

# **POLICY-MAKING IN THE EU**

## **ACHIEVEMENTS, CHALLENGES AND PROPOSALS FOR REFORM**

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**CENTRE FOR EUROPEAN POLICY STUDIES  
BRUSSELS**

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The Centre for European Policy Studies (CEPS) is an independent policy research institute based in Brussels. Its mission is to produce sound analytical research leading to constructive solutions to the challenges facing Europe today.

This report is based on discussions among the participants of three Expert Groups focusing respectively on EU Decision-Making, Better Regulation and Implementation and Subsidiarity. The experts included a broad range of international academics, policy-makers, business representatives and other stakeholders, who came together in meetings several times over the past year (see the annex for a full list of the members).

While the report has benefited from the discussions among the members of the three Expert Groups, it should be noted that its contents are the sole responsibility of the five rapporteurs. The views expressed are those of the rapporteurs and do not represent the views of the members of the Expert Groups nor do they necessarily represent the views of those of CEPS or any other institution with which the rapporteurs or members are associated.

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# PREFACE

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For the past five decades, the European integration process has been a driving force for trade, innovation and growth, delivering tangible benefits to all Europeans. New challenges lie ahead, and fresh goals have to be set if the EU wants to maintain its competitiveness in a globalised world. Specifically, if the EU aims to become the world's most competitive economy, it needs to have the most effective legislative process, powered by efficient and accountable institutions and a world-class public administration. EU member states must also do their part, as better regulation is a shared responsibility. This means above all 'thinking European first' to achieve commonly agreed goals rather than looking primarily at national interests. The benefits of this approach are clearly visible in the Internal Market, which is the most evident win-win situation Europe faces today. The completion of the Single Market and the full realisation of the free movement of goods, services, people and capital enshrined in the EC Treaty will ultimately result in enhanced competition, increased consumer choice, better business and job opportunities and a stronger Europe. There is no better way of restoring confidence in the EU than by producing, implementing and communicating better EU legislation to the benefit of all European citizens and companies.

This report is the product of a joint project initiated by the Centre for European Policy Studies (CEPS) and the Confederation of Swedish Enterprise, the major business organisation in Sweden. Three expert groups of international academics, policy-makers, business representatives and other stakeholders have joined forces to analyse the issues facing the EU and to put forward some suggestions for reform in the short and medium term. At the end of this report, we also provide more forward-looking ideas, resulting from discussions between CEPS and the Confederation of Swedish Enterprise, on how to fully achieve the Internal Market and eliminate harmful barriers to cross-border trade in the European Union. These ideas are offered as a contribution from the research and business worlds for a better functioning Union in the 21<sup>st</sup> century.

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# **POLICY-MAKING IN THE EU**

## **ACHIEVEMENTS, CHALLENGES AND PROPOSALS FOR REFORM**

### **EXECUTIVE SUMMARY**

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#### **Overview – Shaping the ‘post-Lisbon European Union’**

Since its foundation, the European Union has always been a very controversial project, with Euro-sceptics and Euro-enthusiasts often animatedly challenging each other’s views. This never-ending debate is now reaching new peaks, after the Irish referendum that rejected the Treaty of Lisbon, and in the wake of one of the worst financial crises ever faced by the Old Continent. The ‘cost of non-Europe’ – an expression coined as long ago as the Cecchini report in 1988 – is still a major issue in the debate on the future of the EU, especially since the GNP increment (up to 6.5%) predicted by the Cecchini report was not confirmed by subsequent research. Likewise, the European Commission’s publication on the ‘economic cost of non-Lisbon’ linked macroeconomic benefits to the achievement of very ambitious objectives, which as of today have only partly been met. Recently, the Dutch Bureau of Economic Analysis estimated that the completion of the Internal Market for goods and services can add up to 10% to the EU GDP in the long run. This shows that the potential for further integration is enormous, and still waits to be fully unlocked.

The EU integration process has undoubtedly been a driving force for the welfare of European citizens in the past two decades; however, EU decision-making has often been criticised as slow, complex and producing too many ‘lowest common denominator’ solutions. On the other hand, citizens continue to feel distant from the EU’s political processes, and this undermines the legitimacy of many decisions. This lack of ownership in the Union was most recently underlined again by the Irish no-vote to the Lisbon Treaty, but is also reflected in the low turnouts for European Parliament elections which have been decreasing constantly since the first direct elections in 1979, and are likely to follow the same trend in 2009.

How can Europe emerge from this *impasse*? To be sure, if the EU wants to become the world's most competitive economy, it needs to have the world's most effective legislative process, powered by efficient and accountable institutions. At the same time, member states must understand that better regulation is a shared responsibility, and that they should 'think European first', before looking at their national interest. After all, a complete and well-functioning Internal Market is the most evident 'win-win' situation Europe faces today, as it carries the promise of enhanced competition and consumer choice, more business and job opportunities, and a stronger Europe in a globalised context. And there is no better way of restoring confidence in the EU project than producing, implementing and communicating better EU legislation to the benefit of all Europeans.

***If the EU wants to become the world's most competitive economy, it needs to have the world's most effective legislative process.***

Against this background, the coming months will coincide with a 'Camelot moment' for the Union. Major initiatives of the last decade such as the Lisbon strategy and the i2010 strategy will come to an end. At the same time, the first round of administrative burdens reduction will be completed, and the first results of the Single Market Review will be available. All this places a heavy responsibility on the next EU Presidencies, but also a 'one-time opportunity' to unleash the potential of the Union through a more efficient, democratic, transparent and inclusive European decision-making process.

***The coming months are a "one-time opportunity" to unleash the potential of the Union through a more efficient, democratic, transparent and inclusive European decision-making process.***

This report provides recommendations on how to improve the policy-making process in the 'post-Lisbon' European Union. The suggestions contained in the next section follow from the proceedings of three expert groups that discussed three sets of complementary issues: the future of EU decision-making (Pillar I), better regulation (Pillar II) and implementation and subsidiarity (Pillar III). For each expert group, we invited senior officials from all EU institutions, academics, practitioners, politicians and various other stakeholders. What emerged from the meetings, with remarkable consistency across the different expert groups, is a new vision of the functioning and role of the EU in steering European citizens and businesses towards enhanced competitiveness and prosperity in the years to come.

- ***More efficient EU institutions.*** The internal decision-making process can be streamlined in all EU institutions. This implies, *i.a.* a more efficient use of resources throughout the policy cycle, more coordination between internal structures (e.g. Commission Directorates General (DGs), Parliamentary Committees and Council formations), a more effective role of consultative bodies and a better allocation of roles and competences between the institutions.
- ***More accountable EU institutions.*** Better regulation tools have already helped the Commission strengthen its accountability vis-à-vis stakeholders. We propose several ways to achieve more accountable institutions and more widespread evidence-based policy-making. This implies, *inter alia* balancing the efficiency of the policy process with its representativeness and legitimacy, improving the dialogue with stakeholders and reallocating competences as regards better regulation.
- ***Streamlined inter-institutional relations.*** The co-decision process can be made more efficient by a clearer delineation of roles and responsibilities within the institutions involved. The extension of the Commission's role in performing impact assessments throughout the policy process, as well as the early involvement of the Parliament in identifying strategic initiatives in the yearly policy cycle, are examples of ideas that respond to this need.
- ***More participation of stakeholders.*** We can envisage a policy process in which all stakeholders are aware of what is being done (and why), as well as what is not being done (and why). Consultation on draft impact assessments, feedback from national parliaments and consultation on regional and local governments will ensure a more balanced and effective participation of all stakeholders to EU policy-making. These tools alone are not enough: they need to be coupled with a targeted and well-designed communication campaign to make sure they are really used by all stakeholders involved.
- ***Less burdensome legislation.*** Achieving the Internal Market chiefly requires the lifting of unnecessary obstacles to cross-border trade. The elimination of administrative burdens is only a piece in a more complex puzzle: more harmonised legislation in a number of fields can help unleash the potential for the supply and provision of pan-European goods and services to the ultimate benefit of European citizens and consumers. This implies a better use of regulation, including forms of self- and co-regulation, where appropriate.

- *A 'holistic', multi-level view of the policy cycle.* Policy learning and adaptation can be improved in Brussels and in the member states. We propose arrangements aimed at ensuring that the efforts made at early policy stages lead to *ex post* monitoring and evaluation of the performance of policies, and this feedback can be used to improve EU policies overtime.

In the following pages, we summarise the main policy recommendations that emerged from the three expert group meetings by proposing 30 ideas for a modernised European Union. Most of these ideas look at the internal functioning and external accountability of EU institutions, but some of them also refer to tasks that should be accomplished by member states, reflecting the idea that better EU policy is a shared responsibility. At the end of this report, we also provide more forward-looking ideas, resulting from discussion between CEPS staff and the Confederation of Swedish Enterprise, on how to fully achieve the Internal Market and eliminate all harmful barriers to cross-border trade and consumption in the territory of the Union. These ideas are offered as a contribution from the research and the business world for a better functioning Union in the 21<sup>st</sup> century.

## **Part I. More Efficient Decision-Making by the EU Institutions**

*The European Commission of the 21<sup>st</sup> century: Towards a real 'world-class administration'*

### *Idea #1. A smaller College with broader portfolios*

**Problem.** The College of Commissioners has gradually lost its capacity to vote on controversial proposals. The excessive number of Commissioners (one per member state) has led to a significant fragmentation of the competences, and accordingly to a less efficient decision-making process.

**Suggestions.** For this reason, the number of Commissioners should be reduced, and each of them should be given a rather broad and - where relevant - horizontal portfolio. For example, Commissioners for 'Competitiveness', for 'Climate Change' or for 'Quality of Legislation' should be appointed. This would provide an incentive for national governments to propose strong personalities for the College and would give the Commission more visibility on these high-level issues. This also calls for allocating the necessary resources to these posts from different DGs, which implies a more flexible allocation of staff and resources. Future EU Presidencies should seek agreement on potential ways to achieve this

result, proposing forms of ‘egalitarian rotation’ between member states and linking horizontal portfolios to goals and targets set at political level for the post-Lisbon era.

### *Idea #2. Alternative ways to improve the internal efficiency of the College of Commissioners*

**Problem.** Reducing the size of the College may prove very difficult for political reasons. In that case, the Commission could consider other ways of ensuring its capacity to agree on internally controversial proposals.

**Suggestions.** Potentially valid options include:

- *Reinforcing coordinating structures* within the Commission, with horizontal issues coming under the direct supervision of the President of the Commission.
- *Creating an ‘inner circle’ of Vice-Presidents.* This implies the creation of five or six thematic ‘clusters’ of Commissioners, with each of these clusters coming under the responsibility of a Vice-President. This would combine the advantages of each nationality keeping a high-level interlocutor with a more workable size of the College. It would not necessitate a Treaty change and could go as far as giving the respective Vice-President the ultimate say on whether a proposal will be presented to the College.

### *Idea #3. Better use of preparatory documents*

**Problem.** The Commission must guide the debate with a view to the ‘Community interest’, while ensuring that the essentials of its proposals are acceptable to all relevant actors. In the preparatory stage of legislation, good ‘quality’ particularly implies the setting of clear strategic objectives for legislation and extensive consultation. A thorough reflection process preceding legislative action is of key importance for a better outcome and due to strategic objectives, the actual legislative process can run more smoothly later on, similarly to the business sector, where a process ‘from strategy to concept to product’ is common.

**Suggestions.** Early-stage policy documents (such as Green and White Papers) should contain a thorough discussion of: *i)* the need to act, *ii)* the need to act at EU level and *iii)* possible policy scenarios and proportionality of available regulatory options (including self- and co-regulation).

**Idea #4. High linguistic and legal drafting quality**

**Problem.** Legislative proposals are normally not written by specialist drafters and the Commission's legal service often only comes in at a later stage to review the text. In many cases non-native speakers are drafting the proposals in English or French, so that an additional linguistic challenge exists. With 23 official languages now, it is very important that the original language version of a proposal is of great linguistic and legal clarity, so that the subsequent translations do not end in 'Chinese whispers'.

**Suggestions.** It should become a standard that both a legal expert and a mother-tongue speaker are involved by the lead-DG *further 'upstream'* in the drafting process. The same considerations should also apply for the other institutions later in the legislative process.

**The European Parliament: Managing Diversity, Increasing Legitimacy****Idea #5. A code of conduct for tabling amendments**

**Problem.** With currently 785 members, the European Parliament is the largest directly elected parliament in the world: the size of the Parliament is a problem in terms of effective policy-making. Most of the actual work is done at committee level, and the number of amendments tabled has consequently skyrocketed. With a total of 10,767 plenary amendments issued in 2006 alone, concerns had been voiced that the debate would become too technical and difficult to follow. Currently the EP President can mandate that lead-committees act as 'filters' if more than 50 non-committee amendments have been tabled: any amendment that does not receive favourable votes from at least 1/10 of the committee members will not be put to the vote in plenary.

**Suggestions.** The EP-internal Working Party on Parliamentary Reform (WPPR) already recommended making it *obligatory* for the responsible committee to 'filter' amendments, if they exceed a certain number, but the Conference of Presidents did not follow this recommendation. This proposal should be reconsidered, as it would help focus the parliamentary debate and avoid repetitions and inconsistencies of the EP position at an early stage. It would also be beneficial to the quality of the legislative text. A code of conduct could be considered that would outline criteria for tabling amendments.

***Idea #6. Involving the European Parliament more heavily in the selection of key initiatives to be included in the annual work programme***

**Problem.** After the 2004 “Inter-Institutional Agreement on Better Lawmaking”, the European Parliament is in charge of performing impact assessment whenever it wants to significantly amend Commission proposals. However, this feature of the EU’s better regulation system is not working, and is unlikely to become more effective in the future. Moreover, the Parliament is not heavily involved in the early stage of the policy process, when key initiatives to be included in the annual work programme are selected.

**Suggestions.** The European Parliament should not be required to perform impact assessments on its own amendments. While the Commission should take over the competence for updating IAs based on proposed amendments, MEPs should be more heavily involved at an early stage in the selection of ‘strategic’ proposals to be subjected to in-depth IAs in the Commission’s annual legislative and work programme (‘Roadmaps’). This feature strengthens and streamlines the inter-institutional relationship between the two institutions, as the Parliament would be called to indicate the issues that should be subject to technical analysis (the impact assessment), and would then decide (also) on the basis of such analysis when it comes to voting on Commission proposals.

***The Council of Ministers and the European Council: Ensuring Coherence and Continuity***

***Idea #7. Streamlining negotiations: Issue papers, negotiating boxes and sub-groups***

**Problem.** The Council is the institution most affected by the ‘effect of numbers’ following enlargement, and the shift from 15 to 27 national delegations has meant a major change for intergovernmental negotiations. The overall legislative output of the Council has remained stable while difficulties in reaching agreement can particularly be observed in areas where unanimity prevails (e.g. Justice and Home Affairs, General Affairs). Recent research found that legislative acts have on average become longer by 15%, thus signalling a need to accommodate a greater number of national reservations.

**Suggestions.** The Council should give discussions more focus and structure by making more use of initial documents where the main problematic points are outlined (*‘issue papers’*); and documents in which the

presidency lists contentious points, suggested solutions plus the respective state of play, to be subject to constant revision tracking the progress of the negotiations (*'negotiating boxes'*). The general use of these two instruments may necessitate special training for those officials from the Presidency or the Secretariat General that would be involved in drafting issue papers and updating negotiation boxes. Moreover, the use of *sub-groups of national delegations* should be increased to clarify contentious issues before decisions are taken in the plenary. These groups could have different functions ranging from the simple exploration of an issue to pre-negotiations. The sub-groups would not take any decisions and they would be guided and supervised by the Presidency, the Council's Secretariat General and the Commission. However, the acceptance of this approach will largely depend on the level of trust between member states and the skills of the Presidency in maintaining this trust.

#### ***Idea #8. Reduce the number of meetings***

***Problem.*** During six-monthly presidencies, a number of official Council meetings are organised for political or prestige reasons, but too often result in a mere 'tour de table', which makes meetings lengthy and unappealing.

***Suggestions.*** Official meetings should only take place if the legislative agenda justifies them and not because the Presidency would like to hold them for political or prestige reasons. *Unofficial meetings* focusing on topical issues in given policy areas can be far more effective in stimulating political ownership and mutual trust at the national level. In contrast to an official meeting with an unappealing formal agenda in Brussels, meetings could take place in the country of the Presidency. This approach could be considered for the European Council, where two out of the four meetings per year could be turned into informal summits.

#### ***Idea #9. More focused Presidency conclusions***

***Problem.*** The Presidency conclusions of European summits should become more focused and consistent with the role of the European Council as a provider of political orientation for the EU-27. At present the text is often unduly long and contains many general statements that dilute the key messages.

***Suggestions.*** One option would be to limit the length of the text, e.g. to a maximum of 10 pages. Another possibility would be to split the text into a short main part and a second, more general part.

**Idea #10. Coordination of different Council formations**

**Problems.** Due to its organisational structure, the Council is particularly dependent on good coordination mechanisms. The fact that the Council meets in nine different formations inevitably means a risk of incoherence. Particularly in countries with coalition governments and relatively weak coordination mechanisms, national positions are not always fully consistent across Council formations. As such it can happen that a member state takes a different position in one Council formation (e.g. the Environment Council) than it does in another one (e.g. the Competitiveness Council). This can lead to confusion among other delegations and to procedural delays. Another challenge is the rotation of the Council Presidency. It leads to discontinuity, as Presidency staff and political priorities change every six months. If the Treaty of Lisbon should enter into force, the number of Council formations will remain almost the same and the rotation scheme will be maintained for all Council formations except for Foreign Affairs (to be chaired by the new 'double hat' High Representative) as well as for the European Council (with a permanent chair for 2½ years). This means that the current problems are also likely to persist in the future. At this point it remains unclear what the impact of a General Affairs Council (GAC), separated from the Foreign Affairs Council (FAC) will be. In a 'worst case scenario' it will give rise to a structural conflict about competences between the two Council formations, for example on preparations for the Heads of State meetings with their counterparts from Russia, the US or China. In that case the new provisions could lead to a less coherent picture of the EU towards outside partners and would create a need for very clear rules of procedure.

**Suggestions.** The General Affairs Council (GAC) should determine the role of other Council formations concerning important pieces of legislation or legislative packages that touch upon several policy areas without clear emphasis. 'Jumbo Councils' (i.e. joint meetings of different formations) should be avoided in the future, as their sheer size makes them difficult to handle. Instead, 'ad hoc working parties' should be extended. This means that the number of participants per delegation is strictly limited, but it remains up to the national level to decide who participates and speaks as a representative of the respective member state.

## Part II. More Accountable EU Institutions through Better Regulation and Timely Consultation

### *Idea #11. In-depth IAs on 'strategic' initiatives*

**Problem.** The number of impact assessments (IAs) performed by the Commission has been constantly increasing since 2003, but resources allocated to this task appear rather constant. This increased effort requires a more careful application of the principle of proportionate analysis, in order to avoid that Commission DGs end up being so time-constrained that their work becomes a mere 'box-ticking' exercise.

**Suggestions.** The Commission should perform in-depth IAs on a limited number of key 'strategic' initiatives, and less detailed IAs on other initiatives included in the Legislative and Work Programme. The 'strategic' initiatives that undergo in-depth IA would be selected with a strong involvement of the Parliament (see idea #6 above).

### *Idea #12. The European Commission should perform and update its IAs throughout the policy cycle*

**Problem.** While the Commission has significantly increased its efforts in performing IAs on its own major proposals, the same has not occurred for the European Parliament and the Council. These two institutions are currently required to perform IAs on major amendments, under the 2003 "Inter-Institutional Agreement on Better Lawmaking" and the 2005 "Common Approach to Impact Assessment". However, their use of IA has been very limited to date, and there seem to be no prospects for significant developments in the future.

**Suggestion.** The Commission should perform IAs on 'strategic' initiatives throughout the policy cycle, including the co-decision procedure. This implies that the European Commission assists other EU institutions in assessing the likely impact of major proposed amendments, and then revises the original IA document according to the amendments approved. In other words, the IA should become a 'live' document, which follows the *iter* of the proposal and is always updated, in order to enable evidence-based decision-making from the beginning until the approval of the final text. This way, the IA will also become a valuable document for member states in the transposition and implementation of EU legislation.

### ***Idea #13. The Commission should publish draft IAs for consultation***

**Problem.** Expanded competences and powers of the Commission call for a stronger oversight on the quality of the Commission IAs. The creation of an external or internal ‘watchdog’ in charge of overseeing the Commission’s impact assessment work has been raised on several occasions by academics and industry representatives over the past few years. After the creation of the Impact Assessment Board, an internal body in charge of quality control, the average quality of Commission IAs seems to have improved. However, if the Commission is called to perform IA on Parliament and Council amendments, stronger external oversight should also be guaranteed. Discussion in our expert group on better regulation led to the conclusion that a new agency in charge of oversight would not be needed, if other mechanisms are in place, which could enable consultation of stakeholders on the IA document itself, and not only on the final proposal.

**Suggestions.** The need for oversight should be achieved by i) strengthening the resources available to the Impact Assessment Board, and ii) mandating that the Commission publishes the draft IA on ‘strategic initiatives’ before the IAB opinion, in order to allow for further input and comments from stakeholders as regards the methodology used and the results obtained.

### ***Idea #14. The Commission should plan IA work efficiently***

**Problem.** Impact Assessment often revolves around the problem of ‘asking the right questions, at the right time, and in the right sequence’. As the Commission performs IA at different stages of the policy cycle (e.g. White Papers, Communications, Directives), it is absolutely essential to avoid repetitions in the IA documents. Likewise, it is crucial that the Commission addresses the right questions at the right time: for example, the Commission should provide at a very early stage the answer to questions such as: “Would an intervention improve upon the status quo?” Or, “Is intervention at EU level needed?” On the other hand, a detailed cost-benefit analysis is normally not needed when regulatory alternatives are still far from being precisely defined.

**Suggestions.** The IA work done at an early stage of the policy process (e.g. on a White Paper) should form the basis for an incremental IA done at subsequent stages. The planning of IA work should form part of the preliminary stages of the policy cycle, and include an indication of when and how specific tasks will be performed. For example, the analysis of the

'zero option' and the subsidiarity test should normally be performed at early stages, whereas detailed, quantitative cost-benefit analysis may be more appropriate at later stages, although this decision would have to be taken on a case-by-case basis. The IAB is best positioned to advise on early-stage IA planning.

