Minutes of the Symposium on ‘Better Regulation’ in the European Union*

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How, from a legal point of view, can EU legislative policy be improved? This was the leading question of this symposium. The assessment of legislation on its technical and legal accuracy is already well embedded in the European decision-making process. Yet, in broader terms, the quality of legislation is also determined by its practical value. That is to say that the law must provide clarity in social and economic life and it must provide interested parties methods that enable them to resolve conflict situations.

All in all, this involves questions as to the necessity, the proportionality and the effectiveness of legislation. More attention should be paid to the preconditions enabling the proper performance of the regulation within society. And more attention should be given to the way in which rules are enacted: by directive or regulation, by self-regulation or other forms of regulation. As Schuwer mentioned, product safety regulations are an example of a field in which self-regulation has so far proven to be successful.

Another question is whether uniformity is always desirable. Uniform rules and regulations often seem clear and transparent, yet the pursuit of uniformity can entail risks. In the different Member states circumstances may vary. Detailed rules, if enacted, can be ill suited for the citizens who have to comply to them as well as for the authorities that must enforce them. As a consequence, the limited effectiveness of these rules can provoke a continuous call for modification. Eventually, frequent alteration of regulation can damage legal certainty. So, given the variety of contexts in different Member States, realising a common objective by way of diversity can be easier than by uniformity.

Finally, Schuwer emphasised that guaranteeing legislative quality of European legislation is a responsibility of all parties involved. Member States must see to a sound and expeditious implementation. At the European level, Commission, Council, and Parliament must jointly seek ways to improve European laws and regulations in order to

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* The views and opinions represented in this report are the personal views and opinions of the speakers and do not reflect those of the institutions and organisations for which they work. Errors in the presentation of the speakers’ views and opinions are the sole responsibility of the authors.

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make them really work and to achieve EU policy goals. The Interinstitutional Agreement Better Lawmaking 2003 stresses this joint responsibility. It confirms that all parties involved in the legislative process must make a concerted effort. The application of the preceding Interinstitutional Agreement on legislative quality 1998, enacted under the Dutch Presidency of 1998, has demonstrated that the institutions are prepared to do so. This Agreement is currently being introduced in the organisational practice by way of a common manual - Joint Practical Guide/Guide Pratique Commun - with practical guidelines for clear and consistent legislation. Let’s hope that the Agreement of last year, which goes further and which is explicitly based on a broader view of legislative quality, will have a similar effect in the institutions.

Presentation by Advocate-General Adriaan Geelhoed

During his career Mr. Geelhoed has learned that in terms of complexity, wording, enforceability or burdens Community legislation is not worse than comparable national legislation. However, as Geelhoed added, Member States easily tend to reprimand the EU for bad, superfluous or ineffective legislation. And for sure, there are examples of bad, silly and even irresponsible Community legislation but in the national sphere such legislative monsters can be found as well.

According to Geelhoed, Community legislation has two handicaps vis à vis national legislation. First, Community legislation has to be transposed into a body of national legislation and this transposition inevitably has consequences for the national legal systems. Second, it has to be implemented and enforced by national authorities which do not consider it as their own baby. This leads to irregularities and inconsistencies in the application and execution of the ‘imported rules’.

That is not to argue that Community law is perfect, far from it. For example Geelhoed points out that the regulations applicable to the structural funds are so complicated, diffuse and ill drafted that the Commission is not able to enforce the regulations properly. As a consequence the Commission cannot call the authorities involved to account and consequently money disappears. This, for its part, fuses anxiety on EU spending and calls to decrease the EU budget.

The heart of the matter is: if one wants to improve the quality of Community legislation one must start at improving the quality of the policy decisions which forms the basis of the subsequent legislative activities. Unclear objectives lead to opaque law; ambitious objectives without the willingness to provide the necessary legal instruments lead to disappointing results. Ambitious objectives without taking into account what realisation will mean in the national sphere beg for failure in compliance. Therefore, Geelhoed concluded, clear and transparent law is not always good law when the basic assumptions for that law are wrong or inaccurate.

