aspect concerning capacity which exceeds the provisions of Article 11 remains a matter for the contracting states. Each state would then decide for itself whether or not to extend this precept to legal persons since no unification has been achieved on this specific question.

([34]) See questions 18 and 19 of the Green Paper.

4.13.3 Question of conflict between assignees and their resolution. The considerations set out in the point above would, mutatis mutandis, be valid here. Possible recourse to the law governing the assignment is suggested in the event of a contradiction between the legal systems governing the various assignment relations (although the primacy of this law could lead to different laws being applied to the assignees and to third parties intending to press their claims on the original assignor/creditor – cf. the previous paragraph).

4.13.4 The problem of subrogation not based on fulfilment of an obligation by the assigned creditor.

4.13.4.1 The very helpful Report on the Convention of Rome explained that there was no intention to exclude subrogation resulting from payment not based on an obligation, but rather on simple 'economic interest recognised by law' ([35]), from the scope of Article 13, although the subrogation may then be ex lege.

4.13.4.2 The text should perhaps now be amended to make it clear that this hypothesis should also cover this rule, indicating which connection will prevail.

4.13.4.3 It might also be advisable to flesh out this rule by specifying, similarly, which law should govern the existence or extension of subrogation in the event that satisfaction of the credit is based on a well-founded economic interest, and which law should govern or which situation should provide the grounds for this economic interest – although the judge must be given an adequate margin of appreciation, safeguarded inter alia by the inclusion of an exception clause.

4.14 *Law applicable to credit compensation* ([36])

If it is judged necessary to include a rule of conflicts relating to compensation, the cumulative application of the leges contractuum will have to be determined.

V. **SUMMARY OF THE REPLIES TO THE QUESTIONS**

5.1 As mentioned above (point 1.14), although the Committee has touched upon other matters in order to make the fullest possible contribution to the issues raised by the Commission, it sets out below a summary reply to each of the questions contained in the Commission's questionnaire.

5.2 *QUESTION 1*

5.2.1 The experiences gathered by EESC members in their places of origin point to an overall feeling that judges in general have little, and purely theoretical, knowledge of the Rome Convention: very few judges, particularly in the lower courts, possess a sound knowledge of its tenor and potential.

5.2.2 The same broadly applies to economic actors, especially consumers and SMEs. Only large companies, principally multinationals, have the specialist legal know-how to derive benefit from the Rome Convention in the wording of their contracts, especially standard-form contracts.

5.2.3 On the basis of their personal experience in their places of origin, EESC members are also convinced that this state of affairs is damaging to smooth contractual negotiating, and underlies the increasing conflicts in cross-border transactions.

([35]) See M. Giuliano and P. Lagarde, op.cit.
([36]) See question 20 of the Green Paper.

5.3 *QUESTION 2*

The reply to this question is given in points 1.2 to 1.10 of the present opinion.

5.4 *QUESTION 3*

As mentioned in several of its opinions, quoted throughout the present opinion, the EESC has always pointed out the disadvantages of a large number of scattered rules, which affect the law applicable under several Community instruments, and it has underlined the desirability of coherent and consistent consolidation of these rules into a single Community instrument in this field.

5.5 *QUESTION 4*

5.5.1 The EESC would welcome the introduction of a clause as described by the Commission in point 3.1.2.2 of the green paper, particularly insofar as it counters abuse of freedom of choice, as a means of blocking application of the rules providing greatest protection to the rights of certain weaker parties to contracts.

5.5.2 The reply is given in point 4.10.2.1 of the present opinion, where an amendment to the proposed wording of the green paper is suggested, since rules which, although grounded in Community legislation, would be of internal origin, are involved.

5.6 *QUESTION 5*

In relation to international agreements containing rules of conflict to which the Member States are party, the Committee believes that the minor disadvantage arising from the application, in specific cases, of rules of conflict differing from those laid down in a Community instrument is far less serious than withdrawing from such agreements. The general thrust of the first part of Article 21 of the Rome Convention should therefore be retained. In view of the primacy of Community law, possible future links with existing or potential conventions on the unification of rules of conflict should only be established if they have no effect on the objective of the regulation. The regulation should not therefore prejudice accession to conventions of uniform substantive law, or prevent Member States from acceding to conventions extending the legislative aspects of the regulation to other, non-EU countries.

5.7 *QUESTION 6*

A detailed reply to this question is given in point 4.5.3.

5.8 *QUESTION 7*

The EESC does not consider the solution set out in the Rome Convention to provide the best protection for the rights of insured persons/policy holders. The position of insured persons/policy holders should be put on the same footing as that of consumers, regardless of whether insurers are established within the Community territory or not. It is general knowledge that certain insurance directives contain rules which influence the applicable law (cf. Directives 88/357/EEC of 22 June 1988, 90/619/EEC of 8 November 1990 and 83/2002/EC of 5 November 2002) but, in the interests of the aim of unification, consideration should be given to including all insurance policies in the regulation, adopting a special rule of conflicts encompassing the most advantageous aspects in this field.

5.9 *QUESTION 8*

A reply to this question is given in points 4.5.1 and 4.5.2.

5.10 *QUESTION 9*

A reply to this question is given in point 4.5. The terms of the 'either/or' formulation laid down by the Commission are not in fact mutually exclusive and are perfectly compatible. It should however be acknowledged that it is the role of the judge to determine, in each case, if a tacit choice has been made in accordance with the factual and evidential elements available to him.

5.11 *QUESTION 10*

A reply to this question is given in point 4.6.1.

5.12 *QUESTION 11*

A reply to this question is given in point 4.6.3.

5.13 *QUESTION 12*

Replies to these questions, and other related questions, are given in point 4.7.

5.14 *QUESTION 13*

A reply to this question is given in point 4.10.

5.15 *QUESTION 14*

A reply to this question is given in point 4.8.

5.16 *QUESTION 15*

A reply to this question is given in point 4.8.

5.17 *QUESTION 16*

A reply to this question is given in point 4.10.

5.18 *QUESTION 17*

A reply to this question is given in point 4.11.

5.19 *QUESTION 18*

A reply to this question is given in point 4.13.

5.20 *QUESTION 19*

A reply to this question is given in point 4.13.

5.21 *QUESTION 20*

A reply to this question is given in point 4.14.

5.22 It is pointed out that, in addition to these questions, the present opinion has touched upon other matters not specifically included in the questionnaire, such as issues concerning the structure of the Rome Convention (point 4.2.2 and 4.2.3), the effects of subsequent choice of competent law by the parties (4.5.5), contracts for carriage of goods (4.6.4.2) and the law applicable to the capacity of legal persons (4.12.2).

VI. **CONCLUSIONS AND RECOMMENDATIONS**

6.1 The Committee supports the two main objectives of the Green Paper, to convert the Rome Convention into a Community instrument and to modernise its content, and urges that this be done as quickly as the complex nature of the subject allows.

6.2 It is the Committee's view that the Community instrument should take the form of a regulation, and agrees that the legal basis should be Articles 61(c) and 65(b) of the Treaty, as suggested by the Commission.

6.3 The Committee reaffirms the main principles underpinning the convention, and believes that they should be carried over into the regulation.

6.4 The Committee's proposals, which are set out in detail above, are based on the need not only to update some of the provisions of the Rome Convention in line with intra-Community commercial transactions and new contractual instruments, especially distance selling, but also to settle a number of questions of interpretation raised in the study of law and in the courts during the period in which the Rome Convention has been in force.

6.5 In its opinion and its replies to the Commission's twenty questions, as well as in its own questions, the Committee has striven to put forward solutions which preserve a balance between the interests of the parties concerned, in compliance with the established principles of law constituting the common heritage of the legal systems of the Member States.

6.6 The Committee is however aware that the issue has not been exhaustively examined and therefore urges the Commission to take proper account, in the final draft of the text it is to submit, of all the contributions it receives in response to its highly positive initiative represented by the Green Paper.

Brussels, 29 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

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 - Adapting e-Business policies in a changing environment: The lessons of the Go Digital initiative and the challenges ahead'

(COM(2003) 148 final)

(2004/C 108/02)

On 27 March 2003, the 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 the subject, adopted its opinion on 16 December 2003. The rapporteur was Mr McDonogh.

At its 405th plenary session (meeting of 28 January 2004), the European Economic and Social Committee adopted the following opinion by 106 votes in favour, three votes against and one abstention.

1. **Introduction and executive summary**

1.1 The Committee is supportive of the 'Adapting e-business Policies in a changing environment: The lessons of the Go Digital initiative and the challenges ahead' Communication from the Commission, whilst drawing attention to some policy areas that deserve more emphasis.

1.2 It believes that the European Commission has produced an excellent proposal document on the need for Member States and regions to re-orient e-business policies from simply promoting e-commerce to helping Small and Medium Sized Enterprises (SMEs) take full advantage of Information and Communication Technology (ICT) to re-engineer automate and streamline business processes.

1.3 The Committee welcomes the highly practical approach proposed in the Communication to engender this policy support for SMEs – with the inclusion of a framework for SME-specific e-business policies, and the setting-up of the European E-business Support Network for SMEs (EEBSN) to provide focused collaboration between e-business policy makers at national and regional levels across the EU.

1.4 It also welcomes the insistence in the Communication on the need for policy makers to set quantitative as well as qualitative targets, using the SMART [specific, measurable, achievable, realistic and timely] principle. Measurement of progress against realistic and appropriate goals is a key requirement for effective management of policy initiatives and the evaluation of their practical impact.

1.5 The Committee believes that there is still significant progress to be made with providing a favourable e-business environment in many parts of the European Union and thinks that the Commission's framework for SME-specific e-business policies should reflect these fundamental requirements. The EESC calls on the Commission to coordinate the efforts of national governments in implementing open and transparent policies in the area of public sector contracts so as to ensure that SMEs can participate on equal terms.

1.6 The Committee also thinks that a fourth main policy area/challenge could be included – to improve the environment for e-business, for instance through ensuring that commercially essential Internet access is available, through on-going targeted awareness programmes to build trust and confidence in e-business process among SMEs, and through recommendations and technological initiatives at EU level to reduce the harmful effects of Spam on e-business.

2. **General remarks**

2.1 The Committee believes that the European Commission has produced an excellent proposal document on the need for Member States and regions to re-orient e-business policies from simply promoting e-commerce to helping Small and Medium Sized Enterprises (SMEs) take full advantage of Information and Communication Technology (ICT) to re-engineer automate and streamline business processes.

2.2 At the same time, the proposals will favour the consumer. A fair, reliable market, fair competition and the right use of ICT, together will increase confidence in e-commerce, which is so necessary in the development of this market.

2.3 It is recognised that SMEs, which account for more than 99 % of all businesses in Europe, play a central role in stimulating innovation, growth and employment. Furthermore, efficient use of ICT increases productivity and improves competitiveness. Thus, the realistic approach advocated by the Commission strongly encourages active support for the Lisbon strategy to make the EU the world's most competitive and dynamic knowledge-based economy by 2010. The highly practical approach proposed in the Communication includes a framework for SME-specific e-business policies and the setting-up of the European E-business Support Network for SMEs (EEBSN) to provide focused collaboration between e-business policy makers at national and regional levels across the EU.

2.4 The development of this dynamic, knowledge-based economy will impose significant changes on the business environment facing SMEs – the business processes, business relationships, technology, knowledge and skills required to succeed in this new economy will be different to what small firms have been used to, and they will have to embrace substantial transformation.

2.4.1 To survive and thrive, SMEs, particularly the micro-firms (with less than 10 employees), need an integrated and well organised support mechanism at local, national and European level and within their specific sector, to provide support for each other as they go through this transformation and acquire the knowledge they need to succeed.

2.5 Unless SMEs are assisted in this transformation to a knowledge economy, by tangible support from policy makers, there will be negative effects on business, employment levels and society across the Union.

2.5.1 The Committee welcomes the highly practical approach proposed in the Communication to engender this policy support for SMEs – with the inclusion of a framework for SME-specific e-business policies, and the setting-up of the European E-business Support Network for SMEs (EEBSN) to provide focused collaboration between e-business policy makers at national and regional levels across the EU.

2.6 By calling for Member States to define sector-specific and region-specific e-business policy objectives and by encouraging them to identify appropriate quantitative and qualitative targets, the Commission is forcefully campaigning for specific, measurable, achievable, realistic and timely (SMART) action that will significantly accelerate the efficient adoption of ICT and e-business processes by SMEs throughout the Union.

2.6.1 The Commission is backing its initiative by providing a forum to discuss, support and co-ordinate policy development across the EU (the EEBSN – European E-Business Support Network) and by suggesting a framework for such policies and targets.

2.6.2 In addition to identifying most of the critical policy issues, the Commission has correctly acknowledged the importance of channelling many SME e-business policy initiatives through trusted intermediaries and multipliers. This campaign to help SMEs deserves the Committee's full support.

2.7 The Committee welcomes the insistence in the Communication on the need for policy makers to set quantitative as well as qualitative targets, using the SMART principle. Measurement of progress against realistic and appropriate goals is a key requirement for effective management of policy initiatives and the evaluation of their practical impact.

2.8 SMEs have taken the first steps towards adoption of e-business with computer usage and access to the Internet almost ubiquitous. However, beyond this basic level of ICT the digital divide opens-up: there are substantial differences in the degrees of digital integration between the larger SMEs and the smaller firms (especially the micro-firms with less than 10 employees), and among SMEs there are also significant differences on a regional and sectoral basis. In particular, the early adopters of ICT have made significant progress with e-business, while the late adopters need significant assistance to catch-up.

2.8.1 Hence the requirement for specific policy initiatives to address the particular needs of SMEs and of specific regions and sectors, especially the late adopters of ICT. Unless the digital divide is bridged, the competitive advantage of the large firms and of the firms with a higher-level of ICT integration over SMEs will grow, with the direct risk that SMEs are squeezed out of the market, creating explosive economic and social problems. The Committee is pleased to see that the Commission has noted these differences and has advocated that special attention be given to closing the digital divide.

2.9 When considering e-business and the greater use of ICT, issues concerning trust and security are of particular concern to SMEs, particularly micro-firms. The Committee wants to stress in these general remarks that policy makers must take these concerns into account when developing policies.

2.10 The Communication states that the role of public authorities in promoting e-business is mainly to ensure a favourable e-business environment for enterprises which would lower market access barriers and lower the costs and risks of ICT investment, thus facilitating access to new international markets.

2.10.1 Such an e-business friendly environment would include a stable legal and regulatory framework, full liberalisation of the telecommunications market with concomitant reduction in costs and increased availability of services and service quality, and the widespread introduction of e-government services. The EESC calls on the Commission to continue its efforts to establish an acceptable regulatory framework at global level which will prevent the creation of national barriers and will ensure the necessary security for electronic transactions.

2.10.2 The document goes-on to state that at both European and national levels, many of the necessary steps have already been taken to provide this favourable e-business environment. With these 'horizontal' policy elements being taken care of under the eEurope framework and under the aegis of other initiatives the purpose of this Communication is to advocate specific SME policies aiming to promote the use of ICT and e-business processes by SMEs.

2.10.3 However, the Committee believes that there is still significant progress to be made with providing a favourable e-business environment in many parts of the European Union and thinks that the Commission's framework for SME-specific e-business policies should reflect these fundamental requirements. The EESC calls on the Commission to coordinate the efforts of national governments in implementing open and transparent policies in the area of public sector contracts so as to ensure that SMEs can participate on equal terms.

2.11 In the Commission's policy framework the overall objective is to stimulate and support SMEs in the adoption of e-business. The framework as proposed then includes three main policy areas or challenges under which specific policies are grouped. The EESC agrees with the Commission's working framework and broad lines of policy and will be monitoring their implementation with particular interest.

2.11.1 The development of this framework and the specific policies is a matter for the Commission and the policy makers. However, the Committee fully endorses the detailed list of activities contained in the Communication and is impressed by the list of possible targets proposed. In this opinion the Committee also highlights some additional areas of policy that it believes should be included in the framework.

2.12 As mentioned in 2.10.3 above, a fourth main policy area/challenge could be included – to improve the environment for e-business. The Committee might also quibble with the combining into a single policy area of both the development of managerial understanding and the acquisition of e-business skills: perhaps greater clarity would be achieved by separating these two distinct challenges. The following section of the opinion includes comments on these issues and on other areas of the policy recommendations which the Committee believes deserves a special mention. In giving these comments the Committee is in line with its earlier opinions in this field [1].

3. **Specific policy issues**

3.1 *E-business environment*

3.1.1 Pressure should be maintained on Member States to ensure that commercially essential Internet access (whether that is deemed to be always-on broadband access, or simply flat-rate high-speed access) is available to a high percentage of SMEs, particularly at regional level, and that the cost of access is in line with competitive EU norms.

3.1.2 All the technology and regulations are in place to provide a secure environment for e-business. However, there is a need for on-going targeted awareness programmes to build trust and confidence in e-business process among SMEs.

3.1.3 Spam or unsolicited commercial e-mail (UCE) can impose great nuisance and cost on recipients, particularly on the scarce resources of SMEs trying to conduct business on the Internet. It also undermines their confidence in the security of the process. Recommendations and technological initiatives are needed at EU level to reduce the harmful effects of this menace on e-business adoption.

3.1.4 While the involvement in e-markets is to be encouraged, the particular problems surrounding reverse auctions need to be considered for policy attention at EU, national and regional levels. Through the reverse auction procurement process, large companies can put undue pressure on SMEs to drastically reduce their profit margin. In extreme cases the viability of the SME can be put in jeopardy. Bad experiences with reverse auctions can adversely affect SME sentiment towards e-business. The Commission should ensure that codes of good conduct are implemented across the EU.

3.1.5 As more SMEs take part in the digital economy, the registration and ownership of domain names becomes an issue. The Committee would urge the Commission to ensure policies are in place that prevent cyber-squatting (hoarding of dormant domain names by companies and individuals which prevents established firms from owning a domain name that fits their registered business name).

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[1] eEurope 2002 – an information society for all, OJ C123, 25.4.2001
Innovation, OJ C260, 17.9.2001
Computer-related crime, OJ C311, 7.11.2001
eLearning Action Plan, C36, 8.2.2002
Go Digital, C80, 3.4.2002
MODINIS, C61, 14.3.2003
e-Learning Programme, C133, 6.6.2003
eEurope 2003 Final Report C220, 16.9.2003

3.1.6 Governments should be encouraged to implement e-government services as widely as possible and to implement their public e-procurement processes in a manner that is sensitive to the limited competencies of some SMEs.

3.1.6.1 Such G2B (government-to-business) and B2G (business-to-government) transactions encourage SMEs to make wider use of ICT and e-business. They also demonstrate the effectiveness and usefulness of e-business to SMEs, familiarising them with the technology and the benefits.

3.1.6.2 However, in some countries, government procurement of goods and services is greater than 50 % of all business purchases in the State. Thus, government implementation of e-procurement systems will have a major impact on the adoption of e-business processes by SMEs, and on the ability of all SMEs to share, on an equitable basis, in the economy for government consumption of products and services. It is critical that government e-procurement systems are implemented in a way that is sensitive to the special needs of SMEs. Unless governments make special efforts in this regard, many SMEs will suffer.

3.1.7 To facilitate greater SME participation in e-procurement processes, efforts should be made to reduce the complexity and cost of compliance with EU procurement rules.

3.1.8 Consideration might be given to the development of national or regional portal trading sites – similar to the Singaporean model – to make it easy and efficient for SMEs to participate in the new economy, and to maximise the general economic benefits accruing from the widespread implementation of e-commerce processes.

3.2 *Managerial understanding*

3.2.1 Businesses ultimately depend on their management and leadership to adopt significant new technology and to change business processes. This is especially true in the case of SMEs. However, most managers in SMEs have a very limited understanding of ICT and its potential benefits and the lack of understanding among SME managers is a major barrier to the adoption of ICT and e-business.

3.2.1.1 The Committee supports the Commission's proposal that policy initiatives should target the improvement of knowledge transfer to SMEs through SME support networks and workshops.

3.2.1.2 It also wholeheartedly agrees with the Commission on the need to develop case studies examples that can demonstrate the benefits and ease of implementation of e-business processes to SMEs. The case studies need to be specific and local enough to the target SMEs to be relevant. It would also be useful to include financial benefit analysis in the case studies. Ultimately, it is the long-term financial benefits of using ICT to implement e-business processes that will convince most managers to re-engineer their businesses.

3.2.2 Besides education in ICT and e-business, which is a long-term policy requirement, SME managers need advice and guidance on the e-business possibilities open to them today. This advice is best got through informed advisors in their support networks, in particular through business representative organisations and industrial representative organisations. Special efforts should be made to ensure the number and quality of such advisors is sufficient for the task. Also, appropriate training and consultative initiatives need to be undertaken to reach SME managers and give them the level of understanding they need.

3.2.3 Fiscal incentives, linked to specific measurable initiatives, should be considered to make it easier for managers to take e-business initiatives in their firms. The tax relief measures could provide support at set-up and for on-going operating expenses, thus helping to make the financial case for greater use of ICT within the SME.

3.2.3.1 The Committee agrees that special care should be taken to harmonise such incentives on an equitable basis across the Union so that fair competition is maintained. Also, it is vital that tax incentives be rigorously monitored to ensure that they are used only for their intended purpose.

3.2.4 Coping with the substantial transformation required of SMEs to succeed in the rapidly emerging new economy will require accelerated and continuous learning. All consideration of policy initiatives to promote learning among SMEs – managerial understanding, technology skills and strategic options – should take cognisance of the need to promote social networks and continuous dialogue among SMEs.

3.3 *Skills for e-business*

3.3.1 SMEs are at a significant disadvantage when it comes to the issue of ICT and e-business skills:

— ICT and e-business professionals are scarce. Much of the available expertise in this field has been attracted to the large firms, who can pay higher salaries for these rare skills.

— Economies of scale also work against the SME, who must employ a much higher ratio of IT staff to total employees than the larger firms.

— Also, in remote areas (where many SMEs are located) knowledge transfer of new technologies and skills is difficult.

3.3.1.1 So ICT and e-business skills are difficult to secure and very expensive for SMEs. This is a major barrier to greater adoption of e-business processes by SMEs.

3.3.1.2 The knowledge transfer initiatives mentioned above will be useful in helping managers to come-to-terms with some of the strategic decisions to be made. However, there will always be a need for specialised expert advice and support on the implementation and on-going maintenance and management of significant e-business projects.

3.3.1.3 SMEs can get some of this expertise from their support network. Tax incentives and grants can also help with the hiring of expertise and the training of employees - however, any fiscal incentives must be rigorously monitored to ensure that they are used only for the purposes intended. Networking and sharing of expertise among e-business competence centres could be encouraged as well.

3.3.2 As the need for ICT consultants increases, it would be desirable to have controls on the quality of practicing consultants to protect SMEs from unscrupulous and incompetent ICT professionals. It would be useful to have a quality certification process and a code of conduct for ICT and e-business consultants working with SMEs on approved schemes. Policy supports (e.g. fiscal aid) could be limited to the use by SMEs of qualified consultants.

3.3.3 Policy makers have got to come to terms with the need for more widespread and extensive education of the workforce to cope with demands of a 21st Century knowledge economy, heavily dependent on ICT and e-business processes. Existing programmes need to be extended to reach more people in the economy and expanded to include the depth and breadth of education required. This education needs to begin in schools and continue through life-long-learning initiatives, supported by appropriate social networks. The Committee agrees with the Commission's enthusiasm for using e-learning techniques and applications within SMEs as a complement to traditional ways of learning for their staff.

3.3.4 The social dimension to e-business adoption must be considered by policy makers. Society at large has got to be engaged and stimulated to support e-business adoption and to see the benefits of e-business for all.

3.4 *Availability of e-business solutions*

3.4.1 SMEs need access to affordable and relevant e-business solutions. Despite the fact that SMEs account for more than 99 % of businesses, most e-business applications such as Customer Relationship Management (CRM) systems are tailored for the needs of large businesses. SMEs need cost effective solutions that can be implemented quickly and easily and are tailored for their particular needs. Such solutions are scarce today.

3.4.1.1 Policy initiatives are required to facilitate the development of reliable and appropriate options with existing ICTs and SME-friendly e-business solutions which go far enough towards meeting their specific needs (1). The Committee approves of the suggestion in the Communication that SMEs could team-up with large ICT firms to create solutions that meet the actual needs of the SME sector, but awaits the concrete results of these proposals, which will be judged in the course of time (2). The Committee welcomes the importance attached to the participation of SMEs in the 6th RTD Framework Programme and the support under that programme for the development of open source software and interoperable e-business solutions, which are useful and technically complete enough to be worthwhile and serious solutions for SMEs (3).

3.4.1.2 Despite the announcements and existing programming, there has been no noticeable direct involvement of SMEs in programmes in the course of the 6th RTD Framework Programme to date because the vast majority of SMEs do not have the necessary infrastructure, know-how, technical expertise and fully trained staff to have any credible participation or to reap any real benefit from them.

3.4.2 A simplification of the European-wide patenting process would facilitate the commercialisation of new applications and technology for SMEs. At present the onerous and expensive patenting procedures create a barrier to small-scale and low-cost innovation.

3.4.3 The Commission's idea about promoting e-business interoperability through national test-beds is stimulating. It is an idea that deserves promotion. It would be a valuable asset to SMEs if the idea was implemented as outlined in the Commission's vision. However, the Committee is not sure that the private sector, as proposed by the Commission, would be sufficiently motivated to implement the plan on a wide-enough basis.

3.4.4 To provide a stimulus to innovation and entrepreneurship in the area of SME participation in ICT application development, perhaps policy makers might consider mandating that a certain percentage of government spending on ICT should be placed with SME firms.

3.5 *E-marketplaces and e-business networks*

3.5.1 E-marketplaces are growing in relevance for SMEs in certain sectors, but many SMEs in those sectors don't properly understand how those Business-to-Business (B2B) e-marketplaces operate nor do they have the ICT infrastructure to take advantage of the opportunity. Policy initiatives are needed to educate the relevant SMEs and to help them overcome the technical, economic and legal barriers to entry. The EESC also calls on the owners and managers of SMEs to be aware of the extremely complex conditions which are taking shape on a global level with the abolition of trade barriers and the use of new technologies and to have the courage to undertake the necessary modernisation of their businesses so that they can face up to the new and particularly demanding conditions of international competition.

3.5.2 The Committee calls on the Commission to consider a quality certification process for e-marketplaces to identify sites that operate best-practice in running their operations.

3.5.3 The Committee calls on the Member States to pay particular attention to the special needs of SMEs when implementing their public e-procurement systems, and on the Commission to continue with its initiatives to ensure real coordination at European level.

3.5.4 Collaborative e-business networks offer many potential benefits to SMEs and the Committee fully supports policy initiatives that encourage them to develop. Besides the direct commercial benefits of combining the strengths of a number of SMEs to bid for contracts more complex or bigger than they could bid for on their own, such networks facilitate the transfer of knowledge and can help bridge the knowledge and skills gaps referred to previously. They can also collaborate to develop e-business applications that meet their particular needs. Policies, including financial support, should be considered to propagate such networks.

3.5.5 SMEs are concerned about privacy and Intellectual Property protection when they get involved in e-markets and collaborative networks. Any security and reassurances that the Commission and policy makers could provide in this regard would facilitate greater involvement.

3.6 *Assessment of European efforts to bring SMEs into the digital age*

3.6.1 The EESC calls on the Commission to review the three lines of action and progress on implementation at national and European level of the individual actions outlined in the Communication entitled 'Helping SMEs to Go Digital' and to draw the necessary conclusions regarding any delays.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council on the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (recast version)'

(COM(2003) 418 final – 2003/0153 (COD))

(2004/C 108/03)

On 28 July 2003 the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community on the above-mentioned proposal.

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 16 December 2003. The rapporteur was Mr Levaux).

At its 405th plenary session of 28 and 29 January 2004 (meeting of 28 January), the European Economic and Social Committee adopted the following opinion unanimously:

1. **Introduction**

1.1 *Aim of the proposal*

1.1.1 The draft directive is a recasting of Council Directive 70/156/EEC on the approximation of the laws of the Member States relating to the approval of motor vehicles and their trailers.

1.1.2 Directive 70/156/EEC is the main legal instrument for implementing the single market in the automotive sector. Agricultural tractors will also be included in this process following the adoption of a new directive amending the framework Directive 74/150/EEC of 4 March 19974. The Committee issued an opinion on this subject on 16 April 1969 ([1]).

1.1.3 The Commission believes that the time has come to extend to commercial vehicles the principles already established for other categories of vehicles.

1.1.4 The technical annexes of Directive 70/156/EEC were consolidated into a single document in the first stage of the recasting. The current proposal is the second stage in this process, involving the recasting of the legislative provisions of the directive. This means that an approval procedure covering all categories of commercial vehicles could come into force as early as 2007. It should be noted that Community type-approval has been compulsory for passenger cars since 1 January 1998 and for motorcycles and mopeds since 17 June 1999.

1.1.5 The Commission believes that the adoption of the draft directive repealing Directive 70/156/EEC, which has been 18 amended times, will result in a more consistent, better-structured text, to the benefit of manufacturers, Member States and candidate countries.

([1]) OJ C 48 of 16.4.1969.

1.2 *Involvement of interested parties in drafting the proposal*

1.2.1 The Commission notes that Member States were informed about the proposal's content by the Commission's Consultative Group and the Motor Vehicle Working Group (MVWG). In addition, the Commission took account of the work done by the OTA (Operationality of Type-Approval) working party and, to large extent, also the work of the TAAM (Type-Approval Authorities Meeting) working party. The majority of government experts support the proposal, although some have expressed reservations as to whether the type-approval of commercial vehicles should be optional or compulsory.

1.2.2 The Commission stresses that the draft directive will have an enormous impact. In the table in point 5.2 of the explanatory memorandum (Appendix 1 of the present opinion) the Commission compares the annual production of passenger cars, light trucks and heavy commercial vehicles in the USA, Japan and the EU-15. Production in the EU-15 is stagnant. It is therefore regrettable that the Commission did not include an extra column, in advance, for the 12 candidate countries, where national production has been boosted as a result of heavy investment by Western manufacturers ([2]). The Commission also notes that the number of commercial vehicles in the EU-15 will increase from 24,829,000 in 2000 to 32,867,000 in 2014. While the Committee appreciates that the draft directive will cover many millions of vehicles, it would like the Commission to clarify its figures, given that the EU-15 will become the EU-27 by 2014 and that the 12 new Member States are making very rapid progress in this area.

1.2.3 The Commission points out that the automotive industry was involved from the outset in the preparation of the proposal and made an important contribution to developing the concept of multi-stage type-approval procedures. The Commission further notes that the industry is generally supportive of the proposal, provided a sufficiently long lead-time is built in to allow all manufacturers, including body-builders, to comply with the requirements on type-approval.

([2]) Following the Committee's comment, the Commission proposal now includes the missing figures.

1.3 *Content of the draft directive*

1.3.1 The following are some of the key concepts:

— the draft directive is based on total harmonisation, which means that Community type-approval procedures will be compulsory and will replace the national procedures;

— the procedures will allow type-approval of a complete vehicle by combining the separate type-approvals issued for its constituent systems, components and technical units, even when partial type-approvals have been carried out in various Member States;

— a new method of type-approval – multi-stage type-approval of the integral parts of a vehicle – is introduced in order to bring the situation into line with the manufacture of commercial vehicles. For this category of vehicles, the manufacturer of the base vehicle normally carries out type-approval of the chassis, including the cab and power unit, while the second manufacturer assembles the bodywork according to the goods to be transported. The completed vehicle is then presented for final type-approval;

— passenger cars built in small series will henceforth be included in the harmonised Community type-approval system;

— the possibility of individual approval of passenger vehicles.

1.3.2 The draft directive forms a coherent whole, which will significantly simplify type-approval operations for manufacturers:

— once a vehicle has been type-approved by one Member State it will be possible to register all vehicles of this type throughout the Community on the basis of their certificate of conformity;

— 'safeguard clauses are included to enable Member States, either at the time of type-approval or on registration, to refuse vehicles which, although they comply with all of the directives applicable, might prove dangerous for road safety. This principle has also been extended to cover environmental issues'. The Committee would point out that this wording (point 6.1 of the explanatory memorandum – 'General') suggests that some of the applicable directives could be dangerous from the point of view of road safety or the environment. This is not the case, however, and the Committee therefore suggests that the Commission add the qualifier 'in exceptional cases' after the word 'refuse' in the above paragraph.

2. **General comments**

2.1 In a recent opinion on the draft Directive relating to the protection of pedestrians and amending Directive 70/156/EEC (CESE 919/2003) [3], the Committee made a number of suggestions, some of which must be restated in the present opinion.

2.2 The Committee endorses the Commission's initiative to recast a directive which has been amended 18 times and to harmonise the applicable rules, thus simplifying procedures and at the same time promoting the development of the single market.

2.3 On the other hand, this recast version of Directive 70/156/EEC contains another, broader objective concerning the improvement of road safety and environmental protection which the Committee feels has not been elaborated sufficiently.

2.4 Therefore the Committee would reiterate that the main objective of introducing compulsory Community type-approval is 'to increase the safety of vehicles in use and to protect vehicle occupants in collisions, while at the same time respecting the environment'. This objective must be part of an overall approach which goes beyond the simple application of measures aimed at minimising the consequences of an accidental collision or a failure of a component, system or constituent unit of a vehicle.

2.5 In its opinion on the protection of pedestrians, the Committee singles out three aspects of pedestrian protection, which should also be mentioned in the explanatory memorandum:

— increasing the sense of responsibility of those involved: carelessness by pedestrians, cyclists and vehicle drivers very often causes collisions. It should therefore be stressed that accidents can be caused by all three groups and that there is a need to encourage responsible behaviour by all road users;

— education and information: the automotive industry, together with other interested parties, should provide an input to education and training and respond to training needs from primary school onwards and engage in regular information campaigns to encourage people to act correctly from an early age;

— infrastructure: porous asphalt surfaces, as well as traffic signs and related detection systems should be the subject of a joint study by the European automotive sector and road construction industry.

2.6 Thus, although this is a technical directive, the Committee would once again ask the Commission to amend and supplement its explanatory memorandum in line with the above-mentioned suggestions so as to better develop 'the content of an overall policy on accident prevention for road and street users'.

[3] OJ C 234 of 30.9.2003

3. **Specific comments**

3.1 As concerns the impact of the draft directive and its consequences for the European automotive industry, the Committee agrees with professionals from the sector that there must be sufficiently long time-limits for the application of the directive. It understands this request and considers it justified, particularly for body-builders. Although the Committee does not possess all the necessary information, it considers that the planned schedule for the enforcement of the directive, which extends from 1 January 2007 to 1 January 2012 (Article 40 and Annex XVI), is reasonable.

3.2 On the other hand, the Committee does not understand the reservations expressed by some government experts. It would like to know the reasoning behind the assertion by some of them that 'that only minimal benefit for road safety or the environment could be expected from compulsory enforcement but that there would be an increased cost to manufacturers'. The Committee does not share this view. On the contrary, the Committee is convinced that the directive will have a positive impact on safety and the environment, provided that the proposals concerning the development of an overall approach are implemented within an acceptable timeframe.

3.3 Clearly, the cost to manufactures will be considerable, but acceptable if spread over 10 or 20 years. Consequently, the Committee would like an alternative evaluation of the cost of the draft directive to be carried out with all the interested parties to check whether the automotive industry could bear the cost over these long time horizons. The Committee thinks that it would be better to extend the time limits for application of the directive, rather than set impossible dates with repercussions for employment, costs and even the very survival of companies, including equipment manufacturers. In the current context of enlargement and the economic difficulties faced by Europe, a provisional check of this kind is consistent with the application of the principles of precaution and expediency.