***Idea #15. The Commission should efficiently allocate resources between ex ante impact assessment and ex post evaluation***

**Problem.** Since the Commission IA system has been in place now since 2003, the revision of IAs performed and the *ex post* evaluation of existing pieces of legislation will increasingly become important in the years to come. It is essential that indicators of regulatory quality and performance are used to enable learning and feedback for future policy initiatives.

**Suggestions.** The Commission should expand its use of *ex post* evaluation by linking evaluations to *ex ante* assessments, and using a set of indicators of regulatory quality as well as indicators of the performance of the specific regulatory initiative under scrutiny. In performing the *ex post* evaluation, the Commission should consult stakeholders in order to collect the necessary information on the compliance with the legislation, as well as on the effectiveness of the rules against the initially envisaged results.

***Idea #16. The Parliament should act as an 'informal watchdog' in the EU better regulation system***

**Problem.** Better regulation also implies that proposals put forward by institutions are sufficiently justified. In sending its proposals to the European Parliament, the Commission should clarify the objectives sought and the associated risks, whether through IA or any other statement.

**Suggestions.** The European Parliament is normally the first institution to vote on Commission proposals, and as such is well positioned to act as an informal watchdog. A rule may be established, according to which if a majority of MEPs in the lead-committee dealing with the respective legislative proposal is of the opinion that the Commission has not been sufficiently clear on the objectives of that proposal or that it leaves important elements to implementing measures, they could notify the Commission President in an open letter and call upon the Commission to assume its political responsibilities.

***Idea #17. The scope and role of the measurement of administrative burdens should be clarified***

**Problems.** The EU-wide measurement of administrative burdens covered 42 pieces of legislation in 13 priority areas, and measures only the costs faced by businesses in complying with information obligations contained in relevant legislation. The measurement is well underway and is approaching its second phase, with the expansion of the priority areas included in the measurement and the adoption of measures aimed at cutting red tape. However, the Commission has not yet clarified whether the 25% reduction target is ‘net’ (i.e. it includes new measures adopted during the reduction period) and whether the measurement will be expanded to all the business-relevant *acquis*. There is also a need to clarify the relation between the burdens measurement and the IA system: the question has been raised whether resources for burden-reduction exercises are crowding out resources for the implementation of IA at the EU and member state level. Finally, the scope of the measurement still does not include all costs faced by businesses in complying with EU legislation (so-called ‘compliance costs’), of which administrative burdens are only a fraction.

**Suggestions.** The Commission must clarify that the 25% target is ‘net’. Also, given the narrower focus of the measurement compared to the IA exercise, the former should be gradually incorporated into the IA practice: in scrutinising IAs, the Impact Assessment Board should request a calculation of burdens where absent (and where appropriate). Another improvement would be to broaden the scope of the measurement to include compliance costs, at least qualitatively.

***Idea #18. Use the burdens measurement as a driver for the convergence of IA system***

**Problem.** While impact assessment is seldom implemented in practice at national level, virtually all member states have now adopted the Standard Cost Model (SCM) as a tool to reduce administrative burdens. Achieving better regulation in the EU requires that IA is performed both at EU and member state level. This would ensure that episodes of over-implementation, ‘gold-plating’ and ‘double-banking’ are immediately visible, and that the EU can switch gears towards the completion of the Internal Market.

**Suggestions.** The Action Programme on administrative burdens should be used to promote convergence between EU and member states' better regulation agendas, since most member states have undertaken SCM-type initiatives, but there are very few examples of implementation of complex IA systems similar to the one used by the Commission. The reason why the burdens measurement can be taken as a first step is simple: once the baseline measurement has been completed, reduction proposals will be formulated. In order to understand which proposals are more likely to be beneficial for businesses, a fully-fledged impact assessment will be needed. This calls for continuity between the measurement of administrative burdens and the introduction of impact assessment on national policy processes.

**Idea #19. A 'new Mandelkern Group', with a focus on advancing the EU better regulation agenda should be launched**

**Problems.** The coming months will coincide with the end of the Lisbon strategy and with the 10<sup>th</sup> anniversary of the appointment of the Mandelkern Group on Better Regulation, which laid the foundations of the current better regulation agenda in the EU. Today, there is a need to carefully rethink the better regulation agenda to pave the way for a more coordinated use of better regulation tools (burdens measurement, *ex ante* IA, consultation, *ex post* evaluation) and for an extension of better regulation to member states, where some of the tools are still hardly used.

**Suggestions.** The appointed group of experts should be in charge of:

- Identifying and communicating a coherent and shared vision of better regulation and regulatory quality across the EU and its role in the Lisbon agenda after 2010
- Evaluating the progress made since 2001 in the member states and at the EU level, with the aid of quantitative measurement of the adoption-implementation gap and qualitative case studies to shed light on the mechanisms of success and failure
- Identifying best practice
- Comparing strategies of regulatory oversight and making suggestions for institutional design, with the aim of increasing the credibility and legitimacy of IA at the EU and member state level
- Discussing a roadmap towards the convergence of EU and national better regulation agendas, including multi-level convergence of IA systems.

***Idea #20. A single EU website directed to businesses***

**Problem.** The information available on the Internet for businesses is fragmented in a myriad of websites and very difficult to gather, especially for SMEs. This is particularly important as regards the information on the implementation and enforcement of legislation. Apart from the biannual Internal Market Scoreboard, since 2000 the Commission publishes every two months the data on the progress in the notification of national measures implementing directives. The content of this information and the way it is presented suffer from important operational pitfalls, and is very difficult to exploit by a firm looking for the state of transposition of a directive in a specific country.

**Suggestions.** It would be advisable to create a multi-lingual website, clearly visible and accessible from the Europa portal, with all information on business-related policies and initiatives, as well as information on the units (or better, persons) responsible for transposing the directives at national level and their counterparts in the Commission.

### **Part III. The EU and its member states: Better EU Policy is a ‘Shared Responsibility’**

#### *EU level tasks*

***Idea #21. The Commission should issue practical technical guidelines on the application of the subsidiarity principle***

**Problems.** In a multi-tier government structure such as the European Union, the allocation of public functions must comply with the subsidiarity principle as specified in Art. 5 TEC and the Protocol annexed to the Amsterdam Treaty, which will be incorporated into the new Lisbon Treaty. All institutions are obliged to comply with the subsidiarity principle and they are also involved in its application in some form or another. The Commission – for instance – must justify every legislative proposal on the grounds of subsidiarity and present an annual report that can be assessed by the other institutions. The amendments by the Council and the European Parliament must also be subsidiarity-compliant. The consultative bodies of the EU – the Committee of the Regions (CoR) and the European Economic and Social Committee (EESC) – ensure that subsidiarity is respected from the point of view of regional and local authorities and civil society respectively, while the Court of Justice can be called to assess the

compliance of Community secondary legislation with subsidiarity. Therefore, “the current system puts the burden of proof on the institutions involved in the Union’s legislative process”. Since 2005, the Commission has streamlined the process by using a common questionnaire on subsidiarity and by presenting the information in the same way in every proposal. Although formally assessing the ‘necessity’ and ‘need to act in common’ are elements of the subsidiarity principle, the questionnaire remains vague in some areas. More specifically, there is no mechanism or procedure (as is the case for proportionality on the IA guidelines) to quantify those elements and the use of quantitative indicators to measure cross-border spillovers and externalities remains optional.

**Suggestions.** The Commission should prepare specific guidelines that may also be used by national parliaments in order to ensure a homogeneous treatment of subsidiarity across Europe. Consequently other institutions and interested stakeholders will find it much easier to assess subsidiarity. More efforts in this sense should be encouraged, especially once national parliaments are formally involved in the process. The time is ripe for the Commission to develop a more comprehensive system involving all interested parties such as the CoR, Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) and the European Parliament. With the assistance of these institutions, the Commission should develop specific guidelines for the application of subsidiarity that will facilitate the assessment at national and regional level and consequently the comparison of results.

***Idea #22. Future EU Presidencies should promote the creation of a Task Force composed of representatives of the 27 national parliaments.***

**Problem.** National parliaments will play a more intense role in the years to come as regards their contribution to the good functioning of the Union. This calls for identifying and sharing best practices on the way in which EU affairs are dealt with in national parliaments. A case in point is Sweden, where the General EU Affairs Committee that deals with European issues within the Swedish Parliament is now complemented by a more decentralised approach, in which the relevant Parliamentary Committee deals with Green and White Papers, Proposals for Directives or Regulations, etc. when presented. This change is aimed at improving the awareness of the EU dimension in all policy and legislative areas as well as to increase the quality of national contributions in each sector at the EU level. Should this approach achieve its intended goal, it could potentially be

indicated as a best practice for other countries in search of a new institutional arrangement to deal with EU issues.

**Suggestion.** Future Presidencies should promote the creation of a Task Force composed of representatives of national parliaments to explore and analyse how European affairs are dealt with in each national parliament and highlight potential best practices.

***Idea #23. Improving information on transposition and implementation: Concordance tables***

**Problem.** Member states can engage in undesirable practices during the transposition phase, such as gold-plating, double-banking or regulatory creep, which essentially lead to over-implementation of EU legislation. In many instances, it is difficult to trace the exact implementation of the EU *acquis* in national legislation. Some countries adopt specific acts, other prefer to amend existing legislation, others split the transposing measures in two or more laws or decrees.

**Suggestion.** In order to avoid such practices, the European Commission has repeatedly insisted on the need for using and publishing *concordance tables* between the EU legal acts and national transposition measures. Our expert groups strongly endorsed this view, and encourage the EU Presidency to act in this direction, which would increase the transparency of the transposition process and improve the access to and understanding of new legislation by all interested parties.

***Idea #24. Improving transposition and implementation by creating networks of officials***

**Problem.** Especially in case of complex pieces of legislation, sharing experience and best practices is very important for national legislators in charge of implementation. One good example is the Services Directive, which enables broad administrative cooperation and mutual evaluation. This experience, if successful, could be expanded to other, less complex areas of EU legislation.

**Suggestion.** The creation of networks of implementing officials should be promoted, especially for complex pieces of legislation, as well as for all those rules that are particularly subject to over-implementation.

***Idea #25. Towards the convergence of EU and national IA systems: A common set of IA quality indicators***

**Problem.** Achieving better regulation in the EU is a shared responsibility of the EU and member states. The Commission has stated on several occasions that member states also have to do their part to improve the quality of legislation.

**Suggestion.** One initiative that could be endorsed by the future EU Presidencies, with the help of a ‘new Mandelkern Group’ (see idea #19 above), is the adoption of a common set of IA quality indicators for the 27 member states and the EU institutions, to kick-start a process of facilitated coordination and learning among member states. The adoption of a common set of measures is an important step to create shared beliefs and common progress towards regulatory quality. If supported by a process of monitoring and annual discussion of indicators, the set of IA indicators would encourage more systematic implementation at the domestic level.

***Idea #26. Launch an in-depth screening exercise of national regulations that hinder the Internal Market***

**Problem.** Especially in some policy areas, such as intellectual property, consumer policy, transport, energy and others, the achievement of the Internal Market appears far from complete. The Commission has already started reviewing the Single Market and selected a number of sectors to be analysed more in-depth. In addition, the awareness of the benefit of some EU policies among businesses appears still limited. For example, despite its benefits, mutual recognition is generally unknown to European economic operators.

**Suggestion.** The current review of the Single Market should be extended with a study on national regulations that potentially hinder the application of EU legislation and the functioning of the Internal Market. This would be useful both for data collection and for awareness-raising campaigns. The study should also assess the problems and costs of governance of mutual recognition in the services sector.

### *Member states' tasks*

#### ***Idea #27. Appoint national coordinators of EU policy***

**Problem.** Particularly in countries with coalition governments and relatively weak coordination mechanisms, national positions are not always fully consistent across Council formations. Accordingly, member states may take different positions in different Council formations. This can lead to confusion among other delegations and to procedural delays.

**Suggestion.** A coordinator of EU policy who enjoys the necessary political backing of the Head of State or Government should be appointed in all member states. Ideally, this person would carry the title of Minister for European Affairs. In some countries such a position already exists, while in others past attempts have failed (particularly in those with coalition governments and a strong coordinating role within the Foreign Ministry and/or other Ministries). The perspective of a separate General Affairs Council (GAC) under the Treaty of Lisbon could be an incentive to revive this idea, but even if the treaty may not come into force, member states should be encouraged to introduce such a position. This new position should be coordinated with the work of the national EU affairs committee of each country (idea #22 above).

#### ***Idea #28. Create new post for subsidiarity and proportionality in each national parliament***

**Problem.** Better communication between national parliaments would facilitate their role in assessing subsidiarity and to guarantee a homogeneous analysis across countries.

**Suggestion.** The creation of a position responsible for subsidiarity and proportionality in each national parliament would at once ensure regular contacts with other national counterparts, and create centralised expertise in the application of these two key principles in the drafting, transposition, monitoring and evaluation stages. The appointment of a responsible person for subsidiarity and proportionality would be important also for the effectiveness of the 'subsidiarity check' mechanism foreseen by the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Lisbon.

***Idea #29. Implementation plans***

**Problem.** For the quality and effectiveness of EU rules, the transposition, implementation and enforcement of EU legislation at national level are as important as the earlier stages of policy formulation. The lack of clear information on the way in which individual member states plan to transpose and implement legislation can create widely diverging practices and problems that could have been prevented beforehand, instead of being addressed afterwards.

**Suggestion.** A potential innovation at national level is the adoption of an ‘implementation plan’ for EU legislation by the national minister in charge of a given dossier. The plan should be presented to the national parliament and clearly address the following aspects: how the legislation will be transposed into national law; whether it would require new primary legislation or amendments to the existing one; whether special implementation measures are needed; how legislation will be enforced; whether penalties will be linked to non-observance. If this plan were to be drafted and shared with the European Commission, this could also prevent the emergence of problems in the subsequent transposition phase: as a matter of fact, our expert group participants suggested that the early involvement of national implementation officials can lead to the prevention of transposition problems in a timely and efficient manner.

***Idea #30. Create specialised divisions within SOLVIT***

**Problem.** The latest report on the performance of the SOLVIT network shows a clear increase in the number of cases addressed. The incredible increase in the number of cases submitted by citizens with respect to businesses is further proof of the success of the network and a interesting reflection of what appear to be the more problematic areas (according to the number of cases submitted), such as social security and professional qualifications. The success of SOLVIT is mainly due to the high resolution rates and its rapidity. Yet, the data still reflect a potential for additional use of the network.

**Suggestion.** If this trend persists, it might be wise to create specialised divisions within SOLVIT to ensure an efficient treatment of every case independently of the case submitter. Also, the large number of non-SOLVIT cases received should encourage member states to create similar structures to address problems with national legislation. Finally, cooperation between administrations across member states should be further encouraged to bring down the remaining resistances of some administrations.

## **Conclusion – The way forward: Boosting long-term European Competitiveness**

The previous sections have sketched out the 30 ideas discussed by our three expert groups for improving the quality of EU legislation. Most of these ideas can be tackled in the short term, as they require no Treaty change, and are addressed at the upcoming EU Presidencies as suggestions to shape the European Union of the future. Our suggestions aim at transforming Europe into a community in which a world-class administration (the Commission) leads political agents (the Parliament, the Council, national parliaments, implementing officials) towards the achievement of real better regulation, to the benefit of society as a whole; a community in which dialogue between the EU and member state level finally relies on the same language – the language of better regulation; and a community in which businesses face lower compliance costs, and have easy access to institutions when compliance becomes a problem. We believe that implementing these ideas could significantly improve the effectiveness of EU policy, to the benefits of all Europeans. In this context, it is worth recalling that the Single Market with its four freedoms of movement is the core of the European project: this should be taken as a starting point for any reform effort, as completion of the Single Market will deliver benefits in other areas.

In particular, when looking forward to the post-Lisbon decade, the EU should also do more in terms of eliminating barriers to the Internal Market, by identifying and removing inconsistent legislation in member states and thus facilitating cross-border operations by businesses and consumers. We believe that this objective could be achieved only if the harmonisation of legislation is given a more prominent role in the EU debate, both at the policy formulation stage, and in the implementation at national level. Businesses, and especially SMEs, need harmonised rules to cross their national borders and become real EU players. In the long run, the resulting increased competition and variety of products would enormously benefit European consumers.

Looking at Europe in a few years from now, the current patchwork of national rules should be replaced by a set of common rules and standards. In order to achieve this goal, legislation should be harmonised in stages, starting from the areas in which rules differ without any overarching reason. Accordingly, the Commission's initiative of reviewing the Single Market is welcome. It is crucial that sectoral reviews lead to the

identification of areas where harmonisation is needed, and that this in turn leads to policy action to remove barriers.

Will this be enough? We suspect not. Too often the harmonisation of legislation is hampered by national prerogatives and the need to protect domestic firms. Advocating a smooth transition towards harmonised rules in key policy domains is simply utopia, as of today. As long as national interests remain a real bottleneck – for example, in Council negotiations – this process may never be completed. Currently, EU institutions can decide not to harmonise legislation in certain fields without actually providing any justification. At a minimum, we believe that EU institutions should justify their decision not to remove barriers to the Internal Market when they take action to formulate new legislation or review existing legislation. This is why we propose to ‘reverse the burden of proof’, by establishing a presumption that new EU rules in areas in need of harmonisation should in principle be regulations, or directives that leave very limited discretion to member states in the implementation phase.

In practice, the implementation of this vision means following a number of steps:

- *Review the stock of legislation and identify areas where harmonisation is needed.* This is what the Commission has started to do within the framework of the Single Market Review, and should be expanded and transformed into an in-depth screening process (**idea #26 above**). But sectoral analyses should be presented together with a clear description of the baseline: such description can be used as ‘zero option’ in future impact assessment work.
- *For these areas, ‘reverse the burden of proof’.* This means that the Commission introduces in the IA guidelines a new ‘harmonisation test’ (or a ‘modified subsidiarity test’), where the burden of proof is on the Commission to depart from regulations to adopt more flexible instruments. Of course, this approach should be adopted only once the need for action has been adequately justified (as already occurs in Commission impact assessments). In a nutshell, if the Commission wants to adopt a directive in an area where harmonisation has been considered necessary (e.g. privacy legislation), then the Commission services in charge of the IA would have to make the case for such a choice. If they fail, the IAB should oblige them to revise the IA or propose the adoption of a different instrument. This system can be adapted and refined. For example, besides calling for more regulations, it can also apply to the degree of flexibility left by

directives to member states, so that the rules are as harmonised as possible, unless there is evidence that more flexibility would bring a clear added value. For example, in some cases mutual learning and competition between legal systems may lead to a ‘race to the top’ that the Commission could never achieve.

- **Add new areas.** Once the process has started, new sectoral analyses should be launched to complete the Single Market Review, leading to more baselines to be used as a starting point for the harmonisation of legislation. This ensures that EU institutions and member states keep the momentum in overcoming harmful discrepancies in national legislation.
- **Constantly monitor legislation.** The use of *ex post* evaluation should become more widespread and important, so that areas in which barriers to the Internal Market are not gradually removed are kept under constant scrutiny and are potentially subject to further intervention. In doing this, the use of indicators appears of utmost importance: in particular, efforts should be devoted to developing both indicators of governance and regulatory quality; and indicators that focus on the daily life of businesses, which provide a clear picture of the remaining ‘cost of non-Europe’ from the perspective of operators. The latter indicators can be derived from the expansion of the Standard Cost Model to compliance costs; as well as by improving upon the concept of ‘doing business’ indicators currently used by the World Bank.

This long-term strategy crucially depends on the implementation of many of the suggestions we have identified. For example:

- An effective presumption in favour of harmonisation in certain policy domains becomes possible only if the Commission updates the IA for major proposals after they are amended by the Parliament and the Council (**idea #12**). This way, if MEPs or national governments resist the achievement of the Internal Market by amending Commission proposals in a less ‘Europe-ist’ way, they would have to do so against the evidence brought by the Commission, which points to a need for harmonising rules.
- The expansion of the Standard Cost Model to compliance costs (**idea #17**) can help the Commission and member states in identifying areas where the daily life of a business (and later, possibly also citizens) is significantly affected by the lack of common rules, through evidence

of cases in which the costs and patterns of compliance with EU legislation widely differ throughout the territory of the EU.

- The possibility for businesses to present evidence of the need for harmonisation during a consultation on draft IAs (**idea #13**) is key for establishing a climate in which priority is given to the Single Market. In many cases, large and small businesses know better than legislators where the potential for abating barriers lies, and are able to provide evidence of the potential benefits of further harmonisation.
- Convergence between EU and national better regulation strategies (**idea #18**) ensures that the efforts made in improving the quality of EU legislation are not lost due to a patchy and widely diverging transposition and implementation. The same can be said for the establishment of a common set of indicators (**idea #25**), as well as for the appointment of national coordinators of EU policy (**idea #27**).
- The increased use of *ex post* evaluation (**idea #15**) is necessary for the monitoring of the performance of individual pieces of legislation, especially if coupled with the use of indicators. In this respect, the availability of concordance tables (**idea #23**) significantly facilitates the monitoring phase.
- The adoption of practical technical guidelines on subsidiarity can significantly prevent the risk of over-implementation (**idea #21**), especially if coupled with the appointment of responsible persons or subsidiarity and proportionality in national parliaments (**idea #28**), and the creation of networks of implementing officials for complex pieces of legislation (**idea #24**). The same can be said for the Task Force of representatives of national parliaments (**idea #22**).

Finally, from the perspective of businesses, the availability of a single website for businesses containing, *i.a.* information on the implementation of legislation and responsible officials in member states (**idea #20**) can prove particularly effective in increasing the degree of awareness of certain EU policies. Should problems emerge, a more effective and specialised SOLVIT can help businesses in filing complaints and find an effective solution in a short timeframe (**idea #30**).



# POLICY-MAKING IN THE EU

## ACHIEVEMENTS, CHALLENGES AND PROPOSALS FOR REFORM

### MAIN REPORT

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With the EU and its member states facing increasingly strong competition from other countries such as India and China, there is also growing concern about the European Union's competitiveness in a globalised world. The EU integration process has been a driving force for innovation, but in recent years European decision-making has often been criticised as slow, complex and producing too many 'lowest common denominator'-solutions.<sup>1</sup> Additionally, European companies still face several obstacles when operating within the EU; and citizens continue to feel distant from the EU's political processes, which undermines the legitimacy of many decisions. This lack of ownership in the Union was most recently underlined again by the Irish no-vote to the Lisbon Treaty, but is also reflected in the low turnouts for European Parliament elections which have been decreasing constantly since the first direct elections in 1979.