Furthermore, difficult and complex Community legislation attracts a lot of criticism because the issues it deals with are often controversial. It then does not matter whether this legislation is the result of well founded, carefully analysed policy decisions. This was demonstrated, for example, when the telecommunication regulations were introduced. As to deregulation Geelhoed observed that legislative reform is unthinkable without reassessing the political preferences and policy choices which are the base of onerous, ineffective or inapplicable legislation. This exercise should be done for perfectly honourable reasons, or else one runs the risk that it degenerates into a purely symbolic operation by cutting dead wood or flatter the aesthetic preferences of the legal purist. This will not, however, lead to better regulation.

Drawing from experiences gained in the eighties and the nineties in the Netherlands, Geelhoed sets out a few lessons for legislative reform. The first one is that one should never try to engage a deregulation or reregulation project just for the sake of it. Second, identify areas where the existing legislation is qualitatively poor at an early stage. Third, wait for a proper opportunity. Such a window could be a political moment, a policy review or a sense of urgency inspired by critical attitudes expressed by private parties. Fourth, be ready for that moment; know what you want and be able to explain why your solutions are better that the existing situation and get the right support. Fifth, define your bottom lines to know when you should withdraw your proposals if they are watered down. Sixth, be aware of the risks of encompassing structural reforms. And last, realise that a policy is tremendously successful when you attain 70% of your objectives. When you try to realise 100%, the price you have to pay in stricter and more complicated rules, enforcement costs and resistance of the addressee is almost always disproportional. Geelhoed concluded that on the basis of these simple and basic rules within a decade and a half the economic legal order in the Netherlands was reformed beyond recognition.

Presentation by Secretary-General of the European Parliament Julian Priestley

During the Dutch Presidency a long table could be found in the Rem Koolhaas-designed tent at Place Schumann, on which the entire acquis communautaire was laid out conveying the subliminal message that it is ... too much. And the day before this symposium, on 26 January 2005, the Commission presented its work programme in the European Parliament (EP) that contained 116 initiatives for legislation. Undoubtedly, then, the 80 000 pages of the acquis will increase, Mr. Priestley said.

However the case might be, Priestley is convinced that high quality legislation can guard against at least some of the reproaches levelled against EU-legislation. And there is much that could contribute to its improvement, the Interinstitutional Agreement 2003 (IIA 2003) being one of them. This Agreement involves three institutions (Council, Commission and European Parliament), and it is, from the perspective of the EP, a more appropriate instrument than each Institution working in isolation.

Priestley set out the seven elements of the IIA 2003 which he believes to be of central importance. Transparency. The EP deliberates in public, in plenary and in committee (which is not always the case in national parliaments). The Constitution envisages that Council will also deliberate in public when legislating. Programme. Urgent legislation entails risks for quality, particularly at the end of each
Council Presidency. Interinstitutional programming could make improvements here. *Transposition and enforcement.* While it was for the Commission to monitor the application of EU law, implementation is a matter for all Institutions, not least because Parliament could play a constructive role in its relations with national parliaments. *Alternatives to regulation.* The Agreement recognises that EU directives may not always be the best means of proceeding; the Parliament is open to alternatives to regulation, but has insisted on democratic safeguards in order to ensure transparency. *Preconsultation.* Parliament sought here greater transparency and full disclosure. *Legislative quality.* The earliest possible involvement of lawyer-linguists from all the Institutions should iron out difficulties before positions become entrenched. *Impact assessment.* Agreement requires the Commission to conduct impact assessments on all its proposals and allows for Parliament and Council to conduct assessments on their principal amendments.

These seven pillars— if not of wisdom then of practicality—are enshrined in the Agreement on Better Lawmaking and are now being implemented. That implementation requires more detailed work by the Institutions. The initiative of the Commission seeking a joint interinstitutional approach to the Five-Year Strategic Objectives, thus anticipating the Constitution, is a constructive way forward to better programming; much fine-tuning is required. The record on transposition and enforcement of EU directives is very mixed, according to the review of the Lisbon process undertaken by former Prime Minister Kok. Only 7 of the 40 Lisbon-related directives have so far been implemented in all Member States. Correlation tables as part and parcel of new directives would be very helpful, but the dialogue with national authorities, and in particular national parliaments, needs to be strengthened.