3.4 As regards end-of-series vehicles (Article 26(3)), the time-limit set for Member States to respond to requests from manufacturers should be shortened from 3 months to 1 month so as to reduce stock holding costs

3.5 In its opinion on the type-approval of agricultural tractors and related equipment ([4]), the Committee drew the Commission's attention to the growing market for motor quadricyles (Quads). These are not mentioned in the draft directive or in the directive on agricultural tractors and related equipment. The Committee would emphasise the urgency of harmonising EU type-approval procedures for Quads.

4. **Conclusions**

4.1 The Committee welcomes the simplification and transparency that will result from recasting Directive 70/156/EEC.

4.2 Although this is a technical directive, the Committee suggests that the Commission emphasise in point 3 ('Background') of the explanatory memorandum that the main objective is to improve 'safety' in the use of vehicles with a view to not only protecting vehicle occupants but also to preventing collisions with other road users, pedestrians, cyclists and other vehicles.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

([4]) OJ C 221 of 17.9.2002

Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the measures to be taken against the emission of gaseous and particulate pollutants from compression-ignition engines for use in vehicles, and the emission of gaseous pollutants from positive-ignition engines fuelled with natural gas or liquefied petroleum gas for use in vehicles'

(COM(2003) 522 final - 2003/0205 (COD))

(2004/C 108/04)

On 22 October 2003 the Council decided to consult the Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the above-mentioned proposal.

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 16 December 2003. The rapporteur was Mr Ranocchiari.

At its 405th plenary session (meeting of 28 January 2004), the Economic and Social Committee adopted the following opinion by 113 votes to one.

1. **Introduction**

1.1 The European Commission's intention, with draft directive COM(2003) 522, is to consolidate Directive 88/77/EEC on exhaust emissions from commercial vehicles, and all subsequent amendments to it adopted by the European Parliament and the Council, into a single text.

1.2 As requested in Articles 4 to 7 of Directive 1999/96/EC, the Commission also proposes three new provisions concerning, respectively, the introduction of on-board diagnostic (OBD) systems, procedures for confirming the durability of emission control systems, and procedures for checking the in-service conformity of such systems.

1.3 The Commission's proposal for these three new provisions is structured differently compared to existing directives concerning the type-approval of motor vehicles. This reflects the aim of making the decision-making process more efficient, and simplifying the proposed legislation so that the European Parliament and the Council can focus more on the content and political direction, leaving the Commission with the task of adopting the requirements needed to implement such direction and content.

1.4 The Commission has adopted a 'split-level' approach with two different, but parallel routes for drafting and adopting the legislation. Under this approach:

1.4.1 the fundamental provisions are laid down by the European Parliament and the Council in a directive based on Article 251 of the Treaty under the co-decision procedure, which establishes the basic principles of the new measures (co-decision proposal);

1.4.2 the technical specifications implementing the fundamental provisions are laid down in a directive adopted by the Commission with the assistance of a regulatory committee for adaptation to technical progress (comitology proposal).

1.5 Document COM(2003) 522 corresponds to the draft directive under the co-decision procedure (see 1.4.1 above); the draft directive under the comitology procedure (see 1.4.2 above) is not yet available.

2. **Summary of the Commission proposal**

2.1 In drafting its proposal, the Commission has made a clear distinction between the content concerning the introduction of new measures and content relating to consolidation of the text of the directive arising from the amendments previously adopted by the European Parliament and the Council.

2.2 The Commission proposes to introduce new provisions concerning OBD systems to the measures confirming the durability of emission control systems and to the measures to check the in-service conformity of such systems, on the same dates as planned for the entry into force of the Euro 4 and Euro 5 standards.

2.3 On-board diagnostic systems (OBD): the Commission proposes that these be introduced in two successive stages, with the following deadlines for entry into force:

i. first stage: October 2005 for new type-approvals and October 2006 for all type-approvals;

ii. second stage: October 2008 for new type-approvals and October 2009 for all type-approvals.

2.3.1 In the first stage, the OBD system is required to detect failures in the engine control system, where such failures are caused by an increase in emissions above predefined threshold limits. The system must also be able to detect 'major functional failures' in any emission after treatment systems, such as particulate filters and/or catalysts.

2.3.2 In the second stage, the OBD system is required to detect not only failures in the engine control system, but also any deterioration of the efficiency of emission after treatment systems which could cause an increase in exhaust emissions above predefined threshold limits.

2.4 *Measures confirming the durability of emission control systems*

2.4.1 The Commission proposes the following definitions of the 'useful life' of the vehicles ([1]) to which the engines covered by the directive are to be fitted:

i. N1 vehicles: 100 000 km or five years,

ii. N2 and M2 vehicles: 200 000 km or six years,

iii. N3 and M3 vehicles: 500 000 km or seven years.

2.4.2 With effect from October 2005, manufacturers seeking type-approval for new engines will have to demonstrate emission compliance for the entire useful life of the type of vehicle to which they are to be fitted.

2.4.3 With effect from October 2006, all engines fitted to new vehicles must comply with this provision.

2.5 Checking in-service conformity: the above definitions of useful life for commercial vehicles as set out above will also apply to checks on the conformity of engines in service.

([1]) M = vehicles for the carriage of passengers: M1 (8 seats + 1); M2 (> 8 seats + 1 and total weight < 5t); M3 (> 8 seats + 1 and total weight > 5t); N = vehicles for the carriage of goods; N1 (total weight <= 3.5t); N2 (total weight > 3.5t <= 12t); N3 (total weight > 12t).

3. **General comments**

3.1 EU enlargement means that consolidated versions of the main directives are needed in the interests of greater clarity and transparency. The adoption of a consolidated version of Directive 88/77/EC is therefore required, and the Committee acknowledges the work done by the Commission to this end.

3.2 The Committee agrees that a specific debate on the content relating to the consolidation of the directive is not necessary, since it is in line with decisions already adopted by the Committee ([2]) itself, the European Parliament, and the Council.

3.3 The proposal to follow a split-level approach entails two different but parallel routes for drafting and adopting technical and legislative provisions.

3.3.1 Separating the fundamental provisions underpinning the definition of the proposed measures from the technical details required to implement them can play a key part in simplifying and speeding up the legislative process.

3.3.2 The Committee supports the approach adopted by the Commission in proposing new provisions regarding the introduction of OBD systems and measures regarding the durability of emission control systems and in-service conformity.

3.3.3 The technical details for implementation can be discussed and defined by experts made available by the Member States to the Commission through the committee on adaptation to technical progress.

3.3.4 The Committee urges the Commission also to take note of the contributions that the industry and other interested parties may wish to make to the definition of these technical details.

3.4 The Committee must however point to the significant delay in presenting the Commission's proposals on OBD systems, durability and in-service compliance in relation to the dates set out in Articles 4 and 7 of Directive 1999/96/EC mentioned in point 1.2 above.

3.5 The Committee also feels it must warn that the dates for the entry into force of the proposed new measures are dangerously close.

([2]) OJ C 41 of 18.2.1991; OJ C 155 of 21.6.1995; OJ C 407 of 28.12.1998.

3.5.1 Any delays in adopting the two parallel directives, i.e. one under the co-decision procedure and the other under the comitology procedure, would leave the industry with no time to seek type-approval for engines which are scheduled for entry onto the market in 2005.

4. **Specific comments**

4.1 OBD systems for commercial vehicles will be introduced in Europe considerably earlier than on other markets, including the American and Japanese ones. As a result the kind of prior experience which, in contrast, was available in the previous phase when OBD systems were introduced for cars, will be absent.

4.2 In order to be ready in 2005, European engine manufacturers had to launch the design and preparation programmes for OBD systems years ago, on the basis of proposals they had put forward and of discussions within the MVEG ([3]) forum, on which Member State experts as well as the Commission are represented.

4.2.1 The point of no return, after which the basic system strategies can no longer be modified, was reached some time ago; system span values are now being defined.

4.2.2 The delay before the two parallel directives are published in final form is however a serious problem. The introduction of any unexpected modifications would make it impossible to meet the deadlines for entry into force of the measures.

4.3 The need to demonstrate the efficiency of emission control systems entails tests which require sufficient advance notification. Once again, the delay before the final versions of the parallel directives are presented could give rise to significant problems.

5. **Conclusions**

5.1 The Committee warmly welcomes the new split-level approach which the Commission intends to try out with the draft directive under examination. Separating the fundamental principles and policy objectives of the legislation from the technical details for implementation will simplify and speed up the legislative process.

5.2 The Committee considers that the European Parliament and the Council must adopt the Commission's proposal as a matter of the utmost urgency.

5.3 The Committee therefore hopes that the Council and the European Parliament will make every possible effort to reach a common position in good time, so that the proposal for a directive can be adopted before next April. Any further delay would seriously jeopardise the chances of meeting the deadlines for the entry into force of the new measures concerning durability and OBD systems.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

([3]) Motor Vehicle Emissions Group.

Opinion of the European Economic and Social Committee on 'preparing transport infrastructure for the future: planning and neighbouring countries - sustainable mobility - financing'

(2004/C 108/05)

On 17 July 2003 the European Economic and Social Committee, acting under Rule 29(2) of its Rules of Procedure, decided to draw up an opinion on: preparing transport infrastructure for the future: planning and neighbouring countries – sustainable mobility – financing.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 24 November 2003. The rapporteurs were Mrs Alleweldt, Mr Levaux and Mr Ribbe.

At its 405th plenary session on 28 and 29 January (meeting of 28 January), the European Economic and Social Committee adopted the following opinion by 107 votes to two, with three abstentions.

Foreword

On 8 April 2003, in a letter from Mr Umberto Vattani, Ambassador and Permanent Representative of Italy to the European Union, the Council asked the European Economic and Social Committee to draw up an exploratory opinion on the Revision of the list of Trans-European Network (TEN) projects up to 2004.

At the July plenary session, the Italian Minister for European Affairs, Mr Buttiglione, on behalf of the Council presidency, enlarged upon this request, explaining that it was one of the priorities of the Italian presidency to give new impetus to European transport infrastructure policy. He also expressed the hope that trans-European transport networks would not only facilitate the transport of goods, but would also strengthen ties between the communities along their routes.

Meeting in Rome on 4 September 2003 at the invitation of the Italian Economic and Labour Council (CNEL) and in the presence of Mr Buttiglione, the European Economic and Social Committee's Section for Transport, Energy, Infrastructure and the Information Society adopted its exploratory opinion and a joint resolution with Commission V of the CNEL on large-scale infrastructure projects and networks, emphasising that

— the development of trans-European transport networks is essential for economic and social cohesion in the new Europe; and

— coherent and sustainable development of European mobility must be guaranteed so as to permit the balanced growth of the continent's economic and social fabric.

Speaking on behalf of the Italian presidency, Mr Buttiglione also wished to see the EESC more closely involved in European policy in this area. The TEN section was therefore given the task of drawing up an own-initiative opinion on Preparing transport infrastructure for the future: planning and neighbouring countries – sustainable mobility – financing. Owing to the complexity of the topic, it was decided to appoint three rapporteurs [1], each dealing with one of the three aspects with reference to ongoing work on the growth initiative and the work of the Van Miert group. The EESC's work on the subject is constantly evolving and this opinion, which is to be submitted before the end of the Italian presidency at its final meeting in early December, constitutes its current position.

Alexander Graf von Schwerin

President of the Section for Transport, Energy,

Infrastructure and the Information Society

1. Planning and neighbourhood policy – linking the trans-European networks to the Helsinki pan-European corridors

1.1 One of the priorities of the Italian presidency has been to give new impetus to European transport infrastructure policy. Although Germany and France went on to point out that the priority of this growth initiative for Europe could not be transport infrastructure alone, but should also include energy networks, telecommunications and R&D, the focus on transport infrastructure is entirely warranted. A review of implementation of trans-European transport networks (TEN-T) over the last ten years makes for very sobering reading. Nevertheless, the European Commission responded in October with a communication of its own taking appropriate account of the broader approach and attempting to convert it into a strategy for increasing employment [2].

[1] Mrs Alleweldt: Planning and neighbouring countries
Mr Ribbe: Sustainable mobility
Mr Levaux: Financing

[2] COM(2003) 579 final A European initiative for growth: Investing in networks and knowledge for growth and employment. Interim Report to the European Council

1.2 Faced with the forthcoming enlargement of the EU and the changes to Europe's geostrategic situation, the forecasts for transport trends as a whole and for individual modes, the increasing sensitivity about the environmental impact and the poor prospects for growth in the EU with their implications for employment, the question must be whether we can meet the challenges if we do not make a clear move towards a joint European initiative on transport infrastructure development. This cannot involve simply perpetuating old solutions; we must have the courage to develop new instruments.

1.3 On 4 September 2003 in Rome, the EESC's TEN section adopted a joint resolution with Commission V of the Italian Economic and Labour Council (CNEL) on large-scale infrastructure projects and networks. Together they stressed the urgency of developing the pan-European transport corridors in southern and eastern Europe, thereby improving the conditions for managing transport trends in the Mediterranean region, which, as pointed out in the 'Naples Charter', will take on a new economic, social and strategic role following EU enlargement. The network of existing corridors must be supplemented with important links, such as the Adriatic link between corridors V and VIII. At the same time, care must be taken to ensure balance in addressing the interests of all regions, including depressed areas in the current Member States and Northern Europe. The development of this pan-European network requires more technical and organisational support, as well as financial backing.

1.4 Ten years after the first ground-breaking moves to develop the TEN-T, the European Commission appointed a group of experts headed by Karel van Miert to carry out a review ([3]). It has emerged that not only is implementation of planned projects way behind the deadlines set, but also total public investment in transport has dwindled from 1.8 % of GDP in 1980 to 1 % of GDP in the nineties. On 1 October 2003, the European Commission then submitted a proposal to adapt the guidelines for the trans-European transport network to the situation post-enlargement ([4]). The aim is to create a coherent network between new and old Member States and to speed up implementation of priority projects. The EESC wishes to make a further contribution to these revamped TEN-T with the following comments.

1.5 Trans-European transport routes are an essential prerequisite for economic and social cohesion in the enlarged EU and beyond. The new and old EU neighbours must become partners in this project, which embraces the whole European continent and extends beyond.

1.6 The three Pan-European Transport Conferences in Prague (1991), Crete (1994) and Helsinki (1997) ([5]) both paved the way for a network of trunk routes (corridors) and saw agreement on transport policy objectives integrating principles of energy, environment, social and economic policy so as to create fair and balanced competition conditions. This principle of transport policy cooperation beyond the EU will also be needed in future and the European Commission should take account of it and support it in its work.

1.7 Infrastructure projects with European implications only fulfil their function if they respond to economic, political and social interests. This requires more than just cooperation between transport ministers; it requires the involvement of business associations, transport companies, trade unions, and environmental and consumer organisations working across borders. And EU accession alone is not enough to achieve this. Rather, the reality of TEN implementation shows that the impetus for implementing 'European' transport routes can only be sustained by a socially-rooted appreciation of 'Europe' and a consensus which takes account of economic and social realities. The EESC proposes applying the experience gained with the corridor concept to the TEN-T so as to utilise this potential.

1.8 This implies the following concrete requirements for the revision of the TEN guidelines, which includes further work in the corridors:

1.8.1 TEN trunk routes and corridors must bind the internal market together, reinforcing economic and social relations with neighbouring countries. First and foremost, they must provide optimum connections between economic centres and must also be assessed on those criteria. This has rarely been done to date, if at all, and not in a very clear way. In some cases, individual scientific studies are cited as evidence, but controversial findings and opinions are rarely mentioned. A realistic picture only emerges when the opinions and experience of associations are added to the equation. To date, this recourse has been much underused by the Commission.

1.8.2 The intermodality of TENs and corridors must be ensured, which requires comprehensible quality criteria. Each trunk route/each corridor will have to develop and implement this in its own way, so it is important to introduce a requirement for intermodality blueprints and action plans.

([3]) Report by the high-level group on trans-European transport networks chaired by Karel van Miert, European Commission, 20.6.2003.

([4]) COM(2003) 564 final of 1.10.2003

([5]) cf. EESC opinion OJ C 407, 28.12.1998, p.100.

1.8.3 The environmentally friendly use of inland waterways (cf. also 2.3.8) should be emphasised to a greater extent; this also involves ports, promoting the inland waterway corridor VII ([6]), the Danube, links to rail routes and appropriate technical and social regulations governing cross-border inland waterways transport.

1.8.4 Enough is still not being done to promote short sea shipping and its appropriate integration into the planning of TENs and corridors. The greater prominence given to shipping links in the new Commission proposal is therefore very welcome. For these transport services and their promotion in particular, it is once again important to maintain safety standards and social conditions. Environmental implications should also be borne in mind in the case of busy shipping links (e.g. in the approaches to the Baltic) and coastal transport.

1.8.5 Ambitious, but feasible objectives must be defined for developing rail transport, with particular attention to cross-border cooperation projects and connections to seaports. The implementation of these should also be evaluated. With new toll arrangements for roads under discussion ([7]), it is essential to create alternatives. There are good examples of major rail transport cooperation initiatives in corridors IV ([8]) and X ([9]).

1.8.6 We need growing investment for the acquisition and development of transport infrastructure and improved EU funding, as well as a stricter obligation to keep to 'European' project planning. At the same time, budget resources are limited and care must be taken to ensure balanced development overall. This means that developing existing infrastructure should be given precedence over new building projects and investment in the main transport routes must not be at the expense of regional and local transport facilities to too great an extent. Overall an assessment should be made of how effectively regional transport networks are linked in along the TENs/corridors.

1.8.7 The success of TENs/corridors depends on environmental, safety and consumer protection concerns being seen to be addressed. Transport, safety and sustainability are inextricably linked. For this reason, social concerns must be given equal importance – not just those relating to transport employees – in addition to economic necessities. This also involves organising road transport in an environmentally friendly way and promoting public transport. These qualitative criteria, such as service quality, safety, environmental impact, and the working conditions and skills of transport workers, should be appended to the TEN guidelines as originally intended. This requires the creation of viable assessment mechanisms, such as a specific TEN/corridor environmental report or similar.

1.8.8 When integrating the corridors into the TEN guidelines, positive elements of cooperation in the corridors should be carried over and preserved. Corridors will continue to function as conduits to neighbouring countries and continents beyond the territory of the EU. After enlargement there must be no winding down of the remaining corridors; there must be serious and geographically far-reaching cooperation opportunities. Careful thought must be given to the repercussions of decisions taken now concerning the TENs in the EU on the cooperation which has grown up in the corridors.

The Commission's new proposal to appoint individual coordinators to promote priority TEN projects is worth highlighting as it shows the Commission is drawing on experience in the corridors in a commendable way. The intention to conduct joint cross-border planning procedures and environmental impact assessments is also a step in the right direction. Up-to-date reviews of progress are essential, so the proposed annual reports are also a positive step. The monitoring function laid down in the 1997 Helsinki Declaration has never been fulfilled, although individual reports, such as that by the ECMT, the regular status reports from the corridor steering committees or the 1999 TINA report were available. The coordinators should also work towards realising the above-mentioned political objectives, and in this sense, the remit described in the new Article 17a provides a good basis, especially for promoting dialogue between operators, users, regional and local authorities and the representatives of civil society with a view to the optimum use of infrastructure and possible obstacles ([10]). The EESC calls on the Commission to draw on its experience and support in terms of consulting socio-economic interest groups, creating transparency and holding hearings and dialogue conferences. This was also endorsed in an exchange of correspondence between the TEN section and Commissioner Loyola de Palacio in Spring 2003 and could now be put into effect.

2. **Transport infrastructure with reference to sustainable development**

2.1 *Introduction*

2.1.1 Mobility is an indispensable benefit of our modern world. A wide range of leisure activities and the desire to travel, as well as the world of work, which demands ever greater flexibility, have made us into a society which sets great store by mobility. For many, mobility is synonymous with freedom, which is supposed to be as unrestricted as possible, both literally and figuratively.

([6]) Germany – Austria – Slovakia – Hungary – Croatia – Serbia – Bulgaria – Moldova – Ukraine – Romania
([7]) OJ C 32, 5.2.2004.
([8]) Germany – Czech Republic – Slovakia – Hungary – Romania – Bulgaria – Greece – Turkey
([9]) Austria – Croatia – FYROM – Slovenia – Hungary – Serbia – Bulgaria
([10]) COM(2003) 564 final, Article 17 a (4) c), p. 23

2.1.2 Mobility is also a crucial and fundamental prerequisite for the functioning of major sectors of our economy. Investment in new transport routes, and the maintenance and modernisation of existing ones, helps to boost the economy and to create jobs.

2.1.3 But being mobile does not mean necessarily having to travel long distances. High transport performance is by no means synonymous with high mobility in the positive sense. On the contrary, excessive transport performance levels are at their limit: traffic jams on our roads are turning mobility into paralysis. To solve this problem, there are frequent calls for transport infrastructure to be expanded further. At the same time, 'disconnected' regions are to be opened up so as to provide a prospect of economic development in outlying areas too.

2.1.4 Yet it has not escaped the EESC's notice that there is an ever-growing chorus of critical voices. For transport undoubtedly has its downsides, affecting both man and nature:

— Accidents, health hazards from noise and air pollution, damage to the landscape and the consumption of natural resources result in so-called 'external costs', which amount to an annual figure of some 530 billion euro in the EU (incl. Norway and Switzerland); this is equivalent to nearly 8 % of these countries' GDP.

— The countryside is torn apart, natural habitats destroyed, wildlife migration routes disrupted.

— People in Europe are suffering with the increase in traffic and its impact on the environment. A survey by the European Commission shows that three of the seven most frequently mentioned forms of environmental pollution are mainly caused by transport: noise, destruction of the countryside and air pollution. Not surprisingly, car traffic tops the poll as far and away the worst offender.

2.1.5 Critics of transport policy to date are increasingly asking at what point the process of opening up a country with roads and other transport infrastructure can be considered to be either at an optimum level or complete. There is also uniform criticism of the fact that the economy is often faltering and unemployment high in regions which are well served by transport, giving many critics increasing cause to question the often cited causal link between transport infrastructure and economic development.

2.1.6 It is clear to the EESC that, when assessing development plans for European infrastructure, a fine distinction must be made between the purely investment phase (building as such) and the subsequent impact caused by operating or using the infrastructure. This involves not only the environmental and social implications, but also the knock-on effects on existing national or regional transport infrastructure. The Maastricht Treaty states that trans-European networks are intended to reinforce the economic and social cohesion of the European Union. However, there are an increasing number of empirical studies which attest to the fact that, contrary to the goals of the Treaty, while the development of TENs does improve links between Europe's economic centres, thereby enhancing Europe's global competitiveness, the existing disparities in accessibility and economic potential between central and peripheral regions of Europe are exacerbated by giving priority to centre-to-centre links.

2.2 *Transport infrastructure and sustainable development*

2.2.1 The European Commission gives a very precise outline of the apparent problem on its website: 'Open frontiers and affordable transport have given Europeans unprecedented levels of personal mobility. Goods are shipped rapidly and efficiently from factory to customer, often in different countries. The European Union has contributed by opening national markets to competition and by removing physical and technical barriers to free movement. But today's transport patterns and growth rates are unsustainable' ([11]).

2.2.2 In the sustainability strategy decided on by the European Commission in Gothenburg in 2001, it is rightly explained that 'The Common Transport Policy should tackle rising levels of congestion and pollution and encourage use of more environmentally-friendly modes of transport'. The Commission announced that it would 'give priority to infrastructure investment for public transport and for railways …'. The EESC has endorsed the goals of the Gothenburg strategy in a number of opinions ([12]).

2.2.3 Transport is thus of great importance not only for current economic policy. The decisions taken as part of the growth initiative should not be evaluated only on short-term criteria. The EU's transport policy must certainly be one of the key areas of action in future as part of the EU's sustainability and climate protection policy, and as the Commission describes, changes are needed for this to be possible. For example, transport currently contributes to climate change, accounting for 28 % of greenhouse gases, with road transport alone responsible for 84 % of this total. If nothing is done to reverse the trend of traffic growth, CO2 emissions are expected to rise by 50 % to 1.113 billion tonnes between 1990 and 2010 (1990: 739 million tonnes).

([11]) Source: http://europa.eu.int/pol/trans/index_en.htm
([12]) OJ C 048, 21.2.2002, p. 112 etc.

2.2.4 The cause of the environmental and social problems is the sharp increase in road and air transport while less environmentally harmful transport modes are losing out ([13]). Transport infrastructure policy has contributed to this trend. According to Eurostat, the length of the motorway network in the EU grew by more than 25 % between 1990 and 1999 while the rail network contracted by 4 % over the same period ([14]).

2.2.5 The EESC points out that under virtually all environmental headings (energy and land use, emissions etc.) rail has proven to be the most environmentally friendly mode of transport ahead of inland waterways navigation, while private cars and planes (for passenger transport) and lorries (for goods transport) have the worst environmental performance by far. Further details are given in the appendix to this opinion.

2.2.6 During the deliberations involved in drawing up this opinion, there was some discussion of the impact on jobs arising from the building of different transport modes. Studies from Germany, some of quite long standing, indicate that investment in railways has a more positive effect on jobs than road building measures. The EESC recommends that the Commission have separate studies drawn up on this question, along the lines of those on external costs, to provide objective evidence for the debate.

2.2.7 In many cases, large-scale projects have triggered public protest and it has not been possible to carry out some projects at all, or at least not within the planned timeframe. In the EESC's view, this experience must now be borne in mind, especially with the growth initiative and EU enlargement and the resulting increase in transport links. The Commission statements quoted in 2.2.1 must at last be acted upon so that the same negative impact on man and environment does not recur in the accession countries. The EU could make a decisive contribution towards preserving the still high, but now rapidly falling proportion of transport carried by environmentally friendly means in those countries.

2.2.8 The aim of European transport infrastructure policy must not only be to help achieve the target of reducing CO2 emissions by 50 % by 2030. Rather, it must make a positive contribution in all sectors of sustainability (economic, environmental and social), which add up to sustainable mobility.

2.2.9 In the EESC's view, 'sustainable mobility' should be understood to mean mobility which

— consumes no more energy in the long term than is produced through regeneration;

— fully preserves the capacity of the natural environment to function and regenerate (and therefore which does not pollute, either through emissions or the removal of resources, in the production, use or disposal of vehicles and infrastructure);

— does not lessen the quality of life of present and future generations;

— is accessible to all.

2.2.10 The EESC associates the following sustainability objectives with a new, durable transport policy.

2.2.11 In the economic field, investment should be used to help create jobs, improve regional net value added, develop an all-round efficient transport system and establish financial sustainability.

2.2.12 In the social field, investment also takes care of the protection of physical integrity, including effective noise reduction. The working conditions of transport workers should be improved and investment conform to the principle of social justice (epitomised in 'mobility for all'). Towns and cities must be designed for people, not for traffic, and account taken of the mobility needs of all those who live in rural areas (and not just car owners).

2.2.13 In the environmental field, investment decisions are already made on the basis of the EU's climate protection objectives. Land use must be reduced; the protection of nature, cultural landscapes and the areas people use for recreation is of greater concern than ever. The reduction of harmful substances and lower resource consumption are becoming an integral part of infrastructure policy.

2.3 *Specific comments*

2.3.1 The EESC is well aware that, in accordance with the subsidiarity principle, transport policy falls largely within the decision-making and funding remit of the Member States. However, every year, billions are paid out of the EU budget specifically for transport infrastructure development via the Structural Funds (including the Cohesion Fund). These funds should be deployed in accordance with the principles of sustainability.

2.3.2 Transport policy must become an integral part of a spatial development policy aimed at minimising the generation of new, additional traffic and managing existing traffic with the most environmentally friendly transport modes possible.

([13]) The EESC has several times mentioned regional bus transport as being an important pillar of sustainable transport policy. However, since this opinion is primarily concerned with European transport infrastructure, no specific views are given on promoting bus transport; a separate EU bus infrastructure policy is inconceivable for the EESC.

([14]) Eurostat News Releases No. 42/2002, 9.4.2002

2.3.3 This also means that particular attention should be paid to the fact that developing European transport infrastructure (TENs/TINA) may have direct and indirect repercussions on national and regional infrastructure. The EESC points to the danger that, with the budgetary situation in the Member States and accession countries, concentrating investment on TEN or TINA projects may result in regional and local infrastructure being neglected. The EESC has pointed out in other opinions that countries like Poland or Hungary currently spend well below 1 % of their GDP on maintaining and rebuilding their whole transport infrastructure; but the implementation of TINA projects by 2015 as scheduled requires annual investment of the order of some 1.5 % of GDP in the corridors alone. The EESC calls on the Commission, Member States and accession countries not to ignore the regional economic problems which may arise from this.

2.3.4 The EESC welcomes the fact that links with local transport infrastructure now also come in for support in the context of TEN-T planning, but doubts that the high-speed maglev link between Munich airport and Munich city centre, which has been selected for such support, can be seen as a suitable project.

2.3.5 The EESC therefore expects the EU to deploy funds in a considerably more strategic manner in future. Precedence for co-funding should be given to projects which comply with the following principles:

— The principle of traffic reduction: As has already happened with energy consumption, economic development must be disassociated from transport growth. The aim should be to reduce the amount of traffic while preserving mobility. This means halting the trend towards ever greater distances in passenger and freight transport by means of a consistent transport, land-use and economic policy: this can be achieved by means of a 'short journey policy', e.g. between home, work or shops, attractive living environments, avoiding pointless journeys across Europe and reinforcing regional economic networks ([15]) etc. In order to implement this principle, it will be important to internalise external costs – as has frequently been called for by the EU (see below).

— The principle of mode shifting. The aim here is to reduce the dominance of private motor car transport and road-borne goods transport. This can only be achieved if an attractive alternative is provided. The key component of such an alternative is rail transport, closely networked with all other mobility providers in the environmental alliance (public transport operators, cycle ranks, mobility centres, car sharing, taxis, logistic service providers etc.), an important task also being to provide attractive bus services, especially in regions where rail transport is not viable because of low population density. The necessary expansion of the environmental alliance requires targeted investment to modernise infrastructure, vehicles and new communication and information technologies, thus opening up excellent prospects for innovative small and medium-sized enterprises in particular.

— The principle of a 'campaign for a new culture of mobility': Any measure is fruitless unless a new conception of mobility finds acceptance. There is a need in the EU to campaign for a new culture of mobility and the infrastructure projects co-financed by the EU should serve as models.

2.3.6 The guidelines for trans-European networks (TENs and TINA) should thus be revised (cf. point 1.8) and improved to comply with the principles of a transport infrastructure policy which is sustainable both in environmental and financial terms.

2.3.7 The EESC is pleased to note in this respect that rail links predominate in the selection of new priority TEN projects. But, here again (as with all new building projects), the principle applies that appropriate options should be sought which gain greater acceptance from the public, thereby also preventing stalled investment.

2.3.8 One example of a potentially imminent conflict as a result of development standards proposed as part of TEN revision without taking account of national circumstances is the development of the Danube between Straubing and Vilshofen. Care must be taken to prevent the compromise hammered out at national level between the federal government and environmentalists to improve navigation conditions while taking account of conservation issues, which also guarantees compliance with the FFH directive, being scuppered because of the requirement for a year-round draught of 2.5 metres.

2.3.9 We can no longer afford to set different transport modes against each other in sometimes cut-throat competition through parallel investment. This means managing the economically and ecologically limited financial resources according to the EESC's sustainability criteria (cf. 2.2.9 to 2.2.13) and putting them to optimum use. What is needed in future are integrated global transport concepts derived from a sustainable policy of land use and urban planning. Implementing an integrated global transport plan means not just planning infrastructure projects, but also first examining alternative forms of spatial and transport development, including large-scale options. Innovation information and communications technologies are needed for these.

2.3.10 This also means that a balanced relationship between transport modes must be established following careful consideration of detailed impact assessments. Preference should be given to rail or water-borne transport where possible, particularly over long distances.

([15]) Promoting traffic-reducing regional economic networks plays a role here. For example, creating a limited number of centrally located, large-scale abattoirs (often with EU funds) has led to an enormous increase in traffic (including the controversial transport of animals) while wiping out regional jobs. If all the external costs incurred were incorporated into the costing of slaughtering operations, their 'economic viability' would look quite different.

2.3.11 The EESC would like to stress that a new, sustainable transport policy of this order requires a huge investment programme and will therefore help to kick-start the economy. But changes are needed in the pattern of investment: less large-scale new building projects, more tailored development programmes, more renovation work (e.g. to make the railways more attractive).

2.3.12 As far as TENs are concerned, this means that the available financial resources should be concentrated primarily on the rehabilitation, modernisation and maintenance of the rail and road networks, as well as ecologically acceptable parts of the waterways network. The EESC assumes that existing TEN and TINA projects will also be reviewed to ensure they meet the standards and requirements outlined in this opinion. Needless to say, all new building projects must also be in line with the EU's sustainability objectives.

2.3.13 In the case of environmentally friendly modes (rail and some inland waterways), there is considerable reserve capacity available which could be put to use in the short term by means of technical and organisational measures, particularly on the railways. The 'railways of the future' must win back lost ground and be an attractive mobility provider. This should be one of the priority areas for EU investment.

2.3.14 In the case of investment in the construction of waterways which involve interference with the natural flows of rivers and river estuaries, a new approach is needed; the floods of recent years have demonstrated that the greatest care is needed in such cases. If inland waterways navigation is to be developed further as an environmentally friendly mode of transport, the principle must apply that ships are adapted to rivers and not rivers to outsized ships.

2.3.15 With all new building plans it must be borne in mind that satisfying man's desire for mobility can come into conflict with that of wild (migratory) animals. Few people realise that animals need 'highways' and 'rest stops' in all sectors of sustainability (economic, environmental and social) just as drivers do. For instance, the planned Via Baltica will cut across important migration routes for wolves and lynx, ruining a unique opportunity to facilitate a natural resettlement in Western Europe. In other words, the environmental impact assessments of detailed plans should involve a far more complex analysis than is the case today and allowance made for the relevant extra costs, e.g. wildlife overpasses.

2.3.16 In future, EU resources should only be used for projects which the EU can convincingly demonstrate contribute to the objective of creating a sustainable system of mobility. A sustainable system of mobility requires appropriate framework conditions, which the EESC has discussed in a number of opinions. These include:

— True pricing in transport: A key element of sustainable transport policy is the creation of economic incentives for transport users. Enforcing true pricing, i.e. the internalisation of external costs (530 billion euro per year in the EU), is crucial for successful traffic reduction, transference to the environmental alliance and the further development of maximum efficiency vehicle technology and its market penetration. Instruments such as universal, performance-related heavy goods traffic charges for lorries, the gradual alignment and increase of taxes on mineral oils, a reorganisation and wider range of taxes on motor vehicles based on their emission levels – and taking account of the noise criterion – and the alignment of taxation on shipping and air transport with that on road and rail could be appropriate for ensuring the optimum use and full utilization of existing transport infrastructure and the progressive and accurate incorporation of external costs. The EESC feels it is high time to stop merely talking about the internalisation of external costs and to actually implement it in earnest. The Commission should draw up concrete proposals as soon as possible for discussion with the Member States and civil society.

— Fair competition: Undesirable environmental and social developments must also be prevented by observing, enforcing and, if necessary, tightening up existing rules and prohibitions such as driving and rest times for HGV drivers, speed restrictions, and safety and noise regulations. Competition conditions must be harmonised at a high environmental and social level as a prerequisite for liberalisation of transport markets. This is particularly true in the case of goods traffic and public passenger transport.