Moreover, while the European Union and its member states have taken important steps towards improving the quality of legislation and more generally the regulatory environment for European citizens and businesses, several areas still exhibit room for improvement. This is particularly true in the case of the EU Internal Market, one of the core pillars of European integration, which in turn brings to the fore the question of the respective role of the EU and its member states in shaping and implementing present and future goals of the European project.

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<sup>1</sup> For a recent contribution to the academic debate on the deficits of EU decision-making see Fritz W. Scharpf (2006), "The Joint Decision Trap Revisited", *Journal of Common Market Studies*, Vol. 44, No. 4, pp. 845-864.

It is in this context that the present report has been drafted. The text is the product of a joint project initiated by the Confederation of Swedish Enterprise and the Centre for European Policy Studies. Chapters 1, 2 and 3 are based on the findings of three Expert Groups composed by experts from EU institutions (the European Commission, the European Parliament, the Council, the Committee of the Regions and the Economic and Social Committee), former high-level EU officials, authoritative academics and practitioners, senior officials of international organisations, and experts from national better regulation units. The project was structured along three main pillars ('EU decision-making', 'Better Regulation', and 'Implementation and Subsidiarity').

In Chapter 4, we provide more forward-looking ideas, resulting from discussion between CEPS staff and the Confederation of Swedish Enterprise, on how to fully achieve the Internal Market and eliminate all harmful barriers to cross-border trade and consumption in the territory of the Union. These ideas are offered as a contribution from the research and the business world for a better functioning Union in the 21<sup>st</sup> century.

# 1. THE FUTURE OF EU DECISION-MAKING

*SEBASTIAN KURPAS\* & PIOTR MACIEJ KACZYŃSKI*

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The Expert Group on the Future of EU Decision-Making has looked at the EU decision-making cycle, with special emphasis on the preparatory phase and the legislative negotiations.<sup>2</sup> In this chapter we identify existing problems in the internal processes of EU institutions, in the inter-institutional relations between EU institutions and in the interaction of the EU institutions with other actors. We look first at the European Commission, then at the Council of Ministers (and the European Council) and finally at the European Parliament. In addition, we look at the key role played by national administrations in the context of the Council of Ministers, as well as the important contribution of national parliaments to the shaping of EU legislation.

In each section, we first describe the key challenges for the institution at hand, and then address a number of more concrete challenges ahead, leading to recommendations for improvement. For each challenge, the respective scope (internal, inter-institutional, interaction with other actors) and the stage of the decision-making cycle (preparatory, negotiations or implementation) are indicated. Recommendations are then classified according to the type of proposal. Most recommendations fall into the categories of formal rules (e.g. rules of procedure of a given institution) or

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\* This chapter was drafted in the rapporteur's former capacity as Head of CEPS Politics and Institutions research unit and Research Fellow.

<sup>2</sup> The implementation phase is also touched upon, but has been addressed in much greater detail in Chapter 3 on implementation and subsidiarity.

informal practices (e.g. norms, working methods). Treaty change has been proposed in only one case.

### 1.1 What do we mean by ‘quality of decision-making’?

We define ‘quality’ as a function of three different elements: i) problem-solving capacity, i.e. achievement of initial objectives; ii) efficiency, i.e. ease of adoption and implementation of decisions; and iii) representativeness, i.e. sufficient and appropriate input from stakeholders and involvement of the general public.

These three elements are not always complementary, and in some cases they may even conflict. For example, an efficient procedure would generally entail adoption and implementation of a legislative act with as little delay as possible; however, this must be weighed against concerns about the problem-solving capacity of the legislation, as well as the representativeness of the process. In some cases, additional time may be justified, if the benefits of consulting stakeholders and the general public more-than-compensate the cost of lengthier procedures. More generally, there is no ‘golden rule’ as to which of the three quality determinants should prevail over others.

Building on the concept of ‘decision-making cycle’, the different stages call for a different focus when it comes to defining quality. In the *preparatory stage*, ‘good quality’ implies the setting of clear strategic objectives for legislation and extensive consultation. A thorough reflection process preceding legislative action is of key importance for a better outcome and, due to strategic objectives, the actual legislative process can run more smoothly later on, similarly to the business sector where a process from ‘strategy to concept to product’ is common. Concerning the phase of *legislative negotiations*, ‘quality’ is defined by the problem-solving capacity and the effective acceptance of the outcome by stakeholders. The measures proposed in a legislative act must address previously identified problems and these measures must find the support of those who are directly affected by them. During the *implementing stage*, ‘quality’ implies that a legislative act has to be relatively easy to put in place and may not cause a great demand for subsequent clarification or even litigation. Administrative burdens are to be kept to a minimum and need to be weighed against concrete benefits that the measure will bring.

Consequently, the following five elements should be understood as ‘general guidelines’ for actors involved in EU decision-making:

1. A clear *identification of the needs and objectives* that justify a legislative initiative.
2. A good technical grasp of the matter and focused work towards substantive answers for the identified problems (*'technical preparedness'*).
3. A thorough understanding of the concerns about the proposed solutions that may exist in the different national contexts (*'political preparedness'*).
4. *Communication* of (the essentials of) the agreed solutions in a way that is understandable for the wider public.
5. The *capacity to detect shortcomings* throughout the decision-making process and feed 'lessons learned' into future decision-making (thus turning the 'process' into a 'cycle').

In addition, the quality of decision-making also depends on political leadership and a genuine willingness to cooperate among key actors. Such a spirit of 'give and take' is a core factor for successful decision-making, but can hardly be ensured through rules of procedure or guidelines. A positive example in this respect has been the recent agreement during first reading on the legislative package concerning the free movement of goods (so-called 'goods-package').<sup>3</sup> According to interviews conducted for this report, all relevant actors representing the Commission, Council and European Parliament had demonstrated their flexibility and openness to compromise during these negotiations, with the result of a quick and meaningful

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<sup>3</sup> *Official Journal of the European Union*, L 218, Vol. 51, 13 August 2008 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:SOM:en:HTML>):

- Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another member state and repealing Decision No 3052/95/EC (1);
- Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (1);
- Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC.

agreement.<sup>4</sup> Much depends thus on building momentum in the process, so that all actors understand the benefits of reaching agreement.

## **1.2 The European Commission: Need for leadership and public acceptance**

The European Commission is the ‘guardian of the treaties’, as it defines and defends the Community interest and ensures the proper implementation of EU policy. Its institutional self-understanding has traditionally been that of a politically neutral and expertise-driven bureaucracy, despite its important political and agenda-setting functions. Since the beginning of the 1990s, the hybrid nature of the Commission has become more problematic due to an increasingly critical public demanding a stronger democratic legitimacy of the Commission’s actions.<sup>5</sup> This trend is reflected in the growing party-political criticism of the Commission: on the political left the Commission is portrayed as a proponent of ‘ultra liberal’ policies that neglects social aspects, while critics from the political right tend to present it as a tireless producer of regulations that ignores business interests.

The dual challenge for the Commission is therefore the preservation of its capacity to provide political leadership in the Community interest on the one hand, while finding public acceptance for its actions on the other.

### ***1.2.1 Improvement of legislative proposals***

With its monopoly on legislative initiatives in the first pillar, the European Commission has an important agenda-setting function and plays a key role in the preparatory phase of legislation. The Commission’s White Papers and Green Papers are crucial documents in which the strategic objectives for envisaged legislation can be presented and developed. Over recent years, there has already been a clear trend towards a more careful testing of the grounds before a legislative proposal is put forward, but room for

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<sup>4</sup> According to the stakeholder organisation of the retail, wholesale and international trade sectors, EuroCommerce, the goods package has been “a good example of speed in legislating” (<http://www.eurocommerce.be/content.aspx?PageId=41159>).

<sup>5</sup> For an overview of the academic debate, see Dionyssi Dimatrakopoulos and Argyris Passas (2004), “Governing without government?”, in Dionyssi Dimatrakopoulos (ed.), *The Changing European Commission*, Manchester: Manchester University Press, pp. 152-163.

improvement remains.<sup>6</sup> In some cases, Green Papers and White Papers remain too general and are not sufficiently clear about the actual problems and preferred solutions. Similarly, legislative proposals sometimes leave key aspects open, so that they have to be elaborated by the Council and the European Parliament or even during the implementing stage by comitology committees.

*Box 1.1 Preparing legislative packages: Good and bad cases*

A positive example of a well-prepared package of legislative initiatives is the electronic communications framework (Directive 2002/21/EC). It was agreed in 2002 and preceded by a Commission Green Paper that set out in detail the basis for the legislation and presented very clearly the objectives and the proposed structure for future legislation. The legislative proposals included all essential elements. The Commission had clearly defined the objective (i.e. eliminating competitive dysfunctions in the telecoms sector due to a number of dominant players) and the measures to be taken (i.e. the establishment of a network of authorities that would analyse the market and have powers to intervene against anti-competition conditions). This greatly helped to put the debate on a concrete track for a constructive solution, which was acceptable to all major players. When it came to negotiations in the Council and the EP, the basic structures for a solution had largely been accepted and the debate could be based on this common ground.

In contrast, the Commission's preparatory documents for the current reform of the telecoms package have been more ambiguous on the main problems and appropriate solutions. According to observers, the 2006 Commission review of the existing legislation lacked concrete proposals on key points, for example on the usefulness of a central European telecommunications authority or on the next generation of telecoms investments and some key options in the proposal were not subjected to consultation. These shortcomings backfired and caused mistrust among the political actors, leading to a very difficult composition of interests in second reading (still ongoing).

There have been calls in the past for an external body in charge of ensuring the quality of Commission proposals. To some degree, such an

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<sup>6</sup> See for example Anna Michalski (2002), *Governing Europe: The Future Role of the European Commission*, The Hague: Netherlands Institute of International Relations - Clingendael, pp. 29-30.

external control may come into being, if national parliaments build up the necessary capacity for an effective ‘subsidiarity check’, as foreseen by the *Protocol on the Application of the Principles of Subsidiarity and Proportionality* to the Treaty of Lisbon.<sup>7</sup> If a proposal is not sufficiently concrete on the means of intervention and the expected consequences, national parliaments may stand up to highlight conflicts with the subsidiarity principle. The protocol foresees two different scenarios:

- a. If *one-third* of the votes accorded to national parliaments (i.e. 2 per member state) support a reasoned opinion indicating a breach of the principle of subsidiarity, the Commission must review its proposal. After the review, the Commission may maintain the proposal, but it has to give a reasoned opinion for its decision.
- b. If a *majority* of the votes accorded to national parliaments indicates a breach of the subsidiarity principle, the Commission can still maintain its proposal, but under the co-decision procedure (or ‘ordinary legislative procedure’ according to the Treaty of Lisbon) the reasoned opinion of the national parliaments and the one of the Commission will be submitted to the Council and the EP for consideration before the first reading. If then a majority of 55% of member states in the Council *or* a majority of the votes cast in the EP indicate that the proposal is not compatible with the principle of subsidiarity, it will not be considered.

It remains to be seen how effective this control mechanism will be in practice. Its impact will largely depend on the capacity of national parliaments to organise themselves and table their reasoned opinion within the obligatory 8-week period.

#### *1.2.1.1 Recommendations*

The Commission must use its preparatory documents to present all relevant alternatives during the consultation phase. It has the most resources and staff, and it is thus best placed to organise the initial consultations. It must guide the debate with a view to the ‘Community interest’ of the EU, which can neither be defined by the Council (focusing on national interests) nor by the EP (dominated by party-political

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<sup>7</sup> Protocol on the Application of the Principles of Subsidiarity and Proportionality (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0150:0152:EN:PDF>).

preferences). At the same time the Commission must also ensure that the essentials of its proposal are acceptable to all relevant actors, so that amendments from the Council and the EP can build on the Commission's proposal.

An *automatic* external control mechanism for Commission proposals that would go beyond the provisions foreseen in the protocol on subsidiarity and proportionality would raise many questions about the institutional framework of the EU. If every proposal first had to undergo an external quality check, it would de facto put an end to the Commission's right of initiative and undermine the delicate balance of powers among EU institutions. Quality control should therefore remain with the Commission's Secretariat General and the College of Commissioners as politically responsible institutions.

Some element of external control and pressure could however be envisaged through a 'watch-dog' function of the European Parliament. If a majority of MEPs in the lead committee dealing with the respective legislative proposal are of the opinion that the Commission has not been sufficiently clear on the objectives of that proposal or that it leaves important elements to implementing measures, they could establish a mechanism according to which the EP would notify the Commission President in an open letter and call upon the Commission to assume its political responsibilities.

An additional problem can be the linguistic and legal quality of the proposal's text. Legislative proposals are normally not written by specialist drafters and the Commission's legal service often only comes in at a later stage to review the text. In many cases non-native speakers are drafting the proposals in English or French, so that an additional linguistic challenge exists. With 23 official languages, it is therefore very important that the original language version of a proposal is of great linguistic and legal clarity, so that the subsequent translations do not end in 'Chinese whispers'.<sup>8</sup> To guarantee high drafting quality in all cases, it should therefore be considered to make it a standard that both a legal expert and a mother-tongue speaker are involved by the lead DG *further 'upstream'* in the drafting process. The same considerations should also apply for the other institutions later in the legislative process.

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<sup>8</sup> This problem has also been acknowledged by the Commission before the House of Lords, see previous reference.

### 1.2.2 *Strengthening the College of Commissioners*

Despite predictions of institutional dead-lock following the 2004 enlargement, recent research shows that the number of legislative proposals adopted by the Commission has not significantly decreased since 2004, and consultative documents like Green Papers and Communications have even become more numerous.<sup>9</sup> This result can partly be explained by the fact that the Commission has streamlined and centralised its internal functioning. Besides ensuring continuity in the overall output, however, the Commission has been hesitant to deal with controversial matters over the last few years. Whether this is due to the difficult political context that followed the rejection of the Constitutional Treaty and the Treaty of Lisbon, or whether it reflects a real change of the Commission's self-understanding remains to be seen.

It is clear, however, that enlargement has strengthened the role of the Commission President within the College. Important issues are increasingly dealt with by the Commission President and the Commissioner(s) directly concerned on a bi-lateral basis rather than through discussions within the College. The principle of collegiality – once the driving logic of the College – has thus been considerably weakened. The current College also does not proceed to take an issue to a vote anymore. While the Prodi Commission still voted on about 15 occasions, the current one has not done so once. Recent research suggests that this is not the result of a deliberate choice, but rather of political incapacity due to the greater number of Commissioners (from a greater number of national backgrounds) and an attitude of increased cautiousness on the part of member states towards the Commission.<sup>10</sup> Especially larger states see their influence diminished in a body that formerly hosted two of their nationals out of a total of 20, and that now hosts only one out of 27. The credible prospect of a vote (the so-called 'shadow of the vote') increases the chances for the adoption of ambitious, but internally controversial legislative initiatives. Under the current practice, however, every Commissioner enjoys a de facto veto. This makes Commissioners who dissent from the

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<sup>9</sup> Sebastian Kurpas, Caroline Grøn and Piotr Maciej Kaczyński (2008), *The European Commission after Enlargement: Does more add up to less?*, CEPS Special Report, February ([http://shop.ceps.eu/BookDetail.php?item\\_id=1620](http://shop.ceps.eu/BookDetail.php?item_id=1620)).

<sup>10</sup> Ibid.

majority position less likely to agree to the essential elements of a proposal in order to obtain some concessions for their position.

*Box 1.2 Limits of the current College*

The limits of the current College could be observed during the adoption of the proposed regulation on the reduction of CO<sub>2</sub>-emissions from cars (COM(2007) 856), which was one of the few internally controversial proposals adopted by this Commission. Although it was not even subject to a formal vote, four Commissioners (including the ones from Germany and France) leaked to the press that they did not stand behind the proposal adopted by the College on 19 December 2007. Since then the process has been dominated by an agreement between Angela Merkel and Nicolas Sarkozy in the Council and by the demands of the EP's Environment Committee, while the Commission hardly featured in the debate. Similar observations could be made concerning the directive on services and the REACH regulation. In both cases a deal was struck between the Council and the European Parliament, with the Commission hardly defending its initial proposal.

A reduction of the number of Commissioners would not only increase the capacity of the College to adopt controversial decisions; in addition, it would also underline the body's obligation to serve the Community interest and the fact that Commissioners are not representatives of their respective country. However, after the Irish no-vote, it looks increasingly likely that the European Council will agree to keep one Commissioner per country in the College, thus abandoning the envisaged reduction to 2/3 of the number of member states by 2014. This is possible without changing the Treaty of Lisbon, as the text already includes such an option in its Art. 9 D (5), if the European Council so decides unanimously. If the Treaty of Lisbon does *not* enter into force, the Protocol on Enlargement that was introduced with the Treaty of Nice, foresees that once the EU will have 27 member states, the following Commission [i.e. the one taking office in the autumn of 2009] will have to have fewer members than the EU has member states. Even in this case, however, a possible solution could be that only the country from which the High Representative for the CFSP comes will not have a Commissioner anymore, thus leaving the membership of the College at 26.

### *1.2.2.1 Recommendations*

The current debate about each country ‘keeping its Commissioner’ carries the risk of an ‘inter-governmentalisation’ of the College, with national governments rather putting forward candidates for Commissioners whose key qualification is loyalty to the national leadership. An incentive for sending strong personalities to the College would be the creation of interesting horizontal portfolios for Commissioners, e.g. a Commissioner for ‘Competitiveness’, for ‘Climate Change’ or for ‘Quality of Legislation’. This would also provide the Commission with a face on these high-level issues, which would help to give it more visibility in the media. Additionally it would put the available resources in one hand. The concept is inspired by the business sector where resources are often allocated flexibly to specific project leaders for a given time. It would have to be adapted to the public service, however, as earlier attempts to establish horizontal structures within the Commission have often failed in practice. Considerable internal resistance to a more flexible allocation of staff and resources can thus be expected. There would have to be guarantees that re-allocation of staff would only be temporary and subject to review. Measures should be introduced with a pilot project of limited scope, and upon an evaluation of results, it could then be extended to other areas. An additional problem results again from the size of the College, as it is already difficult to identify meaningful portfolios for 27 Commissioners under the current conditions.

The current size of the College should be reduced. If this proves to be impossible, however, the Commission should consider other ways of ensuring its capacity to agree on internally controversial proposals. One option would be to reinforce the coordinating structures within the Commission, with horizontal issues coming under the direct supervision of the Commission President. Another option would be a system of rotation concerning the voting right of Commissioners instead of the number of College members. Such a step would however require treaty change (i.e. changing Art. 219 TEC). A third possibility would be the creation of five or six thematic ‘clusters’ of Commissioners, with each of these clusters coming under the responsibility of a Vice-President. This would combine the advantages of each nationality keeping a high-level interlocutor with a more workable size of the College. It would not necessitate Treaty change and could go as far as giving the respective Vice-President the ultimate say on whether a proposal will be presented to the College. As the Vice-Presidents could meet with the Commission President on a regular basis,

de-facto an 'inner circle' could be established. In order to avoid a 'directoire' of large member states, however, clear guidelines would have to be established beforehand. These provisions should be presented as the logical and political counter-balance to the likely future composition of the Commission (i.e. 'one Commissioner per member state'). It should be made clear that the Commission should not become a 'secretariat' of member states, but has to preserve the capacity to define and defend the 'Community interest.'

If hierarchical and functional differentiation in the rules of procedure is not an option, however, much will depend on institutional practice and political leadership in the Commission. With weaker collegiality and a stronger position of the Commission President within the College, it is crucial that a planned initiative enjoys the full backing of the president. Once the president has given the political backing, Commissioners have to rely on him/her to defend the essential elements of the proposal, even in case of strong opposition from member states or the EP.

### **1.3 Council of Ministers and European Council: Ensuring coherence and continuity**

Just like the Commission, the Council of Ministers has not experienced paralysis after 2004, but the Council is the institution most affected by the 'effect of numbers' following enlargement and the shift from 15 to 27 national delegations has meant a major change for intergovernmental negotiations. Hagemann & De Clerck-Sachsse (2007) concluded that the overall legislative output of the Council has remained stable while difficulties in reaching agreement can particularly be observed in areas where unanimity prevails (e.g. Justice and Home Affairs, General Affairs).<sup>11</sup> According to interviews conducted in the framework of their research, "negotiators experience agreements being reached on the basis of a lower common denominator, since the content of individual proposals must now accommodate a more diverse set of interests".<sup>12</sup> This indication falls in line with Settembrì's finding that legislative acts have on average become longer by 15%, thus signalling a need to accommodate a greater number of

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<sup>11</sup> Sara Hagemann and Julia De Clerck-Sachsse (2007), *Old Rules, New Game: Decision-Making in the Council of Ministers after the 2004 Enlargement*, CEPS Special Report, March, p. 35.

<sup>12</sup> *Ibid*, p. 36.

national reservations.<sup>13</sup> Settembri (2007) also finds that the share of what he qualifies as “important acts” has decreased by roughly one-third, while the share of “marginal acts” has significantly increased in the EU-25 (57.1%) as compared to the EU-15 (42.6%).<sup>14</sup>

Against this background, the two key challenges for the Council remain ensuring coherence and continuity of its work: coherence is crucial as the Council meets in nine different policy formations, and political and administrative continuity is needed due to the fact that the Council presidency rotates on a 6-monthly basis. In the following section, proposals are presented that address these key challenges by increasing the capacity of the Council to deal with the ‘effect of numbers’.

### 1.3.1 Streamlining negotiations

Since enlargement proceedings have become lengthier and more formalised within the official bodies of the Council, this has prompted a shift towards informal practices and ‘pre-cooking’ of decisions among key delegations.<sup>15</sup> The pressure on the Presidency and all coordinating bodies

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<sup>13</sup> Pierpaolo Settembri (2007), *The surgery succeeded. Has the patient died? The impact of enlargement on the European Union*, Jean Monnet Working Paper 04/07, pp. 27/28 (<http://www.jeanmonnetprogram.org/papers/07/070401.pdf>).