Priestley repeated that the EP has an open and willing attitude to alternatives for regulation. However, in the Commission's 2005 work programme, there is no indication as to where such alternatives would be proposed. Returning to impact assessment, Priestley noted that this was the most difficult issue. The key question was how to have a common approach to impact assessments, in such a way that their results would inform, not confuse public opinion. In the end, it may be necessary to set up an independent and impartial body for assessing the impact of regulation. In the short-term an understanding as to what impacts to assess and what priority items should be the subject of extended impact assessments was a minimum. On legislative quality, Priestley referred to the Common Guide drawn up by the Legal Services of the Institutions and which Parliament is now translating into all working languages.

Priestley concluded his presentation by noting that the 2003 Interinstitutional Agreement gives us the instruments to succeed. What is now required is the political will in all the Institutions to move forward.

**Presentation by Bevis Clarke-Smith of the Legal Service of the Commission**

In his presentation Clarke-Smith discussed the position of the Legal Service of the Commission (LSC) within the context of 'Better Regulation' and the numerous activities undertaken in that field.

The LSC has a twofold task: on the one hand it is the guarantor of the lawfulness of the Commission's actions; on the other it has to ensure a consistently high standard of quality of the institution's legislative output. Its experience with litigation shows that these two elements of its task are linked: a large proportion of cases arise because of the lack of clarity in legislative texts, which induces differences of opinion and of interpretation. Clarke-Smith argued that a higher proportion of the institution's attention and resources should be directed towards improving the quality of initial drafts of legislation coming out of the Commission Services. These drafts form the basis of the whole EU legislative process, and if quality is not built into the product at the earliest stage it is very difficult to inject it later on. However, although several structures for improving quality exist, no single service is given horizontal responsibility for that specialised subject.

The Interinstitutional Agreement on Better Lawmaking 2003 covers the whole range of preoccupations expressed in relation to Community legislation, both internally and externally. The IIa 2003 brings the several strands of the regulatory process into one text, which may give the impression that the EU legislative process is somehow monolithic and that one department can be responsible for implementing it. However, this is not the case: the Working Paper 'Who is doing what on Better Regulation?' produced by the SG of the Commission, shows that some 50 institutional and interinstitutional bodies and structures are likely to intervene at some point in the debate on legislative quality. Without coordination this system can be counter-productive.

This raises the question, Clarke-Smith added, whether an overarching authority might be a solution. An authority such as an EU Legislative Drafting Office should have the power to intervene at all stages of the legislative process. Some Member states, like the Netherlands, favour this idea and it can also be found in the Koopmans report and the Bellis report, recently discussed in London. Although Clarke-Smith does not rule out such an institution, too, he pointed out that it would be very difficult to position such an institution within the delicate balance between the Council, the Commission and the European Parliament.

Returning to drafting practice, Clarke-Smith mentioned another problem, namely that the weight of precedent is something that is hard to shake off. As a draftsman it is always easier to copy the way you did it last time than to rethink your problem in terms of increased clarity. We should not forget that at present time the *acquis communautaire* covers 9,000 printed pages and that codification, as practiced by the institutions, will not in itself lead to an improvement in the overall quality of Community law.

The challenge is therefore not only to reduce the sheer number of pages and Clarke-Smith set out how the Legal Revisers Group within the Legal Service makes a contribution to changing the way Community legislation is perceived by those to whom it is addressed. In essence, the Group attempts to ensure that acts adhere to a model set out in the 1998 Interinstitutional Agreement. This Agreement itself is an example of such an act; its only defect is that it is not actually binding on the Institutions.
Clarke-Smith noted furthermore that the working methods of the legal revisers have recently undergone substantial change, partly because of the 1998 Interinstitutional Agreement, partly as a response to the rapid increase in size of the Group, coupled with the doubling of the number of official languages. The biggest change is their early involvement in the drafting process: rather than having the possibility to act only in the final stage of the decision-making procedure, when a draft legislative text is ready for adoption by the Commission, a greater proportion of draft legislative texts are now scrutinised at the stage of the interservice consultation. However, despite the many advantages of this early involvement, a negative opinion of the LSC is not sufficient to block the procedure.