3. **Financing**

3.1 *Introduction*

3.1.1 The free movement of people and goods within the European area, which is the prime condition for fostering exchanges, can only be guaranteed if there are suitable, effective and reliable means of transport available.

3.1.2 Initially, the development of the networks focused mainly on roads. Subsequently, a policy which was more economical in the use energy resources, combined with increased consideration for the environment, necessitated the search for alternative forms of transport. Today there is a clear desire to shift the predicted increase in road haulage over the coming decades to other modes of transport (rail, inland waterways and sea routes etc.). At the same time, the development of collective passenger transport by bus or coach should be encouraged.

3.1.3 More recently, enlargement of the European area, with the transition in 2004 from 15 to 25 Member States, and subsequently to 27, makes it necessary to interconnect the networks and to develop them in the countries joining the EU.

3.1.4 The intentions, prospects and constraints are well-known and shared. Over the last two decades they have given rise to ambitious European-scale projects submitted by the Commission in the form of master plans and White Papers, followed by some concrete projects which constitute the beginnings of a European web of efficient transport networks.

3.1.5 Against this background, it could be said that the action initiated with these master plans in conjunction with objectives reiterated in the White Papers is sufficient. The deadlines set are reasonable and, depending on the case, extend as far as 2010, 2020 or beyond, incorporating as they do new constraints and developments as they emerge. Pragmatism, adaptability and flexibility are the qualities needed to succeed provided that these objectives are met within the scheduled timeframes. Unfortunately this is not the case, as deadlines are very often put back.

3.2 *Reasons for the failure to fulfil aspirations or commitments in the field of transport infrastructure*

3.2.1 Although global decisions are taken at the level of the European master plans, the subsidiarity principle leaves implementation on the ground to the initiative of each Member State, as well as the bulk of the financing (except for infrastructure supported by the Structural and Cohesion Funds).

3.2.2 Thus, for every European government, long-term ambitions are conditional upon electoral commitments to be realised within a short term of office (four to seven years, depending on the case). Unfortunately, budget resources are redeployed every year.

3.2.3 Under these conditions, the implementation of formative and continuous European transport networks remains largely impossible to manage despite the good intentions of political decision-makers and the EU's financial incentives.

3.3 *How can the situation be improved?*

3.3.1 In order to improve the current situation, it is necessary to examine the conditions under which transport infrastructure is currently implemented as regards financing.

3.3.2 When any state builds European network infrastructure on its territory, the EU gives it a very limited financial contribution, i.e. 10 % of the total investment cost in the case of subsidies granted under the Transport heading of the EU budget. This contribution, which is made up of subsidies direct from the EU budget, is insufficient to allow an immediate and irreversible commitment to the actual work. Only projects receiving Structural or Cohesion Fund support are subsidised to a higher level (30 to 50 %).

3.3.3 Increasing the EU's contribution to TEN projects to 30 to 50 % in the form of subsidies, or even very long-term loans, assumes that the EU has sufficient resources at its disposal. But the EU budget must not grow unchecked because:

— enlargement will necessitate a whole range of expenditure;

— resources are allocated to these projects over the long term and must be permanent.

3.3.4 In the light of these criteria, the EESC has examined a number of proposed financing solutions and will present its various proposals thereafter.

3.4 *The financing of European transport network projects*

3.4.1 Raising a European loan (1993 Commission proposal)

3.4.1.1 In its White Paper on European transport policy for 2010 ([16]), the Commission tackled the question of funding head-on in the section entitled 'The headache of funding', pointing out that it 'raised the alarm' as early as 1993, suggesting that the EU be authorised to raise a loan, a suggestion rejected by the Council. The Commission has since asked for the proportion of Community funding to be raised from 10 to 30 % so as to provide a greater incentive for the Member States and a degree of leverage. But 30 % is a maximum rate applicable to certain priority and cross-border projects, and to date the Council has still not ratified the list of TEN-T projects eligible for this more attractive rate.

3.4.1.2 Against this background, for TEN or TEN-T projects where the proportion of trans-European traffic is greater than the proportion of national traffic, the Community contribution to the project under consideration should be higher so as to act as an incentive and, above all, fair (cf. the examples of the Brenner tunnel in Austria and the high-speed line between Lyon and Turin in France and Italy). The EESC feels that raising the level of subsidy from 10 to 30 % for such projects is unfair on the countries concerned, provides insufficient incentive and will only go part way towards removing the obstacles cited by those countries.

3.4.2 The Public-Private Partnership including Concessions

3.4.2.1 In the same White Paper, the Commission proposed developing 'public-private partnerships' to implement projects. The EESC gave its view on this subject in its opinion on the Revision of the list of trans-European network (TEN) projects for 2004 ([17]):

'As regards the public-private partnership (PPP), the Committee agrees with the Commission's analysis of the limits of entirely private funding of large-scale infrastructures. However, mixed financing cannot provide the sole solution, insofar as private investors quite legitimately require certain guarantees and profitability from their investments. As a consequence, costs go up. Moreover, other aspects should be taken into consideration:

([16]) COM(2001) 370 – EESC opinion OJ C 241, 7.10.2002, p. 168
([17]) OJ C 10, 14.1.2004

— every priority TEN-T project involving several European countries should be carried out by setting up a "European company" legal structure, so as to secure the transparency necessary for the financial arrangements for the project;

— a PPP can only reasonably be set up where there is a balance between the financial input from the public and private sectors. It would be hard to imagine a PPP where the private sector had only a very small input. It is therefore not realistic to envisage the private sector contributing the necessary funding for carrying out the majority of projects;

— limits must be set so as to avoid the unforeseen consequences of a gradual abandonment of the sovereign power traditionally held by Member States or public authorities in matters pertaining to spatial planning and major public infrastructures.

As far as the funding of transport infrastructures is concerned, while PPPs represent an interesting option for certain specific cases, they in no way constitute a panacea'.

3.4.2.2 To avoid having to finance road infrastructure from their own budgets, some countries have resorted to a financial arrangement whereby the state concerned pays a private concession-holder the sum of the 'virtual' tolls paid by vehicles using the route. This innovative form of funding allows the necessary loans to be raised within the private sector. Although the cost is slightly higher, the work is carried out more promptly.

3.4.3 Cofinancing arrangements and coordination thereof

3.4.3.1 On 23 April 2003 the Commission also submitted a Communication entitled 'Developing the trans-European transport network: Innovative funding solutions: Interoperability of electronic toll collection systems' ([18]). In the above-mentioned opinion, the EESC endorses the Commission's approach pointing out that improving coordination of public funding will facilitate optimum use of resources and prevent delays, but will not create a new source of funding.

3.4.3.2 The creation of a European transport infrastructure agency would facilitate the better coordination, optimisation and flexibility of regional, national and Community public funding for every project while ensuring that the criteria of sustainable mobility are respected. As a result, the financial resources available for transport should be put to better use in the long run.

3.4.4 The interoperability of toll systems

3.4.4.1 On the interoperability of electronic toll systems, the Committee wonders what the technical objectives presented by the Commission as part of a communication seeking to establish innovative funding solutions for the development of trans-European transport networks actually are ([19]). Existing and future electronic toll systems are a service provided for users to facilitate toll payment and to keep traffic flowing, but they are by no means a new source of funding for TEN-Ts. They merely offer a better tool for collecting tolls.

3.4.4.2 However, unlike the tolls paid to a route concession-holder which are mentioned in the concession contract, the introduction of an automatic tonne/km toll only for heavy goods vehicles on certain motorways which are currently free (in Germany) will indeed bring in new funds. But since the Commission has not adopted a position on the allocation of these new funds, it will probably be the case that, in accordance with the subsidiarity principle and the budget deficit criteria laid down in Maastricht, each state or region (owning the road for which the toll is charged) will use the proceeds to improve its network (road widening, maintenance). Therefore it cannot be considered to be an innovative form of funding for the new rail, road or waterway links planned in the TEN-Ts.

3.4.5 Creating a 'major works fund' fed by EU budget surpluses

3.4.5.1 The Committee noted the proposal by the European Commissioner for regional policy and institutional reform, Michel Barnier, stating that the EU budget, which often showed a surplus, represented 1 % of Community GDP and could provide European economies with some room for manoeuvre, for example by means of a 'major works fund' set aside during buoyant periods and used for priority investments in less favourable times. The Commissioner also called for greater flexibility in the use of funds, particularly the Structural Funds, so that they could be redirected.

3.4.5.2 As regards the financing of such a fund, the Committee obviously favours the Commissioner's proposal to use part of the EU's budget surplus, systematically allocating it to a 'major works fund'. However, although this surplus could serve as a back-up allowing a more effective approach to the issues involved in implementing European transport networks, the bulk of funding for these should come from permanent resources not dependent on the underuse of the EU budget in certain years.

3.4.5.3 The Committee feels that the transport heading of the EU budget at only IJ700 million per year (2000/2006) is woefully inadequate to achieve the objectives laid down and confirmed by numerous European summits and should be greatly increased.

3.4.5.4 Lastly, the Committee is pleased to see the principle of creating a 'dedicated' fund fed by proceeds not initially budgeted for being proposed by the Commissioner responsible for institutional reform, which proves the feasibility of such a project, thereafter making it dependent only on the political will of the Member States.

([18]) COM(2003) 132 final, 23.4.2003

([19]) OJ C 32, 14.1.2004

3.4.6 Creating a European fund dedicated to transport infrastructure

3.4.6.1 Recently, the Committee pointed out that the implementation of European transport infrastructure is a matter of crucial importance for the EU. The EESC feels that the very future of the EU is at stake and that the moment in history has come to take the decisions which will ensure that future generations have effective means of interaction. The methods used up till now, especially for funding infrastructure, are proving to be ineffective and inadequate, depending on the project, and are the cause of delays which will soon be impossible to make up in the face of international competition. It is therefore essential to put in place a truly innovative funding mechanism which is unaffected by national political and economic fluctuations.

3.4.6.2 The Committee points out that it proposed the creation of such a fund three times in 2003 ([20]), the features of which would be:

— a European fund dedicated to priority TEN-T projects;

— permanent revenue from 'one cent' on every litre of fuel (petrol, diesel, LPG) consumed in the EU-25 for all road transport of goods and persons (public or private);

— collected by the Member States and paid in full every year into the dedicated fund in the EU budget, i.e. about IJ3,000 million from the 300 million tonnes of fuel consumed;

— management of funds entrusted to the European Investment Bank to spend on the priority TEN-Ts proposed by the Commission and adopted by the Parliament and Council:

— very long-term loans (30-50 years);

— interest rate subsidies for the loans;

— provision of financial guarantees for PPPs;

— on behalf of the EU, granting of subsidies of 10 to 50 % of the work according to the type of project (natural obstacles, trans-European character etc.).

3.4.6.3 This European transport infrastructure fund would thus be drawn from a solidarity levy of one cent per litre on all fuels consumed on EU roads by all private, public or commercial vehicles carrying cargo or passengers.

3.4.6.4 The obvious advantages of such a levy would be:

— as an ongoing financing resource over 20 years;

— to meet the annual requirement of three to four billion euro, the sum needed to finance the TEN-T according to the Van Miert group of experts;

— its simplicity, as all Member States have a system of fuel tax collection in place.

Nevertheless, there could be strong objections to the principle of such a tax. The EESC will therefore examine this means of financing TEN-T projects in more detail, and calls on the Commission to carry out a concrete and exhaustive study on this subject.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

([20]) OJ C 85, 8.4.2003, p. 133 (opinion on the harmonisation of excise duties on petrol and diesel fuel), OJ C 220, 16.9.2003, p.26 (opinion on safety in tunnels on the trans-European road network), OJ C 10, 14.1.2004.

Opinion of the European Economic and Social Committee on 'Promoting renewable energy: Means of action and financing instruments'

(2004/C 108/06)

On 17 July 2003, the European Economic and Social Committee, acting under Rule 29(2) of its Rules of Procedure, decided to draw up an opinion on promoting renewable energy: Means of action and financing instruments.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the work on the subject, adopted its opinion on 8 January 2004. The rapporteur was Mrs Sirkeinen.

At its 405th plenary session of 28 and 29 January 2004 (meeting of 28 January 2004) the European Economic and Social Committee adopted the following opinion by 113 votes to two.

1. **Aim and background**

1.1 Europe, as the rest of the industrialised world, is highly dependent on fossil fuels. Transports are almost totally and energy generation to a high and still growing rate dependent on oil, coal and increasingly natural gas. In the EU their of energy generation is around half and is forecasted to grow to 70 % by 2020. Also governments finances are substantially tied up to fossil fuels through, in particular, high taxes on transport fuels.

1.1.1 The high dependence on fossil fuels is linked with some problems. The future running-out of reserves of fossil fuels will probably somewhat exacerbate the supply situation in the long term. At the moment, however, this is not yet beyond the power of the markets to deal with. But fossil fuels are constantly in the focus of international politics. Most of the reserves of oil and gas are in politically unstable regions or otherwise not in the reach of normal market rules and competition. The most pressing challenge presently is, however, climate change, as fossil fuels emit carbon dioxide when combusted.

1.2 A central piece of energy policy in Europe is to increase the use of renewable energy sources. The Green Paper on security of energy supply in Europe identifies renewable energy sources as one cornerstone of a European energy strategy, aiming at sustainable development.

1.3 The Green Paper presented two main objectives for the strategies it outlined:

— enhancing security of supply by diversification of energy sources towards non-imported sources; and

— combating climate change by substituting fossil fuels with sources which do not emit greenhouse gases.

The third simultaneous objective for energy policies is the competitiveness of Europe, in the spirit of the Lisbon strategy.

1.4 The main proposals on renewables by the Commission are the White Paper on renewable energy from 1997, the Directive on promotion of electricity from renewable energy sources ('RES-E'), which was adopted in 2001, and a Directive on biofuels adopted in 2003.

1.4.1 The EESC has adopted opinions on each of these proposals, and in addition produced an own-initiative opinion on Renewable energy from agriculture in 2000. In all these opinions the Committee gave its strong support to the objective of increasing the use of renewable energy sources. The proposed policy measures were also largely supported, but some detailed comments given. In its opinion on the RES-E Directive the Committee expressed its concern that leaving the choice of support measures and their level freely to the Member States could lead to distortions of competition in the internal market.

1.5 Support measures to renewable energy sources are necessary because many of the sources and technologies are not always competitive in relation to traditional energy production, but may have a potential to be so. Support can also be seen as compensation to renewables for the public support traditional energy sources and production methods have received over time and the external costs caused but not carried by traditional energy production and use. Many studies support these arguments, but all do not, at least not fully.

1.6 The aim of this own-initiative opinion is to give an input of facts, analysis and recommendations to the continuing vivid discussion on renewable energy at a time when the Commission is starting to prepare its review of the RES-E Directive. A lot has happened in the Member States, even if this Directive's implementation deadline is still only approaching.

2. **Present EU goals and regulations**

2.1 On the European level targets are set to increase the use of renewable energy sources. A definition of RES is given in the Directive on renewable electricity production. The directive states that renewable energy sources shall mean renewable non-fossil energy sources: Wind, solar, geothermal, wave, tidal, hydropower, biomass, land-fill gas, sewage-treatment plant gas and biogas. The directive specifies biomass further to mean the biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the biodegradable fraction of industrial and municipal waste.

2.2 The White Paper for a Community Strategy and Action Plan – Energy for the Future: renewable Sources of Energy aims at doubling the share of renewable in the total energy supply for EU. This means increasing the use of renewable energy sources (RES) to an amount that is equal to 12 % of the European Union's final energy consumption by 2010.

2.3 To kick-start the implementation of the strategy set out in the White Paper a campaign for Take-off started in 1999, aimed to go on until 2003. For a couple of renewable energy sources indicative targets were set for additions in the period 1999-2003.

2.4 The Directive on the promotion of electricity from renewable energy sources (RES-E) sets an overall target for the share of electricity from renewable sources at 22 % of total EU electricity consumption in 2010. The directive holds indicative targets for the share of renewable electricity production for each Member State.

2.5 The aim of the Directive on biofuels is to increase the consumption of biofuels to 2 % of the consumption of diesel and gasoline in 2005 and 5.75 % in 2010. In couple with this directive the Directive on tax deductions for biofuels has been approved, providing for a key instrument for Member States in promoting biofuels.

2.6 The RES-E directive does not set any clear rules on support measures to renewable electricity. It states, however, that the Commission will make an overview of the implementation and results in 2005 and then possibly decide on one common support method to be implemented throughout the Union.

2.7 Meanwhile the Commission has in 2001 set Community guidelines for State aid for environmental protection. These apply in principle to aid for RES. The main thrust of the guidelines are that renewable energy sources may receive state support. Aid schemes must be notified to the Commission. Four different, alternative types of aid are allowed. Only a given, but in some circumstances high, share of costs can be covered by aid and it must not lead to over-compensation. Aid schemes must be limited in time and the aid intensity have a declining trend.

2.8 At the World Summit on Sustainable Development in 2002 it was agreed to work towards increasing the use of renewable energy sources worldwide, but no target was set. The EU, however, committed itself by forming a coalition of likeminded states to work towards a global target for the share of renewables in line with the EU target. The Commission is preparing a communication on this issue.

3. **Related Policies and Measures**

3.1 Promoting energy efficiency is another pillar of energy policy with the same objectives as promoting renewables, i.e. security of supply and combating climate change. A key technology is combined heat and power generation, CHP. A directive on CHP will be adopted soon. Other measures for energy efficiency are efficiency standards for appliances, labelling, a draft Directive on design of electricity-using equipment and one on demand-side management (DSM).

3.1.1 Member States have also put into place own measures for promoting energy efficiency. In some cases Voluntary Agreements have been successful. The general appreciation is that there is still much potential in this area.

3.1.2 Measures for better energy efficiency do usually not overlap or intervene with measures to promote renewables. In the case of CHP there is, however, an overlap, because one source in CHP generation is biomass. This overlap should not cause any problems on the market or vis-a-vis fulfilling obligations under the different directives.

3.2 The EU scheme for emissions trading, as designed in the recently adopted directive, covers energy generation causing CO_2 emissions. This directive does not directly cover renewable energy or other emissions-free energy sources, like nuclear - that is, under the scheme no credits are given for cutting CO_2 emissions by investing in emissions-free generation. The cap-and-trading system is, however, a very forceful instrument and will, indirectly enhance renewables, as the system will increase energy prices and the cost of using fossil fuels, rendering non-emitting sources more competitive.

3.2.1 The ET Directive and in particular the RES-E Directives overlap, and are in some parts probably not coherent. The ET Directive can also be seen to cover the climate change aspect of promoting renewable energy sources. One question is, whether the goal of decreasing CO_2 emissions should be left to emissions trading solely. Possibly redesigning measures related RES to promote the objective of security of supply only. The EU emissions trading will, according to several studies, increase the market price of electricity considerably (conclusions vary from 20 % to over 100 %). Is it economically and politically feasible to add to this cost burden by also applying any direct support scheme for RES that additionally increases the user's electricity bill?

3.3 EU agricultural policy has a major influence on the provision of biomass for energy use. In this respect, reform of the common agricultural policy (CAP) is bringing changes. Energy crops can now also be planted on normal agricultural land and promoted with a EUR 45/ha subsidy.

3.4 The Intelligent Energy-Europe, a Community support programme for non-technological actions in the field of energy efficiency and renewable energy sources, was adopted in June 2003. It runs for 2003-2006 and support is granted to projects committed to remove market barriers to energy efficiency and renewable energy sources. The programme is structured in four fields with ALTENER directed to new and renewable energy sources. The others are SAVE for energy efficiency, STEER for energy relating to transports and COOPENER cooperation with developing countries.

3.5 R&D policies are key to both developing new renewables solutions and further refining those technologies, which already are on the marketplace or close to it. Some form of renewables that fall under the definition of the RES-E Directive are, as a matter of fact, still in a stage of early development and will require substantive R&D efforts before their potential can be fully developed.

3.5.1 Hydrogen technology attracts much attention and expectations. In some applications it seems to be close to market entry. Used as a transport fuel and in fuel cells, the big potential of hydrogen lies in the fact that its use does not emit greenhouse gases, it can offer a means of storing electricity and substitute oil. Hydrogen is produced either from natural gas (the primary fossil energy source), from water (through energy consumption) with electricity or from biomass. These sources, or either of them, need to be sufficiently available. Since the known reserves of natural gas are limited, it would be preferable to direct them towards use as transport fuel. Nuclear and in the future hopefully photovoltaic are best suited to supply the electricity needed to produce hydrogen from water. Also the production techniques need to be further developed to cut costs, including technologies to handle this very explosive fuel safely.

4. **Promotion of renewables in Member States**

4.1 Transposition of the Directives promoting use of renewable energy and the biofuels directive are still under way in the Member States. It is too early to say whether all Member States will meet the target dates, but it is probable that all will not. All Member States have already notified their national targets.

4.2 Most Member States have meanwhile introduced national support schemes for renewable energy sources. Some have intensified schemes which were taken into use already before EU-level policy declarations. Support systems in Member States differ considerably from each other, and so do the levels of compensation they provide.

4.2.1 Five main forms of support methods can be identified:

1) guaranteed feed-in tariffs and mandatory buy-back obligations;

2) renewables certificates, usually coupled with take-in obligations;

3) public-bidding systems;

4) tax relieves or exemptions, and

5) direct support to investments.

4.2.2 Feed-in tariffs are in use in at least Austria, France, Germany and Greece. Certificate systems are in use Belgium, in Denmark, the Netherlands, Sweden and the United Kingdom and planned in Italy. Support is built into the energy/carbon tax system in Finland, the Netherlands and the United Kingdom.

4.2.3 An example of a feed-in tariff/buy back regime is the German Law on Renewable Energies. The system provides for guaranteed feed-in tariffs for generators of electricity from renewable energy sources over 20 years. There are different tariff groups for different technologies and different efficiency levels within a group, normally over EUR 80/MWh. The tariffs are usually guaranteed for some years, then gradually decreasing over time. The costs are allocated to all consumers at the same rate. The German Law has been tried for its compatibility with State aid rule of the Treaty, and the judgement was that it does not constitute State aid as it does not involve State resources.

4.2.4 An example of a system built into the tax system is the Regulating Energy Taxation system of the Netherlands. Electricity not generated from renewable energy sources is taxed in order to support the generation of 'green' electricity. Industrial electricity users are widely exempted from the tax in consideration of an alternative instrument established for industry, i.e. the industry's obligation to meet world top energy efficiency targets.

4.2.5 The UK Renewables Obligation is an example on a system of certificates and obligations. An obligation is imposed on suppliers (3 % in 2002, 10.4 % in 2010). The costs thereof, including a possible cost of a penalty (about EUR 45/MWh) is allocated to the consumers.

4.3 Systems are mostly purely national, imports are usually excluded. Even so, in some cases operators may achieve double benefits. An example is wind energy produced in Germany and exported to the Netherlands, which may get both the guaranteed feed-in tariff price in Germany and the support in receiving Netherlands.

4.4 Wind energy is expected to contribute most to the overall targets, and support programmes are set accordingly. Remuneration for wind power is presently over EUR 100 per MWh in Italy and Belgium, and over EUR 50 in addition in France, Austria, Portugal, Germany and the United Kingdom. In some Member States the remuneration levels will fall after between five and 15 years.

5. **Enlargement**

5.1 The share of RES in the national electricity generation in 1997 is in only three of the ten new EU member countries higher than the current EU average in the same year (12.9 %). These three countries are:

— Latvia with 42.4 %;

— Slovakia with 17.9 %; and

— Slovenia with 29.9 %.

All of them use mainly hydro power resulting from a good availability of this energy source. In all of the other seven countries the share of RES in electricity generation is quite low, i.e. about 2 % in the average.

5.2 The national objectives of the new member countries amount to an increase of their RES electricity generation which in 2010 shall be more than double as high as 1997. This increase rate is thus nearly the same as the objective of the countries of EU. One of the problems will be that these ten countries do not have very much wind potential. Insofar the use of wind power does not promise an efficient way of electricity generation. Therefore, the use of bio mass seems to get a growing importance in most of the new member states.

5.3 As to the provision of heat, the new member states are largely covered by extended district heating networks, which have however partly suffered from lack of maintenance. The potential for use of biomass and CHP for district heating can be considerable, but details are not known.

5.4 There seems to be a big potential for increased energy efficiency in the new member states, still considerably bigger than in the EU. This must be enhanced in parallel with RES. In particular information campaigns to citizens should be initiated on how to save energy in households.

5.5 One benefit might result from the fact, that they have started their efforts to use RES at a later stage. Therefore, they can profit from experiences of success and failures in the EU concerning RES use. To enable both the new as well as the current EU Member States to do so, it seems necessary that positive and negative results of RES use in all EU countries should be monitored thoroughly each year. Thus, successful developments can be further improved, whereas mistakes could be reduced. Generating costs can become optimised.

5.6 To support the new members in this respect seems very important, as their experience in using RES seems to be rather restricted according to the statistical figures, which show that most of RES-electricity generation is based on hydro.

5.7 An additional aspect in this context relates to the costs of RES electricity. All new members suffer from scarcity concerning financial sources. Therefore any new technology which needs much capital and only few manpower is a heavy burden and reduces the possibility of the new EU members to reach the EU-levels within a certain number of years. Expensive energy consumption could result in reduced rates of growth and bad competitiveness.

5.8 Therefore, the development of competitive prices for RES electricity production is vital especially for this group of countries, since they will, of course, soon be obliged to accept the same obligations and targets as the current EU Member States.

6. **Potentials and non-tariff obstacles to renewables**

6.1 The potential of renewable energy sources is big, but in most cases still limited, even when disregarding costs. The potential differs both between sources, and in particular, over time. The forms of RES, which have the biggest potential in the short and medium term, mainly wind, hydro and biomass, also have obvious limitations. Other forms of renewables, like photovoltaic and tidal, are still in early stages of development and will show their potential only after 20-30 years, perhaps even more. They still need much effort of research and development. This means very different approaches and solutions than those directed to helping almost fully developed technologies be more efficient and thread the last steps to full competitiveness.

6.2 The use of wind power is limited by the need for back-up power and related grid capacity. The production of biomass is enhanced by agricultural and forestry policy. The use of biomass for energy generation is, however, influenced by other uses with higher value added. Any market-driven preference granted to such uses could, however, put the production of biomass at a competitive disadvantage. Building more hydropower is more difficult in Europe for reasons of natural protection; even forward-looking plans for small plants encounter resistance.

6.3 A growing, serious obstacle for increased use of renewables is public resistance. Resistance can be caused by insufficient insight in the importance of increasing the use of RES as well as misinformation about the qualities of the technologies. In order to deal with this information and educational campaigns should be set up, including taking the importance and features of RES up on school curricula. Location decisions must naturally always take account of local acceptance. Technological development can also provide for good solutions, like off-shore wind generation instead of on-shore.

6.3.1 Technologies for renewables attracts a lot of inventiveness and entrepreneurship. This should be encouraged and fostered. Also should possibilities for involvement of and investment by local people be encouraged. In spite of support systems, sometimes fairly open handed, one should however not ignore the risks involved.

6.4 Cumbersome and prolonged permit processes make investments in RES often too risky and costly. A time limit should be introduced and respected by authorities. Still, appeals to court on decisions by authorities can extend the permit process unpredictably, even to years.

6.5 In many cases the increased use of renewables requires development of infrastructures, which can take time. Also, increased use of RES leads to additional requirements on and sometimes problems for grids, in particular if location parameters are not carefully taken into consideration. Therefore the pace of increase in use may be somewhat slower than targets indicate, or costs can be higher.

6.6 In practical terms, the goal for promoting renewable energy is to substitute fossil fuels, as these emit greenhouse gases and are, to a large extent, imported from outside the EU. Taking into account efficiency rates for the use of primary energy, direct electricity generation from renewables, like wind, has the best substitution effect. Substituting primary fossil fuel use with renewable fuels is less effective. Combined heat and power production from biomass increases this substitution effect considerably. The Commission observed the substitution principle in its overall planning, but it has often not been taken into account when designing promotion measures and calculating results.

6.7 High expectations are put on renewable energy sources. Taking into account the above mentioned limitations and the long time span needed in many cases, it is obvious that renewables will not solve all of Europe's energy problems. They can make an important contribution in covering increased demand. In the short or medium term they cannot, even in the most positive but still realistic scenario, substitute coal or nuclear, let alone both. For the longer run scenarios and visions need to be developed, in order to inspire and direct R&D and other actions at an early stage.

7. **Evaluation of promotion methods and results**

7.1 The effectiveness of the instruments vis-a-vis increasing the use of renewables depends much on their detailed design. But it seems that feed-in tariff regimes are particularly effective. Cost effectiveness, adverse impacts on markets and other implications of the systems must, however, also be taken into account.

7.2 Most support schemes do not open for competition between different forms of renewables nor between renewables and traditional generation. Most promotion schemes lack also otherwise any element of enhancing technology and efficiency development. Also a barrier mechanism for over-compensation is often lacking.

7.3 Markets structures for heat, electricity and transport fuels are fundamentally different. Heat has a purely local market, with the extension of district heating networks. Transport fuels markets are competitive, distorted to some extent by differing taxation within the EU. Electricity is starting to open up, but still has a lot of obstacles for transborder trade. Unbundling of infrastructure and ensured third party access are key issues.

7.3.1 Any measure to promote electricity and transport fuels from renewables should take careful consideration of not distorting competition in the internal market. A level playing field for all in the EU, which is presently not the case, should be put as a central goal.

7.3.2 In the case of electricity, EU-wide optimal use of natural and climatic circumstances as well as existing grid capacity should be taken into account when planning promotion measures. Otherwise solutions will be all but cost efficient, leading to much higher costs of investments and use for the same end result. One example is the positioning of wind power parks – they should be optimised in relation to beneficial wind conditions and, on the other hand, grid capacity and use. Today this is not the case, when driving factors are national targets.

7.4 The RES-E Directive sets criteria on national support schemes. They must be compatible with the internal market, take into account the different characteristics of RES, be efficient and simple and include sufficient transitional regimes to maintain investors' confidence. In its opinion on the RES-E Directive the Committee proposed additional principles to be taken into consideration. These include an affordable cost burden on users and public funds, decreasing compensation levels, no long term continuing support, full transparency and, as far as possible, leaving the final decision to the market, including normal market risks.

7.4.1 These principles are still fully valid. Unfortunately it seems that many national support schemes in place are not in line with them, usually differing on several points. When compared with these principles, the feed-in-tariff/buy-back system seems to contradict several of them.

7.5 Some studies have already been made on how support systems have worked and forecasts have been made on the resulting increases in the production and use of renewables. Some of the studies take into account that the EU instruments are mostly not yet in force. Some include the effects of policies and instruments to be taken into use in the near future. Results vary substantially, but it seems that most Member States will have big difficulties reaching their targets for increasing RES by 2010, as will the EU as a whole.

7.6 In some cases substantial increase in renewables has, however, been achieved. The most obvious example is the increase of wind power in Denmark, Germany and Spain. This indicates that increases are possible, even in by natural circumstances less favourable areas, like inland Germany for wind. If every Member State would follow the example of those with the best achievements, the total EU target would be reached.

7.7 Reaching the EU target is thus not impossible, the question is whether politicians and voters are willing to put up the resources needed. Costs must be tolerable for consumers and the global competitiveness of European industries must not be jeopardised.

7.8 Many Member States, in particular the three mentioned above, have opted for substantially high remuneration levels for renewables. Evaluating acceptability of costs for meeting RES targets are political decisions. The impression is, however, that cost levels are in many cases very high, when one compares remuneration levels up to over EUR 100 per MWh with the present market price for electricity (excl. transmission and taxes), which on average is about EUR 25-30 per MWh.

7.9 As long as the amounts of renewables receiving support are fairly small, so is the total cost. But when the amounts increase, in accordance with objectives, the cost burden starts to have an impact of users' economy. This may cause reactions amongst voters, like in Denmark, or affect the competitiveness of, in particular, big energy users in industry, which hardly is in line with the objectives of the Lisbon strategy and other economic goals.

8. **Conclusions and recommendations**

8.1 At the moment it seems that neither most Member States nor the EU as a whole will reach their targets for increasing the use of renewable energy sources by 2010. Achievements in some Member States indicate, that it would not be impossible to reach the EU target. It is, however, uncertain whether the political willpower and the resources needed can be fully mobilised.

8.2 As there are no EU-wide guidelines for support systems for RES, Member States have applied national systems, varying much in approach, design and intensity. It seems that many of the present schemes need, in particular, to be critically reviewed vis-à-vis their cost effectiveness.

8.3 The present situation creates obstacles in the internal market when schemes are purely national and imports are excluded. The court's view on this concerning electricity is that this is not the case, because the internal electricity market is not fully open until 2007. Cross-boarder trade of electricity is, however, already everyday and growing all over the EU.

8.4 There is also no level playing field among market actors in different parts of the EU. There are several reasons for this: for instance the European Court of Justice decision [1] that the German feed-in-tariff system does not constitute state aid because state funds are not involved. In economic terms, however, there is hardly any difference between support flowing from consumers directly or the same money flowing from the taxpayer via the state pocket.

8.5 As to the different forms of support schemes, no-one meets fully the requirements of being effective, not distorting the market and enhancing competition and innovation. For feed-in-tariffs prices are set by authorities and amounts by the market. For certificate trading it is vice versa. Feed-in schemes can take into account efficiency, if properly used. Certificates may not give enough security for investment, while prices may be volatile.

8.6 The cost of RES promotion schemes is in some cases already very high. This is starting to raise concern and this can develop into a political backlash for the goal and policies of increasing renewables.

8.7 The Commission is, according to the RES-E Directive, in 2005 to review the developments of use of electricity from renewable sources and can propose one single support system. It will take until 2012 to reach full harmonisation. It is to be expected that most Member States will strongly resist if they have to change a system they have run for several years.

8.8 The introduction of a single support system for RES-E is not by many seen as necessary at this stage. Also there is no perfect choice for such a system. The Committee's view is that a common system should be developed and introduced in due course, and that developments towards further fragmentation of national systems should be counteracted already now. A common system should by its design particularly enhance innovation and competitiveness.

8.9 The Commission has responsibility for the execution of policies it has proposed. Even if it is an early stage in implementing EU policies for renewable energy, the Commission should pay serious attention to the above-mentioned problems before they worsen over time.

8.10 The EESC recommends that DG TREN:

— strengthens its efforts to facilitate the exchange of good practices between Member States, regions and other actors for promotion of RES, with a particular emphasis on the new member states;

— requests Member States to monitor yearly the developments in their RES markets with a view to compile both statistical figures and information on experiences, and that DG TREN publishes a yearly summary report on this;

— makes an in-depth evaluation of the interaction, coherence and practical effects of different EU policies affecting the use of renewable energy sources and technologies in order to avoid over-regulation. In particular the effects of the emissions trading Directive should be closely studied and acted upon before the implementation of the Directive;

— without delay starts a thorough study of the developments and the present situation of promoting RES, covering in particular innovativeness, market issues, cost effectiveness of support measures and their impact on cost burdens for consumers and on global competitiveness of EU industries.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

[1] ECJ ruling of 13.3.2001, case C-379/98

Opinion of the European Economic and Social Committee on the 'proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1406/2002 establishing a European Maritime Safety Agency'

(COM(2003) 440 final - 2003/0159 (COD))

(2004/C 108/07)

On 8 September 2003, the Council decided to consult the European Economic and Social Committee, under Article 80(2) of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 8 January 2004. The rapporteur was Mr Chagas.

