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BETTER LAWMAKING 1998
A SHARED RESPONSIBILITY

COMMISSION REPORT TO THE EUROPEAN COUNCIL

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I. INTRODUCTION

The annual report to the European Council on "Better Lawmaking" details the measures taken by the Commission to improve Community legislation.¹ These measures include correctly applying the principles of subsidiarity and proportionality, improving the quality of drafting, employing practices such as simplification and formal and informal consolidation and opening up access to information.

As the 1998 report makes clear, this undertaking is now bearing fruit and attracting greater political interest.

*In 1998
"Better
lawmaking"
received...*

Measures that are bearing fruit ...

The results are plain to see:

- the Commission is targeting its initiatives, concentrating on political priorities. Its proposals have been the driving force behind the major developments in the recent history of the European Union, such as the move towards the euro;
- the Commission endeavours to apply scrupulously the principles of subsidiarity and proportionality even before the ratification of the protocol annexed to the Treaty of Amsterdam. It takes internal steps to check the grounds for legislative proposals more closely for compliance with the principles of subsidiarity and proportionality. It will formally adjust its guidelines for legislative policy before the Amsterdam Treaty enters into force;²
- the overall number of proposals is falling despite an increase in the number of proposals for new legislation to implement Agenda 2000;
- the Commission is engaged in better consultation with the

*... constant
attention from
the
Commission,*

¹ This report is a response to the requests made by the European Council of December 1992 and subsequent European Councils and to the Interinstitutional Agreement of 29/10/1993 on the application of the principle of subsidiarity (Bull. EC 10-1993, p. 102). After the first two reports, for 1993 (COM(93)545) and 1994 (COM(94)533), the Commission decided that the scope should be extended to include all action aimed at improving legislation in the broad sense ("Better lawmaking"). This approach was approved by the European Council. "Better lawmaking" reports have been presented every year since then: 1995 (CSE(95)580), 1996 (CSE(96)7) and 1997 (COM(97)626). In 1998 the Commission also presented a report to the Cardiff European Council: "Legislate less to act better: the facts" (COM(1998)345).

² Bull. 1/2 1996, point 1.10.11.

parties concerned and is framing clearer, simpler, more accessible legislation;

- more generally, the Commission is restructuring its organisation in order to perform its role effectively in a Europe that is constantly changing.

... and attracting greater political interest:

The Protocol on subsidiarity and proportionality and Declaration No 39 on the quality of the drafting of Community legislation, both annexed to the Treaty of Amsterdam, have put these subjects back on the political agenda at the highest level:

... and greater interest from the Heads of State or Government

- the Cardiff European Council in June welcomed the Commission's report "Legislate less to act better: the facts" and emphasised "the importance of subsidiarity and better regulation" which was "a shared responsibility which requires the institutions and the Member States to work together";

- the Cardiff European Council also convened an informal meeting of the Heads of State or Government under the Austrian presidency, which took place in Pörtlach in October 1998 and was devoted to the future of the European Union. The implementation of the subsidiarity principle was one of the topics discussed here, in the wider context of bringing Europe closer to the people.

II. APPLYING THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

1) Clear and codified principles

There are now clear rules on subsidiarity and proportionality, which are to be found in the Protocol annexed to the Treaty of Amsterdam. This lays down as precisely as possible the conditions for applying these principles, expounded in Article 3b of the Treaty.

Subsidiarity

According to this Protocol, the principle of subsidiarity:

*What
subsidiarity is
not*

- does not mean rewriting the Treaties or changing the powers which they confer on the Community (only an intergovernmental conference could do that);³

- does not seek to shift the institutional balance, and in particular to limit the role of the Commission in carrying out the duties conferred on it by the Treaty;

- has nothing to do with a "democratic deficit" that has to be made good: it should not be confused with democratic control of Community action.

The important points to note in both the Protocol and Article 3b of the Treaty are that:

- subsidiarity does not apply to the exercise of exclusive Community powers;

- it operates instead in the area of shared powers. Community action cannot be justified merely by referring to the objectives of the Treaty and to secondary legislation; the proposal must demonstrate why such action is necessary.

What subsidiarity is. It applies to areas of shared powers

This calls for a case-by-case examination, while still maintaining the coherence of Community action. The protocol specifically states that the extent and impact of the proposed action must be examined in political, economic and budgetary terms.

Proportionality

Proportionality, which of course also applies in areas of exclusive powers, seeks to ensure that the impact of Community law on national law does not go beyond what is necessary to achieve the objectives of the Treaty. This principle should, in particular, help the institutions to eliminate excessive detail in regulations. It implies a strictly objective assessment of the issues.