<sup>14</sup> Ibid. According to Settembri, “important acts” are legislative acts that score positively on at least four of the following points, while “marginal acts” score positively on at most one (all others are categorised as “ordinary acts”):

- Bill introduced by ‘oral procedure in the Commission
- Bill discussed in the Council at least once as a B point
- Opinion adopted on bill by any other committee in the EP besides the responsible one
- Bill based on a treaty article (as opposed to secondary legislation)
- Bill is ‘new’ legislation (i.e. not amending, implementing or otherwise interfering with existing legislation).

<sup>15</sup> Hagemann & De Clerck-Sachsse, *ibid.*, p. 12; Helen Wallace (2007), *Adapting to Enlargement of the European Union: Institutional Practice since May 2004*, Trans European Policy Studies Association (TEPSA), November, p. 13 (<http://www.tepsa.be/docs/TEPSA%20-%20Wallace%20Publication%20website.doc>).

has significantly increased. Certain measures have already been taken, but their proper enforcement often depends on the respective Presidency.<sup>16</sup>

### *1.3.1.1 Recommendations*

Significant streamlining of the procedure could be achieved with relatively modest means. Especially concerning the Presidency and the Council Secretariat progress can be made by changing certain practices and expanding the use of innovative instruments. They would give negotiations more structure and result in a much more efficient use of time. The two examples presented below – issue papers and negotiating boxes – have already been used successfully during the very contentious and politically sensitive negotiations on the last budgetary perspective and on the agreement of annual fishing quotas. Their application should therefore be extended to a broader range of issues.

#### *Box 1.3 Good practices: Issue papers and negotiating boxes*

Issue papers can be used by the Presidency to identify and present all contentious aspects at the beginning of negotiations. Compared to a ‘tour de table’ followed by a simple (verbatim) report reflecting the different national statements, an ‘issue paper’ could save a lot of time by focusing directly on the problematic points. Such a paper could either be based on an initial discussion or on written contributions from all delegations indicating to the Presidency which aspects are seen as problematic. Once the negotiations have started, a ‘negotiating box’ could be used as standard procedure to give discussions focus and structure. In this document the presidency lists all contentious points, suggested solutions plus the respective state of play. The document is subject to constant revision tracking the progress of the

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<sup>16</sup> For example, delegations are encouraged not to insist on a ‘tour de table’ at the beginning of each session. On most subjects there are groups of countries holding the same position, so that 27 statements are often repetitive. If however, for whatever reason, a delegation insists on its own statement, others will follow suit and meetings become lengthy and unattractive. Especially at the highest level this development has already led to a trend of ministers rather sending their deputies, state secretaries or high officials instead of participating themselves in Council meetings. During the Dutch EU Presidency, a good practice had been introduced according to which national delegations presented written contributions also on behalf of other delegations holding similar positions. Unfortunately, this practice has been abandoned by the subsequent presidencies.

negotiations. It would also indicate where contentious points can potentially be linked to achieve an overall agreement. The negotiating box functions as an 'institutional memory' when one Presidency takes over from another, as debates would simply continue according to the stage indicated in the document. In 2005 this was done with the handover from the Luxembourg to the UK Presidency on the budgetary perspective negotiations and helped to keep the difficult negotiations on track.

The increased use of issue papers and negotiating boxes would give a lot of responsibility to the Presidency and the General Secretariat (see Box 1.3). In particular, the Presidency would have to take its task as an honest broker very seriously, as delegations would certainly not accept if issues that are important to them were ignored or side-lined in the document. It may involve special training for those officials from the Presidency or the Secretariat General that would be involved in drafting issue papers and updating negotiation boxes, as the acceptance of this approach will certainly depend on their political sensitivity and drafting skills. As regards the use of languages, it would be the easiest solution, if these internal documents were to be drafted in only one language. Since this would most probably be English, objections from France and Germany can however be expected.

Another proposal that would simplify negotiations is the increased use of sub-groups of delegations to clarify contentious issues before decisions are taken in the plenary. These groups could have different functions ranging from the simple exploration of an issue to pre-negotiations. Membership in groups could either depend on the stakes involved for the respective country or there could be one representative for each group of countries holding similar positions. The sub-groups would not take any decisions and they would be guided and supervised by the Presidency, the Council's Secretariat General and the Commission. However, the acceptance of this approach will largely depend on the level of trust between member states and the skills of the Presidency to maintain this trust. The first case(s) will therefore be crucial for a more general acceptance of this approach, as so far all delegations have insisted in being part of all official meetings. Meetings in smaller formations have always been unofficial, which gives a structural advantage to large member states. As their weight counts particularly during the official negotiations, large member states are much more likely to be consulted also during the unofficial phase. Smaller member states must be particularly pro-active and have to rely on good networks to make up for this structural disadvantage.

The increased use of official preparatory sub-groups would help to make the current practice more transparent and would help to stress the benefit of the argument rather than the political power of its proponent.

Negotiations could also be streamlined if the number of official meetings were to be reduced. Official meetings should only take place if the legislative agenda justifies them and not because the Presidency would like to hold them for political or prestige reasons. The important function of meetings for political ownership of the national level and for the creation of mutual trust could often be better achieved with an unofficial meeting instead. In contrast to an official meeting with an unappealing formal agenda in Brussels, these meetings could take place in the country of the Presidency and focus on a topical issue in the respective policy area. This approach could even be considered for the European Council, where two out of the four meetings per year could be informal summits. Although an atmosphere of 'fire-side talks' are a rather unlikely perspective with 27 participants, the agenda would be more open for general and topical discussions and it would allow for more informal exchanges among leaders.

Finally, it should be considered how the Presidency conclusions of European summits could become more focused and apt to the role of the European Council as a provider of political orientation for the EU-27. At present the text is often unduly long and contains many general statements that dilute the key messages. One option would be to limit the length of the text to a maximum of 10 pages. Another possibility would be to split the text in a limited main part and a second more general part. Since the Presidency conclusions are largely pre-negotiated since the 2002 'Seville reforms', an obligatory limit to the length of the text would greatly help to 'discipline' national representatives involved in the drafting process by making them focus on a number of main issues.

All of the proposals that have been made under this point could be introduced without any treaty changes and would make an important contribution to a much-needed streamlining of Council negotiations. Much will depend on the Presidency to set successful precedents, so that member states' delegations will have the necessary trust to agree to more streamlined and structured standard procedures.

### *1.3.2 Improving coordination structures*

Due to its organisational structure, the Council is particularly dependent on effective coordination mechanisms. The fact that the Council meets in 9

different formations inevitably means a risk of incoherence. As such, Hayes-Renshaw and Wallace state: "The pronounced segmentation of work between policy areas and between Councils (and the working parties and committees that prepare ministerial meetings) impedes coherent decision-making and the consistent treatment of subjects."<sup>17</sup> Particularly in countries with coalition governments and relatively weak coordination mechanisms, national positions are not always fully consistent across Council formations. As such it can happen that a member state takes a different position in one Council formation (e.g. the Environment Council) than in another one (e.g. the Competitiveness Council). This can lead to confusion among other delegations and to procedural delays.

Another challenge is the rotation of the Council Presidency. It leads to discontinuity, as Presidency staff and political priorities change every six months. The disadvantages of the rotating presidency have been addressed with increased cooperation between subsequent presidencies.<sup>18</sup> These efforts have certainly helped to reduce inconsistencies and discontinuity, but they cannot completely avoid that each presidency still pushes its special issues and that the responsible staff changes every six months.

If the Treaty of Lisbon enters into force, the number of Council formations will remain almost the same and the rotation scheme will be maintained for all Council formations except for Foreign Affairs (to be chaired by the new 'double hat' High Representative) as well as for the European Council (with a permanent chair for 2 ½ years). This means that the current problems are likely to persist also in the future. At this point it remains unclear what the impact of a General Affairs Council (GAC), separated from the Foreign Affairs Council (FAC) will be. In a 'worst case scenario' it will give rise to a structural conflict about competences between the two Council formations, for example on preparations for the Heads of States' meetings with their counterparts from Russia, the US or China. In

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<sup>17</sup> Fiona Hayes-Renshaw and Helen Wallace (2006), *The Council of Ministers*, Houndmills: Palgrave Macmillan, 2<sup>nd</sup> edition, p. 337; see also Christian Egenhofer et al. (2006), *Policy Coherence on Development in the EU Council – Strategies for the Way Forward*, CEPS Special Report, Brussels ([http://shop.ceps.eu/download.php?item\\_id=1356](http://shop.ceps.eu/download.php?item_id=1356)).

<sup>18</sup> Since 2007, a system of 'team presidencies' has been introduced. Under this system groups of three subsequent presidencies prepare a common programme covering 18 months.

that case the new provisions could lead to a less coherent picture of the EU towards outside partners and would create a need for very clear rules of procedure. In a positive scenario the separate GAC will become a strong horizontal structure that helps to coordinate national positions in the other Council formations.

### 1.3.2.1 Recommendations

Coherent and continuous decision-making in the Council depends on good coordination both within the Council as well as in national capitals. Both at the EU-level and in member states stronger coordinating structures should be envisaged. The perspective of the re-introduction of a *separate* General Affairs Council (GAC) under the Treaty of Lisbon may be used as an additional opportunity to promote such structures.

At the European level, the GAC should determine the role of other Council formations concerning important pieces of legislation or legislative packages that touch upon several policy areas without clear emphasis. 'Jumbo Councils' (i.e. joint meetings of different formations) should be avoided in the future, as their sheer size makes them difficult to handle. Instead, the use of 'ad hoc working parties' should be extended. This means that the number of participants per delegation is strictly limited, but it remains up to the national level to decide who participates and speaks as a representative of the respective member state.<sup>19</sup>

At the national level, a genuine coordinator of EU policy who enjoys the necessary political backing of the Head of State or Government<sup>20</sup> should be introduced in all member states. Ideally, this person would carry the title of 'Minister for European Affairs'. In some countries such a position already exists, while in others past attempts have failed (particularly in those with coalition governments and a strong coordinating role within the Foreign Ministry and/or other Ministries). Considerable resistance can therefore also be expected in the future, but it cannot be ignored that member states with a strong coordinating position perform most efficiently

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<sup>19</sup> In case of the REACH regulation on chemicals this approach was successfully applied. As delegations had to be small, member states were forced to organise horizontally across ministries and could not extrapolate their internal coordination problems and inter-ministerial rivalries to the European level.

<sup>20</sup> This would normally be the Prime Minister or Chancellor. In case of France, it would be the President of the Republic.

at the EU level. The perspective of a separate GAC under the Treaty of Lisbon could be an incentive to revive this idea, but even if the treaty may not come into force, member states should be encouraged to introduce such a position.

#### **1.4 The European Parliament: Managing diversity and increasing legitimacy**

Of all EU institutions, it is the European Parliament that has gained most new competences and powers with each of the treaty reforms over the past three decades. Since its members have been directly elected for the first time in 1979, the EP has developed from a mostly consultative body to a serious co-legislator in most policy fields of the first pillar. The Treaty of Lisbon would be another step in this direction, bringing important parts of agricultural policy and the current third pillar (judicial cooperation on criminal matters and police cooperation) under the co-decision procedure (or 'ordinary legislative procedure' as it would be called then).

Its gain in legislative and political powers does not mean, however, that the EP is not facing important challenges that impact on the EU decision-making process. This has also been recognised by the EP itself and since February 2007 an EP-internal 'Working Party on Parliamentary Reform' (WPPR) has been set up by the Conference of Presidents. It is chaired by the German MEP Dagmar Roth-Behrendt and has the mandate to consider changes to all aspects of parliamentary procedures.<sup>21</sup>

Compared to the WPPR, which focuses in great detail on internal rules and procedures of the EP, the present study takes a larger view. It does however build on some of the findings and takes into account important recommendations of the reports. Two key challenges are discussed here: managing diversity and increasing legitimacy.

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<sup>21</sup> So far the WPPR presented two interim reports: *The Plenary and the Calendar of Activities* (September 2007). The great majority of reform proposals in this report has been endorsed by the Conference of Presidents of the EP; and *Legislative Activities and Interinstitutional Relations* (May 2008). The report was still under consideration by the Conference of Presidents at the end of 2008, but has received a largely positive reaction. A third report on *External Relations and proposals as regards Parliament's structure for 2009* is still to be presented by the WPPR.

### 1.4.1 Dealing with amendments

The European Parliament has not only gained in legislative competences and political self-confidence since 1979, but also the number of deputies and their national diversity has grown. With currently 785 members, the EP is the largest directly elected parliament in the world.<sup>22</sup> More than 700 deputies is certainly hardly an ideal size for the internal functioning of a parliament. Recent research suggests, however that the EP has coped rather well with the increase in members after the 2004 enlargement<sup>23</sup> and prospects for a reduction below the threshold of 700 are very slim.<sup>24</sup> The political sensitivity of the number of deputies has been demonstrated during the IGC on the Treaty of Lisbon, when the Italian delegation successfully threatened to veto an agreement, if the number of Italian MEPs were not to be increased to equal the number granted to the UK (i.e. 73).<sup>25</sup>

Due to the high number of MEPs, most of the actual work on legislative content is done at committee level.<sup>26</sup> Committees are crucial instruments to structure the internal process of the EP, but there are still aspects that make this process quite unwieldy and difficult to follow. One of the most problematic ones for stakeholders following the legislative process is the enormous number of – sometimes even contradictory –

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<sup>22</sup> From an initial 410 MEPs from 9 member states, the number quickly rose to 434 (1981: Accession of Greece), 518 (1986: Accession of Portugal and Spain), 626 (1995: Accession of Austria, Finland and Sweden), 732 (2004: Accession of ten new member states) and finally 785 (2007: Accession of Bulgaria and Romania). See [http://www.ipu.org/parline-e/NumberOfSeats.asp?LANG=ENG&REGION\\_SUB\\_REGION=All&typesearch=1&Submit1=Launch+query](http://www.ipu.org/parline-e/NumberOfSeats.asp?LANG=ENG&REGION_SUB_REGION=All&typesearch=1&Submit1=Launch+query).

<sup>23</sup> Wallace (2007), *ibid.*, p. 15; Olivier Costa, “Parlement Européen et Elargissement – Entre Fantasme et Réalité”, in Renaud Dehousse, Florence Deloche-Gaudez and Olivier Duhamel (eds), *Comment l’Europe s’adapte*, Science Po Presse, Paris, pp. 75-96.

<sup>24</sup> After the 2009 elections the number of deputies will be reduced to 736 according to the Treaty of Nice, but it would increase again temporarily with the likely accession of Croatia during the next legislative period. If the Treaty of Lisbon enters into force, the number of MEPs will be 750 (plus the president of the EP) from 2014 onwards.

<sup>25</sup> Renata Goldirova, “EU agrees new ‘Lisbon Treaty’”, *euobserver*, 19 October 2007 (<http://euobserver.com/9/25001>).

<sup>26</sup> Richard Corbett, Francis Jacobs and Michael Shackleton (2007), *The European Parliament*, 7<sup>th</sup> edition, London: John Harper Publishing, p. 9.

amendments tabled on important dossiers. At committee level there is no limitation as to who can present amendments. Any MEP, if member of the committee or not, can put them forward. Plenary amendments however are only voted if they are tabled by either one of the political groups, the committee responsible for the report or at least 40 MEPs (i.e. about 5% of MEPs).

Despite the acknowledgement of the problem, early considerations on limiting the number of amendments have however not been included in the first report of the WPPR. With a total of 10,767 plenary amendments issued in 2006 alone, concerns had been voiced that the great number would make the debate too technical and difficult to follow, but most members of the WPPR saw a limitation of amendments as going against the very rationale of the EP as a deliberative body.<sup>27</sup> It is indeed difficult to determine at which stage such a cap on amendments should be made and it is likely that MEPs with extreme views would have used a limitation to present themselves as victims of ‘anti-democratic’ EP rules of procedure.

#### 1.4.1.1 Recommendations

According to the EP’s rules of procedure the President can request the committee responsible to act as a ‘filter’ and consider plenary amendments, if more than 50 non-committee amendments have been tabled. Any amendment that does not receive favourable votes from at least 1/10 of the committee members will not be put to the vote in plenary (Rule 156).<sup>28</sup> The WPPR had recommended making it *obligatory* for the committee responsible to consider amendments, if they exceed a certain number,<sup>29</sup> but the Conference of Presidents did not follow this recommendation. However, such change to the rules of procedures is worth reconsidering, as it would help to focus the debate and avoid repetitions and inconsistencies

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<sup>27</sup> Lucia Kubusova, “MEPs want to see fewer Heads of State in Plenary”, *euobserver*, 20 September 2007 (<http://euobserver.com/9/24801>).

<sup>28</sup> Rules of Procedure of the European Parliament, 16th edition, February 2008 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20080218+RULE-156+DOC+XML+V0//EN&language=EN&navigationBar=YES>).

<sup>29</sup> European Parliament (2007), Working Party on Parliamentary Reform, *First Interim Report on “The Plenary and the Calendar of Activities”*, PE 392.600/CPG/GT (Internal EP document), p. 20.

of the EP position at an early stage. It is also likely to have a beneficial effect on the overall quality of the legislative text.

Beyond this, a code of conduct could be considered that would outline criteria for tabling amendments (e.g. avoiding repetitions or contradictions). The enforcement of these criteria can however only be of a political, non-administrative nature. It would have to be the responsibility of political group leaders, committee chairpersons, 'rapporteurs' or other political actors to exercise pressure on other MEPs to make them act responsibly. As possibilities for party discipline remain however weaker in the EP compared to national parliaments, it is difficult to predict the actual impact of such a code of conduct.

#### *1.4.2 Increasing visibility and public debate*

The increased legislative role and political self-confidence of the EP remain in a strong contrast to the limited importance that citizens and national media give to this institution. This is illustrated both by the low turnout in European Parliament elections as well as in the lack of public debate on the EP's legislative activities.<sup>30</sup>

The Treaty of Lisbon would have introduced an official vote of the newly elected EP on the Commission President, but it is clear by now that the text will not be in force in time for the elections. The link between the outcome of the elections and the establishment of the new Commission will thus not become more visible. Other limitations that make EP elections unattractive for the national voter will also remain:

- Most probably there will not be two (or more) competing candidates running for Commission President ahead of the 2009 elections, as only the EPP may name Barroso as its candidate.
- The political programmes of the European parties are likely to remain very general, bridging the gap between many national member parties. As the election is not clearly linked to a European executive and the EP itself does not have a right of legislative initiative, it is

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<sup>30</sup> Since its first direct elections in 1979, voter turnout has constantly decreased. In 2004 turnout reached an all-time low of 45.5%, with participation around 20% in some of the new member states. The prospects do not look promising for the 2009 elections.

difficult for European Parties to present concrete policy proposals before the elections.

- Members of the European Parliament will again be exclusively elected on the basis of national or regional lists or according to electoral constituencies controlled by national or regional parties. This gives a major incentive for MEPs to ensure support from their respective national party establishment rather than relying on their own performance at the EU-level.

European elections are thus most likely to remain what they have been in the past: A 'second order national contest'<sup>31</sup> that is used by national parties as an opportunity to test the grounds for the next national elections. Voters will make their choice mostly according to their views on national politics and even those who decide according to EU matters, will mostly do so according to whether they like or do not like 'Europe,' rather than according to political preferences on concrete EU policy issues.

The EP's failure to create public debate is not only confined to the European elections, but is also reflected by the lack of public interest for the legislative activity of the EP in general. Fraud allegations and the controversy over abandoning the EP's Strasbourg seat usually draw considerably more attention from national media than any of the EP's – sometimes far-reaching – legislative decisions under the co-decision procedure.

The concern about a lack of visibility and public debate has also been stressed by the WPPR.<sup>32</sup> The WPPR makes a link between 'technocratic

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<sup>31</sup> Karlheinz Reif and Hermann Schmitt, "Nine Second-Order National Elections: A Conceptual Framework for the Analysis of European Election Results", *European Journal of Political Research*, Vol. 8, No. 1, 1980, pp. 3-45; Cees van der Eijk and Mark Franklin (eds), *Choosing Europe? The European Electorate and National Politics in the Face of Union*, Ann Arbor, 1996, University of Michigan Press.

<sup>32</sup> In one of its working documents the group regrets that current practices would "certainly not increase Parliament's visibility in the public and the media, who are looking for political confrontation along clear political lines and not for a flat, 'technocratic' debate where the representatives of the three Institutions congratulate each other on the "good work" done." European Parliament (2007), Working Party on Parliamentary Reform, *Codecision and Conciliation*, Working Document No. 12 (Part II), 11 December 2007, p. 2 (<http://www.poptel.co.uk/statewatch/news/2008/jan/ep-working-party-co-decision.pdf>).

debates' and a significant increase in 'quick deal' agreements during first readings.<sup>33</sup> The trend is especially strong in those policy areas where the EP has gained powers only recently, for example in Justice and Home Affairs. The extension of the co-decision procedure to new policy areas under the Treaty of Lisbon (e.g. agriculture, fisheries, external trade, police cooperation) may thus further reinforce the trend. MEPs are likely to come under pressure from Council and Commission not to 'block' legislation in the new areas and the capacity of EP support structures that help making a critical assessment of a proposal will become more squeezed.

A major incentive for decision-makers to come to an agreement during first reading is the fact that a simple majority is sufficient, while an absolute majority (i.e. at least 393 MEPs) is needed during the second reading. First and 'early second reading' agreements are not necessarily problematic for the quality of legislation, as second readings rarely lead to a significant change of the legislative text. However, first readings tend to be more informal, which makes the process rather less transparent and limits the possibilities for having controversial debates. The WPPR expressed its concern about this lack of debate backfiring when the act is actually implemented. At this stage the act is then often presented at the national level as an 'illegitimate act' of a detached 'Brussels bureaucracy'.

A number of proposals from the WPPR to improve the situation have already been adopted in October 2007.<sup>34</sup> They particularly concern plenary sessions, aiming to increase the quality of debate and making them more attractive for the media. This includes, for example:

- clear sections of the plenary agenda with 'priority debates' on major legislation taking place on Tuesdays and topical political issues on Wednesdays;
- a 'cooling off' period of at least one month between votes in the committee and votes in the plenary, which should allow MEPs to

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<sup>33</sup> During the current legislature (i.e. since November 2004) first reading agreements account for 64% of all co-decision agreements, compared to only 28% during the last one (1999-2004). If early second reading agreements (i.e. EP amendments being directly integrated into the Council's common position following informal negotiations) are also counted, 80% of all agreements are covered. Ibid, p. 2/3.