At its 405th plenary session of 28 and 29 January 2004 (meeting of 28 January), the European Economic and Social Committee adopted the following opinion by 107 votes with two abstentions.

1. **The Commission proposal**

1.1 The European Maritime Safety Agency (EMSA) was set up under Regulation (EC) No. 1406/2002 [1] following the 'Erika' oil tanker disaster in late 1999, with the purpose of ensuring 'a high, uniform and effective level of maritime safety and prevention of pollution by ships within the Community'. The Agency will provide Member States with technical and scientific assistance in order to ensure that Community legislation on maritime safety and the prevention of pollution by ships is properly applied.

1.2 The Agency is also responsible for collecting information and exploiting databases on maritime safety; evaluating and auditing classification societies; and organising inspection missions in the Member States to monitor the conditions for ship inspections by the port State.

1.3 In particular, the Commission proposes:

— providing the Agency with the legal competence and the necessary means to respond to accidental or unlawful pollution caused by ships, and offering the possibility of chartering specialised ships and the necessary equipment to respond to maritime pollution;

— expanding the Agency's objectives to include maritime transport security, as justified by the rise in terrorist threats against ships and port facilities, and the need to ensure that the security measures laid down in the Commission Communication on enhancing maritime transport security [2] are properly applied;

— clearly defining the Agency's role in recognising the qualifications of third country seafarers, in line with Community legislation on the minimum level of training of seafarers.

2. **General comments**

2.1 Given the scope of its responsibilities, the European Maritime Safety Agency clearly plays an essential role in ensuring that Community and international rules on maritime safety and the prevention of accidental or unlawful pollution by ships are applied in an effective and uniform manner.

2.2 For this reason, and in particular following the Prestige disaster in late 2002, the Commission decided in December of that year to speed up the creation of the EMSA and not wait for the Council decision on the future location of the Agency, which was finally taken by the European Summit in December 2003.

2.3 This has speeded up the entire administrative process of recruiting staff (still underway), appointing an Administrative Board and gradually getting all of its services up and running.

2.4 As regards the proposed amendments to the EMSA Regulation, the EESC supports the Commission proposal, subject to the comments made below.

[1] OJ L 208 of 5.8.2002, p. 1

[2] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on enhancing maritime transport security, COM(2003) 229 final.

2.5 It is a known fact that not all the Member States implement Community legislation in the same way and at the same time, in particular that relating to the safety of Community shipping. However, the Commission's efforts to constantly improve the harmonisation of procedures and implementation, and thereby improve the safety of people and goods, as well as environmental protection, are acknowledged. The EESC therefore welcomes these amendments, as they strengthen and clarify the EMSA's role in assisting the Commission in the following areas: drafting and updating Community legislation and monitoring its implementation; organising training actions; compiling and maintaining information databases on maritime safety, maritime security, prevention of pollution and response to pollution; cooperation with third countries in these areas; improving the quality of state port control; and evaluating and recognising the certification and implementation of relevant legislation by third parties.

2.6 It is nonetheless important to recall the EESC's opinion on establishing the EMSA ([3]), in which it pointed to the need to make a clear distinction between the remit of the EMSA (which has no legislative or regulatory powers) and that of the Committee on Safe Seas (which has a regulatory role).

2.7 The EESC therefore calls on the Member States to speed up the process of drawing up contingency plans, reviewing and updating existing national plans (including regularly conducting practical exercises), and acquiring the equipment needed to respond properly to major accidents.

2.8 The EESC also believes that the Agency should play a role that supplements actions by the Member States, i.e. by providing technical and scientific assistance in the event of accidental or deliberate pollution by ships. However, each Member State will continue to be responsible for drawing up pollution prevention and response plans and for providing appropriate resources for this task. The EESC regrets that, despite the fact that the Member States are already responsible in this area, some are still not properly prepared to respond to accidents such as the Erika and Prestige disasters.

2.9 The EMSA must cooperate with the Member States in drawing up consistent and coordinated maritime pollution prevention and response plans, as well as managing the technical resources available (specialised ships or other equipment). It would therefore be advisable for the EMSA to be able to play an active role in emergency situations, without this in any way diminishing the responsibility of the Member States. This is the logic behind the introduction of a new point c) iii) in Article 2.

2.10 The EESC also believes that, when ships are chartered to carry out these tasks, it must be ensured that the owner(s) in question respect(s) the relevant Community and international legislation, in particular that governing safety conditions on ships and the living and working conditions (and certification) of crew members.

2.10.1 It would be useful to clarify who will be responsible for the operational management of the ships and equipment provided for pollution response assistance. The EESC is of the view that the competent national authorities should manage the resources available during the intervention.

2.11 Given that some of the States joining the EU in May 2004 are coastal States and that, according to the monitoring reports on the progress towards accession published in November 2003, all fall seriously short in terms of administrative and technical capacity, the EESC recommends drawing up special plans to help equip these countries. This would help prevent certain areas not being covered by any plan or not having the resources needed to provide assistance in the event of an accident. Consideration should also be given to possible forms of cooperation in this area with third countries bordering Member States.

2.12 As regards including maritime security among the Agency's responsibilities, the EESC acknowledges that in this area too it is necessary to ensure that the national plans drawn up by the Member States are effective. This is an area in which the EMSA could assist the Commission. It must be noted, however, that these national plans sometimes include military components to which even the EMSA inevitably has only limited access. In order to prevent some Member States blocking such access, it is important to find flexible solutions that ensure national plans – both individually and as a whole – are effective, and which take account of restrictions that some Member States may introduce.

2.13 Above all, it is important to ensure that rules on improving ship and port facility security are transposed and implemented in a harmonised and consistent manner, without jeopardising their objectives.

2.14 The EESC would like to point out that the Council of Transport Ministers already agreed in principle on this proposal at its meeting in December, without taking account of either the EESC's opinion or the European Parliament's report, both of which are still being drafted. Given that this situation frequently arises, the EESC calls for referrals submitted to it to be given sufficiently long deadlines to allow its opinions to be adopted in good time.

2.15 The Committee also believes that the idea of setting up an EU Coastguard should be discussed further. Although this is a delicate matter owing to the fact that it raises questions of sovereignty and maritime authority, such a coastguard could supplement the EMSA's role in the areas of prevention and monitoring.

3. **Conclusions**

3.1 The EESC welcomes the Commission proposal and stresses the EMSA's key role in improving maritime safety in the Member States. It nevertheless points to the need to make a clear distinction between the remit of the EMSA and that of the Committee on Safe Seas.

([3]) OJ C 221 of 7.8.2001, p. 54.

3.2 The EMSA's role in pollution response must supplement and not replace actions by the Member States.

3.3 The EESC profoundly regrets that, in spite of the Erika I and II packages, several Member States still do not have the equipment and human resources necessary to respond to major accidents. Priority must be given to this.

3.3.1 Moreover, the Member States are still behind in drawing up contingency plans. The EESC therefore calls for this process to be speeded up so that a comprehensive network covering all Community waters can swiftly be set up.

3.4 Particular attention must be given to helping equip the future Member States in human resources and equipment for pollution prevention and response.

3.5 The EESC recommends discussing further the idea of setting up an EU coastguard, which could supplement the EMSA's role in the areas of prevention and monitoring.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council on the regulation of the operation of aeroplanes covered by Part II, Chapter 3, Volume I of Annex 16 to the Convention on International Civil Aviation, second edition (1988)'

(COM(2003) 524 final - 2003/0207 (COD))

(2004/C 108/08)

On 22 September 2003, the Council decided to consult the European Economic and Social Committee, under Article 80(2) of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 8 January 2004. The rapporteur was Mr Green.

At its 405th plenary session on 28 and 29 January 2004 (meeting of 28 January), the European Economic and Social Committee adopted the following opinion by 46 votes to one.

1. **Background**

1.1 On 1 April 1987, the European Commission instructed its staff that all legislative acts should be codified after a maximum of ten amendments, or at even shorter intervals, to ensure that the Community rules are clear and readily understandable.

1.2 Given that no changes of substance may be made to the instruments affected by codification, an interinstitutional agreement was concluded on 20 December 1994 between the European Parliament, the Council and the Commission under which an accelerated procedure may be used for the fast-track adoption of codified instruments.

2. **The Commission proposal**

2.1 This proposal seeks to codify Directive 92/14/EEC, which governs the use of aircraft in line with the rules laid down at international level. The new directive will supersede the various instruments incorporated in it. Their content is fully preserved, and only such formal amendments are made as are required by the codification exercise.

2.2 The directive deals with noise-emission standards for civil subsonic jet aeroplanes.

3. **General comments**

3.1 The European Economic and Social Committee fundamentally endorses the Commission proposal which seeks to make Community law clear and transparent.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council on the use of vehicles hired without drivers for the carriage of goods by road'

(COM(2003) 559 final - 2003/0221 (COD))

(2004/C 108/09)

On 3 October 2003 the Council decided to consult the European Economic and Social Committee, under Article 71 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 8 January 2004. The rapporteur was Mr Simons.

At its 405th plenary session of 28 and 29 January 2004 (meeting of 28 January) the European Economic and Social Committee unanimously adopted the following opinion:

In the context of a people's Europe, the clarity and transparency of Community law are an important element. The European Parliament, the Council and the Commission have therefore stressed the need to codify frequently amended legislative acts and have agreed on a rapid procedure. No changes of substance may be made to legislative acts in the process of codification.

This Commission proposal complies with this intention and the EESC therefore has no objections.

Brussels, 28 January 2004

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 2320/2002 of the European Parliament and of the Council establishing common rules in the field of civil aviation security'

(COM(2003) 566 final - 2003/0222 (COD))

(2004/C 108/10)

On 8 October 2003 the Council of the European Union decided to consult the European Economic and Social Committee, under Article 80 (2) of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 8 January 2004. The rapporteur was Mr Simons.

At its 405th plenary session (meeting of 28 and 29 January 2004), the European Economic and Social Committee adopted the following opinion unanimously.

1. The EESC considers it appropriate to permit the application of equivalent levels of security than those explicitly prescribed in the legislation at airports used only by small aircraft, general aviation or airports used infrequently, on the grounds that investment in expensive security equipment would be inappropriate. The proposal also corrects some minor errors of little substantial importance. The EESC therefore supports the proposal.

2. Furthermore, it would underline the importance of Article 4, new paragraph 3a) stating that: 'Each flight originating from a demarcated area of an airport shall indicate this fact to the destination airport in advance of the arrival of the flight'. This information is essential for ensuring appropriate security measures can be taken to receive air passengers and baggage from 'demarcated' areas of 'origin' airports who are transferring flights or entering a terminal building where there is no physical separation of arriving and departing passengers. The aircraft operator is best placed to provide this information.

3. Finally, the Committee underlines that the national security measures (as referred to in Article 4, paragraph 3 of Regulation 2320/2002) must be applied to 'demarcated areas' and not to individual general aviation flights or individual small aircraft (with less than 10 tonnes of Maximum Take Off Weight or less than 20 seats) which arrive at a destination airport where no 'demarcated area' exists.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'proposal for a Regulation of the European Parliament and of the Council on shipments of waste'

(COM(2003) 379 final - 2003/0139 COD)

(2004/C 108/11)

On 1 September 2003 the Council decided to consult the European Economic and Social Committee, under Article 175 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Agriculture, Rural Development and the Environment, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 18 December 2003. The rapporteur was Mr Buffetaut.

At its 405th plenary session held on 28 and 29 January 2004 (meeting of 28 January 2004), the European Economic and Social Committee adopted the following opinion unanimously.

1. **Introduction**

The proposal has four main objectives:

a) to transpose into Community legislation: the revised OECD Council decision of 14 June 2001; the revised Basle Convention;

b) to address the difficulties encountered in applying, administering and enforcing the 1993 Regulation and establish greater legal clarity;

c) to pursue global harmonisation with regard to transboundary shipments of waste; and

d) to reorganise and simplify the structure of the Articles of the Regulation in order to make it clearer and more logical.

2. **Main elements of the proposal**

Waste shipments must follow various procedures and control regimes, which are determined by the type of waste shipped and the type of treatment to be applied to the waste at its destination. Therefore, different levels of control regime are to apply, depending on the risk posed by the waste and its treatment.

2.1 *Prior written notification and consent procedure*

Prior written notification and consent is to be required for shipments of all waste destined for disposal and shipments of hazardous and semi-hazardous waste destined for recovery.

In practical terms, when a waste producer or waste collector – the notifier – intends to ship hazardous or semi-hazardous waste (Annex IV) for recovery or disposal or non-hazardous waste (Annex III) for disposal, he or she must submit prior written notification to the competent authority of dispatch.

The notifier is also to be obliged to draw up a contract with the consignee for the recovery or disposal of the notified waste.

Notification must be sent to the competent authority of dispatch, which forwards it to the competent authority of destination. The latter sends an acknowledgement of receipt to the notifier if it considers that the notification has been 'properly completed'.

2.2 *Prior information requirement*

Shipments of non-hazardous waste (Annex III) destined for recovery are not to be subject to the prior written notification procedure. However, a contract must be drawn up between the person arranging the shipment and the consignee.

2.3 *Main changes to the scope and definitions (Title I)*

a) The scope of the Regulation has been clarified.

b) The definitions of 'notifier', 'consignee', 'dispatch' and 'destination' have not been harmonised with the terminology used in the Basle Convention and the 2001 OECD Decision.

c) Several new definitions have been added.

d) It is proposed that the definition of 'competent authority' be amended and aligned with the Basle Convention.

e) A definition of 'environmentally sound management' has been added.

f) The definition of 'notifier' has been clarified.

2.4 *Main changes and clarifications as regards shipments within the Community (Title II)*

This is the heart of the Regulation and contains the main provisions.

a) The number of waste lists is to be reduced from three to two, and at the same time it is proposed that the number of procedures be reduced to two.

Thus, it is proposed that semi-hazardous waste (Annex III) and hazardous waste (Annex IV) be put together in one list, which becomes Annex IV. The list of non-hazardous waste (currently Annex II) would then become Annex III.

In concrete terms, this means that:

— shipments of non-hazardous waste destined for recovery are to be accompanied by certain information;

— shipments of all waste destined for disposal, hazardous and semi-hazardous waste and non-listed waste destined for recovery are to be subject to the prior written notification and consent procedure.

b) It is also proposed that the competent authorities give their consent individually within 30 days and that certain procedural safeguards for the notifier be added.

c) Interim recovery and disposal facilities are to be bound by the same obligations as final recovery and disposal facilities (see comments below).

d) It is proposed to extend and clarify the list of information and documentation which must accompany shipments of non-hazardous waste.

e) In line with the 2001 OECD Decision, shipments of waste destined for laboratory analysis are not to be subject to the prior written notification and consent procedure.

f) Waste containing POP chemicals is to be subject to the same provisions as shipments of waste destined for disposal.

g) It is proposed to establish a procedural rule to deal with cases where the competent authorities disagree about the classification of waste.

h) The notifier's financial guarantee or equivalent insurance should be established and legally binding at the time of notification.

i) It is proposed that the obligation to take back waste (in cases where the shipment cannot be completed or is illegal) also apply to non-hazardous waste destined for recovery.

2.5 *Provisions as regards shipments within Member States (Title III)*

No changes are proposed.

2.6 *Main changes and clarifications as regards Community exports and imports (Titles IV, V and VI)*

a) These changes and additions primarily concern the implementation of the Basle Convention's procedural rules, which differ from those applicable to intra-Community shipments.

b) According to the European Commission, this proposal will not place additional economic burdens on industry. However, it could entail extra costs for certain Member States.

c) It should promote a more uniform application of the Regulation and reduce distortions of competition on the internal market.

3. **General comments**

3.1 The European Economic and Social Committee considers that the Commission proposal will improve the 'traceability' of waste shipment operations. The proposal should help to do away with certain practices and provide the uniform standards needed to effectively implement good practice with the aim of improving environmental protection and sustainable development.

3.2 The proposal should help to make the activities of waste professionals more transparent, and to enhance traceability and accountability, particularly by introducing declaration mechanisms and financial guarantees and requiring that waste be taken back if a contract is not completed. It will also make authorities more answerable, since they will have to give written consent for planned shipments (classification of operations, authorisations to operate treatment facilities, compliance, etc.), which is a much-needed improvement. Authorities will also have to respect deadlines so that operations are not delayed.

3.3 The streamlining of the text should make it easy to apply, which in turn should reduce distortions of competition within the Union. It should be noted that the proposal has already been examined both by the European Parliament Committee on the Environment and at the EP plenary session. ([1]) It is unfortunate that the EESC was not consulted earlier so that its opinion was available for the parliamentary debate, during which improvements were made to the text.

([1]) See document EP T5-0505/2003.

3.4 However, the EESC notes that the approach adopted seems to be based on a procedure for individual shipments involving a single loading operation, whereas in practice multiple shipments take place under a general notification procedure. The related costs and paperwork and the fact that the volume of waste transported requires several loading operations explain why individual shipments are the exception.

4. **Specific comments**

4.1 Articles 175 and 133 of the Treaty establishing the European Community are given as the legal basis. Obviously Article 175, i.e. environmental protection, must be kept. But it is probably premature to invoke Article 133, since at the moment there are still too many disparities within Europe which must be eliminated before a real European market in waste can be considered to exist.

Definitions are inconsistent, there is a lack of clarity and precision, and therefore too many disparities of interpretation between countries and too frequent appeals to the Court of Justice. In other words, this is a long way from being a market in the European sense.

The Commission must certainly make efforts to open up this market, but many steps still have to be taken first:

— definition of recycling, recovery and disposal;

— definition and regulation of so-called interim operations;

— standardising various aids and tax regimes;

— transparent financing of facilities;

— uniform practice in relation to permits for geographical regions where facilities operate, and the possibility for a producer to conclude contracts anywhere in Europe;

— uniform classification of operations, with the guarantee that the classification will not be revised for a shipment and that the same constraints will be applied in the importing country as in the country of origin.

4.2 *Article 1(6)*

The EESC has reservations about excluding waste covered by Regulation No. 1774/2002. If these products are waste, they should be covered by the legislation on waste shipments, if only to ensure uniform procedures.

4.3 *Article 2, Definitions*

Parliament's proposals clarify the text and make it more precise.

4.4 *Article 3(4) and Article 20*

It seems somewhat unrealistic to require that companies wishing to send samples for laboratory analysis inform the authorities three days in advance. Such an arrangement seems impossible to organise and monitor in practice. In fact, in most cases samples are delivered by car and collected the same day.

A declaration to be sent on the same day or before the waste is transported or collected could solve the problem of traceability, samples being transported with a copy of the information.

4.5 *Article 3*

Parliament has proposed that shipments of waste not intended for 'final' treatment should be prohibited.

Under current legislation, no definition or operating rules exist for interim operations. Surely the export of waste not intended for final treatment should therefore be banned, as Parliament proposes.

How can operations involving mixtures of waste be allowed without addressing issues of dilution and therefore potential decommissioning?

4.6 *Article 4*

It does not make sense that an operator who changes the nature of waste should be the notifier of the shipment.

What is meant here by 'changing'? As long as there is no legislative framework governing such operations that are not waste treatment operations, it seems inappropriate to 'authorise' them in a regulation that is intended to ensure that waste shipments are only possible if the environment is better protected and recovery operations improved.

4.7 *Article 5*

It should be specified that the notification and movement documents could comprise e-documents standardised by a competent authority or an environmental agency.

However, Parliament's proposal, which would tend to exempt public facilities from the obligations imposed on private facilities, should not be taken up for the obvious reasons concerning respect of competition rules.

4.8 *Articles 6(4), 7(3) and 7(6)*

For the reasons already given above, operations that are not final should not be covered by this regulation.

4.9 *Articles 8 and 9*

The EESC welcomes the guarantees provided for professionals with respect to deadlines. To make these more effective, it should be stipulated that the notifier may claim damages and interest if there is an unjustified delay in delivery of the acknowledgement.

4.10 *Article 10*

The purpose of this article is to accelerate procedures, and it should therefore also encourage the use of e-mail to transmit requests.

4.11 *Article 11*

It could be proposed in this article that waste treatment facilities which import waste should inform the authorities of dispatch of what will ultimately happen to the waste treated, and that the authorities of dispatch and destination should also be required to cooperate by each checking that the operations are completed successfully.

4.12 *Article 16*

This is the first time in European legislation that the concept of transparency has been introduced for so-called interim operations and the operator made accountable. This is a positive development, but as noted above 'interim' operations are introduced here without any background legislation. It would therefore seem preferable in the current circumstances to limit shipments to final operations.

4.13 *Article 21*

The mixing of waste during shipment should be prohibited.

4.14 *Article 31*

Under this article, administrative costs may be charged to the notifier. The problem here is that the definition of appropriate and proportionate costs may vary considerably between individual countries, which could lead to distortions of competition.

4.15 *Article 62*

This article is very vague and general. What type of additional measures might the Commission adopt?

5. **Conclusion**

The EESC stresses that the proposal for a regulation improves the traceability of waste and provides a guarantee for professionals that deadlines will be met. This is in the interests of better environmental protection and respect for the requirements of sustainable development, objectives which must be the fundamental priority of the text. Certain provisions must be made more precise and simplified in order to be more effective.

To achieve a real liberalisation of the market, clear definitions that are accepted by all the Member States must be proposed in relation to recycling, recovery, disposal and interim operations.

It would also be particularly useful to organise an exchange of information on good practice in the Member States. Subject to these comments, the Committee considers that the amendment of the regulation will help to improve European legislation.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'proposal for a Regulation of the European Parliament and of the Council on certain fluorinated greenhouse gases'

(COM(2003) 492 final – 0189/2003 COD)

(2004/C 108/12)

On 9 September 2003, the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Agriculture, Rural Development and the Environment, which was responsible for preparing the Committee's work on this subject, adopted its opinion on 18 December 2003 The rapporteur was Mr Sears.

At its 495th plenary session held on 28 and 29 January 2004 (meeting of 28 January 2004), the European Economic and Social Committee adopted the following opinion unanimously.

1. **Introduction**

1.1 The earth is surrounded by gases, some of which absorb and reflect heat, causing temperatures at ground level to rise. This is the greenhouse effect. Concentrations of the gases causing this (carbon dioxide, methane, water vapour, nitrous oxide, ozone and some deliberately made substances including fluorinated gases) have increased as a result of human activity.

1.2 If these trends, and the associated global warming, cannot be restrained or reversed, they will lead to permanent and potentially harmful climate change. Balancing this with the needs of peoples at all levels of development around the globe is the greatest challenge currently facing humanity.

1.3 The international response was defined in the United Nations Framework Convention on Climate Change (UNFCCC), adopted in 1992, and by the Kyoto Protocol of 1997. The EU has made climate change a priority for its 6th Environment Action Programme 2001-2010.

1.4 In June 2000 the EU established the European Climate Change Programme (ECCP) as a multi-stakeholder consultative process to determine how the EU could best meet its Kyoto targets. In its first report in June 2001, the ECCP identified 42 cost-effective options to reduce greenhouse emissions by 664-765 million tonnes carbon dioxide equivalent (MT CO2 eq.). These included actions to restrict the use and emissions of certain fluorinated gases.

2. **Summary of the Commission's proposal**

2.1 The proposal seeks to limit emissions of hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF6), used widely as refrigerants, cleaning solvents and foam blowing agents, and in medical and specialty applications, including fire-fighting, semi-conductor and switch gear manufacture and the production of magnesium.

2.2 These substances are powerful greenhouse gases covered by the Kyoto Protocol. The actions proposed are expected to reduce their emissions by 23 million tonnes to 75 MT CO2 eq. by 2010, with the possibility of further reductions as the measures take full effect.

2.3 The proposal is based on Article 95 of the Treaty. Measures to harmonise requirements on monitoring, containment and use will assist Member States in meeting their obligations under the Kyoto Protocol, whilst providing essential protection for the internal market.

2.4 Article 3 provides for the monitoring and containment of leaks from stationary refrigeration, air-conditioning, heat pump and fire protection systems. Article 4 refers to the servicing and end-of-use recovery of the gases for recycle, reclamation or destruction. Article 6 requires producers, importers and exporters to maintain records of production, trade in and use of these fluorinated gases, and to report these data to the Commission. Articles 7 and 8 prohibit the placing on the market and subsequent use of certain fluorinated gases in specific applications.

2.5 Articles 9 and 10 deal specifically with the use of fluorinated gases in Mobile Air-Conditioning systems (MACs) in cars and light goods vehicles. A transferable quota system is proposed to allow manufacturers time to introduce the necessary changes in a cost-effective manner. Other than as provided for in Article 10, the use of fluorinated gases with a Global Warming Potential (GWP, after 100 years, v CO2 taken as 1) >150 to fill new vehicles placed on the market from 1 January 2009 is prohibited.

3. **General comments**

3.1 The EESC recognises the continuing and urgent need to reduce global greenhouse gas emissions and strongly supports the Commission in its drive for full ratification of the Kyoto Protocol. It therefore welcomes this proposal on the control and use of certain fluorinated gases. The actions proposed have been developed in conjunction with affected stakeholders to provide Member states with cost-effective measures to meet their emissions reduction targets. The EESC hopes that these will in turn provide models for countries outside the EU to follow.

3.2 The activities covered by the proposal (refrigeration, air conditioning, medical and specialty applications) are increasingly regarded as essential to the continuation of human life. Without them, the daily provision of fresh food would become impossible, and the undertaking of safe and productive activity at home, at work or during travel would become increasingly difficult.

3.3 However activities to mitigate these effects of heat can also contribute to global warming, by the leakage of the refrigerants used (direct effects) and by the increased use of power to drive the cooling system (indirect effects). Indirect effects normally outweigh direct effects. For a domestic refrigerator the power usage accounts for 96 % of total emissions. The use of a MAC unit in a car increases fuel use and emissions by up to 20 %.

3.4 The choice of refrigerant is largely restricted to ammonia, carbon dioxide, water, hydrocarbons or fluorocarbons (HFCs). Each has advantages and disadvantages; no new molecules are expected to be identified for this use in the short term. Chlorofluorocarbons (CFCs), introduced in the 1930s as safe and cheap alternatives to ammonia, sulphur dioxide or hydrocarbons, are already being phased out under the Montreal Protocol due to their high Ozone Depleting Potentials (ODPs); they also tend to have high GWPs.

3.5 For domestic refrigeration, the problem of flammability of the preferred replacement, iso-butane, has been overcome, with low initial charges (30-60gms) and leakage rates, and the use of explosion proof electrical systems.

3.6 Commercial systems depend on ammonia on remote sites or where there are trained personnel used to working in potentially hazardous conditions, or on mixtures of HFCs, e.g., in supermarkets, where safety is paramount due to the presence of the public. In these cases, improved design, monitoring and containment are essential.

3.7 The growth in demand for MACS in private cars follows falling costs and growing awareness of the effects of local climate change. However, the initial charge (750gms) of refrigerant, typically HFC 134a with low flammability but a GWP of 1300, is far larger than in a domestic refrigerator. Lifetime use is much greater (1200-2400gms). Indirect effects are greater still.

3.8 Under these conditions, redesign and better containment are imperative, to permit the safe use of either HFC 152a, which is mildly flammable but with a GWP of only 140; butane, which is extremely flammable but with a GWP of only 3; or of carbon dioxide which is non-flammable but which requires higher pressures, may result in higher fuel use and which could lead to asphyxiation of those inside the vehicle in the event of an accident. The implications for engine and body design, servicing and end of life venting or recycling are all important.

3.9 The EESC believes that greater urgency is required so that MACs can be incorporated within the type approval process for all new models placed on the European market. The development by the Commission of EU standards for the measurement of leakages and of total emissions and their impact on air pollution and climate change, with and without MACs in use, are key steps towards this.

3.10 The EESC agrees with the Commission that, in order to safeguard the global environment, the Treaty base for this proposal should be Article 95, to provide direction and protection to the internal market in the sectors most affected. For full impact, it is essential to establish long term sustainable trends in consumer preferences and in associated manufacturing innovation in these globally supplied industries. The EU needs to maintain its leadership role, continuing the process of consultation with stakeholders and providing incentives for positive actions and a framework in which they can be undertaken in a timely and cost-effective manner.

3.11 National governments have important roles to play in this via exchange of best practice, e.g., monitoring systems in place in Sweden (reducing leaks from commercial and retail installations from 30-40 % to 5-8 %) and the Netherlands (the STEK system for leak-free refrigeration equipment) and in the provision of systems to inform and reward consumer choice on decisions affecting the global environment. Energy labelling, already having a major impact on domestic systems, should be extended to commercial and mobile systems as quickly as possible.

3.12 As a number of countries already subject to the Montreal and Kyoto Protocols but in different stages and with different rates of internal development accede to the EU, the EESC encourages the Commission to continue to work for sustainable and realistic reductions in the emission of greenhouse gases, protecting the widened internal market and providing a level playing field for manufacturers and importers. The EESC agrees that a Regulation is the appropriate legal instrument for this proposal.

4. **Specific comments**

4.1 The recital must include considerations of the safety and health of all those involved throughout the life cycle of the products concerned.

4.2 Some definitions are missing. Clarity is required over 'operator'/'owner' of stationary systems. The Commission should work with the affected parties to ensure that real-life situations are fully covered.

4.3 The recommendations with respect to containment are weak, with little requirement for action or for focused monitoring of unreliable and leaky installations. The Swedish and Dutch systems should be followed more closely. As incentives grow to reduce leaks at the design stage, so the frequency of monitoring of new energy-efficient installations with demonstrated low leakage rates should be allowed to decrease. This should be irrespective of the refrigerant used. Users should see leak reduction both as a cost benefit and as a contribution to their environmental performance. Voluntary agreements, labelling and award schemes, information via trade journals, and consumer recognition of progress made, can all be utilised to bring about the desired changes to existing practices.

4.4 Article 5 provides for training for personnel involved in containment and recovery, but not for installation, maintenance and inspection. This will be essential if the changes are to be effective.

4.5 The EESC supports the reporting processes outlined in Article 6. National reporting against EU air standards is of variable quality: without a consistent and robust database, it will be hard to determine what progress has been made or what further actions are required.

4.6 Given the need to balance hazards and benefits in refrigeration and air conditioning, it would be preferable for these specific activities to be the subject of future legislative action, including type approval for MACs, rather than, as here, focusing on only one set of refrigerants.

4.7 The quota system for emissions from MACs is complex and it is hard to see that it is strictly necessary. Provided the time-scale is realistic, type approvals for new models based on all aspects of energy efficiency and emissions limitation and applying equally to manufacturers and importer from, say, 2012, would be the preferred course. A cut-off date should also be set, e.g. 2020, by which time all new cars, whether new or existing models, should be fully compliant with the new standards. Schemes to increase the replacement rate for existing non-compliant models should also be encouraged.

4.8 Finally the role and responsibility of the consumer is critical. Where activities are regarded as essential, the consumer should be aware of the choices available and of the consequences of each choice. Where there are special costs, for instance for servicing or at disposal, these should be identified and passed on. Labelling schemes have played an important role in increasing the energy efficiency of domestic refrigerators; this, with the Commission's help, should be extended to other aspects of refrigeration and air conditioning as quickly as possible.

4.9 For other applications which are optional but relatively trivial or for which safer alternatives are readily available, then the Commission's approach as set out in Articles 7, 8 and in Annex II seems appropriate and is supported by the EESC. Voluntary agreements, accompanied by steady progress and the exchange of best practice, are preferred in complex and essential areas such as drug delivery via Measured Dose Inhalers (MDIs).

4.10 Other uses of fluorinated gases, e.g., in heavy goods vehicles, and in road, rail and sea-borne refrigeration systems, not covered by this proposal should be included in later proposals when the necessary data become available.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'proposal for a Council Regulation on the establishment of a regime of local border traffic at the external land borders of the Member States' and the 'proposal for a Council Regulation on the establishment of a regime of local border traffic at the temporary external land borders between Member States'

(COM(2003) 502 final – 2003/0193 (CNS) – 2003/0194 (CNS))

(2004/C 108/13)

On 18 September 2003, the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned proposals.

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 6 January 2004. The rapporteur was Mr Simons.

At its 405th plenary session of 28 and 29 January 2004 (meeting of 28 January), the European Economic and Social Committee adopted the following opinion by 52 votes to three, with no abstentions.

Introduction

The purpose of the European Commission's proposals on the establishment of a regime of local border traffic at the external land borders of the EU Member States [1] and at the temporary external land borders between Member States [2] is to facilitate border crossing for bona fide border residents having legitimate reasons to frequently cross the external land borders and, at the same time, to take account of the need to prevent illegal immigration and potential threats to security posed by criminal activities.

1. Gist of the Commission proposals

1.1 Under the proposal for a regulation submitted as document 2003/0193, the existing and, from 1 May 2004, the new Member States that have a common land border with a neighbouring third country may, if desired, elaborate further on the rules on local border traffic set out below through bilateral, reciprocal agreements.

1.2 Under the proposal for a regulation submitted as document 2003/194, an existing and a new Member State, or two new Member States, that have a common border may, if desired, also elaborate further on the rules set out below through agreements of this kind.

1.2.1 These are temporary rules that may be applied from 1 May 2004 but which will cease to be operative once the new Member States concerned implement the Schengen acquis in full and controls at the common borders are lifted.

1.3 The Commission's purpose in submitting these two proposals is to facilitate border crossing for bona fide border residents having legitimate reasons to frequently cross the external land borders, and also to take account of the need to prevent illegal immigration and potential threats to security posed by criminal activities.

1.4 The European Commission is thus proposing that third-country nationals who regularly reside in an area bordering a neighbouring Member State for a minimum of one year be allowed to cross the external land borders frequently for family, social, cultural, economic or other reasons, outside authorised border crossing points and hours, and be allowed to remain for a maximum of seven consecutive days provided the total duration of the successive visits does not exceed three months within any half-year period.

1.5 Those concerned must have the requisite travel documents. Third-country nationals not requiring a visa will be granted entry on production of their identity card or a specific permit.

1.5.1 Third-country nationals requiring a visa will have to have a specific 'L' visa which will be valid for a minimum of one, and a maximum of five years, and will have a uniform format (standard model).

1.6 Those affected by these measures are given access only to the border area, which does not extend more than 50 km and within which zones or towns may be specified as subject to the local border traffic regime.

2. General comments

2.1 The Committee endorses the proposals' objective but wonders about arrangements for establishing that the maximum authorised duration of stay has not been exceeded, especially as, for practical and other reasons, the travel documents concerned cannot or need not be stamped upon entry and exit.

[1] COM(2003) 502 final – 2003/0193 (CNS)
[2] COM(2003) 502 final – 2003/0194 (CNS)

2.2 The European Commission clearly assumes that the checks made for granting the 'L' visa are sufficient for the party concerned to be considered bona fide after the visa has been issued. However, as this visa may be valid for anything up to five years, it will be difficult to check that the parties crossing the border – at any rate if they do so outside authorised border crossing points and hours – continue to meet the visa requirements and, for instance, are not in the meantime subject to an alert refusing them entry.

2.3 In any case, this approach is not a satisfactory way to monitor the stays of third-country nationals not requiring a visa who, in this instance, may enter simply on production of their identity card.

2.4 If any parties covered by these measures are nonetheless discovered outside the border area on the territory of another Member State, their stay is considered to be unlawful and they must be expelled from that territory. It would be expedient to lay down that the appropriate Schengen provisions for such expulsions are to apply in cases where no return or readmission agreement is in place with the countries concerned.