Proportionality applies to all areas of Community activity

2) Dynamic principles

Subsidiarity and proportionality, now clearly codified, must remain evolutionary and dynamic principles, flexible to apply and pragmatic, including economic efficiency as a criterion for application.

Clear and codified principles: application must be flexible and evolutionary

This is particularly true of subsidiarity. This dynamic view of subsidiarity is in fact expressed by the Protocol annexed to the new

³ Article 3 of the Protocol states that, "The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice."

Treaty. It means that Community action may be extended when circumstances require, subject of course to the limits of the objectives and powers provided for by the Treaty. Conversely, action that can no longer be justified may be terminated. There is a need for rapid adaptation to keep pace with the changes we are witnessing in technology, the economic climate, social problems and popular expectations.

In other words, the sharing of responsibilities should evolve towards an "active" subsidiarity, based on clear objectives pursued in concerted fashion at all levels. In this respect, granting rigid block powers does nothing to encourage the exercise of shared responsibility. On the contrary, it is likely to lead in practice to a division of powers that is inimical to efficiency.

The quest for active subsidiarity

The aim is not, therefore, to set immutable limits to the powers of the Union. On the contrary, new dynamism must be injected by taking or refraining from action on more clearly defined grounds and with more detailed information about the terms and extent of our involvement.

3) Difficulties of application

The Commission acts within the international political and economic context; it takes account of the needs of the people and the interests of economic actors. It maintains its political responsibility in the exercise of its right of initiative, even when it is subject to a certain amount of legislative pressure arising from the interinstitutional context of the Community, the specific demands of the Member States and economic operators and the very nature of international affairs. These demands do not always correspond to the principles of subsidiarity and proportionality.

The origin of Commission proposals

A quick analysis of the origin of Commission proposals produces the following interesting results:

- some 35% of the Commission's legislative proposals are the direct result of international agreements (either proposals for decisions enshrining an undertaking between the Community and third countries or proposals for internal acts to implement the Community's international commitments at internal level);

35% of proposals are the result of international agreements

- a second major category of legislative acts proposed by the Commission concerns the amendment of existing Community law to update it to take account of new scientific or economic data and technical progress. The economic and technological context of world society is changing more and more quickly (one has only to think of advances in biotechnology and the growth of the information society). This category of acts accounts for 25% to 30% of the Commission's

Between 25% and 30% of proposals are concern the amendment of existing Community law

legislative initiatives each year;

- a third category of legislative acts consists of proposals put forward by the Commission at the express request of other Community institutions (Council and Parliament, particularly), the Member States themselves and economic operators (here, too, as a result of scientific and technical progress in some cases):

20% of proposals are a response to specific requests

- The Commission has to take account of its interinstitutional relations with the two branches of the legislative authority. Each year it is asked by the Council and Parliament - by means of either resolutions or commitments entered into in the course of the legislative procedure - to take new initiatives. Although the Commission is not legally bound to respond to requests for legislative initiatives from other institutions, it can hardly ignore unanimous requests from the Member States or resolutions adopted by a large majority in the European Parliament, particularly in areas of special concern to the public.
- Last but not least, the European Council itself often asks the Commission to carry out new studies and/or take new initiatives (some 80 requests were made by the European Council between 1995 and 1998).

This category of legislative initiatives represents roughly 20% of the Commission's proposals.

- a fourth category of legislative initiatives by the Commission (accounting for around 10%) consists of acts that are required by the Treaty and secondary legislation (e.g. fixing annual agricultural prices or adopting multiannual research programmes). In such cases the Commission has no discretion in the exercise of its right of initiative;

10% of acts are required by Community law

- the last category is where the Commission launches initiatives which it considers to be in the Union interest. These are cases, for example, where the Commission itself, after consulting the groups concerned (e.g. through green papers and other consultative documents), reaches the conclusion that legislation is essential (see, for example, recent initiatives in the field of intellectual property and electronic commerce).⁴

Other initiatives required in the Union interest

⁴ Proposal for a European Parliament and Council Directive on the legal protection of services based on, or consisting of, conditional access (COM(97)356). Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society (COM(97)628). Proposal for a European Parliament and Council Directive on a common framework for electronic signatures (COM (98)297).

This rapid overview must not hide the fact that in all these cases it is for the Commission to decide whether a proposal should be put forward and what the content should be. In exercising this right of initiative the Commission must ensure compliance with the principles of subsidiarity and proportionality. It does likewise when responding to requests from outside, in particular from the other institutions. They must themselves take these principles into account when suggesting initiatives to the Commission.