<sup>34</sup> See [http://www.europarl.europa.eu/multimedia/eplive/cont/20071029MLT12549/media\\_20071029MLT12549.pdf](http://www.europarl.europa.eu/multimedia/eplive/cont/20071029MLT12549/media_20071029MLT12549.pdf).

better consider their final positions at first readings and give more time to ensure the quality of legislative texts;

- debates directly before the respective vote, with political group speakers speaking systematically at the beginning of the debate;
- additional speaking time for rapporteurs, who will also have the last word in order to react to interventions;
- five minute 'catch-the-eye' sessions in every debate to give the word to MEPs who are not on the pre-arranged speaking list.

Beyond this, the WPPR proposes the adoption of a *Code of Conduct for Negotiating Co-decision Files*, which should be put in annex to the EP's rules of procedure. So far guidelines that were agreed in November 2004 have not been followed by all committees, while a 'Code of Conduct' attached to the rules of procedure would have greater visibility for those MEPs and staff who need to apply them. The Code of Conduct should enhance transparency, for example through a clear mandate for any team that negotiates on behalf of the EP. It should also make it obligatory for negotiation teams to send reports on the outcome of talks to the respective committee, including making available all distributed texts.

#### 1.4.2.1 Recommendations

As argued above, there is a considerable risk that the upcoming European elections will again be dominated by national politics during the election campaign, produce a low turnout and see an increase in votes for eurosceptic and populist parties. A low turnout would undermine the legitimacy of the EP and stronger eurosceptic parties would increase the risk of institutional dead-lock during the next legislature (e.g. through an increase in amendments that are simply aiming at disturbing the legislative process). If it materialises, the outcome of the European elections must therefore be used to create a momentum for elaborating concrete proposals aiming at a more democratic, transparent and inclusive European decision-making process by the incoming EU presidency. For example, these proposals could envisage finding ways how the presidency can help promoting the current internal EP reforms. Also, the implementation of some of the WPPR's proposals on giving more visibility the co-decision procedure would very much benefit from the Presidency's support, for example:

- *“Ensure better presence of Council and Commission representatives at political level in meetings of the committees and plenary;*

- *Re-evaluate the current system of order of interventions in the EP plenary by the Commission and the Council with at view to making debate more lively and more focused on the parliamentary aspect of the debate [...]*
- *Open up Conciliation Committee meetings to the public (possibly through web streaming) [...]*<sup>35</sup>

As the scope of the WPPR's work is by definition limited to a reform of the EP's internal rules, however, proposals could also take a larger scope. Greater efforts for transparency and visibility on the side of all institutions should be made and more efficient and spontaneous inter-institutional cooperation should be envisaged in order to make the European decision-making process more interesting and understandable for a wider public. A recent joint declaration between the EP, Council and the Commission on '*Communicating Europe in Partnership*' should be used as a point of departure.<sup>36</sup> Problems with the European Commission's *myparl.eu*-project (intended to establish a virtual network for debate between MEPs and national MPs in view of the European elections) illustrate how important inter-institutional consultation and coordination is.<sup>37</sup> It is also of key importance that all ideas are developed in partnership with the political actors on the ground. Any attempt – regardless how well-intended – that is seen as 'prescription from above' is likely to be counterproductive.

### **1.5 National parliaments: Ensuring a stronger involvement in EU-decision-making**

In most EU member states, the involvement of national parliamentarians in EU affairs has been marginal in the past. Established structures like the *Conference of Community and European Affairs Committees of Parliaments of the European Union* (COSAC)<sup>38</sup> have strengthened the networks among 'EU expert'-MPs (i.e. usually the members from the respective EU Affairs Committee) rather than 'mainstreaming' EU affairs into the work of

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<sup>35</sup> European Parliament (2008), Working Party on Parliamentary Reform, *Second Interim Report on Legislative Activities and Interinstitutional Relations*, 21 May 2008, pp. 8-9.

<sup>36</sup> *Communicating Europe in Partnership*, 22 October 2008 ([http://ec.europa.eu/commission\\_barroso/wallstrom/pdf/press\\_poldec\\_20081022\\_en.pdf](http://ec.europa.eu/commission_barroso/wallstrom/pdf/press_poldec_20081022_en.pdf))

<sup>37</sup> <http://www.myparl.eu/myparl/public/landing.jsp>

<sup>38</sup> <http://www.cosac.eu/en/>

specialised committees. However, a number of national parliaments have recently reviewed their management of EU-affairs or are in the process of doing so.

In this context, the experience of the Swedish Riksdag should be mentioned as an example of positive change. Since January 2007 it has forwarded Commission proposals not only to the EU Affairs Committee, but also to the respective specialised committee(s). In practice, this means that specialised committees are more involved in EU affairs than in the past and that they can be involved at a very early stage (normally already when the Council Working Groups take up their work). Specialised Committees can now ask for a hearing with government ministers and are often in a much better position to provide input to the government on the substance of the respective matter than the EU Affairs Committee would be. The ultimate hearing (i.e. before the vote in the Council of Ministers) still takes place in the EU Affairs Committee, but in many cases it just takes up the points raised by the specialised committees.

According to Swedish observers the new system has increased ownership of national MPs, which also proves to be beneficial at the implementing stage. MPs who are experts on a specific policy issue are now better informed about the respective EU activities. Whether the new system has also contributed to a wider public debate on EU matters is less evident, but certainly MPs cannot tell their electorate any longer that they do not know what the EU does in their policy area. Since the new arrangements on the involvement of specialised committees have come into force in January 2007 the number of committees and individual MPs coming to Brussels has already increased considerably. The 'Swedish model' certainly does not eliminate the problem of EU affairs normally featuring low on the national news agenda, but it is a step in the right direction.

#### *1.5.1.1 Recommendation*

Democratic legitimacy and ownership of the EU by national deputies must be enhanced through mainstreaming EU-affairs in the work of national parliaments.

As national parliaments will play a more intense role in the years to come as regards their contribution to the good functioning of the Union, the opportunity to examine and promote positive national experiences should be seized at the highest political level.

This could be achieved by promoting the creation of a Task Force composed by representatives of national parliaments to explore and analyse how European affairs are dealt with in each national Parliament and highlight potential best practices. Along these lines, the EU Presidency could envisage the creation of an inter-parliamentary mechanism for the identification of 'good practices' across the EU. This could take place through stronger personal contacts, but also virtual instruments should be considered. For example, it should be tested whether instruments like the IPEX-website (*Interparliamentary Information Exchange*)<sup>39</sup> can be useful for such an exchange of national experiences.

Such an approach towards a better implication of national parliaments would also help to change the current (self-) understanding of many MPs as defensive 'subsidiarity watchdogs' to a broader and more positive role of national parliaments in EU decision-making.

## 1.6 Concluding remarks

This Chapter has discussed the most pressing challenges facing the EU decision-making process today and the in the forthcoming future. It has put forward a set of specific recommendations targeting the key decision-making institutions. National Parliaments are also included in the picture, as an integral component of the multilevel structure of the European Union. The latter aspect and the balance between EU and national components of policy-making will be addressed in greater detail in chapter 3.

The main suggestions of this chapter are summarised below and divided per institution.

Recommended improvements for the **European Commission** include:

- Aiming at a smaller College with broader portfolios;
- Finding alternative ways to improve the internal efficiency of the College of Commissioners, if a reduction of its size is not politically feasible;
- Making a better use of preparatory documents to guide the policy debate;

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<sup>39</sup> <http://ipex.eu/>

- Ensuring high linguistic and legal drafting quality of legislative proposals.

Decision-making in the **Council of Ministers** would benefit from:

- Streamlined discussions and negotiations through the use of ad hoc tools such as issue papers, negotiating boxes and sub-groups;
- A reduced number of official 'prestige' meetings to the benefit of unofficial meetings focusing on topical issues;
- More focused Presidency conclusions;
- An increased coordination of different Council formations.

Instead, the **European Parliament** should:

- Be more heavily involved in the selection of key initiatives to be included in the annual work programme;
- Adopt a code of conduct for tabling amendments.

Finally, the creation of a Task Force composed by representatives of the 27 national Parliaments to explore and analyse how European affairs are dealt with in each national Parliament and possibly identify best practices should be promoted at the highest political level.

## 2. BETTER REGULATION

*ANDREA RENDA*

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**B**etter regulation is commonly defined as a broad strategy to improve the regulatory environment, containing a range of initiatives to consolidate, codify and simplify existing legislation and improve the quality of new legislation by evaluating its likely impact.

Since the late 1980s, better regulation has increasingly been at the forefront of the EU agenda, but only with the Commission's 2001 White Paper on European Governance, the Commission has set up a comprehensive and consistent agenda for the establishment of better regulation standards in the EU.<sup>40</sup> A few months after the publication of the White Paper on European Governance, the Mandelkern Group on Better Regulation published its final report, which specified some of the features of the prospective new Impact Assessment (IA) model, suggesting its adoption by the Commission before June 2002 and its application to all Commission proposals with possible regulatory effects.<sup>41</sup> During 2002 and early in 2003, the Commission developed its Action Plan on Better Regulation through eight targeted Communications, at the same time defining with the European Parliament and the Council an overall strategy on better law-making. These initiatives, which have the potential to significantly improve the regulatory environment, especially for European businesses, have undergone significant evolution in the past few years (see Box 2.1).

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<sup>40</sup> See European Commission, White Paper on European Governance, COM(2001)727, 25 July 2001.

<sup>41</sup> Mandelkern Group, Final Report (available at [http://europa.eu.int/comm/secretariat\\_general/impact/docs/mandelkern.pdf](http://europa.eu.int/comm/secretariat_general/impact/docs/mandelkern.pdf)).

*Box 2.1 Recent steps in the EU better regulation agenda*

Recent major steps in the Commission's better regulation agenda include the following: the re-launch of the Lisbon agenda under the name "Partnership for growth and jobs" that identified better regulation as one of the main pillars of competitiveness and sustainable development in Europe (COM(2005)24, at §3.2.3); the growing involvement of the European Parliament and the Council through the 2003 Inter-Institutional Agreement on Better Lawmaking and the 2005 agreement on a 'common approach' to impact assessment; the appointment in late 2006 of an Impact Assessment Board (IAB) in the Commission, responding to repeated calls for better quality assurance mechanisms and stronger coordination in the *ex ante* assessment activities carried out by the various DGs; the launch in January 2007 of the Commission Action Programme for the measurement and reduction of administrative burdens generated by EU legislation (COM(2007)23 final); the 2007 review of the Commission's minimum standards for external consultation and the oversight role of the IAB in checking that these standards have been complied with; the gradual strengthening of the Commission's Simplification Rolling Programme, which covers 164 measures for 2005-2009 and is now part of the annual work programme. The Commission has already proposed or adopted 91 such measures, and envisages the adoption of 44 new measures in 2008. An *ex post* evaluation of the Commission's IA system was completed in April 2007, with overall mixed results and a number of suggestions for improving the system in the future. And finally, improved Impact Assessment Guidelines were adopted by the Commission in January 2009, together with new Annexes containing guidance on risk assessment and a list of best practices.

The 2009 Communication on the third strategic review of better regulation in the European Union confirmed that progress has been achieved on several fronts, including cultural change in the Commission, in the number and overall quality of IAs performed, in terms of simplification and the measurement and reduction of administrative burdens.<sup>42</sup> However, there are many areas in which the Commission could improve the performance and effectiveness of such a wide array of instruments devoted

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<sup>42</sup> COM (2009) 15, 28 January 2009.

to better regulation, and even more room for improvement can be found in other EU institutions and at member state level.<sup>43</sup>

In this respect, the Commission clarified its intention to improve the quality of impact assessments in the future, by focusing more on legislative proposals (also beyond the Legislative and Work Programme); improving stakeholder consultation; strengthening the analysis of subsidiarity and proportionality; improve the screening of specific impacts; improving the quantification of impacts and the assessment of administrative burdens where appropriate; and presenting the results in a more transparent way. More generally, one of the key messages launched by the Commission over the past years is that “[t]he Better Regulation Agenda is already bringing concrete benefits for businesses and consumers”, but at the same time “the full benefits will only be obtained if all European Institutions and member states work together”.<sup>44</sup> The main challenge is, in other words, the need to involve other EU institutions and member states in the better regulation agenda. This can be achieved in several ways, some of which are more immediately attainable, whereas others are more difficult to pursue.

Against this background, the Expert Group on better regulation converged around a set of key points to improve the performance of the European better regulation agenda. These include an assessment of possible refinements in the criteria used for selecting proposals that should undergo IA, as well as in applying the principle of proportionate analysis; the question of internal/external oversight of the quality of IAs; the interaction between IA and the Standard Cost Model (SCM) for measuring administrative burdens and the latter’s potential role as a driver of multi-level convergence; and a possible ‘holistic’ approach to mainstreaming IA into the EU policy cycle. Each issue is discussed in detail below.

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<sup>43</sup> On this point, see also Ragnar E. Löfstedt (2007), “The ‘Plateau-ing’ of the European Better Regulation Agenda: An analysis of activities carried out by the Barroso Commission”, *Journal of Risk Research*, 10(4), pp. 427-447; Jonathan Wiener (2006), “Better regulation in Europe”, *Current Legal Problems*, No. 59, pp. 447-518; and Radaelli and Meuwese, “Hard questions, and equally hard solutions? Proceduralization through impact assessment in the European Union”, paper delivered at the CONNEX workshop in Norwich, 28-29 May 2008.

<sup>44</sup> See the Consultation document, available on the Commission’s website at [http://ec.europa.eu/governance/impact/consultation/ia\\_consultation\\_en.htm](http://ec.europa.eu/governance/impact/consultation/ia_consultation_en.htm).

## 2.1 Expanding the role of the European Commission

Many of the Expert Group participants pointed at the need for an expanded role of the European Commission in performing IA throughout the policy cycle. This would entail that the Commission: i) performs IA on its own proposals; ii) provides assistance to other EU institutions during the co-decision procedure, by commenting on the likely economic, social and environmental impacts of proposed amendments; and then iii) updates the original IA document according to the amendments approved.

The arguments in favour of such an expanded role include:

- *The disappointing experience of the ‘Common Approach’ to impact assessment:* as observed by many participants to the Expert Group, the European Parliament and the Council are not undertaking any impact assessment on proposed amendments, and the reason seems mostly related to political problems, rather than lack of resources. As a matter of fact, *politicians* seem unwilling to rely on evidence for decision-making purposes, and the more ‘political’ institutions at EU level consequently faced almost insurmountable obstacles in launching IAs on major amendments. This, in turn, also means that simply endowing these institutions with more resources and expertise to perform IA would be unlikely to solve the problem. To the contrary, the European Commission has already contemplated the possibility to assist other EU institutions in performing IA on the amendments they propose.
- *Having the Commission directly updating its own original IA based on proposed amendments would achieve the goal of having all EU institutions engaged in evidence-based policy-making,* without requiring an active participation of the Parliament and Council.
- At the same time, the continuous involvement of the Commission would also ensure that *the IA document does not become obsolete during the co-decision procedure, but remains ‘alive’* and represents a key reference document that is updated as EU institutions change the text of the proposal.
- *Keeping a ‘live’ IA would also be a very useful interface between EU and member states,* which could use the final IA document as a starting

point before transposing EU legislation into national law, and (possibly) draft their own IAs on implementation measures.<sup>45</sup>

- *Centralising IA 'intelligence' and competence in the Commission would lead to economies of scale and scope.* Although the Commission's involvement through to the end of the policy process may appear as placing an additional burden on the Commission, the additional workload for the Commission is likely to be lower than for any other institution, as the Commission DGs in charge of individual IAs would just have to update estimates and assessments already carried within the IA on the Commission proposal. Furthermore, our proposed 'targeting' of IA resources on a limited number of strategic initiatives would lead to a lower workload for the Commission on non-strategic IAs.
- *Keeping a 'live' IA throughout the policy process also means keeping a live' baseline on administrative burdens.* Once the Standard Cost Model has been applied in the *ex ante* IA on the Commission's proposal, there is no guarantee that subsequent amendments leave administrative burdens unaltered. With a 'live' IA, the Commission would be able to update its assessment of the impact of the final proposal on administrative burdens (including the identification of information obligations added and repealed by the proposal, with attached quantification of burdens).

On the other hand, enhancing the Commission's role in performing IA would create the need to stronger accountability and transparency of the Commission's IA work. This issue is addressed in the next sections.

### 2.1.1 *Strengthening the Commission's accountability towards stakeholders*

As observed above, expanded competence and powers of the Commission calls for a stronger oversight on the quality of the Commission IAs. This goal can be achieved in several ways, including:

- i) *Strengthening the IAB with more resources and support staff.* In 2006 an Impact Assessment Board (IAB) was created within the Secretariat General, grouping five top-level officials from the SecGen, DG

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<sup>45</sup> This solution would possess the additional virtue of enabling a transparent transposition process, and consequently the possibility to immediately identify cases of diverging implementation and/or gold-plating.

Enterprise, DG Employment, DG Internal Market, DG Environment – although the members of the Board act in their personal capacity, not representing their own DGs. All Expert Group participants welcomed the creation of the IAB, which led to a significant improvement in the quality of IAs produced by the Commission. However, given the increase in the volume of IAs produced by the Commission, the IAB is likely to face resource constraints in the future. More resources and staff could thus be needed.

- ii) *Enhancing/institutionalising the role of existing networks such as the HLG of national regulatory experts and the HLG of independent stakeholders.* For example, *ex post* oversight could be strengthened by mandating that existing High Level Groups (HLGs) dealing with IA-related issues review a sample of Commission IAs every year and issue suggestions for improvement. The groups at hand are the HLG of national regulatory experts and the HLG of independent stakeholders (for issues concerning the measurement of administrative burdens). This option would provide a rather ‘soft’ solution to the need for increased accountability of the Commission’s work on IA, providing for an ‘institutionalisation’ of existing expert groups. This would be particularly welcome in case the EU agenda heads towards some form of convergence between the IA system and methodology at EU and national level, in line with one of the issues identified by the Commission in the Communication on the second strategic review of better regulation in the EU.<sup>46</sup>
- iii) *Consultation on draft IAs.* Accountability to stakeholders could be strengthened if draft IAs were published for consultation before the IAB issues an opinion (accept/reject/request amendments). This would allow for further input and comments from stakeholders as regards the methodology used and the results obtained. In order to avoid ‘opening Pandora’s box’, the input sought through the consultation on the draft IA would have to be limited to comments on the methodology and the data used, so that information missing in the IA document is highlighted and provided by external stakeholders. The IAB would then rely on more information and data

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<sup>46</sup> In the Communication: “The Better Regulation Agenda is already bringing concrete benefits for businesses and consumers. But the full benefits will only be obtained if all European Institutions and member states work together”.

when deciding whether the IA carried out by the Commission was a sufficient basis for choosing the preferred policy option. Consulting on draft IAs would also, in this respect, avoid that the IA is used only as a justification for already selected policy options. To the contrary, stakeholder input could help the Commission ‘think outside the box’ when identifying and analysing policy options, and use IA as a discovery and learning process.

- iv) *Creating a new agency in charge of oversight.* The problem of strengthening oversight to improve the quality of IAs has long been discussed in Brussels. As regards the creation of an external oversight body, in charge of quality control, there was very little consensus in the Expert Group, also due to a (quite understandable) reluctance toward the creation of additional agencies at EU level. A strong advocacy (or ‘moral suasion’) role assigned to such an agency would require a very thorough revision of the already delicate balance of powers existing at EU level, and seems impracticable at this stage. Accordingly, it seems fair to state that the ‘outsourcing’ of the quality check would not be a feasible solution for boosting the better regulation agenda in the EU, at least in the short run.<sup>47</sup>

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<sup>47</sup> Over the past months, the Regulatory Reform Committee of the UK House of Commons tackled a similar issue for the national better regulation system, where the BRE plays a role that can be considered as broadly homologous to that of the SecGen/IAB in Brussels. The Committee acknowledged that [t]here is an issue as to whether there should be independent review of impact assessments, as provided by ACTAL in the case of the Netherlands”, where the *Regiegroep Regeldruk* reportedly stated the usefulness of having a body that provides a “source of independent validation of the numbers in impact assessments”. The Committee also considered this issue on the basis of a concern expressed by the House of Lords Merits Committee – and endorsed by the BCC and by the Institute of Chartered Accountants in England and Wales (ICAEW) – according to which the BRE does not adequately challenge impact assessments performed by Government Departments. Accordingly, the Committee concluded that “there is a role for independent review of certain, although probably not all, impact assessments”: but was “reluctant to recommend the setting up of more Government bodies”. However, more recently the UK Government announced that it will set up a new external Regulatory Policy Committee whose role will be to advise Government on whether they are doing all they can to accurately assess the costs and benefits of regulation. As stated by the Government on 2 April 2009, “[t]his body will also advise Government on whether regulators are appropriately risk based in their

- v) *Creating a representation of businesses within the Commission Secretariat General*, along the lines of the UK Risk and Regulation Advisory Council (formerly “Better Regulation Task Force” and “Better Regulation Commission”). This option was rejected by Expert Group participants. Industry representatives observed that, if draft IAs were made available before the final adoption of the proposal, the industry would be able to spontaneously create a board in charge of scrutinising draft IAs and providing input to the consultation, in order to help the IAB take an informed decision on whether to accept/reject the draft IA or ask for further revisions. IAs a consequence, there would be no need for the Commission to appoint yet another High Level Group of experts to act as watchdogs of the quality of the Commission’s IAs.

The debate hosted by the CEPS-CSE Expert Group on better regulation led to the identification of preferred options. On the one hand, the creation of new agencies and the further empowerment of high level groups were rejected as potentially adding more administrative layers to an already complex policy process, with important budgetary consequences and a negative impact on the efficiency and timeliness of the IA exercise. To the contrary, a stronger IAB and consultation on draft IAs were considered as highly desirable. Importantly, the possibility of commenting on the draft IA was considered as a suitable option for strengthening the Commission’s accountability vis-à-vis stakeholders, at a stage of the policy process in which the Commission often becomes a ‘black box’, and stakeholders are left with little or no chance to see what is being proposed, and why.