3. **Specific comments**

3.1 *Proposal for a Council Regulation on the establishment of a regime of local border traffic at the external land borders of the Member States (2003/0193 (CNS))*

3.1.1 Article 3 (definitions)

3.1.1.1 The definition of 'transfrontier workers' under point (h) of this article is taken from a proposal for a Council Directive that is still to be adopted on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.

3.1.1.2 This raises the question, therefore, of whether the provisions laid down for transfrontier workers in the present regulation are, in fact, to apply, or whether they will be replaced by the appropriate provisions of the above-mentioned directive once it has been adopted and transposed into national law.

3.1.2 Article 4 (non-discrimination clause)

3.1.2.1 Given that all Member States have endorsed the Charter of Fundamental Rights of the European Union, it is clear that they will also comply with the provisions of Article 4.

3.1.2.2 While, in matters of readmission or asylum, it is worthwhile pointing out that third-country nationals may not be expelled to or via a third country, and that Member States may recognise them as refugees if they run a genuine risk of persecution in the third country concerned for the reasons set out in Article 4, it seems superfluous to include this clause in provisions relating to local border traffic.

3.1.3 Article 10 (format of the visa)

3.1.3.1 This article stipulates that the visa is to be issued in a uniform format and marked with the distinctive letter 'L'. This implies that the Schengen area inspection officials must be given clear instructions on this matter, particularly since the letter 'L' is also used as the country code for Luxembourg on visas limited to the territory of that country.

3.1.4 Article 20 (Amendment of the Common Consular Instructions)

3.1.4.1 These instructions set out the visa-issuing rules for the visa-issuing bodies. Hence, it is necessary to amend not only Part I, point 2 (definition and types of visa) but also Part V (examination of applications and decisions taken), point 3, and Part VI (how to fill in visa-stickers). The bodies concerned can hardly be expected to have to read an annex to the instructions, before they are able to issue a visa.

3.1.4.2 The Committee would also ask why the second paragraph of point (a) stipulates the minimum, but not the maximum period of validity.

3.1.4.3 Lastly, border inspection officials will also have to be briefed about the rules for local border traffic. The Common Manual of External Borders will thus also have to be modified, but no amendments have been incorporated into the final provisions.

3.1.5 Article 21 (Amendment of the Convention implementing the Schengen agreement)

3.1.5.1 The Commission's purpose in including this article is to delete Article 136(3) of the Convention.

3.1.5.2 A regulation may render certain provisions of the convention inapplicable, but it cannot delete them.

3.2 *Proposal for a Council Regulation on the establishment of a regime of local border traffic at the temporary external land borders between Member States (2003/0194 (CNS))*

3.2.1 The above comments on the proposal on the establishment of a regime of local border traffic at the external borders of the Member States (document 2003/0193) also apply, as appropriate, to the provisions of this proposal on local border traffic at the temporary external borders between Member States.

4. **Conclusions**

4.1 The Committee endorses the aims of both proposals on local border traffic – notably to facilitate border crossing for bona fide border residents and, at the same time, to take account of the need to prevent illegal immigration and potential threats to security posed by criminal activities.

4.2 To the extent that this twofold objective cannot be achieved under existing Community law (including the Schengen acquis), the Committee would recommend the following in relation to the proposal for a Council regulation submitted as document 2003/0193:

4.2.1 In order to be able to monitor the maximum authorised duration of stay, the possibility of crossing the border outside authorised crossing points and fixed hours should not be offered (cf. Article 18).

4.2.2 In order to regularly check the bona fide credentials of those concerned by these measures, specific visas should be valid for not more than one year (cf. Article 12).

4.2.3 A reference might be inserted in Article 2 of document 2003/0193 to indicate that Article 23 of the Schengen agreement also applies in cases of expulsion of any third-country nationals discovered outside the border area and thus illegally present elsewhere in the Schengen zone.

4.2.4 As the status of transfrontier workers is not yet settled at Community level, and the Council deliberations on a directive to be adopted on this issue are not yet complete, the definition contained in Article 3(h) (and Article 15 which also refers to transfrontier workers) must be deleted, or at any rate included conditionally, subject to the adoption of that directive.

4.2.5 Article 4 is unnecessary as Member States have to comply with the principle of non-discrimination in the application not just of this regulation, but of all Community and national law. Moreover, to include such an article gives the impression that, in the case of local border traffic, Member States do not intend to comply with this principle at all times. If desired, reference may be made to this fundamental right in the recitals.

4.2.6 As the letter 'L' is used as the country code for Luxembourg in visas limited to the territory of that country and thus may confuse inspection officials, care must be taken to ensure that none of the letters used in the specific visa under Article 9 are the same as EU country codes.

4.2.7 To help visa-issuing bodies and border inspection officials, appropriate, more detailed instructions must be set out in the final provisions, both in Article 20 and in a new article.

4.2.8 Article 21 must be omitted or, if necessary, reworded, as an article of the Convention implementing the Schengen agreement cannot be deleted by virtue of a regulation.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on 'Europe's Creative Industries'

(2004/C 108/14)

On 9 April 2003, in a letter from Mrs Viviane Reding, the Commission asked the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, to draw up an opinion on Europe's Creative Industries.

On 15 April 2003, the Committee Bureau instructed the Section for the Single Market, Production and Consumption to prepare the Committee's work on the subject. The section adopted its opinion on 16 December 2003. The rapporteur was Mr Rodríguez García Caro.

At its 405th plenary session of 28 and 29 January 2004 (meeting of 28 January), the European Economic and Social Committee adopted the following opinion by 72 votes to seven with five abstentions.

1. **Introduction**

1.1 *Reason for the opinion*

1.1.1 On 9 April 2003, Commissioner Viviane Reding wrote to the President of the Committee to request that an exploratory opinion be drawn up on Europe's creative industries.

The Commissioner felt that the EESC, with its roots firmly planted in civil society and representing the interests of industry and workers, is particularly well placed amongst other things, to:

— offer expertise on this issue;

— sum up the interests at stake;

— shape ideas that express common ground between the parties concerned.

The Commission intends in principle to propose new Community instruments in the areas of culture and the audio-visual media early in 2004.

1.1.2 According to the Commission, the major challenges facing these industries are:

— external competition;

— pirating associated with the new technologies;

— the balance between major operators and independent entrepreneurs (market access and cultural diversity);

— varying tax treatment;

— and a lack of skills and training in certain of the sector's lines of work.

1.1.3 The Commission feels that this situation calls for a detailed examination of the following aspects:

— the challenges facing the creative industries;

— hurdles they will have to overcome;

— the contribution that the EU can make to help them rise to these challenges, in particular in the context of an enlarged Union.

1.1.4 At its meeting held on 4 September 2003, the European Parliament approved the Resolution on Cultural Industries. The rapporteur was MEP Myrsini Zorba.

1.1.4.1 This comprehensive text was drafted using the same rigorous methodology as that adopted by the European Parliament when drawing up a draft resolution containing practical suggestions for methods that could be adopted by the responsible European institutions and the Member States.

1.1.4.2 At the public hearing held on 22 April 2003, the results of a questionnaire sent out to two hundred professional associations, federations of specific sectors, companies and experts in this field were presented. The following were cited as the major problems faced by the European creative industries:

— lack of investment;

— problems related to distribution;

— restricted size of the market;

— linguistic diversity;

— pirating.

1.1.4.3 According to the document presented at the hearing, operators in this sector are dissatisfied with cultural policy at both national and European level.

1.2 *Content of the exploratory opinion*

1.2.1 In its opinion, the European Economic and Social Committee focuses on specific issues which together are considered to be of particular relevance for future Community action.

1.2.2 The Committee will be asked to respond to two basic questions:

— What are the cultural and socio-economic challenges facing Europe's creative industries?

— What contribution could Europe make to respond to these challenges in a lasting way?

2. **Europe and culture**

2.1 *Culture*

2.1.1 The definitions given in different dictionaries for the overall notion of 'culture' are generally very similar. Culture could be described as the set of knowledge, customs and levels of artistic and scientific development that defines an era or social group.

2.1.1.1 The peoples of Europe share similar knowledge, customs, levels of development and values, to varying extents, such that, with all due respect to much more local identity markers, we could claim the existence of a European culture or 'European Cultural Area'.

2.1.1.2 In line with the focus of the opinion presented here, culture can equally be defined as a set of cultural and artistic products and productions from the fields of music, theatre, cinema, television, literature and so on. This description of culture takes much greater account of its economic dimension and recognises the important role played by the creative industries.

2.1.2 However, culture is not an abstract concept; it is born out of the very lives of those who make it possible. Culture cannot exist without artists, performers and other creative minds who take their inspiration and turn it into works to be considered and enjoyed by all citizens and which form the cultural wealth of all humanity.

2.1.3 Indeed, what would be the purpose of a cultural work if it were entirely inaccessible? Access to culture enhances the possibilities of the human mind. But it should not be forgotten that any abuse of culture can turn it into an element of power and control. Strengthening culture and promoting free and open access to culture for all citizens can help counter forms of hegemony that attempt to use culture as a means to becoming established.

2.2 *Cultural Policy and a European Cultural Area*

2.2.1 Prior to the entry into force of the Maastricht Treaty, the European Union had no legal basis on which to create a cultural policy. Now, with a solid legal basis and through the launch of programmes specific to this area of Community policy, the European Union no longer appears solely as a geographical, political, social or economic entity on the world scene, rather the more essential aspects of the shared cultural heritage of the European Community are taking on increasing importance.

2.2.2 In the light of this, the Committee agrees that culture constitutes an essential and unifying element in the everyday lives and identities of the citizens of Europe. ([1])

2.2.3 Although the EU does not have a common policy to deal with the various cultural sectors and despite the restrictions laid down by Article 151 of the EC Treaty, the Member States and the Union with its institutions must help draw up a joint vision for the future that will enable the Union as a whole to take more decisive action in the field of culture.

2.2.3.1 A cultural policy developed at European level would need to promote access for the citizens of the Union to the cultural identity which unites them as well as awareness of the cultural diversity of the different regions of Europe and of the people who make up in that diversity.

2.2.4 In its resolution of 5 September 2001, the European Parliament indicated that it felt that the cultural dimension of the Union should be strengthened for the future, both in political and budgetary terms, boosting cooperation between the Member States in order to create a 'European Cultural Area'.

2.2.4.1 The creation of a European Cultural Area would benefit the Union on two counts: firstly it would enhance the cultural wealth of Europe, and secondly it would bring economic advantages through the development of the creative industries. The creative industries are what provide the citizens of the Union with access to culture and it is through these industries that our culture is exported beyond the Community borders.

2.2.5 While the purpose of this opinion is not to provoke a debate concerning European cultural policy, the Committee does feel that this is a crucial issue that has a bearing on the creative industries and should be looked at in depth.

3. **Community Programmes that support culture and the creative industries**

3.1 *Legal basis*

3.1.1 Prior to the ratification of the Maastricht Treaty, the European Union had no legal framework within which to develop a cultural policy at Community level. None of the articles or sections of the Rome Treaty made any specific reference to this issue; only the preamble alluded to the role played by culture in unifying peoples and promoting socio-economic development.

3.1.1.1 Article 151 of the EC Treaty sets down a basis on which to promote, support and supplement action undertaken by the Member States, while respecting national and regional diversity, placing particular emphasis on the common cultural heritage of the citizens of the Union. However, harmonisation of any sort is expressly excluded from the sphere of application of this article.

3.1.2 One of the tasks that falls to the European Union is to ensure that the conditions necessary for the competitiveness of the Community's industry exist. Article 157 of the EC Treaty stipulates that Community action shall be aimed, amongst other things, at speeding up the adjustment of industry to structural changes and encouraging an environment favourable to initiative and cooperation between undertakings.

([1]) European Parliament Resolution on Cultural Industries, whereas clause A. [P 5 TA-PROV (2003)0382].

3.1.2.1 The European Union must contribute to the creation of an environment that is favourable to the development of the creative industries, enabling them to benefit from the findings of research, technological progress, better access to funding and the advantages of cooperation within a European Cultural Area.

3.2 *Specific programmes in the field of culture*

3.2.1 Under the appropriate legal framework provided by Article 151 of the EC Treaty, the European Union launched three programmes in 1996 and 1997 aimed specifically at the field of culture: Kaleidoscope ([2]), set up to promote artistic creation and promote awareness and the dissemination of the art of the peoples of Europe; Ariane ([3]), designed to develop cooperation between the Member States in the field of literature and reading and to promote better knowledge of the literary and historical works of the countries of Europe through translation; and Raphael ([4]), intended to boost cooperation between the Member States in relation to cultural heritage with a European dimension.

3.2.2 In February 2000, the first European Community framework programme for culture ([5]) was approved. This programme simplifies Community action by establishing a single financing and programming instrument for cultural cooperation. The resulting cooperation between the players in the cultural field is contributing to the creation of a European Cultural Area, the development of artistic and literary creation, raising awareness of European history and culture, boosting the dissemination of culture worldwide, and increasing the value of heritage which has a European dimension and promoting intercultural dialogue.

3.2.2.1 Culture 2000 aims to create a common cultural area characterised by cultural diversity and the shared cultural heritage of the peoples of Europe. The countries of the European Economic Area and the candidate countries have also been invited to participate in this programme. It supports artistic and cultural projects which have a European dimension in terms of their conception, organisation and realisation. The majority of the projects involved also have a multimedia element seen through the creation of websites and discussion forums.

3.2.2.2 Culture 2000, which covers the period 2000 – 2004, is set to be extended via a new Proposal for a Decision of the European Parliament and the Council amending Decision No. 508/2000/CE ([6]), which suggests that the programme should be continued unchanged until the year 2006.

3.3 *Community programmes relevant to the field of culture*

3.3.1 The aim of MEDIA, (the French acronym for 'Measures to Encourage the Development of the Audiovisual Industry'), is to minimise the weaknesses of the European audiovisual and multimedia content industries, characterised above all by insufficient dissemination of European productions and a chronic deficit in investment in the development of new projects, ongoing training and the promotion and distribution of productions. The significance of these shortfalls becomes all the more apparent when compared with productions of North American origin.

3.3.1.1 The MEDIA programmes, therefore, support culture via projects involving the audiovisual industries that provide this type of cultural production. More precisely, the aims of the MEDIA Training ([7]) and MEDIA Plus ([8]) programmes, previously MEDIA I and MEDIA II, are, respectively, to train professionals in the European audiovisual production industry and to boost the development, distribution and promotion of audiovisual programmes.

3.3.1.2 The Commission has conducted a public consultation exercise with a view to proposing a new generation of programmes for the European audiovisual industry, based also on the outcome of the evaluation of the current programmes.

3.3.2 Furthermore, the EU runs various programmes and actions, which are not directly linked to support for culture itself, but which comprise approaches and back individual projects that touch on a host of aspects related to culture in general and cultural heritage in particular.

3.3.2.1 The following can be listed as some of the most significant of these programmes, complete with a description of the cultural activities to which they relate:

a) The Fifth Framework Programme for Research and Technological Development, including some programmes that aim to preserve cultural heritage, in particular the European research programme on a 'User-friendly information society'.

b) Many projects financed by the European Union education and training programmes SOCRATES and LEONARDO aim to raise awareness and enhance knowledge of the arts and to create links between cultural and educational institutions with a view to teaching European citizens about works of art such that they might appreciate these better and be encouraged to train for professions related to culture in its many guises.

c) The European Social Fund, which supports training schemes that specialise in subjects related to the arts, such as the restoration and conservation of the photographic heritage in Italy. The Community initiative EQUAL should also be mentioned in this connection.

d) The Youth programme, which finances annual gatherings of young people aged between 15 and 25, some of which focus on artistic activities.

([2]) Decision 719/96/EC
([3]) Decision 2085/97/EC
([4]) Decision 2228/97/EC
([5]) Decision 508/2000/EC
([6]) COM(2003) 187
([7]) Decision 163/2001/EC
([8]) Decision 821/2000/EC

e) The eContent Programme, which is part of the eEurope Action Plan, and specialises in developing automatic translation technologies that will help preserve the linguistic diversity of literary works written in Europe as well as supporting the production of European digital content.

f) The European Union's regional policy also contributes financially to setting up areas of artistic creation and distribution, such as music schools, concert halls, recording studios, etc.

g) The regional 'EUROMED HERITAGE' programme, which is part of the MEDA programme set up to foster cooperation with the Mediterranean countries and supports the development of the Euro-mediterranean cultural legacy. EUMEDIS, an initiative aimed at developing digital services in the Mediterranean countries and in particular multimedia access to that region's cultural heritage and tourism, is part of this programme.

h) The URB-AL programme, which supports cooperation between towns and cities of the European Union and Latin America for issues related to the problems of urban areas, including the preservation of urban heritage. An equivalent programme is run in Asia under the title ASIA-URB and cooperation projects involving the countries of Africa, the Caribbean and the Pacific under the Cotonou Agreement seek to conserve and boost that region's cultural heritage.

i) The European Regional Development Fund, which finances heritage restoration projects as part of general regional development programmes. The Community initiative URBAN, set up to assist urban areas in crisis, and INTERREG, which promotes cooperation between the regions of the European Union in different areas such as urban development, also lend their support to projects of this type.

j) The European Agricultural Guidance and Guarantee Fund, which supports development projects in rural areas and comprising the LEADER project, which contributes to the cultural renovation and upgrading of rural buildings, sites, furnishings and other materials.

k) The LIFE III programme, which is part of the Sixth Community Environment Action Programme and which contributes to the Union's environment policy by promoting the enhancement of sites of natural and cultural interest and the sound management of any related tourism.

3.3.3 In the Committee's view, this list of programmes reflects the growing interest of the Community institutions in the promotion of culture. However, it also indicates the spread of initiatives and projects which are individually achieving considerable progress, but which could create synergies, achieve even better results and show greater effectiveness in reaching the culture targets set were they coordinated.

3.3.3.1 Several of the programmes listed fall under the aegis of the same Directorate General, in particular those most directly linked to culture, the creative industries and the audiovisual sector. However, other initiatives and programmes do not fall into this category. It would perhaps be advisable to consider whether there should be more coordination between these programmes.

4. **The creative industries**

4.1 *What is meant by the creative industries?*

4.1.1 The Committee does not wish to provide a narrow and restricted definition of what it means by the term 'the creative industries', as the definition should aim to establish which sectors fall within the cultural and creative industries.

4.1.1.1 Furthermore, depending on which source is consulted, some quite different sectors of activity are labelled creative industries. These include the performing arts, such as theatre, music, dance and others, the plastic arts, covering both painting and sculpture etc., cultural craftsmanship, book publishing, music publishing, the audiovisual media and the cinema, the communication media, cultural and above all architectural heritage, the conservation and restoration of our cultural heritage and cultural works and even tourism where this aims at raising awareness of a specific cultural asset, whether urban or rural, not to forget museums, libraries and other centres of culture.

4.1.2 According to UNESCO, creativity, an important part of people's cultural identity, is expressed in different ways. These means of expression are copied and boosted by industrial processes and worldwide distribution. Cultural industries consist of books, magazines, music records, film and videos, multimedia products and other new industries that are being created. ([9])

4.1.2.1 This definition does indeed cover the concept of the creative industries very accurately. Some further sectors containing cultural works that cannot be reproduced on a large scale, but which attract interest, invite direct or indirect study or which are visited by citizens should be added to this list. These are industries that, through tourism, bring millions of citizens closer to cultural heritage that cannot be reproduced.

4.1.2.2 In view of the above and in order to guarantee the effectiveness of a European cultural policy in supporting the creative industries, the Committee seconds the request for a clear definition submitted by the European Parliament in its Resolution of 4 September 2003, and contributes towards this definition by listing a series of criteria in points 4.1.2 and 4.1.2.1 of this document.

4.2 *Into what categories could the different creative industries be placed?*

4.2.1 For merely didactic purposes, and without excluding other forms of classification, the creative industries can be placed into the following categories:

— Cultural displays. This category comprises artistic displays such as theatre, concerts, dance and other live exhibitions

([9]) http://www.unesco.org/culture/industries

— Cultural works and works of art such as the artistic and architectural heritage and all the very important tasks of conservation and restoration which ensure we are able to enjoy this art long into the future.

— Cultural institutions such as museums, galleries and libraries.

— Publishing. This sector covers both the publication of books, music and photographs as well as cinema and its reproduction on video and DVD.

— The daily media. This category covers radio and television broadcasting and the media in general.

— The multimedia sector. This sector includes the new culturally-oriented digital media and on-line information provided via broad-band Internet access.

4.2.2 The significance of cultural products and the creative industries from an economic point of view is clear. The growing economic importance of the creative industries has turned them into an important source of economic activity and ongoing job creation. As such, the Committee feels that the creative industries of the European Union have a significant role to play in enabling the Lisbon objectives concerning employment to be met.

4.2.2.1 In a society that sets increasing store by leisure time and activities, the creative industries help promote knowledge, entertainment and employment. It would seem only logical then that both the Member State and Community authorities should support the development and expansion of these industries, especially with regard to technological change.

4.2.2.2 Special measures are required for the specific culture practised and used by indigenous and minority populations.

5. **The European Economic and Social Committee, culture and the creative industries**

5.1 The essential role of the European Economic and Social Committee is to represent organised civil society and the socio-economic partners within the European Union. As such, it is ideally placed to offer an opinion that will reflect not only the concerns and wishes of these partners, but will also provide a vision of culture from the viewpoint of the users of the creative industries, adding a further perspective to the debate.

5.2 Over the years, the Committee has voiced its views on culture in general and the creative industries in particular on several occasions. In terms of the latter, the Committee has expressed its view on the industries of the audiovisual sector through the different opinions concerning the adoption of the different phases of the MEDIA programme.

5.3 In its opinions the Committee clearly stated its position both on the pin-pointing of the problems and challenges faced by the audiovisual industries as well as on possible solutions that could be adopted in order to support and boost the creative industries with the aim of promoting the accessibility and dissemination of the culture of Europe in general and of the individual states and regions in particular.

5.4 These opinions, which are still fully valid today, are reiterated below.

5.4.1 Opinion on the Proposal for a Council Decision concerning Community participation in the European Audiovisual Observatory ([10])

5.4.2 Opinion on the proposal for a Council Decision amending Council Decision 90/685/EEC concerning the implementation of an action programme to promote the development of the European audiovisual industry (Media) (1991-1995) ([11])

5.4.3 Opinion on the proposal for a Council Decision on a training programme for professionals from the European audiovisual programme industry and on the proposal for a Council Decision on a programme to promote the development and distribution of European audiovisual works ([12])

5.4.3.1 Under point 3 of the general comments listed in this opinion, the Committee conducted an in-depth analysis into the shortfalls of the sector, indicated by the Commission in its Draft Decision, and offered a series of observations which remain valid today. As such, the Section reiterates its support for them.

5.4.3.2 Today, the same difficulties as those encountered years previously, and on which the Committee had given its views, have once again been identified. It would appear that the measures taken, action undertaken and projects backed, above all in the audiovisual sector, have failed to resolve the structural problems which emerged years ago. The Committee feels that this itself is a problem. It is clear that despite everything, the institutions of the European Union have acted ineffectually.

5.4.4 Opinion on the Proposal for a Decision of the European Parliament and of the Council on the implementation of a training programme for professionals in the European audiovisual programme industry (MEDIA - Training) and on the Proposal for a Council Decision on the implementation of a programme to encourage the development, distribution and promotion of European audiovisual works (MEDIA Plus) ([13])

5.4.4.1 As mentioned in reference to the previous opinion, the same unresolved problems as in the past continue to affect the audiovisual sector: points 1.3 and 1.4 of this opinion express this once again in very similar terms, and refer to some additional challenges.

5.4.4.2 Under point 3.1 of the general comments listed in this opinion, the Committee indicates its support for the proposed decision containing complementary measures to promote the dissemination of the common cultural heritage specifying that, 'this fact should be highlighted in the proposal, given that the promotion of our cultural identity is involved.'

([10]) OJ C 329, 17.11.1999
([11]) OJ C 148, 30.5.1994
([12]) OJ C 256, 2.10.1995
([13]) OJ C 168, 16.6.2000

5.4.4.3 Finally, it is worth making reference to point 3.3 of the opinion. Indeed, the Section feels the comments made under this point to be of such relevance that it considers it impossible to discuss the problems and solutions surrounding the creative industries without first making reference to these remarks. As such, they are reinforced in the exploratory opinion.

5.4.4.4 The Committee stated the following: 'the Committee regrets that the proposal has not taken account of the fact that the importance of the European audiovisual industry does not derive exclusively from its entrepreneurial dimension, but also from its role as a vehicle for the promotion of our culture and democratic values'. In short, the Committee recognises the cultural dimension of the audiovisual industry.

5.4.5 On 24 September 2003, the Committee plenary session adopted a new opinion on the Proposal for a Decision of the European Parliament and of the Council modifying Decision No. 163/2001/EC of the European Parliament and of the Council of 19 January 2001 on the implementation of a training programme for professionals in the European audiovisual programme industry (MEDIA-Training) (2001-2005) and the Proposal for a Decision of the European Parliament and of the Council modifying Council Decision 2000/821/EC of 20 December 2000 on the implementation of a programme to encourage the development, distribution and promotion of European audiovisual works (MEDIA Plus – Development, Distribution and Promotion). ([14])

5.4.5.1 According to points 2.1 and 2.2 of this opinion, the Committee thinks that it would have been better if the Commission had taken earlier action to create the conditions and adopt the measures needed ahead of the discussion and submission of the new multiannual programme, rather than simply prolonging existing programmes. Once again the Committee reiterates its hope that account will be taken of the suggestions and proposals contained both in this opinion and those mentioned above.

5.5 *The European Economic and Social Committee and the Culture 2000 Programme*

5.5.1 The Committee regrets that it was unable to submit remarks on this programme in view of the restriction placed by paragraph 5 of Article 151 of the EC Treaty. This Article does not provide for consultation of the Committee when introducing measures to promote culture, although thanks to the provisions of Article 157 it must be consulted for all measures supporting industry in general and the creative industries in particular.

5.5.2 Given that the Committee represents organised civil society, it would make sense for its opinion to be asked on all issues under discussion related to the cultural policy of the Union, in particular as the Committee considers culture to be part of the European model of society.

5.5.3 In April of 2003, the Commission published a public consultation document entitled, 'Designing the future programme of cultural cooperation for the European Union after 2006' ([15]). The aim of this document was to launch a debate on future projects in the wake of Culture 2000.

5.5.4 In order to make known the opinion of the Committee on this programme, which will directly or indirectly affect players in the cultural sector, from the creators through to the producers and editors of cultural products, and as such will affect the creative industries themselves, the Committee should draw up an own-initiative opinion outlining its views.

6. **Cultural and socio-economic challenges faced by the creative industries in Europe**

6.1 *The need to define what is meant by the 'creative industries' and identify the sectors of activity that fall within this category*

6.1.1 Throughout this document a series of problems and challenges faced by the creative industries of Europe, and identified through a variety of studies and analyses conducted over a period of several years, has been listed.

6.1.2 As stated above, the concept of 'creative industries' encompasses very different types of culture-related production. Moreover, each sector of activity presents its own specific issues and interests, making it difficult to simplify the problems facing the creative industries as a whole and the solutions to them.

6.1.3 It is therefore necessary to establish which activities fall within the scope of the creative industries in order to identify the specific problems affecting each sector of activity and solutions that can be applied in practical terms to each one.

6.1.4 In point 4 of this opinion, the Committee states what it means by the term 'the creative industries' and the sectors falling within it. Given the huge diversity of sectors, each affected by widely varying issues, the Committee must adopt a broad and cross-cutting approach to the major challenges affecting either the creative industries as a whole or more than one of the sectors of activity identified in the opinion.

6.2 *Challenges arising from linguistic diversity*

6.2.1 In all of the analyses carried out, the linguistic diversity of Europe stands out as both a strength and a weakness at the same time. It is a strength in that it represents a host of different forms of expression, each of which conveys the most positive aspects of the culture from which it originates. And yet it is a weakness, not from a cultural point of view but rather in terms of the industry itself, in that it renders production more costly and is an obstacle to distribution. While it is only logical that this situation should arise within a multilingual Europe, the Committee believes that the authorities of the Union and of the states and regions of Europe must succeed in strengthening this diversity whilst at the same time supporting all measures and studies required to overcome this weakness.

([14]) OJ C 10, 14.1.2004.

([15]) http://europa.eu.int/comm/culture/eac/archive/consult_pub_en/html

6.3 *Specific problems affecting businesses in the cultural sector*

6.3.1 Since this is a sector that covers many different spheres of activity, the problems faced by businesses concerned with cultural production are very diverse. A single standard should be drawn up so that uniform statistics can be compiled on the creative industries throughout Europe. On the basis of such data, a joint action plan can be devised which refers to both the individual sectors and the regions and in which goals, strategies and measures are defined.

6.3.2 While large-scale mergers are under way in the publishing sector, the audiovisual sector remains excessively fragmented and is therefore in no position to take on its major competitor, the North-American audiovisual industry. Throughout this document as well as during the debates held by the study group responsible for drawing up this opinion, and in the Resolution of the European Parliament drafted by MEP Myrsini Zorba, some common elements come to the fore as the essential challenges still faced by the creative, and above all the audiovisual, industries. These challenges are essentially as follows:

a) A chronic investment deficit coupled with an evident inability to attract financial resources, jeopardising commercial viability of businesses.

b) Poor economic investment in the planning and implementation of audiovisual projects undermining the profitability of productions and reducing capacity for future investment.

c) Insufficient capitalisation of businesses which in turn weakens their international industrial development strategy.

d) Lack of regulations covering such areas as taxation, particularly where value added tax is concerned, which is applied in many different ways depending on the cultural product and Member State concerned.

e) The absence of any real regulatory framework within which to dismantle obstacles to labour mobility for artists and other creative performers. More obstacles remain to the free movement of citizens than to that of goods, if cultural products may be considered as such.

f) Problems linked to poor distribution compared to the US and scarce transnational dissemination of cultural products combined with the difficulties of drawing up catalogues of those works or lists of those productions available for distribution. These problems affect businesses linked to the audiovisual sector and book and music publishing.

g) The insufficient size of the market, essentially owing to the fragmented and compartmentalised nature of both national and regional markets, and the variety of languages viewed in purely industrial terms, since it entails higher production costs and distribution difficulties, which in turn hampers the transnational dissemination of cultural products across Europe.

h) Low investment in promotion and publicity at European and international level.

i) An increase in pirating and illegal use of brand names in the audiovisual and music sector. This situation could become intolerable for businesses. Copyright must take precedence over the right to reproduction for private use. The European Economic and Social Committee's Section for the Single Market, Production and Consumption has drawn up an Opinion on the Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights. ([16])

6.4 *Challenges related to globalisation*

6.4.1 The Committee feels that one of the major problems faced by the creative industries and, in particular, the audiovisual and music industries of the European Union is the continuing globalisation of the market for the trade in cultural products. The strength of the North American industry is evident. The commercial surplus of US audiovisual products is tremendous in comparison to the European Union.

6.4.2 In order to be able to compete with the United States, Europe's audiovisual industry must be imaginative and not restrictive. Cooperation inside Europe must be strengthened and a climate created that is favourable to the further development of the European sector, promoting its expansion within Europe itself as well as supporting export beyond the European borders.

6.5 *Problems facing the European Union*

6.5.1 In the Committee's view, the European Union cannot be said to have any global strategy for its creative industries. In order to support them, a cultural policy must be drawn up at European level, but which upholds in full the principle of subsidiarity, coordinating existing national policies so as to determine a common cultural objective, enabling the emergence of a competitive European cultural industry.

6.5.1.1 The Committee considers it to be necessary to draw up such a policy at the level of the European Union complete with clear strategies that will strengthen the European Cultural Area and promote European culture outside the European Union.

6.5.2 Cultural policy affects a great many areas and must connect other Community policies to each other in order to create synergies that will support all efforts made in a clear and precise manner. Currently, the projects and initiatives undertaken in this area are spread across the various programmes listed in this document, each of which is making unquestionable progress on an individual basis. However, by coordinating these projects, synergies could be created that would in turn enable an even better result. Decentralisation resulting from the wide reach of cultural policy must in no case lessen the efficiency with which the objectives set are reached.

([16]) COM(2003) 46 final

6.5.3 The creative industries of the European Union could make an important contribution to achieving the Lisbon objectives regarding employment creation.

6.5.3.1 The budget appropriation for measures to support culture and the creative industries is a problem that must be dealt with by the European Union. The budget for the various programmes directly linked to culture and the audiovisual industries as well as for projects that fall within the scope of other programmes that touch on the area of culture is insufficient to provide a fresh boost to the audiovisual sector in particular and the creative industries in general. It falls to the European institutions to determine which of the production sectors has the greatest influence and are expected to create the greatest number of jobs, then to offer clear support to the sector of the creative industries which, through its many facets, is offering increasingly attractive possibilities for growth.

7. **The potential contribution to be made by Europe to finding long-term solutions to these challenges**

Without reiterating the opinions already stated by the Committee throughout this document and, more precisely, under points 5 and 6, the following observations may be made regarding how to address some of the problems faced by the creative industries.

7.1 *A cultural policy for the European Union*

7.1.1 The Committee feels that a cultural policy drawn up at European level should be based on promoting access for citizens of the Union to greater awareness of the cultural identity that unites them, on restoring Europe's defining values, and on familiarity with the cultural diversity of the different regions of Europe in order to learn to live in diversity.

7.1.2 The Committee therefore shares the opinion expressed in the European Parliament's Resolution of 4 September 2003, according to which culture is an essential and unifying element in the everyday lives and identities of the citizens of Europe.

7.1.3 A common cultural policy for the European Union must not, however, interfere with existing responsibilities for culture at the regional and/or Member State levels, but rather boost culture and promote it as a unifying force.

7.2 *A European Cultural Area*

7.2.1 The Committee fully agrees with the resolution of 5 September 2001, in which the European Parliament argued that the cultural dimension of the Union should be strengthened for the future, both in political and budgetary terms, boosting cooperation between the Member States in order to create a 'European Cultural Area'.

7.2.2 The creation of a European Cultural Area would benefit the Union on two counts: firstly it would enhance the cultural wealth of Europe, and secondly it would bring economic and social advantages through the development of the creative industries.

7.2.3 Cooperation between the various players in the cultural field is helping to create such a European Cultural Area, as well as to develop artistic and literary creation, raise awareness of European history and culture, boost the dissemination of culture across Europe and worldwide, increase the value of heritage with a European dimension and promote intercultural dialogue.

7.2.4 For these reasons, the Committee proposes that consideration be given to the following initiatives:

— the introduction of incentives to promote artistic creation and provide artists with the tools they need to ensure their works can reach the public;

— backing for exchanges of live performances and extending tours across national boundaries;

— a support system so that audiovisual productions can be broadcast over the Internet, satellite television and specialist TV channels; and

— closer links between the creative industries and research and technological development, so as to be able to offer innovative products and services with higher added value.

7.3 *Definition of the creative industries*

7.3.1 The Committee feels there can be no discussion of the creative industries without first determining their scope, however wide this may be: restrictive criteria are unnecessary, and the list may remain open-ended.

7.3.2 The huge diversity of sectors that fall within the concept of 'the creative industries' presents a range of issues that are as varied as the sectors themselves. In order to be able to identify the problems affecting the creative industries as a whole, and each specific sector, and possible solutions to them, the Committee believes it is necessary to define what is meant by 'the creative industries' and which sectors of creative and productive activity fall within this category.

7.3.2.1 The Committee has contributed towards this by listing a series of criteria in point 4 of this opinion.

7.3.3 With this in mind and despite the wide-reaching nature of cultural policy, the measures taken to support the cultural sector should be based on an inclusive, global strategy.