4) Positive results in 1998

In the context described above the strict application of the principles of subsidiarity and proportionality by the Commission continues to produce tangible positive results.

*Tangible
positive
results:*

The Commission is already endeavouring to implement the recommendations set out in the Protocol annexed to the Amsterdam Treaty ...

- each proposal - and in particular each new legislative proposal⁵ - includes a statement of grounds with regard to subsidiarity (in areas of shared powers) and proportionality (in all cases);⁶ *...grounds for proposals,*
- there is more careful consideration of the impact of proposals on the parties targeted by Community rules. The launch of the pilot stage of the "Business Test Panel",⁷ an initiative heralded in the Action Plan for the Internal Market, is an attempt to improve the procedures for analysing the impact on businesses of new legislative proposals in terms of adjustment costs and administrative burden. Firms taking part in the test panel scheme are sent, via a national coordinator, a short memorandum describing the future legislative proposal, together with a questionnaire to be sent back within three weeks; *... impact assessment,*
- the Commission fosters broad, open and constructive dialogue with the parties directly affected by Community legislation (trade unions and employers' organisations, national government departments, industry) whether in a formal context (green and white *... dialogue with partners,*

⁵ This year nearly half of the 34 proposals put forward at 2 December 1998 came under areas of exclusive powers.

⁶ With regard to proportionality, the Commission gives its preference to non-binding measures which offer Member States greater latitude. This year, for instance, it proposed a recommendation (98/257/EC, OJ L 115, 17.4.1998) instead of a directive on the settlement of consumer disputes.

⁷ COM (1998)197.

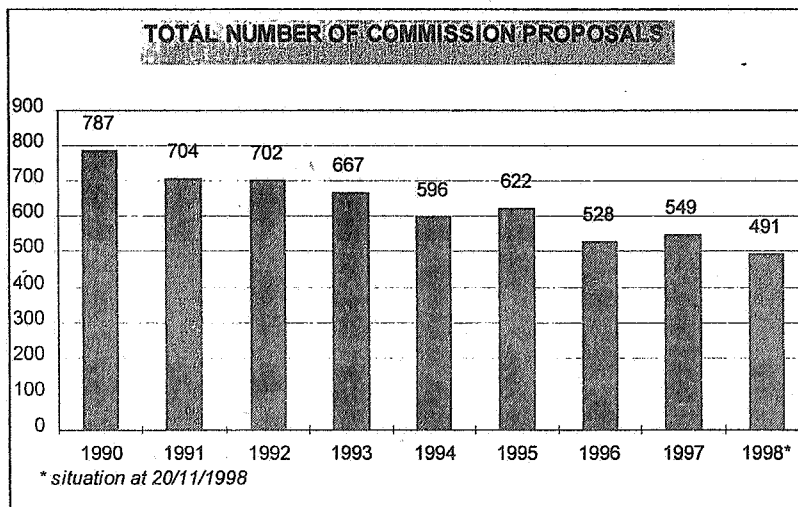
papers) or informally (various kinds of meetings, seminars, forums). Such dialogue is designed to provide the Commission with the information on which to decide whether Community action is called for, in matters of shared powers, and in all cases what the extent of any action should be.

...but it has also abandoned draft legislation and withdrawn proposals

- the Commission encourages alternatives to legislation that offer a suitable substitute,⁸ *...alternatives to legislation,*

- the total number of proposals has been falling, and the proposals for new legislation reflect the priorities for the future. So far this year the Commission has presented 34 proposals for new legislation. This figure shows the Commission's determination to implement the political priorities laid down in its work programme, as it did with Agenda 2000; *...well-targeted proposals,*

- the Commission regularly weeds out proposals that have become obsolete for various reasons, including subsidiarity. It is planning to withdraw around 90 proposals in December 1998. *...withdrawal of proposals*



III. OTHER MEASURES

⁸ See for example the voluntary agreement between the Commission and European car manufacturers on reducing emissions of CO² from private vehicles. The Commission agreed on the content of this agreement in its communication of 29 July 1998 (COM(1998)495). See also the agreements concluded under the social protocol and enshrined in Directives 96/34/EC and 97/81/EC and the use of standardisation mandates under Directive 92/59/EC.

1) Quality of drafting: new guidelines

Better implementation of Community legislation by the national authorities depends on this legislation being clear, coherent and unambiguous. This is crucial if it is to be understood by the public and business circles alike. This aim is all the more important in view of the constraints of multilingualism, which can lead to differences in interpretation. The Commission, for example, has to translate more than 30 000 pages of documents into the 11 Community languages.