### 2.1.2 *Selecting proposals efficiently*

One of the key features of the EU impact assessment system is the lack of a pre-determined threshold for the selection of proposals that should undergo IA. While, for example, in the US precise criteria have been introduced by the Clinton administration to avoid investing excessively in policy appraisal for proposals that exhibit a rather low impact on society,<sup>48</sup>

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work; however, it will not have the power to require changes in the behaviour of independent regulators”. Other national governments such as Sweden have set up a new Regulatory Council, which began its work in September 2008.

<sup>48</sup> See, for a description, A. Renda (2006), *Impact Assessment in the EU. The State of the Art and the Art of the State*, CEPS Paperback books, CEPS, Brussels.

at EU level such threshold is still absent. At the same time, while in the US the scope of IA is limited to secondary legislation prepared by government agencies within their general duty of implementing the government agenda set by the presidency, in the EU Impact Assessment has been made mandatory for major policy initiatives included in the Commission Legislative and Work Programme (CLWP),<sup>49</sup> and can encompass both far-reaching regulatory initiatives, broad strategy documents, White Papers, etc. Initiatives that should undergo impact assessment are decided every year by the Secretariat General/Impact Assessment Board and the DGs concerned.

The revised IA Guidelines clarify that this “is decided each year by the Secretariat General/Impact Assessment Board and the departments concerned. In general, impact assessments are necessary for the most important Commission initiatives and those which will have the most far-reaching impacts”.<sup>50</sup> The Commission adds that “[t]his will usually be the case for any item which is part of the Commission’s Legislative and Work Programme (except for initiatives of a consultative or purely reporting nature), but it will also be the case for certain catalogue items and comitology items.” This statement leaves a degree of uncertainty: in particular, it is not clear whether the need for IA depends on the inclusion of the initiative in the CLWP, or vice versa. The most reasonable interpretation is that the need for IA is independent of the inclusion of an initiative in the CLWP: however, it often occurs that initiatives, which are included in the CLWP, are also selected for IA. But the opposite may also occur. This is decided by the SecGen/IAB.

This formulation may lead to confusion. In particular, given the absence of precise criteria, the accountability of the Commission for having included/excluded an initiative from those in need of IA is substantially reduced. This could lead to instances in which very important proposals are not subject to IA, and conversely less important proposals are subject to IA.<sup>51</sup> This, of course, does not go in the direction of an efficient use of resources that can be allocated to better regulation tools.

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<sup>49</sup> Except for initiatives of a consultative or purely reporting nature.

<sup>50</sup> See the new Impact Assessment Guidelines, SEC(2009)92, at Section 1.4.

<sup>51</sup> In the past, some stakeholders have complained about the lack of IA for some initiatives, especially in the field of consumer policy, and legal issues (the “Rome I” regulation, for example).

Better ‘targeting’ of IA efforts and resource, by linking them to clear priorities in the EU agenda, has been invoked by authoritative scholars in the field.<sup>52</sup> A first step accomplished by the Commission is the identification of ‘strategic’ initiatives, as opposed to ‘priority’ initiatives in yearly Roadmaps since 2007. As stated by President Barroso in presenting the 2007 Work Programme, strategic initiatives correspond to “the concrete actions at the core of the Commission’s political delivery”, whereas priority initiatives seem to play a somewhat less crucial role with respect to the EU agenda.<sup>53</sup>

However, the difference between the two types of initiatives in terms of depth and scope of the IA work to be performed is still, at best, implicit. Looking at the 21 strategic initiatives selected for 2007, it emerges that some of them were not subject to IA (social reality stocktaking, green papers on urban transport and on post-2012 climate change, the Single Market review); of remaining strategic priorities, some were non-legislative proposals, others were binding proposals. Overall, it seems that some of the strategic priorities were subject to a more in-depth IA than non-strategic ones:<sup>54</sup> the sign is probably still too weak to suggest that the Commission has started to prioritise more efficiently its IA work, but the identification of strategic initiatives that fall more in line with key EU objectives and top agenda items is certainly an encouraging first step.

In any event, a number of issues remain unclear, including:

- *How strategic initiatives are selected and distinguished from priority ones.* Here, the Commission hints at “the four strategic objectives set out by the Barroso Commission at the start of its mandate: prosperity, solidarity, security and external responsibility” as a criterion for determining the strategic nature of a proposal. But the four pillars of the Barroso agenda are probably too broadly expressed to lead to any

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<sup>52</sup> Radaelli & Meuwese (2008), supra note 43.

<sup>53</sup> See the Work Programmes at [http://ec.europa.eu/atwork/programmes/index\\_en.htm](http://ec.europa.eu/atwork/programmes/index_en.htm).

<sup>54</sup> For example, the Strategic review of EU energy policy, the measures to complete the Internal Market for electricity and gas; the revision of Council Framework decision of 13 June 2002 on combating terrorism; the Directive on minimum sanctions to employers of illegally resident third-country nationals; the Package of Implementation measures for the EU's objectives on climate change and renewable energy for 2020, etc.

meaningful demarcation. One possible solution to this problem could be that yearly roadmaps are subject to public consultation, which would however add another procedural layer in an already quite complex procedure. Such a change in the lifecycle of EU proposals would be feasible only if a specific body in charge of representing industry and consumer interests within the Commission were created. This point is discussed in greater detail below in the dedicated Section on oversight.

- *Whether strategic initiatives could (should) be subject to a more detailed IA* – in other words, whether the dichotomy between strategic and priority initiatives could be a useful ‘litmus test’ to identify those initiatives that warrant an in-depth *ex ante* assessment.<sup>55</sup>

The Expert Group participants have positively commented on the latter option, not because strategic initiatives always lead to more substantial economic, social or environmental impacts, but because they are “the concrete actions at the core of the Commission’s political delivery”, and as such should warrant a more significant allocation of resources and deeper accountability on the Commission’s side.

## 2.2 Tackling proportionality

Due to the heterogeneity of initiatives subject to appraisal, the depth of analysis cannot be the same for each and every proposal. The ‘valve’ that determines the depth and scope of appraisal at EU level is the so-called ‘principle of proportionate analysis’, which links the depth of the analysis to the nature and type of the initiative to be analysed. In the new IA guidelines adopted in January 2009, the Commission elaborates on the 2005 guidelines by providing further assistance to DGs on how to apply the principle of proportionality.<sup>56</sup> The new proposal by the Commission entails that the level of analysis which is proportionate should relate to the entire

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<sup>55</sup> Some commentators have argued that this is not likely to be always the case, as priority initiatives often have the potential for more wide-reaching and deeper impacts than strategic initiatives, and sometimes even items not included in the Work Programme have more potential for negative impacts than included items. See Craig Robertson’s post on the Bertelsmann’s Virtual Working Group on the EU better regulation agenda (<https://wiki.bertelsmann-stiftung.de/display/br/selection?focusedCommentId=4784964#comment-4784964>).

<sup>56</sup> See SEC (2009)92, pages 12 ff.

IA process, including for example data collection, provisions for stakeholder consultation and quantification of impacts.

The criteria proposed by the Commission to assess the depth and scope of analysis to be undertaken are the significance of likely impacts, the political importance of the initiative, and the situation in the context of policy development. Understandably, the Commission does not rigidly specify the depth of analysis for specific types of initiatives, stating that it will be “content rather than any formal classification that determines the degree of analysis needed”.

For guidance purposes, the Commission points at the following ‘categories’ of initiatives: i) non-legislative initiatives/Communications/Recommendations/ White papers, which set out commitment for future legislative actions; ii) ‘cross-cutting’ legislative actions, such as regulations and directives that address broad issues and are likely to have significant impacts in at least two of the three pillars (economic, environmental and social) and on a wide range of stakeholders across different sectors; iii) ‘narrow’ legislative action in a particular field or sector, and unlikely to have significant impacts beyond the immediate policy area; v) expenditure programmes; and vi) comitology decisions.

Overall, looking at all IAs produced to date, it seems that the depth of analysis is only marginally related to the binding nature of the proposal. Also, a significant number of IAs completed by the Commission do not address real policy initiatives, and resemble more closely *ex post* or *interim* evaluation reports.<sup>57</sup> Finally, some DGs have performed IAs mostly on non-legislative initiatives – including AGRI (9 out of 12), COMM (1 of 1), COMP (2 of 3), DEV (11 out of 13), RELEX (4 out of 5).

More in general, the 2009 guidelines have improved over the previous version, which provided little or almost no guidance for DGs wishing to undertake IA. However, it is unclear why the Commission seems to ask DGs to devote limited effort to the analysis of the relevance and consistency with EU priorities when drafting IAs on non-legislative documents, whose main purpose is indeed to explore the direction in which future action at Community level should proceed. Apart from cases in which sophisticated analysis is needed already at an early stage, the

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<sup>57</sup> Examples: Communication of the Commission on the state of play and development of the Euro-Med Facility, the Reports on the European Neighbourhood policy (RELEX), etc.

most important purpose of appraisal at this preliminary stage is often assessing the consistency of the proposed action with the agenda priorities set at EU level.

Secondly, the ‘no policy change’ scenario seems to be almost neglected in the first steps of the analysis, as the Commission suggests that DGs to refrain from investing too much on the zero option – and consequently, on the need for action – in the early steps of the policy cycle. Imagine that a proposal *X* is considered in a White Paper and in a subsequent Communication, and then reaches a stage in which a Directive is being prepared. It may happen, at a late stage, that a more thorough analysis of the zero option reveals that no other option is superior to the *status quo*, or at least that there is no certainty that intervention at Community level could do better than either no action or action at member state level.

Thirdly, the role of quantification should be clarified. Looking at the new guidelines, full quantification seems to be absolutely required only for expenditure programmes (and only for costs), not for narrow policy actions and not for broader policy initiatives. Quantification, in other systems such as the US, plays a much bigger role: it is then worth discussing whether the Commission’s choice marks a definitive departure from the concept of IA as a quantification tool and ‘net benefit’ enabler, towards use of IA as a ‘policy dialogue’ tool.

Fourthly, the current, ‘flexible’ application of the proportionality principle leads to difficulties in evaluating the Commission performance, both in individual initiatives and in aggregate terms. As in Cecot, Hahn, Renda & Schrefler (2008), and as acknowledged also by other scholars, there is room for recommending that the EU explicitly require that more economically significant initiatives receive higher levels of scrutiny (as is currently done in the US for proposed regulations). Furthermore, the EU should identify the *level* of analysis that is expected for each policy proposal beforehand, and indicate the *timing* of the analysis alongside the steps of the policy process.<sup>58</sup> In this respect, proportionality is clearly linked to accountability.

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<sup>58</sup> As stated by Cecot, Hahn, Renda & Schrefler (2008), “An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the U.S. and the EU”, *Regulation & Governance* (2):4, December, pp. 405-424: “[t]his requirement

As recalled already in the Mandelkern report, IA is often a question of “asking the right thing, at the right time, in the right sequence”. Accordingly, a ‘policy cycle’ approach to the selection of the ‘right questions’ to be addressed at each policy stage is needed to ensure that resources are correctly allocated. Against this background, using IA efficiently means investing effort and resources in *ex ante* appraisal up to the point where the input provided by the IA allows the decision-maker to make ‘the right choice’, or at least a reasonably educated guess.<sup>59</sup>

For example, failing to assess the impact of the zero option and to perform the subsidiarity test at an early stage of the policy process can lead to undesirable results in terms of the efficiency of the overall process: what happens if, after an IA on a broad strategy document, in the IA on the final legislative document the analysis of the zero option (or, also, the subsidiarity test) shows that the proposal is a dead end, at least in cost-benefit terms? Many resources would have been invested in vain.<sup>60</sup> Conversely, investing too much effort in quantifying the impact of specific policy measures already at the White Paper stage makes little sense from an economic perspective, as the final policy choice will be taken only after a

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would make it easier to identify analyses that fall short of expectations, thus creating a mechanism for holding the EU more accountable”.

<sup>59</sup> A useful example is the impact assessment performed on White Papers. As these documents normally contain an indication of the direction the Commission has decided to undertake in order to address a specific policy problem, the key issues that should be tackled at this stage certainly include a thorough assessment of the need to intervene, and to do it at EU level. Thus, the subsidiarity test and the analysis of the zero option should play a paramount role in these IAs; in addition, a scenario analysis corresponding to alternative policy choices is certainly helpful to justify a specific approach the Commission considers to be preferable over alternative policy choices. Depending on the type of proposal at hand, this may require: i) the use of law and economics analysis, which compares alternative options without a specific need for a quantification of the impacts of policy options that are still rather vaguely defined; and/or ii) the use of scenario analysis, in which different assumptions are factored in a single model to yield final impacts or ranges of impacts.

<sup>60</sup> On the Bertelsmann’s Virtual Working group’s website, Craig Robertson correctly points out that IAs showing negative impacts do not necessarily indicate a “dead end”, as IA is not a replacement, but only a support to political decision-making. However, this does not affect the conclusion that the zero option is a natural candidate for analysis at an early stage.

new legislative document, at least two rounds of consultation, the opinions of a number of EU institutions (ESC, CoR, etc.) and the input of Parliament and Council. Currently, many IAs performed by the Commission carry an in-depth analysis of options that are not translated into final policy choices at the end of the legislative *iter*.<sup>61</sup>

The Commission is now putting more emphasis on the need to avoid duplications and choose the right timing for investing IA resources along the policy cycle. A possible way to approach the problem of timing and efficient use of resources is to revisit the IA guidelines by creating an 'incremental' approach to IA. As shown in Figure 1 below, a representative (and simplified) policy cycle may entail three IA steps:<sup>62</sup>

- After the Green Paper stage, the first IA is normally performed on the way towards the White Paper (alternatively, this could be a COM stage). In this phase, the key questions to be addressed are:
  - i) *Is there a problem?* For example, is there a market failure? Is there a major legal issue? Or, is there a clear policy proposal that appears as potentially improving over the *status quo*?
  - ii) *Is action at EU level needed?* Is there a policy goal set at EU level that could not be achieved absent action at EU level? Is action at EU level superior to action by member states?

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<sup>61</sup> For example, the IA on the proposed "Directive on the cross-border transfer of registered office" in 2007 concluded that it was "not clear that adopting a directive would represent the least onerous way of achieving the objectives set", and that it would be "more appropriate to wait until the impacts of those developments can be fully assessed and the need and scope for any EU action better defined". However desirable this result may appear, it must also be noticed that it was reached after two rounds of consultation (1997 and 2002), the work performed by a high-level group and a constant involvement of stakeholders before the IA was finally performed on the proposed directive. Part of this effort could have been avoided, had the IA been carried out at an earlier stage with a specific focus on the "zero option", subsidiarity and proportionality. The same can be said of other IAs, such as the IA on the "Proportionality between Capital and Control in Listed Companies".

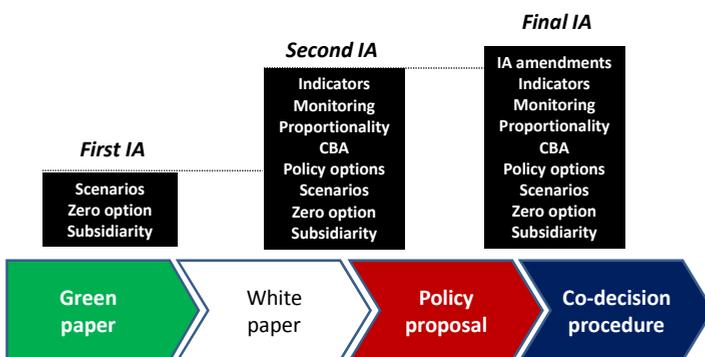
<sup>62</sup> The figure was already included in Renda (2008), *Advancing the EU better regulation agenda: Selected challenges*, Bertelsmann Stiftung Working Paper ([http://www.irr-network.org/document/172/Andrea\\_Renda\\_-2008a\\_Advancing\\_the\\_EU\\_Better\\_Regulation\\_Agenda-Selected\\_Challenges.html](http://www.irr-network.org/document/172/Andrea_Renda_-2008a_Advancing_the_EU_Better_Regulation_Agenda-Selected_Challenges.html)).

iii) *What alternative policy options may be envisaged? Is any of the options clearly superior to the others? Do these options differ noticeably in terms of expected compliance and ease of monitoring and enforcement?*

Needless to say, if these questions are answered negatively, the IA would indicate a ‘dead end’.

- Once the White Paper sets the general approach that can be undertaken by the Commission, a consultation process leads to the refinement of such approach, and its translation into concrete policy proposals. This is the stage at which more in-depth analyses such as cost-benefit analysis (CBA) or cost-effectiveness analysis (CEA) of individual options must be undertaken. CBA and CEA, in particular, perform best when they compare homogeneous options within a common underlying regulatory approach; otherwise, different time horizons, different legal and regulatory tools, different assumptions on compliance and enforcement may lead to misleading results; in addition, performing CBA or CEA at an earlier stage faces the risk of wasting resources – whereas the Commission should avoid having to ‘reinvent the wheel’ every time stakeholder consultation of opinions of other EU institutions leads to a change in the regulatory options at stake.
- Finally, as will be clarified in the next sections of this paper, the IA should be updated to reflect the amendments introduced by the Parliament and the Council during co-decision.

*Figure 2.1 An example of ‘incremental IA’*



This implies that the Impact Assessment Guidelines should be amended to reflect a more logical sequence of analysis throughout the policy cycle, including:

- The need to tackle subsidiarity and the zero option at an early stage of analysis.
- The need to avoid redundancies in IA throughout the policy cycle.
- The need to follow an incremental approach to Impact Assessment.
- The need to devote more resources to strategic IAs as opposed to other IAs.

The proposed expert group to be created (see below, Section 6) should be given this as a specific task.

### **2.3 Strengthening the Commission's accountability towards other EU institutions**

Since the Expert Group has highlighted the need for an expanded role of the Commission in performing IAs on major amendments tabled by the Parliament and the Council during co-decision procedures – at least for strategic initiatives – the need to redefine the role of other EU institutions has emerged. In this respect, an efficient division of roles between the Commission, Parliament and Council entails that the Commission takes responsibility for drafting IAs, and the other institutions are more heavily involved in the selection of initiatives that warrant a more in-depth IA.

More in detail, Expert Group participants have observed that the European Parliament is unlikely to develop sufficient in-house IA resources overtime. To the contrary, the Parliament needs considering a stronger involvement in the selection of priorities in the EU agenda, including those strategic priorities that would deserve careful scrutiny through an in-depth IA.

This new division of roles between EU institutions would possess a number of virtues. First, it would centralise the competence for IA in the Commission, thus creating economies of scale and scope. Secondly, it would preserve and strengthen the Commission's accountability vis-à-vis the Parliament and the Council, as the former would be carrying out the IA work in response to a specific call from the more 'political' EU institutions, ensuring that they always decide on the basis of updated evidence and a structured rationale for action. Thirdly, it would solve the problem of the 'Common approach', which so far has yielded only disappointing results, at the same time ensuring the commitment of all institutions towards better

lawmaking. Finally, such a solution would reflect the enhanced role attributed to the European Parliament by the Treaty of Lisbon.

Hence the European Parliament and the Council should be more involved in the selection of the ('strategic') initiatives that should undergo in-depth IA every year.

## **2.4 Making sense of the administrative burdens measurement**

Over the past few years, and in particular since the end of 2006, the EU better regulation debate has placed substantial emphasis on the measurement and reduction of administrative burdens. This methodology relies on the EU variant of the Standard Cost Model (SCM) developed in the Netherlands since the 1990s. The EU SCM, originally conceived only as a methodology for calculating administrative burdens in individual IAs (and included in the IA guidelines since March 2006 as Annex 10), has later evolved into a tool for completing a baseline measurement of the 'stock' of administrative burdens created by EU legislation in as many as thirteen priority areas, undertaken by a consortium of consultancy firms. This measurement will later be translated into concrete reduction proposals with the contribution of the High Level Group of independent stakeholders (the 'Stoiber group'). Meanwhile, the Commission has also identified a set of 'Fast Track Actions', some of which have already been undertaken.

Following the launch of the EU Action Programme for the measurement and reduction of administrative burdens in the EU, which set a 25% target reduction of administrative burdens by 2012, the spring 2007 meeting of the Council has called for a commitment by member states towards a similar reduction for administrative burdens created by national legislation. So far, at least 21 member states have committed to such a reduction.

The Expert Group has debated the merit of proceeding with the EU Action Programme on measuring and reducing administrative burdens. Opinions widely diverged, with some participants advocating for more emphasis on IA and much less on the SCM, and other that - though acknowledging the non-scientific nature of the measurement - consider it to be anyway useful for businesses. In this respect, it must be recalled that the SCM: i) has a much narrower scope than the impact assessment tool; ii) does not consider all categories of costs, but only burdens generated by information obligations included in pieces of legislation; and iii) does not consider the benefits associated with those costs.

Expert Group participants agreed on the following issues:

- *the scope of the burden measurement exercise is currently too narrow.* However, some participants observed that this should discourage EU and national policy-makers from investing in the measurement in the years to come; whereas others consider this as grounds for expanding the scope of the measurement to other categories of costs – most notably, compliance costs.
- *Whatever amount of resources is allocated to the measurement of administrative burdens, this should not subtract resources from IA and other better regulation tools.* *Ex ante* impact assessment, *ex post* evaluation and simplification initiatives are too important for Europe to be ‘sacrificed on the altar’ of administrative burdens.