Clarke-Smith asked: has the 1998 Agreement led to a dramatic difference in the quality of EU legislation? Not yet perhaps, but it does indicate a number of practical measures which are having an increasing influence on the way legislation is approached in the institutions. These include: the reorganisation of internal procedures; the creation of drafting units; training in legal drafting; cooperation with the Member States; work on information technology tools; and (annual) reports.

Clarke-Smith concluded that despite the efforts to coordinate the various strands of activity, overall authority is still the essential element lacking. This overall authority should have the power to block or amend legislative drafts which do not reach the standards laid down by the Interinstitutional Agreements. This power should lie with the Legal Service, Clarke-Smith adds. Although a small wheel in a big machine, the Legal Revisers Group has an important place: its work has an immediate effect on the quality of the product at an early stage in the legislative process.

Panel-discussion

After the three presentations, Mr. Ignacio Díez Parra from the Legal Service of the Council joined the three speakers on a panel that debated about questions of better regulation with participants in the audience. Mr. Díez Parra has been closely involved in the drafting of the latest IIA. In his brief introduction, Díez Parra said he believes that the IIA is an improvement. Díez Parra also briefly responded to Priestley’s remark that transparency is still a challenge to the Council by referring to the fact that the Council is currently considering possibilities to broadcast its meetings on the Internet.

During discussion, the translation of texts is mentioned as a factor in the quality of proposals: translations should only begin when the Commission has a finalised proposal. As a response to that remark Clarke-Smith noted that that is already a rule in the internal procedures of the Commission, but that in practice it is unfortunately not always complied with well enough.

The panel-members were also asked whether they consider deregulation and better regulation as parts of one and the same process or not. Geelhoed replied that they are hard to distinguish. Furthermore, he added that deregulation hardly ever leads to substantial results. Only in cases of dead law does it really work, but otherwise it is impossible, leaving simplification, streamlining and the likes as the only viable openings. From the audience an opposing example is brought forward, namely that the codification of family law has led to a 30% reduction in primary law. Clarke-Smith said to be more optimistic about simplification of rules, but stresses that what is essential is the quality of the texts – whether it is about deregulation or better regulation.

As regards the need for implementation of the IIA, Priestley said there is a massive amount of work to do, especially in impact assessment, for which an independent body may be needed. A participant from the Commission intervened in disagreement. He argued that an independent body is never truly independent, since it must be given assignments and it must be paid. Furthermore, he added that impact assessment is about considering possible alternatives, not about scientific calculations. Finally, the participant disagreed with Priestley where he had said that multiple methods would confuse public opinion. It is the nature of the problem that defines the method: if there is an economic problematic, that leads to an economic common analysis. Priestley responded by saying that an impact assessment conducted exclusively by the body which initiates legislation could lack credibility. Geelhoed expressed his full agreement with Priestley if you’re not an impartial body, what will happen is that you first lose credibility of your assessments and then eventually you will lose the credibility of your initiatives. For this reason Geelhoed simply does not understand why the Commission would want to have this position. In light of such “politics of assessments” Schuer referred to the Batteries-directive already alluded to in Geelhoed’s presentation, where every participant had a different assessment of the impact it would have. Another participant responds that impact assessment is an instrument to improve legislation and to inform decision-making. The Batteries-directive reminds us of the fact assessments are not now obligated for the more substantial amendments, this participant added. Priestley underlined that impact assessments were necessary as a means of enhancing the Union’s credibility and persuading public opinion in the 25 Member States that its initiatives are based on solid grounds. Public opinion still required much convincing. All efforts must be harnessed to underpin the credibility of the European project.