Joint action by the institutions to improve the quality of drafting will yield better results

How can we coordinate and increase the impact of the various Parliament, Council and Commission initiatives to improve legislative drafting? Declaration No 39 annexed to the Final Act of the Amsterdam Treaty calls on the institutions to draw up common guidelines on the quality of legislative drafting and to incorporate them in the decision-making process. The Legal Services of the three institutions concerned have produced a proposal consisting of twenty or so guidelines for drafting pieces of legislation and practical implementation measures to be taken by each institution. Each institution is now considering this proposal in accordance with its internal procedures.

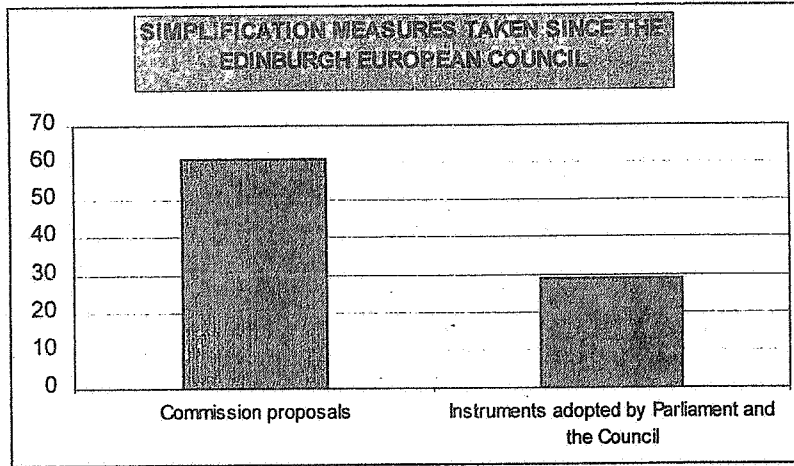
2) Simplification

The Community legal system is complex, namely because of the differences in legal culture and the highly technical subject matter. But this is no reason not to strive for simplification. The single market itself is an instrument of simplification because it replaces numerous separate and sometimes conflicting national measures. But further action is needed. What is the current situation?

15 new proposals for simplification this year

In those areas where it has its own decision-making powers, such as competition, the Commission is again making an effort to draft simpler regulations.⁹ It has also sent 15 new proposals for simplification to the Council and Parliament, which have adopted six proposals this year. Other proposals are planned for 1999.

⁹ Four regulations on the procedure applying to restrictive practices and dominant positions and three regulations on the nature, content and other arrangements for requests and notifications to be submitted to the Commission will be replaced by a single regulation before the end of the year.



Work continues on projects under the SLIM programme (simpler legislation for the internal market). Two proposals were presented this year under phase II.¹⁰ The Council has also adopted a directive under SLIM.¹¹

SLIM: room for improvement

SLIM	
OBJECTIVES	RESULTS
Phase I Intrastat, construction products, mutual recognition of diplomas, ornamental plants	3 proposals transmitted, 2 regulations adopted by the Commission and one directive adopted by the Council to date
Phase II VAT, combined nomenclature for external trade, banking services, fertilisers	2 proposals transmitted to date
Phase III Electromagnetic compatibility, coordination of social security schemes, insurance	Commission report on Phase III in preparation
Phase IV Company law, packaging, dangerous substances	The conclusions of the working groups set up for this Phase will be published in June 1999.

The task force set up as a result of the conclusions of the Amsterdam European Council with a view to simplifying conditions for small businesses (BEST) presented the Cardiff European Council with a report of its work. Three conclusions may be singled out: the impact of Community legislation on businesses must be taken into account, issues should be viewed more from the point of view of small

BEST: measures by Community and Member States called for

¹⁰ COM(1998)377 and COM(98)364.

¹¹ Directive 98/56/EC on the marketing of propagating material of ornamental plants, OJ L 226, 13/8/1998.

businesses, and Member States should not add unnecessary details when transposing Community legislation. The Commission adopted a Communication and action plan¹² showing clearly that specific measures must be taken by both the Community and the Member States to implement these recommendations.