Looking more closely at the current features of the administrative burdens measurement, a number of issues are particularly relevant:

- *Should the target be ‘net’?* Target setting is quite important since, though the Commission has committed to achieve a 25% reduction before 2012, it is still unclear whether the target will be a ‘net’ one – which includes all new legislation that will be adopted by 2012 – or whether it will be a reduction over the stock measured in 2012, regardless of whether EU legislation will introduce, in the meanwhile, additional burdens. The issue has been discussed several times at national level, with governments setting ‘net’ targets as a commitment towards real relief from red tape for businesses. Sophisticated measures have been put in place, including, e.g. compensation rules and other arrangements that ensure that, overall, the stock of ABs does not increase overtime, frustrating any attempt to achieve the desired target. Should the EU target also be ‘net’, administrative burdens would have to be calculated for each and every new proposal falling in the thirteen priority areas – i.e. the Commission should quantify administrative burdens reduced and added for each and every new proposal, including the burdens added/repealed by subsequent amendments proposed by the Parliament and the Council.
- *Should the baseline be ‘live’?* A similar conclusion would be reached if the Commission clarified that the baseline that will be built with the ongoing measurement exercise will have to be kept ‘live’, i.e. constantly updated through IAs performed by Commission DGs. This type of activity would not be feasible unless the Commission: i) *always* performs AB calculation on the basis of the SCM in its IAs on

binding proposals, when such proposals are likely to have a significant impact on burdens; ii) *always* updates its IA on the basis of amendments proposed by the Parliament and the Council, when these amendments are deemed likely to significantly affect administrative burdens. Against this background, the Commission often does not apply the SCM in its IAs on binding proposals. The SCM was applied only in two IAs in 2007 (Postal services and ban on mercury exports), and was later used on the Fast Track proposals issued within the Action Programme on the measurement of administrative burdens.<sup>63</sup>

Hence, if the Standard Cost Model is to become an ongoing effort at EU level, the current situation offers little beacons of hope. In an attempt to formulate constructive suggestions for the near future, the following issues should be taken into account:

- *The scope of the measurement should be expanded.* The Expert Group advocates for: i) an extension of the ongoing measurement to other priority areas beyond the thirteen measured so far, to cover all relevant areas and thus build a full baseline; and ii) an extension of the scope of the SCM methodology to irritation burdens and compliance costs other than mere administrative burdens, in line with the recent evolution of the SCM undertaken in the Netherlands, and recommended by the OECD and World Bank.
- *Stronger coordination between the EU and national measurements of administrative burdens should be ensured, as way to enable convergence of better regulation system in the EU27.* The European Commission, in its

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<sup>63</sup> Recently, a joint letter by the UK Better Regulation Commission, the Dutch *Actal* and the German *Nationaler Normenkontrollrat* advocated for more comprehensive measurement of administrative burdens at EU level: interestingly, the three institutions advocated for the application of the SCM on ‘all’ new initiative, not only those included in the CLWG, and not only those that undergo IA ([http://www.normenkontrollrat.bund.de/Webs/NKR/Content/DE/Publikationen/Anlagen/positionspapier-zum-aktionsprogramm-der-eu-englisch\\_property=publicationFile.pdf](http://www.normenkontrollrat.bund.de/Webs/NKR/Content/DE/Publikationen/Anlagen/positionspapier-zum-aktionsprogramm-der-eu-englisch_property=publicationFile.pdf)), “[a]n ex-ante measurement of administrative burdens only needs to be carried out for initiatives that are likely to impose significant administrative costs (*principle of proportionate analysis*). Since the transparency of administrative burdens is vital, we recommend that it is mandatory for every new Commission initiative to have a comprehensible statement about the administrative burdens imposed.”

Communication on the second strategic review of better regulation in the European Union, has stated the need for increased involvement of member states as a key step towards mainstreaming better regulation in the whole policy cycle to the benefit of EU citizens. However, so far most national governments have failed to include better regulation tools and particularly IA in their agendas, despite the fact that these tools stand at the forefront of the Lisbon agenda. Conversely, the SCM has become way more widespread and standardised than IA in member states, and the commitment by all member states to achieve a 25% reduction of administrative burdens certainly represents the most important multi-level commitment ever observed in the better regulation field at EU level. As a result, the SCM could be a useful forerunner for more convergent better regulation agendas at member state level, and in particular for mainstreaming IA into the policy-making cycle. In order to achieve this result, more coordination between the administrative burdens measurement at EU and national level should be sought. This could be a task for the expert group to be appointed, as described in Section 6 below.

## **2.5 Involving member states**

Looking at the future of better regulation in the European Union, it bears recalling that, although the EU system can be improved in several ways, most member states are far behind the EU in setting up their own better regulation system, despite the fact that the Lisbon strategy explicitly required them to take action in this direction. As already mentioned, one of the key messages launched by the Commission in its Communication on the second strategic review of better regulation in the EU is that “[t]he Better Regulation Agenda is already bringing concrete benefits for businesses and consumers”, but at the same time “the full benefits will only be obtained if all European Institutions and member states work together”.<sup>64</sup>

More in detail, as was observed by some commentators, there is currently a wide adoption-implementation gap at national level, with many member states claiming to have adopted some form of impact assessment methodology, but very few of them actually having mainstreamed IA into

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<sup>64</sup> See the Consultation document, available on the Commission’s website at [http://ec.europa.eu/governance/impact/consultation/ia\\_consultation\\_en.htm](http://ec.europa.eu/governance/impact/consultation/ia_consultation_en.htm).

their policy-making process. As a result, a full-fledged IA system appears to be missing in most member states, with very few exceptions. In this respect, it must be recalled that absence of evidence-based policy-making at national level can negatively affect the Internal Market, especially as regards the different legal systems faced by firms wishing to engage in cross-border trade. As an example, Swedish firms wishing to operate outside national borders may be harmed by inefficient legislation adopted in other countries.

In short, placing the emphasis only on the EU level would miss the broader picture of better regulation in Europe. Striving to reach an optimal balance in Brussels would be almost useless, if member states do not contribute to better regulation by ensuring the timely, effective and efficient transposition, implementation and enforcement of EU legislation. In this respect, a degree of convergence between the EU and national IA systems would also entail that EU IAs serve as a basis for implementation in member states, and that impact assessment can be performed at national level as an ‘add-on’ to what the European Commission has analysed in its own IA document.<sup>65</sup>

Achieving convergence between the EU and national better regulation systems should thus be considered as a key priority in the next years. The opportunity to create commitments and responsibility at the member state level should be seized, possibly with focus on the adoption of a common system of indicators.

## **2.6 A new ‘Mandelkern group’?**

The CEPS-CSE Expert Group on better regulation took as a starting point for its work the Council’s 18-month programme jointly drafted by the French, Czech and Swedish presidencies where advancement of the better regulation agenda is considered to be essential for the future of the EU. The three consecutive Presidencies commit, i.a. to “make sure that impact assessments will take into account the economic, social and environmental impacts and that they will be more systematically examined”. In addition, “efforts will continue to be made to improve the quality of impact assessments and to further strengthen procedures for external stakeholder

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<sup>65</sup> Please note that this is possible only if the Commission updates the IA throughout the policy cycle, thus throughout the co-decision procedure. See *supra*, Section 2.

consultation.” Moreover, the three Presidencies “will also closely monitor progress towards the target of reducing the administrative burdens arising from EU-legislation by 25 per cent by 2012.”

The Expert Group participants have agreed that the most effective way to leave a decisive mark on the future of better regulation in the EU and member states would be to appoint a group of experts in charge of the following activities:

- i) *Communicating the importance of the EU better regulation agenda, and the impact it has had on EU policy-making since its inception (2003).* This includes the use of indicators of regulatory quality and the identification of cases in which better regulation tools have ‘made a difference’ in EU policy-making. Indicators of regulatory quality should be promoted both in *ex ante* IA (in the section on monitoring and evaluation), and in the *ex post* evaluation of proposals.
- ii) *Identifying and proposing detailed criteria for selecting in-depth IAs to be undertaken every year.* This entails discussing the criteria that should be used to identify the initiatives that should undergo in-depth IAs, and the consequent application of the proportionality principle to in-depth v. less detailed IAs.
- iii) *Discuss changes in the IA guidelines, especially for what concerns the proportionality principle and the ‘incremental’ or ‘sequential’ approach to IA, as described above.*
- iv) *Re-designing the process by securing the involvement of all EU institutions in the definition of strategic initiatives.* This entails the discussion on the future of the inter-institutional agreement on better lawmaking, in line with our recommendations on the need for an expanded role of the Commission in drafting IAs on amendments, and a stronger role of institutions in selecting strategic initiatives that should undergo in-depth IAs.
- v) *Discussing the pros and cons of opening draft IAs to consultation.* Besides discussing the merit of the proposal *per se*, the expert group should also clarify the modes and conditions of such a consultation, mostly to ensure that it does not lead to ‘opening Pandora’s box’, but is limited to the collection of opinions on the quality of IAs, and is then used as a basis for the IAB in deciding whether the Commission’s original IA has satisfied the proportionality principle and is sound enough to provide a basis for decision-making by other EU institutions.

- vi) *Discussing the merit of a roadmap towards the convergence of EU and national better regulation agendas, including multi-level convergence of IA systems.* This is a more forward-looking activity, which includes both the future convergence of IA systems at EU and national level, including the setting of a common set of indicators; and the possibility to start from the current spread of the SCM to reach a much broader convergence of better regulation systems, as originally advocated by the Lisbon agenda.

If future EU Presidencies follow the present suggestion and promotes the creation of an expert group in charge of looking into the future of the EU better regulation system, this would occur almost ten years after the Mandelkern Group started its work, which laid the foundations of today's better regulation system in the EU. However, as observed by a number of Expert Group participants, the new group would have a different mandate compared to the Mandelkern Group. While the Mandelkern Group paved the way towards a more comprehensive better regulation agenda in the EU, the future expert group would take stock on the important achievements to date, and look at how to advance the better regulation agenda in the years to come. As a consequence, while the Mandelkern Group was essentially composed by representatives of member states, the future group of experts should be composed mostly by field experts and representatives from all EU institutions.

## 2.7 Concluding remarks

In light of the above, the Expert Group identified the following key suggestions for improving the current and future performance of the better regulation strategy in the EU and its member states.

At the EU level, the **European Commission** should:

- perform in-depth IAs only on 'strategic' initiatives.
- perform and update its IAs throughout the policy cycle.
- publish draft IAs for consultation.
- plan IA work efficiently;
- efficiently allocate resources between ex ante impact assessment and ex post evaluation;

The **European Parliament** should instead act as an 'informal watchdog' in the EU better regulation system.

From a **longer-term perspective**:

- The scope and role of the measurement of administrative burdens should be clarified.
- The burdens measurement should be used as a driver for the convergence of IA systems in the EU.
- A 'new Mandelkern group', with focus on advancing the EU better regulation agenda should be launched.
- A common set of IA quality indicators should be envisaged to foster the convergence of EU and national IA systems.

### 3. IMPLEMENTATION AND SUBSIDIARITY

*LOURDES ACEDO MONTOYA\* & LORNA SCHREFLER*

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Over the past few years, significant progress towards the completion of the European Internal Market for goods, services, people and capital has been achieved. However, geographical barriers have not yet fully come down; indeed, as was authoritatively observed, key economic areas still exhibit incomplete harmonisation partially stemming from regulatory failure, and this significantly hinders the possibility for businesses and citizens to reap the benefits of a single European market.<sup>66</sup> In this context, improved regulatory quality is expected to boost European competitiveness and deepen the Internal Market. Most European institutions, within the context of the Single Market Review, have recently highlighted the need to strengthen the harmonisation of rules to ensure that European businesses and citizens fully benefit from the Internal Market.<sup>67</sup>

As was highlighted by, among others, the Sapir Report in 2003, a key question is whether remaining shortcomings in the economic integration of the EU can be traced back to ‘fault lines in its patterns of governance’. The Report identified three possible sources of failure:

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\* This chapter was drafted in the rapporteur’s former capacity as a researcher in CEPS Regulatory Affairs research unit.

<sup>66</sup> SEC(2007)1521.

<sup>67</sup> See for example, European Commission (2007), “A single market for 21st century Europe”, COM(2007)724, 20.11.2007; European Parliament, resolution of 12 December 2007 on the Commission legislative and work programme for 2008.

- i) a policy may be *not clearly (or mistakenly) allocated* between the EU and the member state levels with respect to the objective that is being pursued (either inappropriate centralisation or decentralisation). Subsidiarity is therefore key to regulatory quality both in economic and political terms. By empowering the relevant government level one satisfies cost/benefit efficiency criteria while reinforcing policy ownership and commitment.
- ii) a policy may be appropriately allocated, but its *design or implementation may be deficient* because of an institutional failure or the lack of appropriate instruments. Thus, one may identify problems derived from failure to monitor/coordinate the implementation of EU legislation at national level and problems arising from inconsistencies between national and European legislation. Recent legal and economic literature puts the blame on member states both for incorrect transposition and for non homogenous implementation of EU law.<sup>68</sup>
- iii) the failure can be entirely internal to a policy domain, because either the goals, or the strategy, or the policy instruments are not appropriate. In this case, better Impact Assessments will undoubtedly help to define the best policy options on the basis of a qualitative and quantitative analysis.<sup>69</sup> Defining straightforward techniques to choose the right policy option (i.e., a functional application of the subsidiarity and the proportionality principles) is, therefore, key to the success of a legislative measure.

In a multi-tiered governance system, such as the European one, better lawmaking is a matter of every layer of government, from the EU level to the level of regions having legislative powers, regions belonging to federal states, and regions in decentralised states. Ultimately, the success of any initiative hinges on the active and resolute participation of member states, regions, and EU institutions.

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<sup>68</sup> For further details, see B. Steunenbergh (2005), "Turning swift policy-making into deadlock and delay: national policy coordination and the transposition of EU directives", *European Union Politics* 7 (3): 293-319; Ph. Nicolaidis and H. Oberg (2006), "The Compliance Problem in the European Union", *EIPAScope*, 2006(1): 12-18.

<sup>69</sup> See Chapter II of this report for more information.

The Expert Group identified and discussed several possible solutions to enhance the convergence of legislation and regulatory practices in the Internal Market, while ensuring the necessary balance between legal security and flexibility. With a specific focus on the development of a more competitive Europe, these suggestions are built around three specific issues: a proper application of the subsidiarity principle, a proportionate application of the spectrum of legislative measures and the reinforcement of the relationship between member states and European institutions to ensure an effective and homogeneous application of European law. The first two points pertain to questions of regulatory quality and are jointly addressed in section 1; while issues related to implementation and to the coordination between the EU and its member states are addressed in sections 2 and 3 respectively.

### **3.1 Regulatory quality: Achieving a suitable regulatory environment for European businesses**

There is a common understanding across Europe of the importance of regulatory quality for boosting ‘growth and jobs’, improving ‘competitiveness’ and releasing the single market potential.<sup>70</sup> In this context, the principles of subsidiarity and proportionality, as well as their practical implementation deserve particular attention.<sup>71</sup>

Subsidiarity and proportionality are the only principles of regulatory quality to be explicitly enshrined in the EC Treaty. As regards subsidiarity, the Treaty clearly states that the principle applies to those areas that do not fall under the exclusive competence of the Community.<sup>72</sup> In those cases,

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<sup>70</sup> Regulatory quality is normally used as a synonym of better regulation or better lawmaking. In general, however, one should consider regulatory quality as a consequence of better regulation, or in other words as a broader concept that may imply changes in decision-making structures or the use of new tools to assess regulatory efficiency. The positive effects of better regulation have been repeatedly described in several official documents (both at EU and member state level), see i.a. COM (2005)97, COM(2002)278, the Mandelkern Report (2001) and COM(2007)724.

<sup>71</sup> On the other dimensions of the overall quality of decision-making and the Mandelkern principles of better regulation, see the previous chapters.

<sup>72</sup> In a multi-tiered structure as the European Union, the allocation of public functions must comply with the subsidiarity principle as specified in Art. 5 TEC and the Protocol annexed to the Amsterdam Treaty which will be incorporated to the new Lisbon Treaty. If one accepts the constitutional logic of the Treaty,

action at EU level is only justified insofar as the objectives of the proposed measure cannot be sufficiently achieved by the member states, but “non-action by member states does not in itself create EU competence”.<sup>73</sup> Several documents have recently linked the goal of enhancing convergence in the Internal Market with a correct application of the principle of subsidiarity.<sup>74</sup>

On the application of the proportionality principle, the new Impact Assessment (IA) guidelines call for a systematic analysis of alternative policy options (including no new EU action) to compare the cost and benefits of stringent vs. lax policy measures. This approach complies with the Treaty requirement foreseeing that Community action should be as simple as possible while achieving its objectives. In particular, the new IA guidelines provide detailed information and guidance on the practical application of the proportionality principle.<sup>75</sup>

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subsidiarity can solely be applied to so-called ‘shared powers’. Should the Treaty of Lisbon enter into force, this article will become Art. 3b, to be read jointly with Art. 3a. As a matter of fact, the Lisbon Treaty clearly specifies the domains of ‘shared powers’ in Art. 2C. One of the main innovations of the Treaty is thus the clear distinction between the policy domains falling within the competence of member states, from those of exclusive EU competence and those where competences are shared. Only the latter are affected by the principle of subsidiarity, and this clarification represents a major step towards a proper application of the principle.

<sup>73</sup> European Parliament, *ibid*, pp. 52-54.

<sup>74</sup> The French submission to the consultation on the future of the Internal Market, for example, clearly states that “[a]reas and sectors of activity where greater integration is needed have to be identified. *This must be done bearing in mind a balanced application of the principle of subsidiarity by determining the relevant level of intervention (EU or national).*” The French report pointed specifically at areas such as financial services, regulation of energy and telecommunications, taxation, company law, consumer protection and intellectual property as those in which greater convergence should be sought. République Française (2006), “French contribution to the European Commission’s public consultation on the future of the Internal Market”, September.

<sup>75</sup> For further details, see section 7.2 of the 2009 European Commission Impact Assessment Guidelines.

### 3.1.1 *What subsidiarity for Europe?*

Any discussion on the application of the subsidiarity principle should start from the roots of the concept, namely giving priority to local preferences in policy-making, unless overridden by proper justification, which render local or national law – or policy-making ineffective or inefficient. Then, decentralisation will be preferred when preferences differ substantially among member states; while centralisation will be applied where there is room for economies of scale and there are cross-border external effects of national policies.<sup>76</sup>

Improving the allocation of public functions between the member states and the EU level can be expected to result in a better functioning of the European Union, hence, in greater legitimacy of the EU for its citizens and superior economic performance arising from higher efficiency and effectiveness. Yet, the attribution of competences has a strong political component, so a purely technical analysis of the subsidiarity principle is extremely complicated. As a matter of fact, three approaches can be identified behind the principle of subsidiarity: procedural (legalistic), functional, and political. In what follows, the focus will be mainly on the functional aspects of subsidiarity, without neglecting the other dimensions. This is motivated by the fact that in 90% of the cases the application of the subsidiarity principle does not cause any problem and hence does not slow down the legislative machine.<sup>77</sup> As for the remaining 10% of the cases, they need to be addressed more thoroughly in order to ensure a successful and correct implementation of EU law. These cases will often touch upon the political dimension of the subsidiarity principle and – under those circumstances – a functional approach is likely to increase the quality and the transparency of the policy process.

All institutions are obliged to comply with the subsidiarity principle and they are also involved in some form or another in its application. The Commission – for instance – must justify every legislative proposal on the grounds of subsidiarity and present an annual report that can be assessed by the other institutions. Amendments by the Council and the European Parliament must also be subsidiarity compliant. The consultative bodies of

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<sup>76</sup> E. Ederveen, G. Gelauff and J. Pelkmans (2006), *Assessing subsidiarity*, CPB Document No. 133, November.

<sup>77</sup> COM(2007)286.

the EU (CoR and EESC) ensure that subsidiarity is respected from the point of view of regional and local authorities and civil society respectively, while the Court of Justice can be called to assess the compliance of Community secondary legislation with subsidiarity. Therefore, “the current system puts the burden of proof on the institutions involved in the Union’s legislative process”.<sup>78</sup>

Since 2005, the Commission has streamlined the process by using a common questionnaire on subsidiarity and by presenting the information in the same way in every proposal. Although formally assessing the ‘necessity’ and ‘need to act in common’ are elements of the subsidiarity principle, the questionnaire remains vague in some areas. More specifically, there is no mechanism or procedure (as is the case for proportionality in the IA guidelines) to quantify those elements, and the use of quantitative indicators to measure cross-border spillovers and externalities remains optional.

The Commission, with the assistance of the European Parliament and the Committee of the Regions, may therefore envisage preparing specific guidelines for the application of subsidiarity that may also be used by national Parliaments in order to ensure a homogeneous treatment of subsidiarity across Europe. Consequently other institutions and interested stakeholders will find it much easier to assess subsidiarity. More efforts in this sense should be encouraged, especially once National Parliaments are formally involved in the process.

The rules on the application of the subsidiarity principle, as they stand today, allow the European Economic and Social Committee and the Committee of the Regions to issue opinions on the application of the principle. Moreover, the Committee of the Regions has recently created the Subsidiarity Monitoring Network with the purpose of facilitating the exchange of information between the Community and the local and regional entities.

In particular, the Subsidiarity Monitoring Network allows its partners to make their voices heard in the decision-making process by commenting on policy and legislative proposals from a subsidiarity, proportionality and better regulation point of view, whilst at the same time serving as a channel to retrieve information on the EU decision-making process.

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<sup>78</sup> Ibid., p.20.

The Network was established in March 2007 and has already been consulted three times.<sup>79</sup> A first consultation, held in 2007, dealt with the so-called '3<sup>rd</sup> Energy Package on Electricity and Gas', while a second one, in 2007-2008, focused on the areas of immigration and employment. A third consultation on 'patients' rights in cross-border healthcare' was launched in September 2008.

Furthermore, following explicit calls in CoR's opinions,<sup>80</sup> and as foreseen under the Cooperation Protocol between the European Commission and the Committee of the Regions,<sup>81</sup> the CoR is strengthening its cooperation with the European Commission through its participation in selected impact assessment exercises. Local and regional authorities are crucial actors in the implementation of many policies and in many cases bear the lion's share of the associated costs and burdens. Therefore, their point of view on the diverse territorial impacts of a proposed action should be taken into account throughout the decision-making process in all relevant fields. In the future and further building upon this initiative, it is envisaged that members of the Subsidiarity Monitoring Network be consulted in the framework of ad hoc CoR territorial impact assessments of European Commission's proposals early on in the pre-legislative process (impact assessment consultations).

The importance of the regions in the operationalisation of the principle of subsidiarity is inextricably related to the role of member states. While the practical aspects of implementation directly affect sub-national levels of governance, coordination between member states is key for a sound linkage between policy-making at the EU level and concrete implementation on the ground. As already mentioned in Chapter 1, a stronger coordinating role could be envisaged for COSAC and this should include the application of subsidiarity. Moreover, the renewed procedures and mechanisms foreseen by the Lisbon Treaty call for the establishment of a real subsidiarity culture capable of ensuring the effective monitoring of the application of the principle by national Parliaments, especially given the tight deadlines foreseen. Therefore, cooperation among all the actors involved in subsidiarity monitoring at the regional, national and European levels is of paramount importance.

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<sup>79</sup> Additionally, two pilot consultations were carried out in 2005 and 2006.

<sup>80</sup> Opinions CoR 62/2003, CoR 220/2004, CoR 121/2005 and CoR 397/2006.