7.4 *Support for the creative industries*

7.4.1 In accordance with Article 157, it falls to the European Union to create an environment that is favourable to the development of the creative industries, as with all other sectors of industry, enabling the latter to benefit from the findings of research, technological progress, better access to funding and the advantages of cooperation within a European Cultural Area.

7.4.1.1 The creative industries generally lack a model for access to funding which suits the sector's requirements. Banks and the financial services sector generally look upon the creative industries as high risk enterprises.

7.4.1.2 A loan guarantee system would cover all or part of the risk assumed by a financial body in granting finance to a creative industry which might prove unable to repay the loan.

7.4.1.3 The introduction of Community support might be considered in this connection under the aegis of the European Investment Bank, with European Commission involvement, and channelled through selected financial intermediaries in the Member States.

7.4.1.4 The Commission's initiative for a Community action programme to promote bodies active at European level in the field of culture should also be mentioned here.

7.4.2 The challenges linked to the problems faced by businesses in the cultural sector must be analysed in depth and solutions must be found to bring an end to anomalies. This has not yet been achieved in the audiovisual sector, where the same problems are identified over and over again but no lasting solution has been found.

7.4.3 The Commission and the Member States must take the necessary measures to ensure that people working in the creative industries can enjoy the same freedom of movement as their products as well as freedom of establishment, in accordance with the provisions of the Treaty.

7.4.4 Given that some of the problems facing operators in these sectors stem from their lack of management skills and knowledge, or from the fact that these are difficult to access, the Commission and the Member States should provide the necessary resources to ensure that the creative industries receive assistance, information and training. The latter should be similar to that which is offered to SMEs but specifically adapted to the creative industries. This would involve extending initiatives of the Media Desk type to other areas.

7.5 *Cultural education and awareness-raising*

7.5.1 The creative industries need above all an audience, spectators, listeners and consumers. The general public, in particular young people, need to be made more aware of and take a greater enjoyment in cultural products. It is therefore necessary to promote and step up actions in the area of education for culture particularly in schools. An open-minded attitude to culture and the diversity of the European cultural heritage can be particularly well communicated in the home and at school.

7.5.2 Public authorities and schools play an important role in this. Television and radio, publicly and privately owned media that are present in every home, must increase culture's attractiveness by broadcasting programmes that promote cultural education and make the most of the cultural heritage.

7.5.3 A platform should be established at European level to put joint measures in place to raise awareness and to link up national initiatives.

7.6 *Support for artists and other creative performers*

7.6.1 Both the Commission and the Member States must work together to break down all barriers and other difficulties that prevent the free movement of artists and other creative performers. Both cultural goods and the people who create, write and interpret them must be able to move freely.

7.6.2 As such, and with a view to finding a solution to the many problems affecting artists and other creative performers, the Section shares the opinion outlined in the European Parliament's Resolution of 4 September 2003 concerning the creation of a 'statute of the artist' for artists which would offer them social protection, facilitate their mobility, and make specific reference to the applicable legislation governing intellectual property rights.

7.6.3 Small and micro enterprises in the creative industries should also receive support for developing their business activities, through cooperation platforms being set up and appropriate further training being offered. It can help these firms to receive assistance at exhibitions, trade fairs, presentations and business missions so that they can operate on international markets.

7.7 *Cultural industry, freedom and pluralism*

7.7.1 Anyone living in a country with strong democratic institutions will understand the true meaning of the statement: 'culture sets us free'.

7.7.2 Strengthening culture and promoting free access to culture for all citizens is therefore essential to ensuring full respect for the right to freedom of expression and information enshrined in Article 11 of the EU's Charter of Fundamental Rights.

7.7.3 Beyond the economic and social dimension, the importance of the cultural industry thus lies also in its potential to promote European democratic values. Not least through updating the legal framework, it is therefore essential to ensure the competitiveness and pluralism of the cultural industry in the face of the gradual globalisation of markets, the growing convergence of the media encouraged by digital technology, and the gradual concentration of the groups which own the industry.

7.7.4 It is for this reason that the section wishes once again to express its support for all European initiatives and proposals intended to defend the pluralism of information and culture and ensure that there are checks on any concentration.

Brussels, 28 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

APPENDIX

to the Opinion of the European Economic and Social Committee

The following amendments, which received at least one quarter of the votes cast, were rejected in the course of the discussion:

New point 2.1.1.3

'What constitutes culture is in the eye of the beholder, so it is difficult to give a clear-cut definition. Culture also includes all types of sporting events, and all those activities pursued by people across Europe in various types of association, such as folk music, folk dance, and arts and crafts.'

Result of the vote:

For: 16, against: 37, abstentions: 7.

New point 2.1.1.4

'We in Europe also have a duty to protect and advance the specific culture of the Sami people and of other indigenous and minority populations. In this context, language is particularly important.'

Result of the vote:

For: 21, against: 44, abstentions: 9.

New point 2.1.2.1.

'Culture is not just a matter of performers but of users, too. There is a huge imbalance in access to culture, and this is a key issue for cultural policy. Every citizen must have the right and opportunity to be both performer and user of culture.'

Result of the vote:

For: 30, against: 36, abstentions: 4.

New point 4.2.2.2

'In an increasingly multicultural Europe, it is particularly important to safeguard the specific cultures of the new Member States'.

Result of the vote:

For: 26, against: 31, abstentions: 8.

Opinion of the European Economic and Social Committee on the 'proposal for a Council Directive amending Directive 77/388/EEC to extend the facility allowing Member States to apply reduced rates of VAT to certain labour-intensive services'

(COM(2003) 825 final – 2003/0317 (CNS))

(2004/C 108/15)

On 18 December 2003, the Council of the European Union decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned proposal.

Given the urgency of the work, the Committee decided at its 405th plenary session (meeting of 28 January) to appoint Mr Malosse as rapporteur-general and adopted the following opinion with 40 votes in favour and four abstentions:

1. The proposal's content and raison d'être

1.1 The Vienna European Council of 11 and 12 December 1998 recommended as part of the 'Vienna Strategy for Europe' that Member States which so wished should be allowed on an experimental basis to apply a reduced VAT rate to labour-intensive services so as to test the impact of such reductions on job creation and action to curb the underground economy.

1.2 The Council of Ministers adopted an ad hoc Directive (1999/85/EC) on 22 October 1999 on the basis of this recommendation. Nine Member States – Belgium, Greece, Spain, France, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom – availed themselves of the possibility. In the wake of reports evaluating the impact of the measures, the European Commission presented a proposal for a directive for simplifying and rationalising the reduced VAT rates [1] on 23 July 2003, since the 1999 directive was due to expire on 31 December 2003.

1.3 Because of numerous divergences, the Council of Ministers has not been able to adopt a new directive, this being an area in which a unanimous vote is required.

1.4 Consequently, and given the risk of legal uncertainty in the Member States applying the reduced rates, the Commission, in agreement with the Council, has now proposed extending the 1999 directive until 31 December 2005. This proposal merely amends the period of validity of the 1999 directive without making any other changes. It does not take account of the European Commission's proposals for simplification and rationalisation or the Member States' requests for changes or additions to be made to the sectors benefiting from these measures.

[1] COM(2003) 397 final of 23.7.2003

2. The European Economic and Social Committee's opinion

2.1 The EESC endorsed the principle of applying reduced VAT rates to labour-intensive services in its opinion of 26 May 1999 [2]. It did so again in an opinion adopted at the plenary session on 30 October 2003 (rapporteur: Mr Bedossa) on the European Commission's amended proposal for rationalising and simplifying the 1999 directive.

2.2 In this opinion the EESC was much more positive than the European Commission in its assessment of these measures' impact in terms of creating jobs and curbing undeclared work.

2.3 The EESC also made a series of suggestions for extending the VAT reductions to other sectors such as restaurant services, for maintaining the reductions for hairdressing and small repair services and for adding, in category 10, historic and religious buildings and buildings of private and professional/industrial cultural and architectural heritage.

2.4 The EESC therefore endorses the principle of continuing to apply the reduced VAT until 31 December 2005 in order to avoid the serious consequences of a legal vacuum or the sudden cessation of measures which have had a demonstrably favourable impact.

2.5 The EESC nonetheless regrets that the Council was unable to agree on the European Commission's proposal for a directive to rationalise and simplify the system. It would point out that the principle of unanimous voting in tax matters has been a definite obstacle here.

[2] OJ C 20 of 22.7.1999

2.6 So as to prevent a legal vacuum from arising once again in the near future and given the very positive assessment of the measure's impact, the EESC would urge Member States to reach rapid agreement on the proposal for a directive of 23 July 2003 on the global revision of the reduced VAT rates with a view to their simplification and rationalisation (COM(2003) 397 final – CNS 2003/0169), and calls on the Council to adopt this proposal as soon as possible and in so doing to include in it the activities listed in point 2.3.

2.7 Finally, the EESC would point to the efforts that will have to be made to highlight the importance of the reduced rates for the new Member States that will join the EU on 1 May 2004. Employment and undeclared work are a serious problem in many of these new Member States. The EESC would also ask the European Commission to evaluate the impact of VAT reductions more effectively, in conjunction with the Member States and with economic and social players, who are in the best position to pass judgment.

Brussels, 28 January 2003

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'proposal for a Council Regulation amending Regulation (EC) No. 1673/2000 on the common organisation of the markets in flax and hemp grown for fibre'

(COM(2003) 701 final - 2003/0275 CNS)

(2004/C 108/16)

On 1 December 2003 the Council decided to consult the European Economic and Social Committee, under Article 37 of the Treaty establishing the European Community, on the above-mentioned proposal.

On 9 December 2003 the Committee Bureau instructed the Section for Agriculture, Rural Development and the Environment to prepare the Committee's work on the subject.

In view of the urgency of the matter, at its 405th plenary session (meeting of 28 January 2004) the European Economic and Social Committee decided to appoint Mrs Santiago as rapporteur-general and adopted the following opinion with 31 votes in favour and one abstention.

1. **Introduction**

1.1 On 27 July 2000 the Council adopted Regulation (EC) No. 1673/2000 amending the common organisation of the markets in flax and hemp grown for fibre. The regulation entered into force on 1 July 2001.

1.2 Article 15(1) of the regulation stipulated that not later than 31 December 2003 the Commission was to submit a report on production trends in the sector in the various Member States and the impact of the reform on the sector's outlets and economic viability. The report was also to examine the maximum content of impurities and shives applicable to short flax fibre and hemp fibre.

1.3 The Commission considers that although the information gathered indicates that the arrangements have had clear positive effects on the sector, the data currently available do not allow for a detailed analysis of the production trends in the Member States or of whether or not the NGQs have been set at the correct level.

1.4 In these circumstances, the Commission thinks that the existing system of aid should not be modified until a more complete analysis of trends in the sector is available. This analysis will be carried out for the report planned for 2005.

1.5 The Commission therefore proposes that the possibility for Member States to derogate from the 7.5 % limit on impurities and shives should be extended until the 2005/06 marketing year, allowing aid to be granted for short flax fibre and hemp fibre containing a percentage of impurities and shives of less than 15 % and 25 % respectively.

1.6 The Commission considers that retaining the current aid system and prolonging the derogation for a further two years should consolidate the positive development the sector is experiencing.

1.7 As the accession countries are also producers of flax and hemp fibre, the proposal will help them adapt to the changes in the sector.

2. **Comments**

2.1 The Committee endorses the proposal and is pleased that the Commission has recognised that a sudden move to the new system of a single payment per farm would slow down the positive trends in the sector. This position is in keeping with the views expressed by the Committee in previous opinions.

Brussels, 28 January 2004

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)'

COM(2003) 356 final - 2003/0134 (COD)

(2004/C 108/17)

On 25 July 2003 the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Economic Community, on the above-mentioned proposal.

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 16 December 2003. The rapporteur was Mr Hernández Bataller.

At its 405th plenary session (meeting of 29 January 2004) the European Economic and Social Committee adopted the following opinion by 77 votes to eight with ten abstentions.

1. **Introduction**

1.1 In the green paper on consumer protection in the European Union ([1]), the European Commission outlined the case for reform of EU consumer protection legislation, identifying a framework directive containing a general duty in relation to unfair commercial practices as a possible basis for reform.

1.2 The Committee issued an opinion on this green paper ([2]), expressing support for a framework directive and agreeing that 'a general clause containing a legal standard is a flexible and suitable instrument to govern marketing behaviour in a very dynamic area, which is constantly developing and undergoing change' ([3]).

1.3 The follow-up communication to the green paper ([4]) provided information on the results of the consultation and an outline of how the framework directive harmonising the relationship between unfair competition, consumer protection and the role of codes of conduct could be structured.

1.4 Around the same time the Commission approved a Communication on sales promotions in the Internal Market and a Proposal for a European Parliament and Council Regulation on sales promotions in the Internal Market ([5]). In its opinion on these documents ([6]) the Committee recommended that the Commission revise the proposal, taking particular account of the public debate on the green paper on consumer protection, so as to ensure that the various Community policies are consistent with each other.

2. **Content of the proposed directive**

2.1 The proposal defines the conditions which determine whether a commercial practice is unfair; it does not impose any positive obligations which a trader has to comply with to show that he is trading fairly.

2.2 It contains an internal market clause which provides that traders have to comply only with the requirements of the country of origin and prevents other Member States from imposing additional requirements on those traders who do so (i.e. mutual recognition).

2.3 It fully harmonises EU requirements relating to unfair business-to-consumer commercial practices and provides – according to the Commission – an appropriately high level of consumer protection.

2.3.1 This harmonisation relates to those unfair commercial practices which harm consumers' economic interests. Hence consumer health and the safety aspects of products are outside its scope, except misleading health claims which will be appraised under the provisions on misleading commercial practices.

2.3.2 The proposed directive will apply where there are no specific provisions in sectoral legislation governing unfair commercial practices. Where such specific provisions do exist, they will take precedence over the framework directive.

2.4 It contains a general prohibition which will replace existing national general clauses and divergent principles. Its aim is to define a common EU framework.

([1]) COM(2001) 531 final
([2]) OJ C 125 of 27.5.2002.
([3]) Ibid.
([4]) COM(2002) 289 final
([5]) COM(2001) 546 final
([6]) OJ C 221 of 17.9.2002. COM(2001) 546 final.

2.4.1 The general prohibition covers unfair commercial practices. It establishes three conditions for determining whether a practice is unfair. A plaintiff will have to demonstrate that all three conditions are satisfied in order for a practice to be judged unfair:

— the practice must be contrary to the requirements of professional diligence;

— the benchmark consumer to be considered in assessing the impact of the practice is the 'average' consumer;

— the practice must materially distort or be likely to materially distort consumers' economic behaviour.

2.5 The benchmark consumer is the 'average consumer' as defined by the case-law of the European Court of Justice, rather than the vulnerable or atypical consumer. For the ECJ the average consumer is 'reasonably well-informed, observant and circumspect', with the proviso that where a specific group of consumers is targeted, the characteristics of the average member of that group are taken into account in assessing the impact of the practice.

2.6 It identifies two key types of unfair commercial practices: those which are 'misleading' and those which are 'aggressive'. These provisions apply all the same elements as are contained in the 'general prohibition', but function independently of it.

2.6.1 This means that a practice which is either misleading or aggressive according to the corresponding provisions is automatically unfair; if the practice is neither misleading nor aggressive, the general prohibition will determine whether it is unfair.

2.6.2 A commercial practice may mislead either through action or omission, and this division is reflected in the structure of the articles.

2.6.3 With regard to fair or unfair after-sale commercial practices, the proposal does not contain any definitions but instead applies the same fairness principles to commercial practices before and after the point of sale.

2.6.4 The proposal acknowledges that codes of conduct are fundamentally voluntary in nature and establishes criteria to indicate when the trader's performance in relation to the code might reasonably be expected to influence the consumer's decision.

2.6.5 It describes three ways in which a commercial practice can be aggressive, namely harassment, coercion and undue influence.

2.7 It incorporates the business-to-consumer provisions of the misleading advertising Directive and limits the scope of the existing directive to business-to-business advertising and comparative advertising which may harm a competitor, but where there is no consumer detriment.

2.8 An annex to the directive contains a short black list of commercial practices. These are practices which will in all circumstances be unfair and therefore banned in all Member States. An ex ante prohibition is therefore imposed on these specific practices.

3. **General comments**

3.1 The EESC endorses the Commission's aim of providing a high level of consumer protection and facilitating the operation of the internal market. It acknowledges not only the timeliness of the proposal, but also the effort put into the public debate sponsored by the Commission and the ex ante assessment drawn up before the presentation of the proposal. It hopes that the same approach will be followed for future proposals concerning consumer protection.

3.1.1 The EESC has already approved the Commission's new approach consisting of general legislation backed up by codes. It agrees on the need to avoid excessively detailed regulation, which is neither in the interest of consumers nor of business, and to introduce progressively the highest possible level of harmonisation of consumer protection legislation by the most appropriate means ([7]).

3.1.2 The EESC particularly welcomes the fact that the specific directives are to have precedence over the framework directive where there are divergences between them.

3.1.3 It is also important that protection from unfair commercial practices applies before and after the point of sale and/or service delivery.

3.1.4 The EESC has already welcomed ([8]) the drawing-up of codes of conduct to which firms subscribe voluntarily, provided that they are of good quality, concentrate on the definition of good practices and are monitored by the public authorities and the associations (employers, consumers, etc.) which have subscribed to them. For this reason it is pleased that the proposal provides for the possibility of legal penalties if the decisions of the bodies responsible for applying and monitoring the codes are not complied with.

([7]) OJ C 95 of 23.4.2003.
([8]) Ibid.

3.1.5 The EESC recommends that the Commission strengthen the protection afforded by the proposal as regards new technologies, especially their use by the most vulnerable groups (children in particular), so as to supplement the legal framework established by the adoption of the directive on electronic commerce ([9]).

3.2 Notwithstanding these comments, the proposed directive raises a number of basic questions:

3.3. *Specific comments*

Minimum harmonisation

3.3.1 The EC Treaty imposes on the Commission a duty to achieve results with its proposals to harmonise legislation, to ensure that they provide 'a high level of consumer protection'. This proposal, however, places more emphasis on 'establishing uniform rules at Community level and (…) clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the Internet Market and to meet the requirement of legal certainty' (4th recital to the proposal).

3.3.2 The EESC fears that the proposal will lower the existing level of consumer protection in the Member States and thinks that this will be difficult to explain to people ([10]). Hence it would like to see a standstill clause inserted in the proposal guaranteeing that existing levels of protection will not fall.

3.3.3 The EESC has already spoken out for maximum harmonisation, considering that protection of consumers in line with Article 153 should be at the highest level ([11]).

3.3.4 More progress is possibly needed on the harmonisation of contractual law along the lines already laid down in the last Commission communication ([12]).

3.4 *Scope*

3.4.1 The proposed directive creates a new legal regime for misleading advertising in relation to consumers, but does not replace the old rules which would continue to apply, with a few changes, in relation to traders. The regulation of comparative advertising is excluded from this proposed directive on consumer protection and would be covered, with the proposed changes, by the present Directive 1984/450/EEC, as amended by Directive 1997/55/EC, on misleading advertising in relation to traders. In addition, and contrary to what is stated in the proposal, this would enable the Member States to maintain or adopt provisions affording greater protection for traders and competitors from misleading advertising.

3.4.1.1 The EESC considers that the simultaneous establishment of two different legal regimes to regulate the same subject – misleading advertising – according to which economic agent is affected, traders or consumers, could considerably complicate the current legal framework and could result in inconsistencies and differences in treatment and regulation. All of this goes against the principle of legislative simplification and could lead to a lack of legal security.

3.4.1.2 The EESC considers that it would be better to have a single set of rules on misleading advertising, with this proposal either repealing the current directive or amending it. The legislative aim should be to focus on organising the internal market and strengthening consumer protection through an objective regulation which is concerned with 'the facts' – misleading advertising – and which simultaneously gives protection to all those concerned, instead of establishing two regulations which may differ in content and protection mechanisms depending on the areas in which they apply (supply or demand).

3.4.2 Assuming that the Commission does not intend to substantially widen the scope of the directive along these lines, it should, as a first step, at least provide for mandatory application *mutatis mutandis* ('reflex-application') in those cases where a commercial practice which is unfair in a business-to-consumer relation forms part of a business-to-business contractual relation at an earlier stage in the distribution chain.

3.4.3. The provision whereby the State in which the head office is located has to ensure compliance with the rules gives rise to practical problems in cases where an enterprise is involved in cross-border activities. The EESC calls upon the Commission to expand upon how the provision is to be applied in this context.

3.5 *Legal basis*

3.5.1 The basis of the proposal is Article 95 of the ECT which concerns the approximation of legislation affecting the establishment or functioning of the internal market. However, it is Article 153 of the ECT which states that the Community must ensure a high level of protection and contribute to protecting consumers' economic interests. The EESC would prefer to base the proposal on the latter article ([13]) or possibly on both articles.

3.6 *Concept of the 'average consumer'*

3.6.1 The Commission uses the term 'average consumer' in its proposal, as interpreted in the case law of the Court of Justice, i.e. a consumer who is 'reasonably well-informed, observant and circumspect'.

([9]) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce

([10]) See footnote 7

([11]) See footnote 2

([12]) COM(2003) 68 final

([13]) Footnote 2

3.6.2 The EESC fears that the use of this interpretive criterion will mean that consumer-protection policy loses its protective nature and, notwithstanding the special attention that the proposal devotes to the most vulnerable groups, fails to protect less well-informed or less well-educated consumers. It should not be forgotten that there is a material inequality between the parties in consumer-to-business relations.

3.6.3 The 'average consumer' referred to in the proposed directive has to be able to make 'informed' decisions. Under the case law prevailing in some Member States, advertisements are not required to mention anything which might be negative or detrimental for the product or service being offered. Consumers can, however, only make informed decisions if they have this information. In the EESC's view, it is important to find a clear and practical solution to this problem.

3.7 *Unfair commercial practices*

3.7.1 The Committee has already agreed that a general clause containing a legal standard is a flexible and suitable instrument for governing marketing behaviour in a very dynamic area, which is constantly developing and undergoing change ([14]).

3.7.2 The proposal has a negative approach to commercial practice and appends a list of practices that are considered unfair. The EESC considers, however, that it should adopt a positive approach to unfair commercial practice, more in line with relevant modern legislation. A commercial clause with this approach would make it possible to adjust to changing market conditions and competitive practices and to monitor dubious practices for fairness.

3.8. *Conceptual clarity of the proposal*

3.8.1 All laws should provide legal security and certainty. The proposal contains concepts alien to the laws of many Member States, e.g. 'professional diligence', which, according to the Commission, is analogous to 'good business conduct'. The EESC would suggest that the Commission clearly explain in the explanatory memorandum to the proposal what this concept means so that legal, economic and social players can understand the scope of the proposal precisely.

3.9 *Consistency with other Community legislation*

3.9.1 The EESC fears that the adoption of the directive will not increase transparency in business-to-consumer relations and that it will not be fully consistent with other Community legislation. In particular it hopes that fears of a possible clash with the proposed regulation on sales promotions in the internal market ([15]) are unfounded. The two texts should be complementary. The Committee calls on the Commission to provide further guidance on the relationship between this directive and the existing sectoral directives and other areas of law (e.g. contract law), and to make it available before the directive enters into force.

3.9.2 Some of the terms used in the proposal should be checked in the various language versions, in particular 'aggressive commercial practices'; it is not really appropriate to use words like 'coercion' and 'threat' in a private law text since such conduct would be considered a crime in many Member States' legislation.

3.10 *Out-of-court settlements*

3.10.1 To complement the codes of conduct, the proposal should consider the possibility of adopting measures for the out-of-court settlement of disputes enabling consumers and businesses to rapidly and flexibly resolve disputes over unfair commercial practices before appropriate bodies. This would be without prejudice to the fundamental right to proper legal protection from the courts. Such bodies should at all events comply with the principles of independence, transparency, the adversarial principle, effectiveness, legality, liberty and representation as set out in Commission Recommendation 98/257/EC ([16]).

3.10.2 The proposal sets out some implementing measures that the Member States have to take in order to make the directive more effective, such as the adoption of preventive measures or the possibility of requiring the trader to substantiate claims in relation to products and services. The EESC believes that consideration should be given to other measures which are only regarded as optional in the proposal and which would reinforce the application of the framework directive, such as the publication in the mass media, at the court's discretion, of the judicial decisions enforcing the cessation of unfair commercial practices.

Brussels, 29 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

([14]) Footnote 2

([15]) Footnote 6

([16]) Commission recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. OJ L 115 of 17.4.1998

APPENDIX

to the Opinion of the European Economic and Social Committee

The following amendments were defeated although they obtained at least a quarter of the votes cast.

Point 3.6

Delete points 3.6.1 and 3.6.2.

Result of vote:

For 24, against 55, abstentions 3.

Point 3.7.2

Delete.

Result of vote:

For 24, against 59, abstentions 4.

The following text from the section opinion was defeated in favour of an amendment, but obtained at least a quarter of the votes cast:

3.3.1 The EC Treaty imposes on the Commission a *duty to achieve results* with its proposals to harmonise legislation, to ensure that they provide '*a high level of consumer protection*'. This proposal, however, places more emphasis on 'establishing uniform rules at Community level and (…) clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the Internet Market and to meet the requirement of legal certainty' (4th recital to the proposal).

Result of vote:

For 28, against 53, abstentions 5.

Opinion of the European Economic and Social Committee on the 'proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the regulation on consumer protection cooperation")'

(COM(2003) 443 final – 2003/0162 (COD))

(2004/C 108/18)

On 1 August 2003 the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the above-mentioned proposal.

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 16 December 2003. The rapporteur was Mr Hernández Bataller.

At its 405th plenary session of 28 and 29 January 2004 (meeting of 29 January), the European Economic and Social Committee adopted the following opinion with 68 votes in favour and four abstentions.

1. **Introduction**

1.1 The Green Paper on European Union Consumer Protection ([1]) argued that there was a need for a legal framework for cooperation between public authorities responsible for the enforcement of consumer protection laws.

1.2 In the Follow-up Communication to the Green Paper ([2]), the Commission undertook to present a proposal for such a legal instrument.

1.3 The recent Internal Market Strategy 2003-2006 ([3]) argued that better enforcement was needed to ensure consumer confidence in the internal market and identified this proposal as a priority action.

1.4 Each Member State has developed an enforcement system adapted to its own laws and institutions. These systems have come into being in order to tackle purely domestic infringements and are not fully adapted to the challenges of the internal market. Domestic authorities lack the power to investigate infringements outside their jurisdiction.

1.5 The result is a system of enforcement in the internal market that has not adapted sufficiently to meet the demands of this market and is not, at present, able to meet the challenge posed by the unfair practices of economic operators seeking to exploit the potential of the Internet in particular.

1.6 The Commission therefore believes that consistent and effective enforcement of the various national consumer protection laws is essential to the good functioning of the internal market, the elimination of distortions of competition and the protection of consumers.

([1]) COM(2001) 531 final.
([2]) COM(2002) 289 final.
([3]) COM(2003) 238 final

2. **The Proposal for a Regulation**

2.1 The overall goals of the regulation are to ensure the smooth functioning of the internal market and the effective protection of consumers participating in this market.

2.1.1 The proposed regulation has two specific objectives to achieve these goals:

— to provide for cooperation between enforcement authorities in dealing with intra-Community infringements that disrupt the internal market. This objective is designed to ensure that enforcement authorities can cooperate efficiently and effectively with their counterparts in other Member States;

— to contribute to improving the quality and consistency of enforcement of consumer protection laws and to the monitoring of the protection of consumer economic interests. This objective recognises that the EU can contribute to raising the standard of enforcement through common projects and the exchange of best practice on a wide range of information, education and representation activities. It also acknowledges the EU's contribution to monitoring the functioning of the internal market.

2.2 These goals and objectives have determined the choice of legal basis and instrument. The Commission has opted for Article 95 of the Treaty as a legal basis.

2.3 The scope of the regulation is limited to intra-Community infringements of EU legislation that protects consumers' interests. The scope of the regulation will be enlarged when the proposed framework directive prohibiting unfair commercial practices enters into force.

2.4 Competent authorities are at the heart of the proposed regulation and must be designated by the Member States. The proposal also provides for the designation by each Member State of a single liaison office to ensure proper co-ordination between the competent authorities nominated in each Member State.

2.4.1 Competent authorities are defined as public authorities with specific consumer protection enforcement responsibilities. The proposal also ensures that only those authorities with a minimum of common investigation and enforcement powers can be designated as competent authorities.

2.4.2 The proposal does not in any way change or diminish the role played by consumer organisations in enforcing legislation, in particular with regard to bringing cross-border injunctions.

2.4.3 The proposed regulation puts in place a network of competent authorities and a framework for mutual assistance that complements those which exist already in each Member State or which exist on a sectoral basis at Community level. The proposed network is designed to provide an enforcement solution to give priority treatment to the most serious cases of dishonest cross-border practices, especially those that seek to exploit the freedoms of the internal market to harm consumers.

The competent authorities will be appointed by the Member States to ensure that account is taken of constitutional provisions governing consumer protection enforcement. Member States that do not already have competent public authorities in this area do not necessarily need to set up new public authorities, as the limited responsibilities of the proposed regulation can be carried out by existing public authorities.

2.5 The effectiveness of the enforcement network established in the proposal depends upon the reciprocal rights and obligations of mutual assistance.

2.5.1 The basis of mutual assistance is free and confidential information exchange between competent authorities. The proposal puts in place a system of exchange on request and, just as importantly, spontaneous exchange.

2.5.2 If the information exchanged confirms the existence of an intra-Community infringement, the proposal requires that competent authorities act to bring about cessation of the infringement without delay.

2.5.3 The general principle is that competent authorities can act against traders within their jurisdiction regardless of the location of the consumers involved.

2.5.4 The proposal also sets out the possibility for information to be exchanged with competent authorities of third countries under bilateral agreements.

2.6 The Community's role is limited to supporting measures which raise the standard of enforcement generally and improve the ability of consumers to enforce their rights, encouraging the exchange of best practice and co-ordinating national efforts so as to avoid duplication and a waste of resources.

2.7 The proposal provides for the submission of statistics on all complaints, the establishment of an up-to-date database for consultation by the authorities, the coordination of enforcement activities and administrative cooperation.

2.8 The proposal also provides for an Advisory Committee to be set up to assist the Commission in implementing the practical procedures for the operation of the regulation. This Committee will be composed, in particular, of representatives of the competent authorities.

3. **General comments**

3.1 The Committee shares the objectives and goals of the Commission proposal. To this end, in previous opinions [4] it urged the Commission to meet its commitment to prioritise the effective enforcement of existing legislation and co-operation between enforcement bodies, as a first step in improving current levels of cross-border consumer protection. In any event, the proposal does not exclude the possibility of bringing civil actions to ensure enforcement.

[4] EESC Opinion 344/2002 on the Green Paper on European Union Consumer Protection. OJ C 125 of 27.5.2002 and EESC Opinion 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 consumer policy strategy 2002-2006. OJ C 95 of 23.4.2003.

3.2 According to the actual proposal, the legal basis is Article 95 of the EC Treaty. However, this article only establishes provisions for the harmonisation of legislation relating to the establishing and functioning of the internal market. Given the objective laid down in the Commission proposal, namely to establish an effective system for improving the protection of consumers' economic interests, the EESC regrets that Article 153 is not mentioned as a legal basis in the actual proposal and calls on the Commission to consider how more use could be made of this article.

3.2.1 The EESC agrees with the Commission on the need to set up at least one competent authority in each Member State, and that this authority should be a public one, for the following reasons:

— only public authorities can be given the investigation powers needed to prevent cross-border infringements being committed,

— public authorities are the best placed to guarantee confidentiality and ensure that such investigations are carried out properly,

— public authorities are the only authorities that can guarantee protection for all consumers, and

— this will facilitate information exchange and help put an end to cross-border infringements.

3.2.2 In the EESC's view, the Commission should play a more active role and take part in coordination meetings.

3.2.3 As the proposal does not provide any specific measures on resolving disagreements that may arise between Member States when providing assistance, the Commission should act as mediator and provide the administrative solutions needed to facilitate this assistance. This is particularly important given that the proposal will be implemented after enlargement, which is expected to exacerbate problems relating to compliance with Article 10 of the EC Treaty since administrative cultures in most of the new countries are not sufficiently familiar with such practices.

3.2.4 The proposal is unclear regarding the conditions for reimbursement of costs or losses incurred as a result of measures held to be unfounded by a court as far as the substance of the intra-Community infringement is concerned. It needs to specify that such court decisions must be final judgments and not therefore open to appeal. What happens if the requested Member State considers it to be inadmissible to bring an appeal but the applicant Member State thinks otherwise? The proposal does not seem to provide for such a situation, which is not merely hypothetical.

3.2.5 As regards requests for mutual assistance, a request may be refused if it would impose a disproportionate administrative burden in relation to the scale of the intra-Community infringement, in terms of the potential consumer detriment. This would seem to suggest that 'de minimis' infringements of consumer protection could be committed in other Member States without any penalty whatsoever being imposed. The EESC fears that such situations could arise as, exceptional cases aside, consumer complaints are usually for relatively low amounts.

3.2.6 The proposal stipulates that a request for mutual assistance may be refused if the request is not well founded. This solution is excessively rigid; in such cases, consideration should be given to allowing the request to be modified by a given deadline, before it is refused altogether.

3.2.7 Nor does the proposal grant a Member State the right to appeal if it considers another Member State's refusal to comply with a request for assistance to be unfounded.

3.3 In the interests of transparency and without prejudice to the deletion of confidential data, the database of statistics on consumer complaints should be accessible to the public, in particular to the most representative employers' associations and to consumers' associations that are qualified to bring cross-border injunctions ([5]), and to universities and research centres.

3.4 The EESC welcomes the proposed enforcement coordination. However, it believes that before officials are exchanged, they should be given appropriate training on the legislation in the 'host' Member State to avoid, as far as possible, problems relating to civil liability.

3.5 As regards administrative cooperation measures, the proposal stipulates that these will be coordinated between the Commission and the Member States, but fails to take account of the relevant role that could be played by civil society in carrying out such activities, in particular employers' and consumers' associations.

([5]) Article 3 of Directive 98/27/EC of the European Parliament and of the Council of 19.5.1998 on injunctions for the protection of consumers' interests. OJ L 166 of 11.6.1998.

3.6 The Standing Committee envisaged in the proposal will examine and evaluate how the arrangements for cooperation are working. However, it will have no competence whatsoever as regards assistance.

3.7 The proposal stipulates that every two years following its entry into force, the Member States must report to the Commission on the application of this regulation. However, the EESC regrets that there is no obligation on the Commission to submit a regular report on the application of the regulation at Community level, with data from all the Member States. Such a report should be sent to the European Parliament and the EESC.

3.8 The definition of the scope of the regulation in Article 3(a) is incorrect in referring to the exhaustive list of Directives found in Annex I. The aforementioned indent (a) should simply provide a number of examples and therefore be worded as follows: 'in particular the Directives listed in Annex 1'.

Another less satisfactory alternative would be to add at least the following omitted Directives to Annex 1:

— Indication of prices of products offered to consumers (98/6/EC)

— Labelling, presentation and advertising (79/112/EEC and 2000/13/EC)

— General product safety (92/59/EEC)

— Safety of toys (93/68/EEC)

— Liability for defective products (1999/34/EC)

— Protection of individuals with regard to the processing of personal data (95/46/EC and 2002/58/EC).