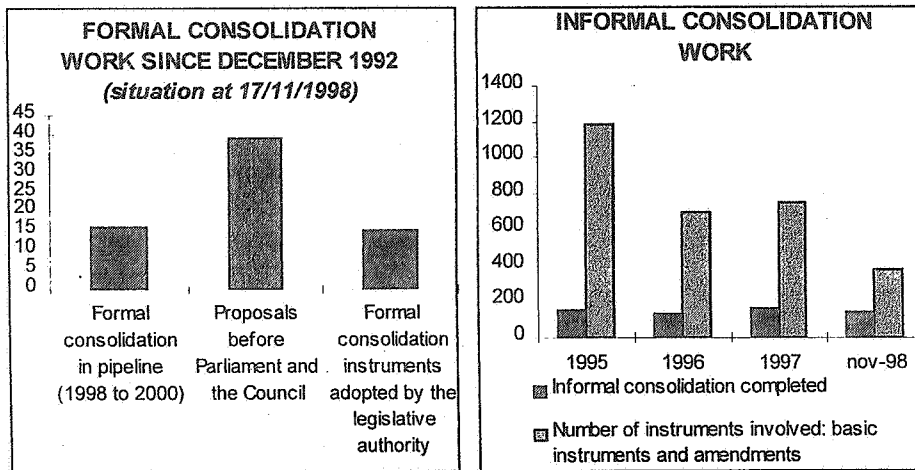
3) Formal and informal consolidation, recasting

The Commission is continuing its efforts in the area of **formal consolidation**, despite the difficulties involved (multilingualism, constant changes to the rules). However, measures are not being adopted by the Council and Parliament at the same pace. It should be noted here that despite the application of the accelerated method for formal consolidation, established by the interinstitutional agreement of 20 December 1994, the presentation of consolidation proposals and the adoption of consolidation instruments are often delayed by the adoption of new amendments to the instrument in question, which mean that the consolidation work has to start all over again.

Difficulties of consolidation

Recasting entails the adoption of a single legislative text which introduces the necessary amendments to an earlier instrument, consolidates these amendments with the provisions that remain unchanged, and repeals the earlier instrument. It thus prevents the proliferation of individual amending instruments that tend to make regulations difficult to understand and hamper consolidation. The Commission is therefore keen to conclude an interinstitutional agreement on recasting as soon as possible.

Scope for extending use of recasting



¹² COM (98) 550.

Major work is being done on **informal consolidation**, which was introduced to satisfy the requirements of all users of Community law. Between 1995 and November 1998 almost 435 informal consolidations were completed, allowing some 3 000 instruments to be merged, each in nine or eleven language versions.

Informal consolidation: 3000 pieces of legislation targeted since 1995

4) Access to information

In addition to its legislative activities in the strict sense, the Commission believes that easy access to information about its activities and a firm commitment to explaining its work are essential aspects of its drive for better lawmaking. The Commission accordingly intends to make full use of all the information and communication tools at its disposal.

Better lawmaking also means better access to legal information:

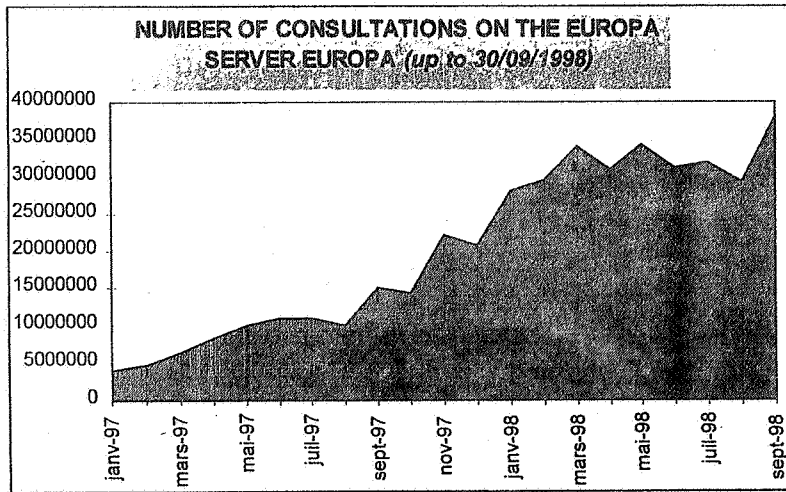
The Commission is determined to make full use of the vast potential of the new information technologies. Europa, the institutions' joint server, is a powerful tool for accessing Community legislation and information. Via the EUR-LEX site on this server it will soon be possible to consult all Community legislation in force as well as recent Court of Justice judgments. A "permanent dialogue with the public and businesses" was launched at the Cardiff European Council. This new service provides information and advice by telephone and Internet on the European Union and the rights and opportunities for individuals and businesses. As part of this dialogue a "one-stop Internet shop" for businesses will also open before the end of the year, also aimed at informing industry about Community developments of interest. The dialogue with the public and businesses will keep the Commission abreast of the problems they encounter when exercising their rights.

*...Europa,
...EUR-LEX,
...permanent dialogue with public and businesses,
... "one-stop Internet shop",*

Applying its new approach to health and food safety the Commission also ensures greater openness in the work of the scientific committees. Their opinions are regularly available on the Internet.

openness in the work of the scientific committees

The growing number of hits on Europa testifies to the success of these initiatives. In the first week after the Commission's recommendation on the list of countries qualifying for EMU and its convergence report were made available on the Internet (25 March 1998), the documents were downloaded over 40 000 times.



Publications, manuals and brochures explaining Community legislation are also produced on a regular basis and distributed widely via information relays and networks so that they are available to users. Opinion polls are conducted to gauge the public's perception of Community legislation. Large-scale publicity campaigns have been organised in conjunction with the Member States to inform the public about such landmarks in Community history as the advent of the euro.

*...publications,
...opinion
polls,
...publicity
campaigns.*

IV. A SHARED RESPONSIBILITY

1) Greater discipline on all sides

This is a matter for all the institutions...

Better lawmaking is not a matter for the Commission alone. The Council and Parliament, which actually adopt Community legislation, cannot shirk their share of responsibility. The other institutions must be far more discriminating when they ask the Commission to present proposals and avoid making proposals more complex by burdening them with details, particularly when unanimity is required.

*Responsibility
of all the
institutions: do
not overload
instruments,*

The proliferation of specialised Council compositions (currently numbering 21) has led to a very significant increase in the number of requests to the Commission to initiate legislation. In each of its compositions the Council tends to want to extend the scope of Community action in the fields it covers.

*... curb
requests to the
Commission,*

The other institutions must also make an effort to adopt the proposals for simplification and formal consolidation currently pending. Recent experience with the SLIM exercise, for example, has revealed some

*...act on the
simplification
and*

contradiction between the European ministers' repeatedly stated commitment to simplification and their attitudes when faced with proposals for simplification in practice. In the case of the Intrastat proposal,¹³ for example, the solution agreed in the internal market Council was far less ambitious than the simplification previously envisaged.

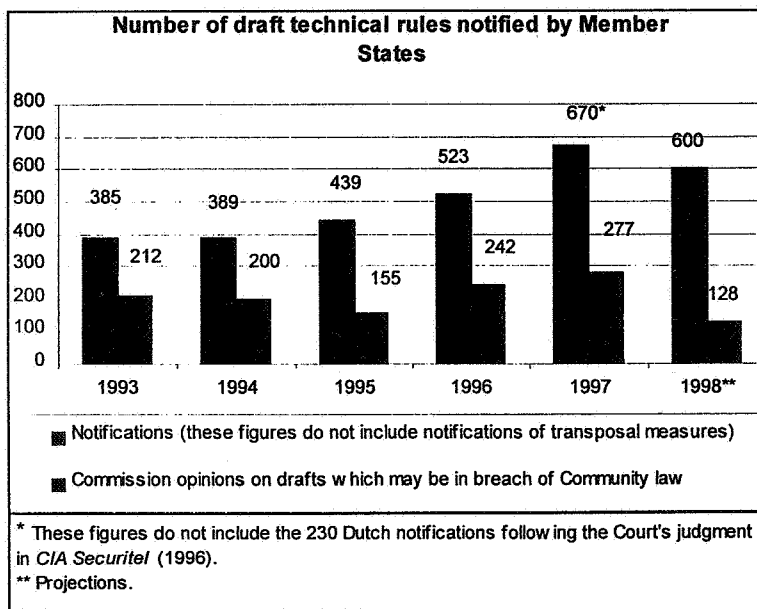
consolidation proposals pending

...and for the Member States as regards the legislation they themselves produce...

The Member States also have a role to play to complement the efforts of the institutions. They are, after all, the main producers of legislation and hence the most direct cause of the burden on firms. For instance, application of Directive 98/34¹⁴ consolidating the 83/189 procedure for the provision of information in the field of technical standards and regulations has resulted in an increase in national regulations on products in the single market which exceed by far, in number, volume and complexity, the measures adopted at Community level. What is more, many of these instruments may be in breach of Community law.