3.9 It would seem unnecessary for consumers to be harmed in at least three Member States for activities to be coordinated. Article 9(2) should not therefore state 'in more than two Member States' but 'in at least two Member States' or 'in two or more Member States'.

3.10 Articles 6, 7, 8, 9, 10, 14, 15, 16 and 17 all refer to Article 19(2). This article should therefore stipulate the procedure to be adopted and not merely refer to Articles 3 and 7 of Decision 1999/468/EC, which is in this way transposed into the national legislation of the Member States.

Moreover, the procedures laid down in this Decision are too bureaucratic to be applied in connection with this Regulation, which should lay down its own more easily implemented mechanisms.

Brussels, 29 January 2004

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'Commission Report XXXIInd Competition Policy Report 2002'

SEC(2003) 467 final

(2004/C 108/19)

On 25 April 2003 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the: XXXIInd Competition Policy Report 2002.

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 16 December 2003. The rapporteur was Mr Metzler.

At its 405th plenary session (meeting of 29 January 2004), the European Economic and Social Committee adopted the following opinion by 60 votes to 18, with three abstentions.

1. Introduction: General Background

1.1 As Commissioner Monti pointed out in his foreword to the XXXIInd Competition Policy Report 2002 (hereafter 'the report'), the keynote of Commission competition policy in 2002 was sweeping modernisation. In the field of antitrust, new procedural provisions were adopted doing away with the Commission's monopoly on exemptions and decentralising the application of antitrust measures. In order to improve the effectiveness of controls on business concentrations, especially in the context of EU enlargement, a proposal was submitted for amending the merger regulation. In addition, a series of measures were set in motion to enhance the procedural rights of the parties in the merger control procedure. In the area of state aid control, the Commission has continued to work on streamlining procedures and increasing the transparency of decision-making.

1.2 One of the main purposes of European competition policy is to promote and protect the interests of consumers, that is, to ensure that consumers benefit from the wealth generated by the European economy. The introduction to the report sets out the twofold broad objective of the Commission's competition policy: addressing market failures resulting from anticompetitive behaviour by market participants and from certain market structures, on the one hand, and contributing to an overall economic policy framework across economic sectors that is conducive to effective competition, on the other.

1.3 The report also provides a comprehensive survey of the activities of DG Competition in 2002, explains its policy, describes the various legal acts passed and provides details of numerous individual cases. The total number of new cases in 2002 was 1,019 (below the 2001 figure of 1,036). Of these new cases, 321 were antitrust cases (284 in 2001), the number of merger cases decreased further to 277 (335 in 2001) and the number of state aid cases remained more or less the same at 421 (417 in 2001). The number of cases closed once more showed a year on year increase, rising to 1,283 (1,204 in 2001), of which 263 were antitrust cases, 268 mergers and 652 state aid cases.

1.4 The report is divided into six sections, dealing with antitrust, merger control, state aids, services of general interest (SGIs), international activities and the outlook for 2003. The following is a summary of the key points of the first five sections referring to 2002, with the Committee's comments.

2. Antitrust – EC Treaty Articles 81 and 82; State monopolies and monopoly rights – EC Treaty Articles 31 and 86

2.1 The Treaty establishing the European Coal and Steel Community (ECSC) expired in 2002 after 50 years with the result that the sectors which came under the ECSC are now subject to the primary and derived legislation of the EC Treaty.

2.2 In December 2002 the Council adopted Regulation No. 1/2003 implementing the competition rules laid down in Articles 81 and 82 of the Treaty ([1]), which is intended to replace the old antitrust regulation No. 17 in force since 1962. The new rules, which are a radical reform of the old arrangements, are to come into force on 1 May 2004 to coincide with enlargement.

([1]) cf. ESC opinion on the White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty, OJ C 51/55 of 23.2.2000, and the ESC opinion on the draft Regulation in OJ C 155/73 of 29.5.2001.

2.2.1 One salient feature of this reform is the shift from a system of notification and authorisation to one of legal exception, where companies must verify the conformity of their agreements with the EC Treaty themselves. Agreements falling within the scope of Article 81 of the EC Treaty are effective immediately even when no block exemption regulation applies – unlike under the notification and authorisation system – as long as the requirements of Article 81(3) are satisfied. This is a positive development, as a legal exception system provides greater protection for competition because the European Commission can in future concentrate on the cases with competition policy implications. The legal exception system relieves businesses of an unnecessary bureaucratic burden. However, the lack of legal clarity for companies which nevertheless goes along with this change could have been mitigated if the regulation had given businesses the right to apply for a reasoned opinion from the Commission in specific, difficult cases instead of leaving them to rely on informal advice which the Commission is not obliged to give out. The Commission must at all events be ready to give an opinion not only in the case of new factual and legal queries, but also in the event of major investments and major or irreversible structural changes ([2]).

2.2.2 European antitrust law will in future be applied directly by national competition authorities and national courts on a decentralised basis, while competition authorities in the Member States will collaborate closely in a European competition network with the Commission and with each other. However, the Committee would like to see the one-stop-shop principle more firmly established to exclude the possibility of companies being the subject of antitrust proceedings in more than one Member State at once. Since the regulation does not itself contain any detailed criteria for case allocation, the Committee recommends that the Commission create the necessary legal certainty for companies by means of relevant guidelines ([3]).

2.2.3 In future it is to be permissible for national law to be applied alongside EC law, though the application of national competition rules may not produce an outcome which deviates from that resulting from the application of EC Treaty Article 81, as pointed out in the Commission report. In the interests of creating equal conditions and a level playing field in Europe, it would have been preferable if – contrary to Article 3(2) of Regulation 1/2003 - the Commission had also enforced uniform application of EC law in the case of unilateral conduct. For example, national law may result in prohibitions which deviate from EC law, thus hampering business activity in Europe.

2.2.4 In order to ensure that EC competition rules continue to be enforced effectively under the legal exception system, it is a logical step for the Commission to have extended its powers of investigation. However, the regulation only partially guarantees companies' rights of defence. Care should be taken to ensure that the general principles of legal process are respected in proceedings against companies if they are not explicitly mentioned in the regulation itself. It would be preferable if the Commission were to make this clear in the notices it announced ([4]).

2.2.5 In the Committee's view, it is also important to ensure the greatest possible transparency when the competition rules are applied decentrally by national authorities. The Commission should press for at least all final decisions by national authorities to be published.

2.3 In February 2002 the Commission adopted a revised leniency policy which is designed to be more predictable for companies than its predecessor was. The success noted by the Commission in the antitrust field – some ten different cartels were discovered in Europe in the first ten months after the entry into force of the new leniency policy – is evidence that the new regulations are well thought out. The Committee would recommend integrating the directly relevant guidelines on setting fines if the leniency policy is revised once again. It would also be preferable for the Commission to take greater account of the actual damage caused by the infringement of competition rules and its implications when calculating fines.

2.4 In 2002 the Commission made the fight against cartels and the handling of antitrust cases a top priority, even more so than in 2001, adopting a total of nine decisions and imposing fines amounting to some one billion euros. However, there were no decisions adopted on the basis of Treaty Article 82.

2.5 The report details developments in competition in particular industries.

2.5.1 In the energy sector, work is underway on the Acceleration Directive and the regulation on cross-border energy trade which will further liberalise the energy market and are intended to enhance competition in energy markets while maintaining the security of supply ([5]). However, the Commission was unable to impose an earlier date than 2007 for complete market opening for private consumers, which has once again delayed the creation of the common energy market.

([2]) cf. ESC opinion on the draft Regulation, OJ C 155/73, point 2.8.2.5
([3]) cf. ESC opinion, OJ C 155/73, point 2.10.1.
([4]) cf. ESC opinion, OJ C 155ç/73, point 2.12.
([5]) cf. ESC opinion the two drafts, OJ C 36/10 of 8.2.2002

2.5.2 In the postal sector, following a proposal from the Commission, the Council and the European Parliament adopted the new postal directive (2002/39/EC) ([6]), which provides for further opening of the market by progressively reducing the reserved area until 2006.

2.5.3 In the telecommunications sector, the Council adopted a new legal framework consisting of five directives for the ex-ante regulation of electronic communications networks and services, overhauling the legal framework for telecommunications and opening it up to greater competition ([7]). Particular attention should be paid to the new definition of the notion of 'significant market power' (SMP) in Article 14 of the framework directive 2002/21/EC in line with the definition of dominance under Article 82 of the EC Treaty. This deregulation will have implications for all market players.

2.5.4 In air transport, the block exemption regulation 1617/93 was extended in June 2002 and in maritime transport, the Court of Justice delivered three judgements on the block exemption regulation 4056/86, which the Commission would like to revise after 15 years in force in order to simplify it. For rail transport, the Commission submitted a number of proposals for legislation to integrate national rail networks into a single European railway area. The Commission is right when it points out that, even today, there is still no effective competition in the railway market.

2.5.5 In the media field, the Commission looked at the joint selling of TV rights to football events, objecting to the conferring of exclusive rights as this increases media concentration and threatens to stand in the way of competition between broadcasters.

2.5.6 In October 2002, the new motor vehicle block exemption regulation 1400/02 entered into force. This deals with the distribution and repair of motor vehicles and the selling of spare parts, as well as introducing new marketing methods, such as Internet sales and multi-branding ([8]). By tightening the regulations, the Commission hopes to create more intense competition between dealers, to make cross-border motor vehicle purchase easier and to enhance price competition. The combination of exclusive and selective distribution and the enactment of location clauses are no longer allowed under the new regulation. Whether the Commission's objectives are ultimately achieved depends on future market developments, as will be ascertained in further market monitoring exercises. Appropriate steps should then be taken.

([6]) cf. ESC opinion on the draft directive, OJ C 116/99 of 20.4.2001
([7]) cf. ESC opinion on the five draft directives, OJ C 123/50, C 123/53, C 123/55 and C 123/56 of 25.4.2001
([8]) cf. ESC opinion on the draft regulation, OJ C 221/10 of 17.9.2002

2.5.7 In the area of financial services, the Commission published a draft block exemption regulation in the insurance sector in July 2002, which was adopted with minor modifications on 27 February 2003. Instead of listing the provisions exempted from antitrust rules, the regulation now only lists those arrangements which may not be contained in exempted agreements. Furthermore, the exemption of co-insurance groups is linked to emerging market power. This is consistent with the business-oriented approach now also followed by the Commission in other block exemption regulations.

2.5.8 In order to promote the information society, the Commission continued with its efforts to create an open and competitive environment for the development of the Internet and e-commerce. In this context, it was particularly concerned with Internet access markets and complaints against registry operators of top-level domain names under Article 82.

2.5.9 A comparatively large amount of space in the report is taken up with a discussion of the liberal professions.

2.5.9.1 The Committee welcomes the Commission's efforts to make the liberal professions sector more transparent for consumers ([9]). The Commission reports that it has commissioned a comparative economic cost-benefit analysis of the regulation of liberal professions in the Member States. The Commission has also entered into discussions with national competition authorities on the regulation of the liberal professions. Consultation with national competition authorities, who are familiar with binding national rules on the liberal professions, is a welcome first step in this direction. To ensure that the process is transparent, representatives of the individual professions should be consulted for their expert input.

2.5.9.2 The Committee welcomes the application of competition rules in principle. Since the liberal professions fulfil social as well as economic functions and are thus subject to binding legal requirements, the Committee feels that the competition rules must respect the minimum level of regulation needed to comply with these binding legal requirements ('code of conduct'). This was confirmed by the judgement of the Court of Justice in the Wouters case cited in the report. In terms of integration, the Committee sees a further problem in that disregarding the code of conduct of the liberal professions could prompt those Member States which currently operate a self-governing model to resort to individual state regulation in conformity with antitrust law. The result would be greater individual state regulation of the liberal professions sector, which would be detrimental to consumers and the general interest.

([9]) This is also expressed in work on the mutual recognition of qualifications directive.

2.5.9.3 The Commission does not question the existence of self-regulating bodies, but, with a view to the primary objective of consumer protection, intends to review the grounds for rules in the areas of fee scales, multidisciplinary partnerships, advertising, soliciting clients and access to the profession. The Committee would point out that many regulations to do with the liberal professions may also exist specifically for the purpose of consumer protection.

3. **Merger control**

3.1 In 2002 the Commission did not make one prohibition decision under merger control law (cf. five in 2001). Seven mergers were approved in Phase II (cf. 20 in 2001). Of 275 final decisions, 252 were taken in Phase I, 111 of these in the simplified procedure.

3.2 There were three significant judgements by the Court of First Instance in which merger prohibition decisions were overturned, namely the Airtours/First Choice decision, the Schneider/Legrand decision and the Tetra Laval/Sidel decision. The Airtours judgement clarifies what evidence is needed to prove collective market dominance on the basis of tacit coordination by companies. The Schneider judgement revealed errors of analysis and assessment by the Commission, as well as infringement of the rights of the defence. In the Tetra-Laval judgement, which the Commission challenged in the Court of Justice because of its fundamental importance, it was the first time a European court has been involved in ruling on conglomerate mergers, that is, mergers of companies which operate in different markets.

3.3 The total number of referrals between the Commission and the Member States has increased. 11 cases were referred from the Commission to the Member States (cf. seven in 2001) and for the first time there were two referrals from several Member States to the Commission.

3.4 It should be noted in particular that the Commission intends to carry out a reform in the area of merger control. To this end it submitted the draft of a new merger control regulation in December 2002 ([10]). At almost the same time it also published a draft notice on the appraisal of horizontal mergers ([11]) and certain best practice recommendations and other administrative measures designed to enhance transparency as well as the current internal procedures and systems within Merger Control. The reason behind this is first and foremost, after over twelve years' of practical implementation, to prepare the Community's merger control legislation for the challenges of the coming years (EU enlargement to the east, the increase in mergers worldwide as a result of globalisation) and to simplify and speed up the merger control procedure as a whole.

3.4.1 The draft regulation contains some improvements, which the Committee welcomes, but on other points it falls short of expectations. The proposed simplifications of the investigation procedure are well conceived ([12]). For example, the removal of the one-week deadline (notification within a week of the contract being signed) allows better management of concentrations for which there also has to be notification outside Europe. It also allows scope for being able in future to give notification of a merger as soon as there is a firm intention to sign a contract. The Committee also supports the Commission in allowing concentrations to be effected immediately, where notification may be given through the simplified procedure, rather than only after completion of the investigation procedure. This is consistent with companies' practical needs. Another key element of the reform is the possibility of extending the investigation procedure in both phases if the circumstances warrant this. At the same time, care must be taken to ensure that the strict system of deadlines is in no way abandoned so as not to compromise the speed of concentrations.

3.4.2 The Committee is pleased to note that, for reasons of legal certainty, the Commission wishes to stick to the original market dominance test and not to switch to the substantial lessening of competition test ([13]). However, the Committee is concerned about the broad wording of Article 2(2) of the draft regulation. The proposed wording of this paragraph is based on the concrete intention of closing a glaring loophole in the market dominance test which has supposedly existed up till now in the case of concentrations in concentrated markets where market dominance does not arise. According to Article 2(2), one or more undertakings shall already be deemed to be in a dominant position 'if, with or without coordinating, they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition'. The Committee takes the view that the new Article 2(2) of the draft regulation does close up any loophole there might be, but, because of its broad wording, significantly lowers the intervention threshold, creating new uncertainties, which call into question the tried and tested decision-making practice of the European courts and the Commission. The Committee therefore urges the Commission to address only the special case of 'unilateral effects', but otherwise to keep to the old notions so as to prevent a loss of legal certainty for European businesses. ([14]) The original market dominance test should therefore be retained.

([10]) cf. ESC opinion on the draft regulation, CESE 1169/2003 of 24.9.2003

([11]) cf. ESC opinion on the draft communication, CESE 1170/2003 of 24.9.2003

([12]) cf. ESC opinion on the draft regulation, CESE 1169/2003 of 24.9.2003 , point 3.10, and on the Green Paper on the Review of the Merger Regulation, OJ C 241/130 of 7.10.2002, point 3.3.1

([13]) cf. ESC opinion on the draft regulation, CESE 1169/2003 of 24.9.2003 , point 3.10, and on the Green Paper on the Review of the Merger Regulation, OJ C 241/130 of 7.10.2002, point 3.2.13

([14]) cf. ESC opinion on the draft communication, CESE 1170/2003 of 24.9.2003, point 3.1.4.

3.4.3 The Committee also welcomes the Commission's intention in future to carefully examine arguments about efficiency in its overall appraisal of a concentration. This is the only way Merger Control can serve the interests of European consumers in the long term ([15]). With regard to the relevant discussions among interested circles, it would also be preferable for the Commission to take a clear position on the circumstances under which increased efficiency achieved through a merger may exceptionally be held against the companies concerned. With no such clarity on this point there is a risk that companies will continue not to cite efficiency as a motive, thereby rendering the Commission's new policy ineffectual. ([16])

3.4.4 The Commission's efforts to extend more or less the same powers of investigation and intervention contained in the new regulation No. 1/2003 on antitrust procedure to merger control are problematic. The prosecution of antitrust violations and the investigation of company concentrations are two different objectives requiring the use of different means. Antitrust violations are directly detrimental to third parties and consumers and are punishable by fines, or in some countries even with criminal sentences. Merger control is not a question of confirming an initial suspicion of unlawful conduct and then prosecuting by the usual methods. In the vast majority of cases, concentrations are lawful processes, as witnessed by the low number of prohibitions. The Committee therefore advises the Commission against making any changes in the area of merger control, recommending that explicit recognition of the ban on self-incrimination and other rights of defence enjoyed by businesses, such as legal privilege for external and internal lawyers, be written into the text of the regulation. Moreover, the existing system of fines and penalties should remain in place, as the fines imposed should be in reasonable proportion to the gravity of the infringement.

3.4.5 The Committee regrets that it has not been possible to extend the European Commission's competence so that there will be less multiple notifications in future ([17]). On the contrary, with EU enlargement, multiple notifications should be more frequent, involving a large bureaucratic burden, high costs and lost time for businesses. On a positive note, the Commission intends in future to decide within a short time in a preliminary procedure at the request of companies whether an intended concentration has Community-wide implications and whether the Commission is therefore responsible for investigating it. But since the decision is within the discretion of the Member States, this proposal is not expected to provide a substitute for a clear rule on competence.

3.4.6 The Committee wholeheartedly supports the proposed measures to improve economic decision-making processes in DG Competition by creating the position of Chief Competition Economist with his/her own staff. In this way the Commission is addressing the issue of insufficient economic analysis, which was the key factor in the three above-mentioned judgements overturned by the Court of First Instance. The success of this institutional renewal will depend on the Chief Competition Economist and his/her staff being involved in the assessment of individual cases at an early stage and on an ongoing basis.

3.5 The Commission is an active participant in all three subgroups of the merger control working group of the International Competition Network (ICN) set up in 2001. The Committee sees the Commission's commitment to this as extremely positive. Improving convergence and reducing the public and private burdens arising from the application of different merger control systems and multiple notifications by businesses are a major concern for European enterprises, who wish to hold their own in global competition. The Committee is very much in favour of the closest possible alignment of the various systems and the development of best practices.

4. **State aid**

4.1 In 2002, the Commission continued to push ahead with reform of both procedural and substantive rules in the area of state aid. One of the main purposes of the reform package is to streamline procedures and free the process of examining state aid from an unnecessary procedural burden, thereby facilitating speedy decisions in most cases and reserving major resources for the most contentious questions in the area of state aid. The Commission expects to be able to complete the reform before enlargement on 1 May 2004. The Committee welcomes the proposed streamlining of procedures, not least because main examination procedures have often taken longer than a year in the past, thus often exposing companies to prolonged legal uncertainty. However, the Committee feels that the measures taken to date are insufficient to actually achieve this end and calls on the Commission to lose no time in announcing the further measures it has planned so that these can indeed be implemented for 1 May 2004.

([15]) cf. ESC opinion on the Green Paper, OJ C 241/130 of 7.10.2002, point 3.2.12

([16]) cf. ESC opinion on the draft communication, CESE 1170/2003 of 24.9.2003, point 4.7.2.

([17]) cf. ESC opinion on the Green Paper, OJ C 241/130 of 7.10.2002, point 3.1.2

4.2 Already in 2001, the Commission created the state aid register and the state aid scoreboard as a basis for discussion among the Member States on how a reduction of the overall level of state aid and a redirection of aid towards horizontal objectives can be achieved. These tools were developed further in 2002. The Committee welcomes the Commission's efforts to achieve greater transparency in the area of state aid, which would seem to be especially important with regard to state aid in the accession countries. Given that there is provision, after review by the Commission, for current aid arrangements in the accession countries to benefit from inventory protection as 'existing aid' in the enlarged Community, there must be guarantees that the interest groups concerned are given the opportunity to put their views across beforehand. The Committee also recommends that the state aid register, which at present contains all decisions made after 1 January 2000, should gradually be extended back in time in order to draw on the Commission's wealth of experience for future cases.

4.3 In 2002 the Commission overhauled a series of frameworks and guidelines. The Committee welcomes the ongoing clarification and fine-tuning of the rules by the Commission. The block exemption regulation for employment aid ([18]) designed to facilitate Member States' job creation initiatives merits particular attention.

4.4 Given that the rules on state aid are applied to regional aid or other assistance in conjunction with the Structural Funds, it would be helpful if future reports contained an outline of Commission practice in this particular area.

5. **Services of general interest**

5.1 In its report to the Laeken European Council the Commission had announced a Community legal framework for aid to companies responsible for providing services of general economic interest. However, the Court of Justice, contrary to the case law of the Court of First Instance, has subsequently decided in the Ferring case that public service compensation does not constitute state aid when it merely compensates the companies concerned for services rendered. At the end of 2002, it remained to be seen whether or not the Court of Justice would stand by this change in case law. In its judgement of the Altmark case of 24 July 2003, the Court of Justice maintained the exclusion from the category of state aid recognised in the Ferring case, but made such exclusion subject to four far-reaching conditions. Firstly, the company concerned must indeed be responsible for performing SGEIs, and these obligations must be clearly defined. Secondly, compensation must be calculable on the basis of objective and transparent parameters to be established beforehand. Thirdly, compensation is only allowed to cover the cost of performing the obligations, taking into account the revenue earned and a reasonable profit. Fourthly, the level of compensation should be limited if the contracts have not been awarded through a competitive award procedure. The yardstick would be the costs incurred by an average, well-run company in fulfilling the obligations. Since compensation which does not fulfil the conditions imposed by the Court of Justice constitutes state aid, there is still a need for the proposed clarificatory Community legal framework. The Committee notes the debate with Member States' experts ushered in by the Non-Paper of 12 November 2002 and recommends concluding this debate rapidly, taking account of the Altmark judgement, in order to establish legal certainty for European businesses as soon as possible by adopting the necessary clarifications.

5.2 The Committee approves the fact that the Commission's Green Paper on Services of General Interest, announced in the report and published on 21 May 2003, begins the review called for by the Barcelona European Council (2002) into whether the principles governing services of general interest should be further consolidated and specified in a general Community framework ([19]).

6. **International cooperation**

6.1 In 2002 the Commission continued with preparations for the new accessions and enlargement negotiations, verifying to what extent the accession countries already have functional competition rules. The only field in which it found there still to be a certain number of shortcomings was that of state aid control. In 2002 the Commission included data from the accession countries in the state aid scoreboard for the first time, making it accessible to all.

6.2 In the context of bilateral cooperation, it should be noted that the Commission and the US antitrust authorities jointly adopted best practices for cooperation in merger control. The Committee considers close cooperation between merger control authorities in the world's two biggest economic blocs to be particularly important and positive, as it will lessen the risk of divergent decisions and reduce the administrative burden for the companies concerned.

([18]) cf. ESC opinion on the draft regulation, OJ C 241/143 of 7.10.2002

([19]) cf. ESC opinion on services of general interest, OJ C 241/119 of 7.10.2002

7. **Conclusions**

7.1 The report contains a great wealth of information and a series of important policy adjustments for European competition law, affecting both consumers and companies in equal measure.

7.2 The Committee's conclusions may be summarised as follows:

— The Committee is in favour of the new antitrust arrangements and the concomitant change to the legal exception system. However, the Commission should make some further improvements to the reforms contained in the modernisation package, providing greater legal certainty for companies and more firmly enshrining the one-stop-shop principle and companies' rights of defence (points 2.2.1, 2.2.2, 2.2.4).

— Greater account should be taken of the actual damage caused when calculating fines (point 23).

— Competition rules should allow the degree of regulation of the liberal professions needed to ensure that their particular remits and legal obligations are fulfilled (point 2.5.9.2).

— In reforming merger control, the Commission should only address the special case of 'unilateral effects' with the new version of the market dominance test so as to continue to ensure maximum legal certainty for companies. The Commission could increase still further the incentive to cite arguments about efficiency and should bear in mind with regard to investigative powers and the level of penalties that merger control and antitrust procedure call for different means (points 3.4.2, 3.4.3, 3.4.4).

— The Commission should publish the announced measures for reforming the area of state aid as soon as possible, allowing the parties concerned the opportunity to give their views on the future handling of 'existing aid' in the accession countries. Future competition reports could also explain Commission practice on state aid law as it relates to the Structural Funds (points 4.1, 4.2, 4.4).

Brussels, 29 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH

Opinion of the European Economic and Social Committee on the 'proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders'

(COM(2003) 687 final - 2003/0273(CNS))

(2004/C 108/20)

On 8 December 2003 the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned proposal.

The European Economic and Social Committee decided to appoint Mr Pariza Castaños rapporteur-general for this opinion.

At its 405th plenary session of 28 and 29 January 2004 (meeting of 29 January 2004), the European Economic and Social Committee adopted the following opinion by seventy-five to one, with three abstentions.

1. **Gist of the Proposal for a Regulation**

1.1 The Plan for the management of the external borders of the Member States of the European Union, approved by the Council on 13 June 2002, endorsed the setting-up of an external borders practitioners' Common Unit in the framework of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) with a view to an integrated management of the external borders.

1.2 In its conclusions on the effective management of the external borders of the EU Member States of 5 June 2003, the Council called for the reinforcement of the Common Unit as a Council Working Party made up of experts seconded from the Member States to the Secretariat General of the Council.

1.3 At its meeting on 19 and 20 June 2003, the Thessaloniki European Council endorsed the above-mentioned Council Conclusions of 5 June 2003 and called on the Commission to examine the need to create new institutional mechanisms, including the possible creation of a Community operational structure, in order to enhance operational co-operation for the management of external borders.

1.4 In its conclusions of 16 and 17 October 2003, the European Council welcomed the Commission's intention to submit a proposal to set up an Agency for the management of external borders. This proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders responds to the European Council's request. It takes account of the experiences of co-operation between the Member States in the framework of the Common Unit, from which the Agency will take over the task of co-ordinating operational co-operation.

1.5 Following the integration of the Schengen acquis into the EU framework, common rules on the control and surveillance of the external borders already exist at Community level. These common rules are applied at an operational level by the competent national authorities of the Member States belonging to the area without internal borders. The objective of this Regulation is, thus, to optimise the implementation of Community policy on the management of the external borders by better co-ordinating operational co-operation between the Member States via the creation of an Agency.

1.6 The Agency will perform, in particular, the following tasks:

— coordinate joint operations and pilot projects between the Member States, and between the latter and the Community, in order to improve the control and surveillance of the EU's external borders;

— provide training at European level for instructors of the national border guards in the Member States, as well as additional training for officers in the competent national services;

— prepare both general and tailored risk assessments;

— follow up research developments that are relevant to the control and surveillance of the EU's external borders and share its technical knowledge with the Commission and the Member States;

— co-ordinate co-operation between the Member States in the field of removal of third country nationals residing illegally in the Member States;

— assist Member States in circumstances requiring increased technical and operational assistance in connection with the control and surveillance of the EU's external borders;

— manage technical equipment belong to the Member States (centralised records of equipment and acquisition of new equipment at the Member States' disposal).

1.7 The Agency will co-ordinate proposals for joint operations and pilot projects submitted by the Member States. It may also launch its own initiatives in co-operation with the Member States. In order to organise joint operations, the Agency may set up specialised branches in the Member States.

1.8 With regard to the organisation and co-ordination of joint return operations, the Agency will provide the Member States with the necessary technical support, e.g. by developing a network of contact points to that end, keeping an up-to-date inventory of existing and available resources and facilities, and preparing specific guidelines and recommendations on joint return operations.

1.9 The Agency may assist Member States in circumstances requiring increased operational and technical assistance at their external borders regarding co-ordination.

1.10 The Agency may co-finance joint operations and pilot projects at the external borders with grants from its budget, in accordance with its own Financial Regulation.

1.11 The Agency will be a Community body with legal personality. It will be independent in relation to technical matters. It will be represented by an Executive Director, who will be appointed by the Management Board.

1.12 The Management Board will be composed of twelve members and two Commission representatives. The Council will appoint the members as well as their alternates who will represent them in their absence. The Commission will appoint its representatives and their alternates. The term of office will be four years and may be extended once. The Management Board will take its decisions by an absolute majority of its members. For the appointment of the Executive Director, a two-thirds majority will be needed.

1.13 The Agency will take up its responsibilities from 1 January 2005. It is envisaged that it will have a staff of 27 and a budget allocation of IJ 15 million per annum for 2005 and 2006.

1.14 The legal basis for establishing the Agency is Article 66 of the Treaty establishing the European Community and is part of the Schengen acquis. The United Kingdom and Ireland are not bound by the Schengen acquis and are not therefore taking part in the adoption of this Regulation, bound by it or subject to its application. Denmark, in line with its special status, will decide within a period of six months whether to incorporate this Regulation in its national legislation.

2. **General comments**

2.1 Very often controls at external borders are insufficient. Authorities in the Member States cannot ensure that all third country nationals entering the Schengen area do so in compliance with procedures laid down in Community and national legislation.

2.2 A number of EESC opinions have called on the Council to speed up its legislative work so as to give the EU a common legislation and policy on immigration and asylum. However, the Council has not taken proper account of the views of either the Parliament or the Committee and the legislation it has adopted is ill-equipped to ensure that immigration within the EU takes place through legal and transparent channels. Several EESC opinions ([1]) have pointed out that one of the most important causes of illegal immigration is the lack of a common policy on the management of migration through legal, flexible and transparent channels. In its opinion on the Communication on a common policy on illegal immigration ([2]), the EESC states that the delay in adopting Community legislation makes it difficult to ensure that migration takes place through legal channels.

2.3 People who find themselves in an irregular situation are particularly vulnerable to exploitation in employment and to social exclusion as, though they are not without rights ([3]), their situation exposes them to a whole range of problems. In its opinion on immigration, integration and employment ([4]), the EESC pointed out that undeclared work and illegal immigration are closely related issues and that action therefore needs to be taken to regularise the legal situation of these people and expose undeclared work.

2.4 The EESC wishes to stress that effective border controls must not jeopardise the right to asylum. Many people needing international protection arrive at the external borders through illegal channels. The authorities must ensure that these people can apply for protection and that their application is assessed in accordance with international conventions and Community and national legislation. Until the administrative and judicial procedures governing asylum seekers are resolved, these people cannot be removed and must be given the corresponding protection.

([1]) See EESC opinion on the Communication on a common policy on illegal immigration – OJ C 149 of 21.6.2002 and EESC opinion on immigration, integration and employment adopted at its plenary session of 11.12.2003.
([2]) See first opinion referred to in footnote 2.
([3]) Ibid.
([4]) See second opinion referred to in footnote 2.

2.5 The lack of effective controls at external borders is often exploited by criminal networks that traffic in human beings and have no qualms about putting people's lives at serious risk in order to increase their illegal profits. In its opinion on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities ([5]), the EESC pointed out that the authorities must protect victims, in particular the most vulnerable, such as children, and victims of trafficking for sexual exploitation, with the same energy with which they combat criminal networks that traffic in and exploit human beings.

2.6 The EESC has already stated in earlier opinions that effective management of the external borders requires close co-operation between the border authorities in the Member States, and between authorities in the countries of origin and countries of transit, through liaison officers.

2.7 In its aforementioned Opinion on illegal immigration ([6]), the EESC '[supported] the Commission's proposal to set up a European border guard with common standards and a harmonised training curriculum' and stated that: 'In the medium term, steps should be taken towards the creation of a border guard school. Border controls should be carried out by officials who are skilled in dealing with people and possess thorough technical know-how.' The EESC also welcomed the creation of a European migration observatory and the development of an early warning system on illegal immigration.

2.8 In this opinion, the EESC welcomes the establishment of a European Agency for the Management of Operational Co-operation at the External Borders, which will be set up under the present Regulation. Although the Agency and its officials will have no executive power, no policy making role and no authority to make legislative proposals, it will improve co-ordination between the authorities in the Member States and the effectiveness of controls at the external borders. Article 41 of the draft European Constitution acknowledges the importance of operational co-operation between authorities in the Member States.

3. **Specific comments**

3.1 The Agency's main tasks (Article 2) must include ensuring that people are treated more humanely and that international conventions on human rights are respected. It is particularly important that effective border controls do not jeopardise the right to asylum. Training (Article 5) for border guards – to be provided by the Agency – must include training in humanitarian law.

3.2 The Agency's tasks must also include co-ordinating rescue services – particularly sea rescue – to warn and help people who are in danger owing to the high-risk practices employed in illegal immigration. Police action at sea has sometimes resulted in small boats sinking and human life being lost, which could have been avoided. The first responsibility of border guards must be to help people in danger.

3.3 It is envisaged that the Agency will co-ordinate or organise return operations (Article 9), for which it may use Community financial resources. In its opinion on the Green Paper on a Community return policy on illegal residents ([7]), the EESC stated the following: 'If the policy of compulsory return is not combined with regularisation measures, the numbers of people in irregular situations will remain unchanged, feeding the hidden economy and leading to increased exploitation in employment and social exclusion.'

3.4 The EESC agrees with the Commission when it states that voluntary return is preferable to forced return. The Committee considers forced expulsions to be an extreme measure that must only be used occasionally. The Committee bases its argument on Article II-19 of the draft European Constitution (Protection in the event of removal, expulsion or extradition, taken from the Charter of Fundamental Rights of the Union) which prohibits collective expulsions and states the following: 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

3.5 With regard to return operations, the Agency must ensure that the principles of humanitarian law are respected, in particular the right to asylum. It must guarantee that the principle of 'non-refoulement' is applied to people who could suffer persecution or ill treatment or whose life could be at serious risk in the country of origin or transit.

([5]) See OJ C 221 of 17.9.2002 .
([6]) See first opinion referred to in footnote 2, point 3.6.4.
([7]) See point 2.4 of the opinion in OJ C 61 of 14.3.2003

3.6 In its opinion on the mutual recognition of expulsion decisions ([8]), the EESC also stated that expulsion decisions should not apply to people finding themselves in one of the following situations:

— return implies family separation, either from children or parents;

— return implies serious harm for minors in their charge;

— the person suffers from a serious physical or psychological injury;

— the safety, life and freedom of the person may be at considerable risk in the country of origin or transit.

3.7 International organisations (e.g. IOM, UNHCR, Red Cross, etc.) may be involved in return operations.

3.8 The proposed Regulation (Article 17) lays down that each year the Management Board will draw up a general report which it will forward to the Parliament, the Commission and the European Economic and Social Committee. The EESC agrees that the Agency should keep it informed of its activities. The Committee reserves the right to issue opinions and invite the Executive Director to any relevant meetings.

3.9 Members of the Management Board (Article 18) should have the appropriate knowledge and skills and act independently of Governments.

3.10 The EESC welcomes the provision that within three years of the Agency taking up its responsibilities (Article 29) it will be subject to an external and independent evaluation. On the basis of this evaluation, the Management Board will issue recommendations to the Commission regarding changes it considers necessary if the Agency is to work more effectively. The EESC would wish to issue an opinion on any changes that may be made in due course to the Regulation and calls on the European Parliament to do the same.

Brussels, 29 January 2004

The President

of the European Economic and Social Committee

Roger BRIESCH

([8]) See OJ C 220 of 16.9.2003

Opinion of the European Economic and Social Committee on 'the agricultural employment situation in the EU and the accession countries: options for action for 2010'

(2004/C 108/21)

On 23 January 2003, the European Economic and Social Committee, acting under Rule 29(2) of its Rules of Procedure, decided to draw up an opinion on the agricultural employment situation in the EU and the accession countries: options for action for 2010.

The Section for Agriculture, Rural Development and the Environment, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 18 December 2003. The rapporteur was Mr Wilms.

At its 405th plenary session, held on 28 and 29 January 2004, (meeting of 29 January), the European Economic and Social Committee adopted the following opinion by 65 votes to 2, with no abstentions.

1. **Introduction**

1.1 Agriculture and rural development are two of the most pressing problems which need to be tackled in connection with the EU's eastward enlargement. Steps to adapt central European agriculture to EU conditions will affect nearly all spheres of rural life. In the accession countries, rural areas will undergo fundamental changes.

1.2 Eastward enlargement will, however, give the EU the opportunity to solve the economic and structural problems affecting central European agriculture by targeting agricultural policy accordingly.

1.3 Enlargement will lead to an increase in the number of people active in farming – whether as farmers or farm-workers – and to structural change, and this in turn will heighten competition between farmers and for jobs in agriculture. This can have serious repercussions on the economic and social structure of European agriculture and on social security systems.

1.4 For the purposes of preparing this opinion, the European Economic and Social Committee (EESC) held a public hearing at which experts from a number of accession countries reported on the situation in their countries. The following issues in particular were addressed at the hearing:

— high unemployment levels in agriculture;

— high poverty rates in rural areas and emigration from these areas;

— the number of migrants moving from the East to the West;

— the poor social security cover in agriculture and the high average age of farm-workers;

— inadequate qualifications of farm-workers;

— insufficient capital resources on farms; and

— the lack of structures for civil society.

1.5 The contributions made by the experts contrasted with the official reports emanating from the Commission. It was clear that the situation in rural areas, in particular, was felt by local inhabitants to be substantially worse than it was described in the documents. The optimism of the people was, however, also expressed by the experts. The people expect that accession to the EU will boost development.

1.6 The enormous income disparities between the current and future Member States, together with the high proportion of the accession countries' workforces engaged in farming, are key issues in the EU's eastward enlargement. Mergers and major restructuring can be expected in rural areas; failure to take the necessary action will lead to an upsurge in rural unemployment in the accession countries and put pressure on the labour market situation in current Member States.

1.7 Differences in prosperity between metropolitan and outlying rural areas are expected to increase. Unemployment in agriculture is nowadays higher than in other sectors. There are scarcely any new jobs outside farming in rural areas.

1.8 One result of this development is that rural areas have become even poorer in more than just economic terms. Human capital is also undergoing a change: young and qualified people are leaving these regions for more prosperous ones.

1.9 Over the next few years, efforts to combat unemployment should be redoubled. Better use should be made of the available potential, and political action should be taken to create synergies from existing options and programmes. The social partners can work jointly with other players in the regions with a view to formulating and implementing new ideas deriving from their business knowledge and experience with regard to potential. The contacts which they have with higher-level programmes and administrations will help them to achieve this objective.

2. **Starting point**

2.1 *Competitive and sustainable farming*

2.1.1 Agenda 2000 heralded a change to the Common Agricultural Policy. The new approach is viewed with scepticism in many quarters. It is however clear that in the course of enlargement, and given the international pressure in this domain (WTO negotiations), new avenues will have to be explored in agricultural policy, offering both the existing Member States and the accession countries opportunities to build up a competitive farming sector. In a multifunctional agricultural sector, agricultural policy should be modelled on sustainable economic practices ([1]).

2.1.2 However, much still has to be done in the accession countries to bring agricultural systems in line with EU standards. The areas giving rise to serious concern are in particular farming, the use of proper procedures for the payment of financial aid, quality standards and the environment ([2]).

2.2 *Sustainable farming can only work as part of an integrated policy for rural areas*

2.2.1 There are many stakeholders in rural areas and there is a plethora of aid measures available, some of which, such as the Structural Funds, could be better used. The lack of integrated approaches for making effective use of existing potential is to be criticised.

2.2.2 The economic importance of agriculture in rural areas is not just confined to the agricultural sector. Every euro spent on agriculture also creates added value - and with that, jobs too - in upstream and downstream sectors. Between four and five jobs in these latter sectors are dependent upon each job in the agricultural sector.

2.3 *Safeguarding of farmers' incomes*

2.3.1 'At the level of EU-15 per capita agricultural incomes have developed quite favourably since the beginning of the reform process. However, this favourable development hides the increased importance of direct payments in farm income as well as considerable variations between countries, regions and sectors.

2.3.2 Since market revenues alone are not enough to ensure an acceptable standard of living for many farm households, direct payments continue to play a central role in ensuring a fair standard of living and stability of income for the agricultural community' ([3]).

2.3.3 The positive trend in incomes in the agricultural sector must, however, not hide the fact that income trends in other sectors have been more favourable and the fact that agriculture has fallen behind the general trend.

2.4 *Employment in agriculture*

2.4.1 When the accession countries join the EU, the average employment rate will fall and the unemployment rate will climb. Agriculture poses a particular problem. In the EU-15, 4.1 % of the workforce is employed in agriculture; however the figure is 13.2 % in the ten accession countries (20.8 % if Romania and Bulgaria are included). After enlargement, 5.5 % of the EU 25's workforce will be employed in agriculture (7.6 % in an EU of 27) ([4]).

2.4.2 If no measures are taken, the already high levels of unemployment in rural areas will rise even further.

2.4.3 'The agricultural sector of most candidate countries is expected to undergo a significant restructuring process in the coming years (with or without enlargement) leading to structural pressures on rural areas in these countries' ([5]).

2.4.4 There are still around 5.5 million self-employed businessmen farmers in the EU-15 at present (plus around 4 million in the 10 accession countries). The number of small farmers continues to decline further. This is a process which will speed up after enlargement, particularly in the accession countries. There are about one million employers in EU agriculture (plus around 80,000 in the 10 accession countries).

2.4.5 There are around one million permanent employees paying compulsory social security contributions in the EU-15 (plus around 550,000 in the 10 accession countries). Enlargement will alter the ratio between small farmers and farm employees (more employees, fewer small farmers).

2.4.6 The EESC has repeatedly studied the situation of seasonal farm-workers. Despite several requests to the Commission, no precise details have been forthcoming about the number, origins, income and social circumstances of these workers in Europe. Altogether, the number of seasonal farm-workers in Europe is estimated at around 4.5 million, corresponding to at least 1,000,000 full time employees. Of these, 420,000 come from non-EU European countries and 50,000 from outside Europe. It is assumed that there are around 250,000 seasonal workers in the accession countries. Moreover, in these countries there are large numbers of illegally employed seasonal workers from, inter alia, Russia, Ukraine and Belarus.

2.4.7 The increasing number of illegal immigrants from non-Member States, principally from Russia, Ukraine and Belarus, gives cause for concern. In the Czech Republic alone, the figure is estimated at 250,000.

([1]) Opinion of the Economic and Social Committee on policy to consolidate the European agricultural model, OJ C 368, 20.12.99, pages 76-86

([2]) The European Commission's Comprehensive monitoring report on the state of preparedness for EU membership, 2003

([3]) Communication from the Commission to the Council and the European Parliament: Mid-term review of the Common Agricultural Policy, COM(2002) 394 final, page 8.

([4]) Communication from the Commission: Second progress report on economic and social cohesion, COM(2003) 34 final, pages 13 and 14.

([5]) Ibidem.

2.4.8 During the hearing it was explained that, especially in the agricultural sector in the accession countries, large numbers of workers are not included in the statistics because they are not paid for their work.

2.4.9 Over the last few years, a new sector has developed between the private and state sectors in which private individuals come together to work for the common good. Numerous businesses with growing numbers of employees have already been built up on the basis of such a commitment. Such organisations and businesses from the 'social economy', or 'third sector' ([6]) traditionally have a role to play in rural areas too. Associations for the protection of local culture and customs, for marketing tourist and cultural facilities and for youth work, as well as cooperatives for the joint marketing of agricultural products, are becoming increasingly important for the economic, social, cultural and environmental fabric of rural areas. The Commission has already underscored the economic importance of this sector on many occasions ([7]).

2.4.10 In its employment strategy, the Commission refers to the local dimension of employment ([8]). Rural regions still have the highest unemployment rates and the lowest levels of prosperity. Yet there are still no strategies for implementing local employment initiatives in rural areas. Even national and local action programmes for employment take little or no account of rural areas and the agricultural sector.

2.5 *Farm incomes*

2.5.1 In the current EU, there are already major regional disparities in farming incomes, but in an enlarged EU, the disparities in farm and farm-workers' incomes will be even larger.

2.5.2 'Ensuring a fair standard of living for the agricultural community and contributing to the stability of farm incomes remain key objectives for the CAP' ([9]). However the suspicion is that it is the smaller farms in particular which will suffer income losses.

2.5.3 The EESC has repeatedly criticised the fact that Commission reports make no reference to farm-workers, yet they too are directly affected by all economic and structural changes. Thus there are no reports on changes to the incomes or social situation of farm-workers and employees of agricultural contractors.

2.5.4 The differences in prosperity levels between the various regions of Europe could in the long term jeopardise comprehensive wage agreements and thus collective agreements as a whole. The fewer issues the social partners are able to resolve in free negotiations, the more necessary State intervention – via regulations, decrees and rules on the minimum wage - will become in order to prevent general impoverishment.

2.5.5 While wage levels in north-western European countries such as the Netherlands and Denmark are relatively high, wages in central European countries such as Slovenia and Poland do not even match a quarter of these. In countries in the middle on the 'border of prosperity', such as Germany, Austria and (northern) Italy, these disparities will throw the wage structure into disarray.

2.5.6 Collective agreements are concluded at different levels in each country. While, for example, wage levels are negotiated centrally in the Netherlands, in Germany framework agreements are reached at federal level and then implemented at regional level. In some countries collective agreements are concluded only at regional level or even within companies.

2.5.7 The influence of the State in collective bargaining likewise varies. In Austria and Germany, for example, the partners to collective agreements negotiate by themselves, while in the United Kingdom, the State may have a say in negotiations.

2.5.8 In many countries, a fixed minimum wage establishes the level below which incomes may not fall. The less influence trade unions and employers' organisations have on shaping collective agreements, the more necessary legislation is to cover this.

2.5.9 It is most difficult to reach and implement collective agreements in the accession countries. Such agreements are only embryonic at regional and pan-regional level.

2.5.10 In a non-binding agreement, the social partners in the agricultural sector have reaffirmed, inter alia, the importance of flexible working time rules for employment in rural businesses and have issued a recommendation on the statutory annual working time.

2.5.11 The structure and levels of agricultural wages are based on national systems, which should be reassessed and developed in the current and acceding Member States at the time of enlargement.

([6]) 'Social economy', or 'third sector', businesses and organisations encompass socio-economic bodies which basically have the following principles in common: they are not-for-profit organisations which operate independently of the public and private sectors, target a more participatory form of organisation and are geared to serving the community ; they cater for needs and public services which the market does not cover and, to this end, engage in economic activity and employ staff; and they are mostly small and medium-sized businesses in local communities whose work is geared to long-term regional development (See footnote 5).

([7]) Communication from the Commission: Acting locally for employment - A local dimension for the European Employment Strategy COM(2000) 196 final, pages 11 and 12.

([8]) Ibidem.

([9]) See footnote 2.

2.6 *Social criteria in sustainable agriculture*

2.6.1 One aim of sustainable development is to strike a balance between social, economic and environmental dimensions. The debate on the social dimension and its criteria and indicators has only just begun. To date there is still considerable uncertainty as to what social sustainability actually is or could be. Until now the debate has primarily been held in scientific circles and at the top levels of some businesses, without fulfilling the basic principle of participation. The key parties are not involved in the debate, and this fact casts doubt over whether the debate's conclusions can find the acceptance required for their implementation.

2.7 *Social security*

2.7.1 Social security in Europe has a complex structure which European integration will not exactly make any clearer. The development of each country's system is marked by its own culture and traditions. Social security is a national responsibility.

2.7.1.1 In many EU Member States, the question of the long-term financial viability of the social security system has arisen.

2.7.1.2 In the enlargement countries, the social security systems have been, or are being, restructured. With incomes low and unemployment high, the changeover from purely State systems to independent, contribution-based schemes is creating a situation where social insurance systems are short of capital. As a consequence, farm workers and self-employed farmers have inadequate cover in old age.

2.7.2 Pension levels in the accession countries' agricultural sectors are very low, and as a consequence, many pensioners feel compelled to continue working in order to earn a living. There is no sign of agricultural pensions coming into line with general pension levels. At the hearing the particularly problematic situation of farmers who had lost their jobs during the years of the political and economic transformation were highlighted. These farmers will have to contend with particular social hardships.

2.7.3 Old age pensions are regulated differently in each country. They often comprise a mix:

— State pensions,

— statutory insurance,

— supplementary pensions arranged through collective agreements, and

— private provision.

2.7.4 Given the low income levels in farming, there are few possibilities for private provision, so that in order to improve the statutory minimum provision, it is first and foremost the supplementary pensions negotiated by collective agreement which play an important role. There are instances of this in Germany, the Netherlands and France.

2.7.5 Social security systems also have to take account of the increasing mobility of labour between countries. Migrant and seasonal workers, for example, are usually not covered at all by pension insurance schemes. There is considerable need for action here.

2.7.6 Work on the land is changing, and with it the qualitative nature of the work to be performed. This matter must also be examined from the point of view of sustainability, and sustainability criteria must be applied. The working conditions must attract new workers.

2.7.7 Occupational safety and health protection schemes in the accession countries still have to be overhauled. Despite major efforts, accidents involving children and young people employed on farms are for example, still very frequent in the accession countries.

2.7.8 The fragility of the social security systems in central European countries is a major reason why the subsistence economy plays such a preponderant role in those countries. Thus in Poland, around 900,000 of the 4 million people working in agriculture are of pensionable age.

2.7.9 At the hearing, various parties underlined the high average age of farm-workers and the consequences of this. This age structure will in the long term lead to a shortage of qualified workers.

2.8 *Basic and further training*

2.8.1 European strategies attach considerable importance to developing workers' skills. There is a causal relationship between the number of jobs, their quality and employee training. For this reason, it is especially important to encourage people to improve their skills.

2.8.2 Solid basic vocational training to prepare young people for work is necessary to maintain the agricultural workforce in the long term. Training must be geared to providing people with a broad training in addition to a high level of specialist skills, enabling them to move to other sectors or countries.

2.8.3 As part of the social dialogue, the social partners have signed an agreement on vocational training stipulating the steps to be taken to develop vocational training further and how readily understandable evidence of vocational qualifications can be provided, in order to take account of the increasing free movement of workers ([10]).

([10]) EFFAT-GEOPA agreement on vocational training

2.8.4 The proportion of the agricultural workforce taking part in skills training is below the average for the workforce as a whole in the EU. In the accession countries, there is a considerable need to match these skills to new techniques and technologies, new markets and also new economic and social content and capabilities.

2.8.5 Nowadays, more than traditional farming expertise is required to manage farms. Constant technical, environmental, economic and social changes are placing increasingly heavy demands on managers. Regions with large agricultural holdings depend in particular on new young managers. In the new federal German States (Länder), for example, there will soon be a shortage of suitable managers to keep farms successfully in business. Similar developments can soon be expected in the accession countries.

2.8.6 Nearly all the rural areas in the European Community, and, above all, however, peripheral, sparsely populated areas, are facing the problem of mobile young people moving away. It is in particular older people who stay behind, often to face the threat of loneliness and intellectual impoverishment. To prepare people properly for old age, access to training and the information society is also needed. Training for older people should:

— make use of their many years of experience working on the land;

— enable their needs to be mainstreamed in everyday life;

— encourage them to be involved in society; and

— prevent loneliness and intellectual impoverishment.

Much voluntary work is already being undertaken in this sphere in rural areas. What is needed is to focus these activities and to specifically integrate training for older people into European programmes such as the ESF and LEADER.

2.9 *Co-determination and participation*

2.9.1 A social model has been developed in the European Union over the last few years which gives as many players as possible a say in matters. The social partners have a special role to play here. Through agreements as part of the social dialogue or at company level, they contribute to the further development of the European social model. This concept also embraces non-trade concerns, which are due to gain in importance as part of EU external protection, too. Such agreements include, for example, also agreements between enterprises, trade unions and other NGOs to meet higher social and environmental standards in respect of certification. A number of highly promising initial measures have been taken in the agricultural and forestry sectors with the Flower Label Programme and the Forest Stewardship Council.

2.9.2 The development of European programmes has created new opportunities for participation, for example as part of the Structural Funds Monitoring Committees, the European Social Fund (ESF) or the LEADER Local Action Groups. It should however be noted that the social partners, particularly employees, are under-represented on these bodies and that the authorities have too great an influence.

2.9.3 Worker participation on farms is very rare due to their small size. Very few farms are large enough to have co-determination bodies. In the accession countries, where larger farms have been built up, much still needs to be done to set up co-determination bodies.

2.9.4 Because worker participation is limited to a few farms, co-determination at a sectoral level takes on greater importance. In some Member States, such as France, there are jointly-run boards or associations which give workers a say in determining employment conditions and skill requirements.

2.9.5 Alongside their work in institutionalised co-determination, the social partners are increasingly involved in moves to further develop society at grassroots level. Members of their organisations actively engage their liaising and communication skills, for example, and help to change fossilised structures. In turn, new ideas, products, markets and jobs may be developed for businesses.

3. **A vision for 2010**

3.1 The history of the EU shows that visions can be translated into reality if goals are set and if all parties are ready to take part in joint action. In this opinion, too, visions, backed up by concrete options for action, are used as a tool.

3.2 *The EESC is looking forward to a competitive, sustainable agricultural sector offering employment and social balance.*

3.2.1 There is to be a competitive agricultural sector that satisfies sustainability criteria. In this context, sustainable agriculture is to be seen as an ongoing process, in which there is to be permanent dialogue between the players concerned, aimed at establishing a balance between economic, environmental and social concerns.

3.2.2 Employment in agriculture is continuing to change. Farms with permanent employees, for whom social insurance has to be paid, are backed up by agricultural contractors and seasonal employment, thereby allowing production requirements to be managed flexibly.

3.2.3 There is to be a level playing-field in world trade. Social and environmental standards in the developing countries are to be a part of this.

3.3 *The EESC is calling for an integrated policy for rural areas. Such a policy should take the impact of upstream and downstream sectors into account.*

3.3.1 The Second European Conference on Rural Development, held in Salzburg in 2003, provided a decisive impetus for reforming rural development policy. Throughout the EU, it has been accepted, without diminishing the value of agriculture, that the funding required for rural development would be provided by the EU, backed up by funding from national budgets. The earlier system, which was complicated and inflexible, has been simplified and extended and assured beyond the previous confines of providing assistance to the agricultural sector.

3.4 *The EESC demands the establishment of a uniform system of aid in Europe, which safeguards farm incomes.*

3.4.1 The adjustment process in agriculture in the new Member States will be completed in 2010. A uniform system of aid will apply. Farm incomes will be safeguarded. Farmers will acquire new sources of income as the agricultural sector becomes multifunctional. Subsidies linked to production levels will be increasingly reduced and will be replaced by performance-related income-support payments for farmers.

3.4.2 Farms are to adapt to the constant structural change in good time. This will also involve an increasing number of activities outside the traditional sphere of agriculture.

3.4.3 Performance-related income-support payments are to cover environmental measures and the provision of land and facilities for tourism.

3.4.4 Farmers who wish to give up their holdings and farm-workers leaving farming are to have the opportunity to take part in employment and training schemes.

3.5 *The EESC is expecting employment in agriculture to pick up.*

3.5.1 The legal transformation of both agricultural enterprises and the ownership of agricultural land is to be completed and, in the agricultural sector, all legal forms are to be placed on an equal footing. There will be an overall increase in employment amongst farm-workers and farmers (including seasonal work and work for agricultural service-supply agencies). Regional funds will be set up, in collaboration with the social partners, to promote employment and skills acquisition.

3.5.2 The various aid measures are to be effectively used; the creation and long-term maintenance of jobs are to be applied as a criterion when the various public funds are allocated.

3.5.3 Seasonal work is to be calculated and observed in studies of full time employment equivalents. Illegal work is to be made legal.

3.6 *The EESC wants the social partners to conclude collective agreements to safeguard adequate levels of income.*

3.6.1 Collective wage agreements will be concluded for farm-workers; these agreements will apply across-the-board, with the result that national minimum wages will be the exception. Wage rates will be set at a level which provides employees with a reasonable income. ([11])

3.7 *The EESC is calling for equal treatment for seasonal workers.*

3.7.1 Collective wage agreements are to apply to seasonal workers and migrant workers. Decent accommodation will be provided for all workers, who will also be protected against poverty in old age by pension schemes.

3.7.2 Information on occupational safety provisions in seasonal workers' mother tongues is to be essential. The EESC realises that this is not always an easy task; it calls upon the European association representing employers' liability insurance associations and accident-insurance bodies to address this matter and to put forward proposed solutions.

3.7.3 There is to be no further illegal hiring of workers.

3.7.4 If farms need extra labour, provisions can be enacted to cover employees from non-EU Member States.

3.8 *The EESC is hoping for social criteria and indicators for certifying businesses where farming is the main activity, as a contribution to sustainable farming.*

3.8.1 The introduction of certification for such businesses will be a key factor in promoting sustainable development in agriculture. Social criteria and indicators will be set in connection with the introduction of such an EU-wide assessment scheme.

3.9 *The EESC believes that effective social security systems will make jobs in agriculture attractive.*

3.9.1 Provident schemes in agriculture are to protect the workforce against loss of social status and social exclusion.

([11]) The term 'reasonable income' implies that employees will receive an agreed performance-related income to satisfy their economic, social and cultural needs. Income trends in agriculture must be geared to general income trends.

3.9.2 Pension schemes for farmers and farm-workers are to provide them with a reasonable income in old age ([12]). Early retirement arrangements will offer decent conditions for taking up retirement.

3.9.3 If farm-workers are to reach retirement age in good health, the environment in which they work must be geared towards the sustainable development of the workforce. Effective measures and instruments have been introduced as part of a European strategy. This strategy will be backed up by national occupational safety strategies for agriculture.

3.9.4 National social insurance systems covering the agricultural sector in Europe are to be transparent and compatible, thereby making it possible to move from one system to another without difficulty.

3.10 *The EESC is looking forward to a sector-based strategy for lifelong learning to underpin employment.*

3.10.1 A sector-based strategy for lifelong learning is to be implemented. This strategy will be based on the following pillars:

— basic vocational training;

— further training for employees in the agricultural sector;

— promotion of entrepreneurship in agriculture;

— learning schemes in old age.

3.10.2 Implementation of this strategy and the establishment of a network of training bodies operated by the social partners in rural areas will have boosted demand for training measures in the agricultural sector.

3.10.3 The social partners' agreement on vocational training is to be put into practice; the authorities concerned are to play an appropriate part in this.

3.10.4 The measures required for this are to be funded from EU sources such as the ESF, CAP, and LEADER programmes with national co-financing.

3.10.5 The profile of careers in agriculture and forestry can be raised by holding cross-border European-wide competitions. Support measures for individuals and grants are also to be provided as part of this initiative.

3.11 *The EESC is calling for civil society players to be involved in the sustainable development of rural areas.*

3.11.1 As part of a move towards 'new participation' in the EU, national and regional civil society players are to work together to promote sustainable development in rural areas. An agricultural sector geared to meeting sustainability criteria will be a key component of this sustainable development.

3.11.2 Guidelines are to be drawn up for sustainable agriculture. Problems about conflicting objectives are to be settled responsibly by the agricultural sector in conjunction with civil society players in such a way that resource use also takes economic requirements into account.

3.11.3 One of the goals of sustainable development is to prevent rural depopulation.

3.11.4 All countries are to have instruments for facilitating social dialogue in the agricultural sector at the level of the Member States and the regions.

3.11.5 There are to be legal provisions to enable the interests of farm-workers to be effectively represented.

4. **Possible courses of action**

4.1 *Achieving a competitive, sustainable agricultural sector*

4.1.1 Agriculture is one of the largest users of land in the EU. It has a special role to play in sustainable development in the EU. This justifies the introduction of a European sectoral strategy for a sustainable agricultural sector to complement Europe's overall strategy.

— The Commission will formulate this strategy together with the civil society players in rural areas. The strategy will inter alia provide a basis for the debate on the new aid period post 2007.

— The strategy for a sustainable agricultural sector can only be successful if it enjoys broad support. For this reason, the Commission is asked to present a programme for publicising the strategy and to fund appropriate activities for achieving this goal, such as seminars and documentation. Civil society players in rural areas are called upon to help implement this strategy.

4.1.2 The sustainable farming model must be taken into consideration in the WTO negotiations. Here the concept of wholesome food production at a fair price must be non-negotiable and minimum social and environmental standards must be agreed upon and complied with.

4.2 *Integrated rural development*

4.2.1 The Commission must press harder than in the past at all levels of action for the targeting of aid to be coordinated. This requires the participation of stakeholders, a clear statement of objectives and funding which has a sustainable impact.

([12]) cf. footnote 1.

4.3 *Safeguarding incomes in the agricultural sector*

4.3.1 The gradual alignment of agricultural policy between the EU-15 and the accession countries is designed to safeguard employment and the income of agricultural workers and self-employed farmers. Modulation is a key tool here. Measures to step up aid to rural areas with the aim of providing new sources of income for agricultural businesses, should be further extended.

— The provision of aid under the CAP should be geared towards achieving two objectives: on the one hand, transitional funding should be provided for businesses with new entrepreneurial ideas and, on the other hand, direct financial aid should be provided for services which, although they are not marketable, are socially necessary and desirable (such as measures to restore parts of the landscape).

— The LEADER programme should be geared more to the involvement of the social partners at local level and to employment and sustainable development.

— Under the LEADER programme, assistance should be provided for employment and training measures for farmers who are obliged, or who choose, to give up farming, thereby stopping them from becoming unemployed. Corresponding, programme-related adjustments should also be made in the accession countries.

4.4 *Measures to boost employment in agriculture*

4.4.1 The local dimension of employment is becoming particularly marked in rural regions. In areas where large, non-farm businesses are rare, local businesses and workers must take their future employment into their own hands and pool their ideas. The approaches adopted up to now by the Commission under the LEADER programme and the European Employment Initiative should be further developed and better coordinated. Local players are, however, not yet sufficiently involved in the development of the process at local level. Local authorities and regions (NUTS 1 and NUTS 2) still have a considerable amount of ground to make up in terms of participation. If our vision is to become reality, the following measures will have to be taken:

— In EU programmes such as the CAP, LEADER and Local Employment, greater attention needs to be paid to the impact of rural employment.

— A programme aimed at the social partners in rural areas and designed to promote employment at local level as part of the European Employment Strategy should be developed and implemented.

— The Commission should press for the employment situation in rural regions and in the agricultural sector to be taken into account and reflected in the National Action Programmes for Employment and the Local Action Programmes for Employment.

— European aid programmes should attach special importance to the development of the 'third sector' as a means of stabilising the economic, social and cultural situation in rural areas. In this context there are still many areas of activity (support for civil society) where new jobs could be created. There is a particular need to take action in the accession countries, where the 'third sector' or 'social economy' has not yet been extensively developed.

— Local training and employment funds should be provided with assistance under EU programmes; the social partners will be able to launch training and employment initiatives with the aid of such funds.

4.5 *Collective agreements to be concluded by the social partners*

4.5.1 Farm incomes are being safeguarded with the help of the CAP. Farm-workers must not be excluded from the general income trend. Collective agreements negotiated by the social partners must form the basis. State-imposed rules, such as the minimum wage, should only come into play on an exceptional basis. The State should only step in when negotiations are unsuccessful.

— The trend in wages scales and employment in agriculture and the situation as regards migrant work and seasonal work are matters of particular interest in the context of economic and social uniformity in the EU-25. For this reason, an observatory for agricultural wages, employment and seasonal work is to be set up. The observatory's task will be to investigate the impact which accession to the EU has on income trends, the socio-economic situation of workers and broader social developments in agriculture. The aims of the observatory will be to: monitor the situation; provide advice for, amongst others, the social partners, the Commission and governments; and identify approaches and options for taking action. The EESC requests the Joint Committee on Agriculture to take on the role of the proposed observatory.

— The income of farm-workers should be included in the Commission's reports.

— As part of the social dialogue, assistance should be provided for the organisation of events for disseminating information about collective agreements between the social partners in the Member States and in the accession countries.

— The social partnership is not yet sufficiently developed in the accession countries for all matters to be covered by collective agreements. The Commission must continue to provide support (especially financial support) in this field.

4.6 *Seasonal work*

4.6.1 In order to prevent upheavals on the agricultural labour markets in Europe, seasonal work in agriculture needs to continue to be regulated even after the countries of Central and Eastern Europe (CEEC) join the EU:

— With the support of the Commission, the social partners in the agricultural sector are to reach agreement on minimum standards with regard to the treatment and accommodating of seasonal workers.

— The introduction of an EU-wide identity card for migrant workers and seasonal workers is still necessary ([13]). The ID card should not be regarded as a passport but rather should provide employers and employees with useful information, e.g. with regard to skills and social security.

— If, after EU enlargement, there is still a need for additional agricultural seasonal workers from non-EU Member States, EU rules should be introduced with a view to reconciling the interests of the social partners and the Member States.

4.7 *Introduction of social criteria and indicators for certifying businesses where farming is the main activity*

4.7.1 Agricultural production is a key element in the sustainable development of rural areas. Consumers are increasingly demanding transparency with regard to the internal workings of businesses. Farmers are increasingly ready to accept these calls for transparent production. There are several approaches possible for putting 'transparent production' into practice. The development and introduction of certification systems, with the participation of the social partners, is essential for a sustainable agricultural sector in the EU.

— Certification systems, stamps of quality and labels are key components of a sustainable agricultural sector. The certification system must therefore also include social criteria and indicators.

— As part of the cross compliance provisions, businesses are to be assessed for keeping land in 'good agricultural condition'. The latter is not possible unless all parties in the production process are suitably prepared and qualified for the tasks in hand. Corresponding criteria are to be included in the definition of 'good agricultural condition' ([14]).

— A Farm Advisory System (FAS), as proposed by the Commission, is designed to secure a steady improvement in the economic, environmental and social situation of farms. Apart from advising farms, the FAS is to provide independent advice to workers to prepare them for the future ([15]).

— There is effective social dialogue at EU level in the agricultural sector. In this context, social criteria and indicators should be drawn up without delay, for use as guidelines when working out common approaches to the problem of sustainable agriculture. These criteria and indicators should be discussed with NGOs, consumer organisations, etc. in order to obtain a broad consensus, and are to serve as guidelines at regional level.

4.8 *Social security systems in sustainable agriculture*

4.8.1 In many European countries agricultural businesses complain about the shortage of skilled workers. One reason for this is that such work is less attractive than work in other sectors for a number of reasons, such as the lower wage levels and the hard physical work frequently involved. One way of making jobs in agriculture more attractive to the new generation of workers is to improve social security systems.

— Under the CAP, early retirement provisions are to be extended in order to provide workers and farmers with decent retirement conditions. Appropriate programmes are to be provided in the accession countries for this purpose, too. It is particularly necessary also to introduce such provisions in central and eastern European countries (CEEC), in view of the increasing ageing of their farmers.

— ILO Convention (No. 184) on Safety and Health in Agriculture should be implemented. The Commission is pressing Member States to draw up and implement national industrial health and safety strategies for the agricultural sector.

— As part of a wide-ranging initiative, migrant workers are to be provided with information on how to improve their social protection arrangements. The EESC calls upon the Commission to coordinate the information campaign with social insurance bodies and the social partners and to provide financial assistance.

— Member States must fulfil their social security responsibilities in the future, too.

— Farm-support services are to provide assistance for small farmers when farm managers are absent.

4.9 *A sector-based strategy for lifelong learning in the agricultural sector*

4.9.1 With a view to improving employment in the agricultural sector and in rural areas, efforts must be stepped up to boost the level of training. In addition to qualitative improvements in training provision, there is also a particular need to stimulate the demand for training. A sector-based strategy for lifelong learning is to be introduced to provide the requisite framework. This will contribute to the development of a knowledge-based economy, in accordance with the Lisbon strategy.

— Along with the social partners, the Commission is devising a four-pillar strategy - basic vocational training, further vocational training, strengthening of entrepreneurship, learning schemes in old age - for providing lifelong learning in the agricultural sector. This strategy is to be co-funded with EU resources, including ESF and CAP funding.

([13]) EESC Opinion on the Elaboration of an initiative aimed at establishing a regulatory framework for the employment of migrant agricultural workers from non-EU states (Own-initiative Opinion, OJ C 204 of 18.7.2002, page 92).

([14]) See EESC Opinion on the CAP review, CESE 591/2003, pages 10 and 11.

([15]) See EESC Opinion on the CAP review, CESE 591/2003, p 11.

— A lifelong learning strategy should also include training counselling for farmers and farm-workers. This measure could be funded under the CAP. Funding should be channelled via technical assistance. The social partners should be involved in the provision of advisory services.

— The transfer of expertise is to be organised by a European training network, bringing together training and employment bodies on which the social partners sit; this network is to be provided with assistance from the Commission.

— The own funding will be supplied by regional funds.

4.10 *Civil society players are to help shape sustainable development in rural areas*

4.10.1 The development of labour relations between the social partners in the agricultural sector in the Member States assumes many different forms. The EU should introduce appropriate measures for developing the social dialogue.

— The Commission is urged to examine and make an appraisal of examples of best practice in labour relations and to disseminate the findings.

— The Commission should provide funding to the social partners in the accession countries in order to ensure that positive and innovative approaches adopted by the social partners can continue to receive assistance.

4.10.2 The key players in the process should be taken into account and involved in developing civil society as part of the move to boost sustainable development in rural areas. Scope for involvement should be created in order to expand participation, with a view to developing society at grassroots level.

— Synergistic effects may be exploited by holding sectoral dialogue in the agricultural sector in Member States and regions. The Commission is urged to set up forums for dialogue as part of key programmes. Sectoral dialogue should cover the coordination of programme development and project assistance in connection with operational programmes, such as LEADER, the ESF and the ERDF.

— The process of having a local agenda for implementing sustainable development has barely taken root in rural regions. A key aspect of this process is motivating as many people as possible to participate; bottom-up approaches can only be successful if the grassroots themselves are in a position to become involved. Such approaches are also necessary to ensure the success of local employment policies.

— 'Rural development workshops' should be set up at regional level in all rural areas. The key players (MPs, heads of administrative bodies and representatives of farmers' associations, trade union, churches etc.) should come together in these workshops to address the problems of rural development.

Brussels, 29 January 2004.

The President

of the European Economic and Social Committee

Roger BRIESCH