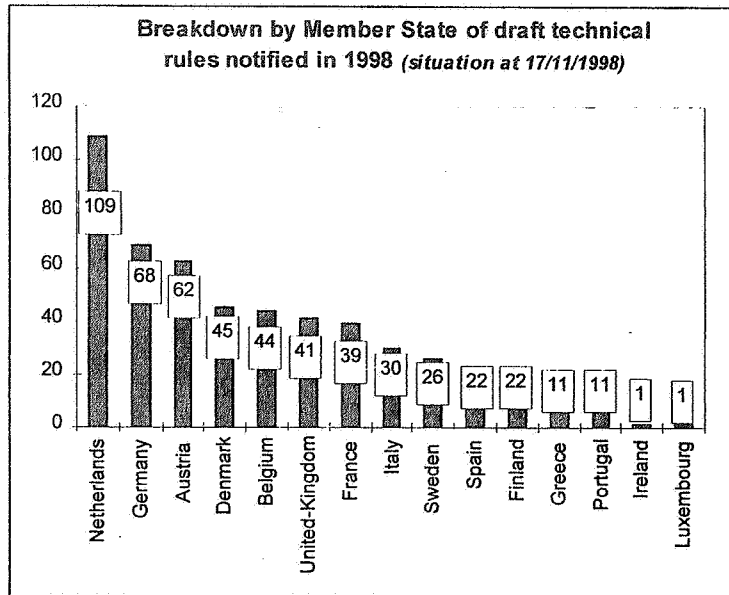
Responsibility for Member States: simplify national legislation,

The Commission would, however, point out that the Member States have begun making efforts to simplify national legislation, as emerged from the proceedings of the conferences on the subject organised by the British and Austrian Presidencies in Manchester and Vienna.



¹³ COM (97) 252.

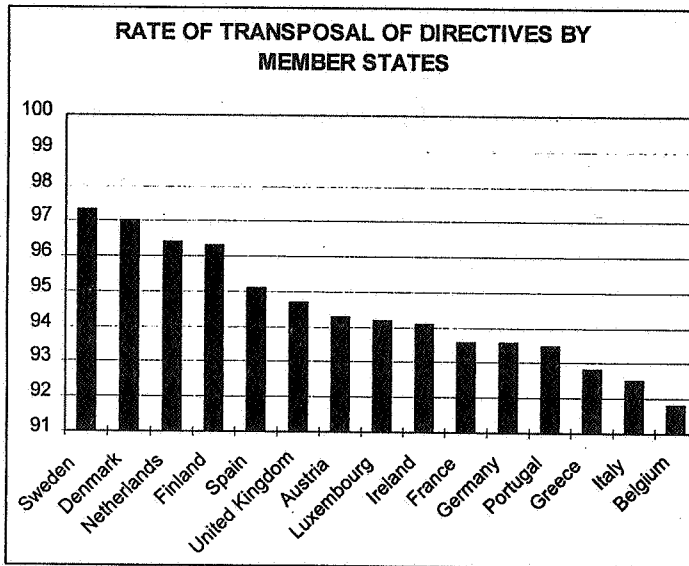
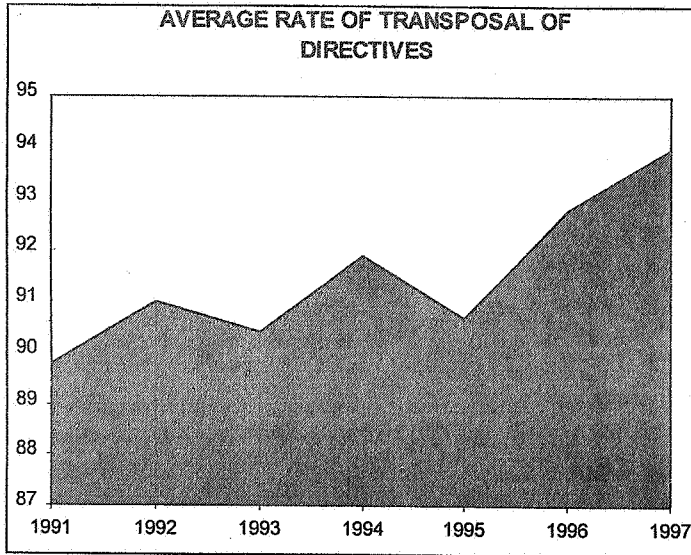
¹⁴ OJ L 204, 21.7.1998.



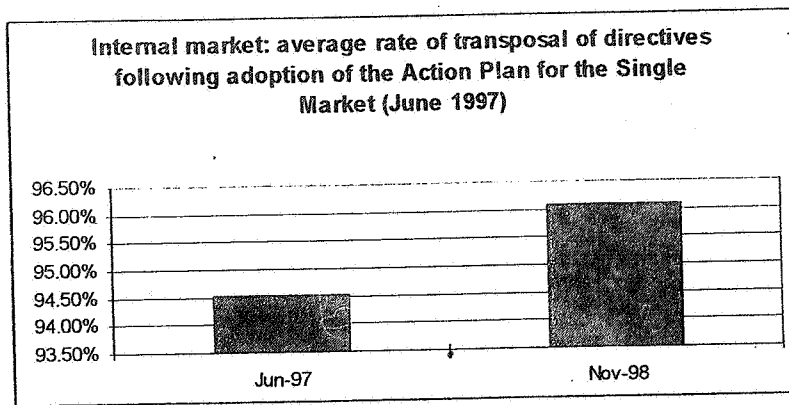
...and as regards the transposal of directives

There is no point in trying to improve the quality of Community legislation if there is no equivalent effort when it comes to transposal into national legislation. The Protocol to the Amsterdam Treaty on the role of national parliaments in the European Union should - by providing them with more information - go some way towards facilitating the implementation of directives. The Commission is currently doing its utmost to see that legislation is in fact implemented in the Member States. For instance, every two months it checks the transposal of directives and initiates infringement proceedings against any Member States which have not notified it of their national implementing measures. Similarly the Commission stays in close contact with the national authorities to help them transpose directives correctly. Although the performances of the Member States differ, these efforts have produced an improvement in the average rate of notification of national implementing measures. At 31 December 1997 the figure was 94%.

...transpose directives correctly



For the single market in particular, the action plan for the single market has produced a distinct improvement in the transposal of directives.



2) Accurate information at every level

Every effort must be made to explain and communicate the principles of better lawmaking to ensure that they are fully understood at all levels. All actors on the European stage (not only the Commission but also the Council, the European Parliament and the Member States) have a responsibility to explain who does what and who is supposed to do what in the European Union. Proper information should help the public to understand the value of action at Union level.

Explaining is necessary

Disinformation about Community activities seriously damages Europe's image. The Commission has collected a number of blatant "Euromyths"¹⁵ since the last European Council in Cardiff.

Euromyths

Its analysis shows that some measures agreed at Community level are perceived in a distorted way by the public. Moreover, Community rules are often seen as reflecting a determination on the part of the European authorities to undermine national or local traditions. The Member States rarely refute these allegations. The job of clarification invariably falls to the Commission.

Conversely, the tangible benefits to the European public rarely if ever receive any coverage. In these circumstances the result is obvious: disinformation almost always triumphs over positive reporting.

There are, however, some examples of effective cooperation between the Commission and the Member States (and with regional and local authorities) to provide accurate information. The information campaign on the launch of the euro, *Citizens First* and *Building Europe Together* are significant examples.

Accurate information about the Union's role and action is needed

¹⁵ For example, the Commission's alleged intention to discontinue the reduced rail fares for large families (June 1998) and to introduce a system of car tolls at the entrance to towns (September 1998).

The Member States must become much more involved in informing their citizens about the role and action of the European Union.

The time has come collectively to discredit the myth of Europe concentrating power at the centre, that squares neither with the institutional reality of the Union nor with the principle of subsidiarity.

V. Conclusion

The Commission endeavours to exercise judiciously the right of initiative it enjoys under the Treaty - in full compliance with the principles of subsidiarity and proportionality. It also seeks to implement the political priorities it has set itself. It continues to take measures to improve the drafting of legislation. Since the Cardiff European Council it has tightened up its arrangements even further and is already applying the Amsterdam Protocol.

Subsidiarity and proportionality are common-sense principles, governed by clear rules. They have been enshrined in Article 3b of the Treaty. The Amsterdam Protocol lays down the rules for their application.

But the road ahead is not clear of obstacles. The Commission is sometimes subject to pressure which does not always satisfy the subsidiarity and proportionality principles. All the players must be on their guard.

"Better lawmaking" requires collective discipline throughout the legislative procedure. The Commission must of course try to improve the quality of its proposals, in particular when it comes to implementing the new Treaty. But it has to be able to rely on the action of the other institutions and of the Member States, which must, for their part, undertake to produce legislation that is simpler and better targeted.

The disinformation about Community activities that abounds in some Member States is at the root of many misunderstandings. The public are not always in a position to realise who does what and who is supposed to do what in the Union and what is the value of action at Union level.

The backdrop to Community legislative policy is changing: completion of the single market, arrival of the euro, enlargement, globalisation, the mounting concerns of the public in relation to employment, health and the environment.

"Better lawmaking" is not an end in itself. It is an instrument to guide

us in our search for the answers to the questions facing us today. If we are to be effective we must work together. This is a shared responsibility.