<sup>81</sup> R/CoR/2007 pt 3 a.

This also requires better communication among all the actors involved, EU institutions and national and regional parliaments. The share of best practices and the interaction between national parliaments should be encouraged via the development of electronic means specially created to this aim and the regular organisation of meetings between parliamentary representatives for reviewing and sharing the different approaches to subsidiarity. The assistance of the Commission in terms of logistics for the creation of electronic means of communication should be further exploited. Moreover, the EP provides the ideal forum for sharing best practices between national parliaments and the knowledge acquired by the CoR on the Subsidiarity Monitoring Network should be shared with national and European Members of Parliament.

### ***3.1.2 Proportionality: Matching the means and the aims***

Improving the governance of the Single Market to make it fully operational requires an efficient use of the regulatory tools and processes so as to ensure the necessary degree of flexibility and security for all market players. The lack of harmonisation observed in various sectors might indeed be a consequence of using inappropriate regulatory techniques. In fact, the principle of proportionality as stated in the Treaty, "...the Community shall not go beyond what is necessary to achieve the objectives of this Treaty", already sets the path to follow when preparing a regulatory proposal. First, the Commission should clearly identify the objective(s) of a proposal and then, it should perform a thorough study of the available policy options in order to identify the most efficient and less intrusive one (for all stakeholders; national, regional or local governments, businesses and citizens).

Early consultation of all the interested stakeholders will certainly improve the quality of legislation and the capacity or readiness of the national and regional authorities to apply it.<sup>82</sup> Along these lines, efforts must be put in place by the European institutions in order to increase the

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<sup>82</sup> The CoR explicitly referred to this need in Opinion 62/2003: "by consulting local and regional governments early on in the legislative process, problems of implementation and financial or administrative cost or burden can be identified and resolved, thereby improving the general quality, practicability and relevance of EU lawmaking."

involvement of all the relevant stakeholders in the pre-legislative process and developing information and communication.

In addition, the 2009 Impact Assessment guidelines provide specific recommendations for the application of the proportionality principle, as explained above in Chapter 2.

Since actions must be proportionate to objectives, any assessment, including cost/benefit analysis, will take account of a great variety of factors including aspects of transposition, compliance and enforcement. The aim of the model is therefore to measure the overall expected burden (and benefits) of the policy for all stakeholders (governments at all levels, businesses and citizens). In this regard, it would be advisable to disaggregate the impact of a proposal on local and regional authorities from that on other stakeholders, by reason of their specificity as policy actors, to increase readability and allow more consistent analysis of the data collected.

The Single Market regulatory toolbox is very diverse so improving the functioning of European markets requires a deep understanding of the most adequate mix of regulatory instruments.<sup>83</sup> The selection of the most appropriate regulatory instrument must reflect the principles of regulatory quality developed by the Mandelkern Group on better regulation and this choice is inextricably linked to the principles of proportionality ('matching the means to the aims') but also accessibility and simplicity.

Indeed, there is a clear trend towards the use of more flexible regulatory instruments or industry voluntary agreements, with the exception of some goods regulated under the New Approach, where Regulations are adopted more often than Directives. This trend towards more flexible regulatory instruments has received clear support from the Commission and other European institutions such as the European Economic and Social Committee.<sup>84</sup>

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<sup>83</sup> European Commission (2007d), "A single market for the 21<sup>st</sup> Century", COM(2007)724 of 20.11.2007.

<sup>84</sup> The accompanying document to the Communication from the Commission on the future of the Single Market entitled "Instruments for a modernised Single Market policy", clearly states that when regulation is necessary, flexible tools would be preferred since they account for regional differences and they can also be adapted over time according to the new market changes. Moreover, the Commission clearly supports the use of non-regulatory instruments as a

Self- and co-regulation, for instance, let the relevant industry players define their working rules.<sup>85</sup> They offer many advantages, are easily implemented, flexible and they ensure the co-responsibility of all interested firms. Nonetheless, their success relies heavily on the adoption of effective monitoring and sanctions procedures (i.e. the credibility of the agreement) and the existence of a legislative framework that guarantees the legal security of other market players (e.g. consumers). In this sense, the database on self- and co-regulation launched in March 2008 by the European Economic and Social Committee and the Commission will facilitate the exchange of good practices and their evaluation and monitoring.<sup>86</sup>

Co-regulation appears in the context of the so-called New Approach Directives which solely define the mandatory essential requirements letting manufacturers choose the appropriate technical solutions to achieve them. There are three EU bodies in charge of defining those standards, two specialised (ETSI for telecom and CENELEC for electro technical/electronic) and one with general competences (CEN). Products complying with those harmonised standards can then be lawfully marketed across Europe. More than twenty years after their introduction,

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complement or alternative to regulation and proposes to develop a more coherent approach towards the use of 'soft law' (e.g. open method of coordination). There are therefore, different ways of achieving market integration other than the traditional legalistic approach. It should be stressed however, that flexible legislative instruments can also entail drawbacks in implementation.

<sup>85</sup> Following the Inter-institutional Agreement on Better lawmaking (2003), co-regulation is defined as "the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic actors, the social partners, non-governmental organisations, or associations). This mechanism may be used on the basis of criteria defined in the legislative act so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned". Self-regulation on the other hand, is defined as "the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)".

<sup>86</sup> <http://www.eesc.europa.eu/self-and-coregulation/index.asp>

the New Approach Directives have proven to be extremely successful in ensuring the free movement of goods thanks to their flexibility.<sup>87</sup>

Therefore, it might be interesting to explore whether the New Approach could be extended to other areas not yet covered by standardisation efforts. In this respect, possible candidates could be standards connected to priority actions for innovation. As pointed out by the European Commission, standardisation in the areas of sustainable industrial policy, lead markets, public procurement and in particular defence procurement, and the integration of ICT in industry and administrations, would contribute positively to the growth and competitiveness of the European industry.<sup>88</sup>

In non-harmonised areas, the principle of mutual recognition ensures that the goods that are lawfully produced in one country can also be sold in the rest of the Union.<sup>89</sup> Overall, mutual recognition improves free movement while preserving national regulatory autonomy. Moreover, the costs of over/misregulation now fall on member states and this results in pressure for less costly regulation (and possibly regulatory competition).<sup>90</sup>

Despite its benefits, mutual recognition is generally unknown to European economic operators. A recent survey conducted by the Commission shows that most of the companies consulted are not familiar with the principle and 51% of the companies trading abroad do not rely on it compared to only 33% of companies that use the principle.<sup>91</sup> This may be caused by a series of associated costs which have been significantly

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<sup>87</sup> There are, however, some drawbacks; especially concerning enforcement and implementation at member states level. This issue will be dealt in the following section.

<sup>88</sup> COM (2008) 133 final.

<sup>89</sup> There are however some 'general interest' limitations to free movement that have been developed by the case law of the European Court of Justice.

<sup>90</sup> J. Pelkmans (2008), *European integration: Methods and economic analysis*, 3<sup>rd</sup> ed., Pearson Education.

<sup>91</sup> European Commission (2004), "Commission Recommendation of 12 July 2004 on the transposition into national law of Directives affecting the Internal Market", OJ L 98/47 of 16.04.2005; see also BusinessEurope (2007), "Enforcement in the Internal Market: challenges and proposals for improvement", June.

reduced by the recent reforms affecting the Internal Market for goods (see text box below) but are still present in the market for services.<sup>92</sup>

In reality, problems do not concern the principle of mutual recognition per se but rather its application by member states. The actual practice of national officials not relying on mutual recognition or of not acting in the spirit of the principle has caused business to be deeply disillusioned, especially SMEs wishing to enter other national markets in the Internal Market. Also, the New Approach has delivered a lot but eventually selective doubts emerged about some 'Notified Bodies' (i.e. certification bodies verifying whether European standards, backing up New Approach directives, have actually been complied with) and the solidity and scope of market surveillance by member states, besides understandable irritation about inconsistencies between directives (a problem for goods falling under several directives).

*Box 3.1 Improving mutual recognition: The 2008 'Goods package'*

The 2008 'goods package' consists of a cluster of three EC regulations and one EC decision<sup>93</sup> to tackle these shortcomings. The smooth acceptance, indeed strongly positive cooperation of the European Parliament and Council, is a most encouraging signal for the better working of the internal goods market. Business associations are enthusiastic about the package. The most important change in the package is the decisive cost and uncertainty reduction for businesses when relying on mutual recognition for intra-EU market access. The main vehicle to accomplish this is a combination of a) the shift in the burden of proof away from the (entering) company towards the importing member state and b) the clarity about the technical exchange between the company and the importing member state, with clear obligations for active administrative cooperation between the relevant member states at all times. This new 'governance' of mutual recognition will render the idea of a *presumption* of compliance with essential health and safety requirements – and that is the spirit of mutual recognition – a normal fact of business life in EU goods markets. The presumption is there despite the possibility that technical requirements in the laws or decrees of the importing member state are somewhat different from those in the member

<sup>92</sup> Pelkmans (2007) identifies three cost categories associated to mutual recognition: information costs, transaction costs, and compliance costs.

<sup>93</sup> See EC OJ L 218 of 13 August 2008, for Regulations 764/2008, 765/2008 and 766/2008, as well as Decision 768/2008, altogether from pp. 21 onwards.

state of origin. The company does not have to fear that the mere differences in the law cause its entry to be blocked or severely delayed. Of course, on reasonable request, the company should be able to document compliance in the EU country of origin (via standards, certification or test reports) and the importing member state, when still in doubt, should do its utmost to appreciate fully the requirements and verification in the country of origin. None of this leads to more than trivial costs to the company (since any bonafide company will dispose of such documents anyway) and in the overwhelming majority of instances, the importing member state will not challenge the mutual recognition presumption. And if it does challenge the latter, it must amply demonstrate why health or safety are endangered (although apparently not in the other member state), which renders it 'actionable' for firms (via the Commission or the ECJ). Against non-bonafide companies, the importing member state remains as protected as before.

As far as the New Approach is concerned, common rules raise the credibility of the Notified Bodies; besides, the European Cooperation for Accreditation (EA) will obtain public recognition and coordinate the actual accreditation process, ensuring that all member states use accreditation for their Notified Bodies. Furthermore, an equivalent level of market surveillance will be guaranteed under a common legal framework and with some minimum operational rules (thus, better and firmer than the RAPEX system for consumer goods). Decision 768/2008 sets up a horizontal framework rendering consistent the terminology and comparable obligations in 30 New Approach directives and related ones. However, a range of subsectors have claimed actual or potential opt-outs and it remains to be seen how far the improved consistency will help day-to-day business.

While this approach may indeed contribute to eliminating residual obstacles in the market for goods, there is currently little knowledge on the practical implementation of mutual recognition in the services sector, with the exception of transport and finance.

There is a clear need to address the remaining barriers that hamper the functioning of the Internal Market by making a better use of the legislative instruments available. Yet, addressing questions such as whether less flexible instruments should be preferred over more flexible ones or whether directives should have a narrower scope for discretion at national level, requires a targeted approach supported by in depth sectoral analysis. The complexity of the regulatory process implies that one-size fits all approach will not suit each sector needs.

*Box 3.2 Different solutions to different problems: A sectoral approach to regulation*

The Single Market Programme, the Lisbon Strategy and the creation of EMU among others, have substantially changed the functioning of European markets during the past 15 years. In this new context, the European Commission within the framework of the Single Market Review advocated for a new approach to market monitoring. The aim is to study market functioning in a disaggregated manner so as to design policies “which are less legalistic and more based on sound economic evidence”.<sup>94</sup> In a first screening exercise, the European Commission identified 23 malfunctioning sectors on the grounds of regulation, innovation, integration and competition (taken either individually or in combination).<sup>95</sup>

Measuring the impact of regulation on various sectors is a complex task because of the scarcity of indicators with a broad sectoral coverage or with an adequate time span. So far, the OECD has been the only institution capable of producing such indicators for product market regulation. Despite their pitfalls<sup>96</sup> they provide a good indication of the state of regulation for most sectors. As a result, the Commission’s initiative represents a welcome step in the direction of more evidence-based analysis and understanding of the consequences of regulation. However, greater clarity could be achieved as regards the selection criteria for the sector to be subjected to market analysis.

Since regulation is mostly a sectoral approach, it is essential to deepen the knowledge on the regulatory constraints affecting each market so as to design a better targeted policy. It is currently too early to draw detailed conclusions on specific sectors (the first findings are expected by the end of 2008); however the methodology and the results of the Commission’s exercise should be monitored closely not only to devise future policy

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<sup>94</sup> F. Ilzkovitz, A. Dierx and N. Sousa (2008), “An analysis of the possible causes of product market malfunctioning in the EU: First results for manufacturing and service sectors”, *European Commission Economic Papers Series No. 336*, August 2008.

<sup>95</sup> European Commission (2007h), *Implementing the new methodology for product market and sector monitoring: results of a first sector screening*, European Commission Staff Working Document.

<sup>96</sup> For a thorough analysis, see J. Pelkmans (2008), “How to measure product market reforms—pitfalls and progress”, Bruges (forthcoming).

intervention but also as a blueprint for future analyses/studies of the functioning of the Internal Market.

Finally, potential solutions to existing shortcomings in the EU Internal Market may derive from regulatory innovation at the decision-making stage, as in the case of the Lamfalussy procedure created to speed up the legislation on securities markets. In the same vein as the New Approach Directives, the Commission is advised by specialised committees for the technical preparation of the implementing measures, made up of representatives of national supervisory bodies. The emphasis placed on transposition and enforcement and the early involvement of sector experts is the key of the success of the Lamfalussy process, which has now been extended to the banking, insurance and pensions sectors.

Regulatory innovation should also be encouraged at the enforcement stage. Alternative dispute settlement mechanisms may also complement the traditional judicial system facilitating the resolution of conflicts and avoiding costly procedures. These mechanisms have generally developed along with self-regulation agreements that already foresee how disputes are going to be dealt with.<sup>97</sup> In this respect, the Commission or the Presidency could elaborate a report on the current state of alternative dispute settlement mechanisms and on how member states are using these tools on the ground.

Encouraging flexible regulatory instruments must remain within the boundaries of legal security ensuring that there is no trade-off between flexibility and security. Thus, any proposal must respect the interests of all stakeholders, including consumers. In recent times, self-regulation initiatives have been extended to cover consumers. Moreover, consultation prior to the establishment of any policy is essential to the policy's legitimacy and will prevent future problems of implementation and enforcement. As pointed out by the European Economic and Social Committee, the survival of self- and co- regulation and alternative dispute settlement mechanisms depends on their ability to safeguard the public interest, their transparency and the representativeness of the signatories and the effectiveness of the monitoring and enforcement.<sup>98</sup>

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<sup>97</sup> EESC (2005b), "The Current State of Co-regulation and Self-regulation in the Single Market", EESC Pamphlet Series.

<sup>98</sup> Ibid.

To conclude, impact assessment tools should be used to clearly define the costs and benefits arising from different policy options. As regards subsidiarity, strengthening the monitoring system set up by the CoR could potentially increase the involvement of national Parliaments in EU policy-making. Finally, the current functioning of the principle of mutual recognition as well as the use of alternative dispute settlement mechanisms should be further studied in order to devise targeted intervention where necessary.

### **3.2 Transposing and ‘correctly’ implementing EU legislation**

The unique political structure of the European Union also translates into a unique legislative body where European and national (and sometimes regional and local) legislation coexists. Therefore, regulatory quality is a shared responsibility of the Union and its member states.<sup>99</sup>

It is a well known fact that the Internal Market suffers from delays in transposition.<sup>100</sup> The 2001 European Council consequently decided to limit member states’ transposition deficit to 1.5% and in 2007 the Heads of State and Government further reduced the allowed transposition deficit to 1%.<sup>101</sup>

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<sup>99</sup> Member states are indeed obliged by the Treaty to incorporate EU legislation into their national legislative structure and to ensure that national laws do not go against the Community objectives (Art. 10 TEC). Therefore, “Member states have primary responsibility for the correct and timely application of EU Treaties and legislation. They are responsible for the direct application of Community law, for the application of their laws implementing Community law and for the many administrative decisions taken under those laws. National courts also play an essential role in ensuring respect for the law including by referring issues to the court of Justice for a preliminary ruling” European Commission (2007c), “A Europe of results – Applying Community law”, COM(2007)502 of 05.09.2007.

<sup>100</sup> The Internal Market Scoreboard, published twice a year by the European Commission since 1997, presents detailed statistics on the state of transposition of Internal Market rules across the Union and the number of infringement procedures opened to those member states that have failed to duly transpose the directives.

<sup>101</sup> The transposition deficit shows the percentage of Internal Market directives not yet communicated to the Commission as having been transposed, in relation to the total number of Internal Market directives which should have been transposed by the deadline. In July 2008, the average transposition deficit (i.e. the percentage of Internal Market directives not yet communicated to the Commission as having been transposed, in relation to the total number of Internal Market directives)

However, as pointed out by the Internal Market Commissioner Charlie McCreevy: “It is not just timely transposition but also correct transposition and application across all member states that is crucial for a well functioning Internal Market”.<sup>102</sup>

Hence, to make EU legislation really effective one should look at four aspects: transposition, administrative implementation, enforcement and interaction with national legislation. As recommendations may differ for each stage, we will address them separately while bearing in mind that they are inevitably interrelated throughout the policy-process.

### 3.2.1 *Lost in transposition?*

Transposition refers to the way in which EU legislation is incorporated into national law whereas implementation looks at the application of EU law at national level.<sup>103</sup>

When transposing a directive into national law, member states are free to choose the form and methods they deem more efficient to achieve the objectives set up in the directive (Art. 249 TEC). As the objectives of the directive are binding for member states, transposition also requires checking the compatibility of the existing national law with the directive

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reached the 1% target which reflects the commitment of member states to correct their poor transposition record of previous years. Today, 18 member states have either 1% deficit or below and there are only five member states (Cyprus, Luxembourg, Poland, Portugal and Czech Republic) with a transposition deficit higher than 1.5%. There are, however, significant differences across countries. New member states have shown an amazing transposition record and today 5 out of the 6 top performers belong to this group. Old member states, possibly influenced by stronger peer pressure, have also improved their transposition record reaching historically low values (e.g. France, Finland, Ireland, Germany). On the other side of the coin are Belgium, Denmark, the Netherlands, Austria and Poland which have reversed their positive transposition trend. For further details, see European Commission (2008d), “Internal Market Scoreboard”, July, No. 17.

<sup>102</sup> Ibid., p 5.

<sup>103</sup> Being regulations directly applicable, transposition essentially refers to directives. Implementation, on the other hand, concerns regulations and directives alike. For further details, see BusinessEurope, op. cit., L. Allio and M.H. Fandel (2006), *Making Europe work: improving the transposition, implementation and enforcement of EU legislation*, EPC Working Paper No. 25.

and to amend it or suppress it if incompatible with the directive. National law must, therefore, be fully compatible with European law.<sup>104</sup>

To address existing shortcomings in transposition and implementation, action is needed on two fronts: prevention and the removal of existing obstacles.

Better regulation practices adopted at EU level may have reduced the legislative burden on member states, which could explain the improved transposition performance of member states. However, according to the European Commission, this progress can be mostly attributed to the application by member states of the 2004 Commission Recommendation on the transposition into national law of Directives affecting the Internal Market.<sup>105</sup>

The annex to the 2004 Commission recommendation identified a wide set of best practices aimed at facilitating “the correct and timely transposition into national law of directives affecting the Internal Market” covering aspects ranging from political commitment to operational and structure modifications. For instance, the nomination of a senior government member as responsible for monitoring the transposition of all Internal Market directives, the discussion of the state of transposition regularly in Ministerial meetings, the creation of a national network of officials responsible for monitoring transposition, issue guidelines, ensure early draft of the legislation transposing the directive elaborating correlation tables, improve the exchange of information between EU institutions and national parliaments at every stage of the legislative process, etc.<sup>106</sup>

*Box 3.3 Improving transposition: Positive national examples*

In 2007, the UK government, which has one of the most mature better regulation policies in Europe, published a transposition guide describing the steps to follow in order to effectively transpose EU directives into national law. The results are summarised in a so-called transposition checklist composed of 20 elements. First and foremost, the UK government gives

<sup>104</sup> EESC (2007).

<sup>105</sup> OJ L98/47 of 16.4.2005. On this point see, European Commission (2007).

<sup>106</sup> Ibid., pp. 50-52. See also EESC (2006), “Opinion on EU and national administration practices and linkages”, CESE 1564/2006, Brussels 14 December.

special importance to the quantity and quality (training on how to handle EU negotiations and how to produce impact assessments) of the resources assigned to transposing EU legislation, an essential item that is rarely mentioned by national governments. In fact, 'transposition' should start before the proposal is published, by participating actively in Commission consultations and in the subsequent negotiations in the Council. Then, the costs and benefits of the various options for implementation should be analysed using the impact assessment methodology. The report also recommends the use of project management techniques to ensure timely and effective implementation (avoiding unnecessary burdens on the interested stakeholders). Finally, a post-implementation review is also foreseen to check on the quality of the process.

The guidelines on best practice in the transposition of EU directives adopted by the Irish government - although much rougher - also emphasise the importance of clarifying the responsibilities of each governmental department and streamline monitoring. Moreover, it encourages continuous contacts with the Commission so as to facilitate transposition.

Other governments, such as France, have also engaged in similar initiatives.

Directive 98/34/EC was also identified as a potential success story in keeping under control the impressive amount of sectoral/specific rules issued by member states that greatly affect the functioning of the Internal Market, independently of European legislation. According to the Directive, member states must notify technical regulations, relating to products and information society services to the Commission in a draft and they must also observe a standstill period of at least three months before adopting the regulation so as to allow other member states and the Commission to study the potential impact of the proposed regulations on trade. By adopting a preventive approach and facilitating the communication between the relevant actors for a specific and technical field, desired objectives can be achieved more easily.

Along the same lines, problems of implementation and enforcement can be addressed through prevention mechanisms embedded in future legislative acts, as in the case of the Services Directive (2006/123/EC).<sup>107</sup>

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<sup>107</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the Internal Market, OJ L 376, 27.12.2006, pp. 36–68.

*Box 3.4 Case study: The Services Directive*

The Services Directive is the first case where measures facilitating the implementation process and extensive mechanisms to ensure further compliance are laid down in the act itself. This should be considered as a major step forward. In fact, the traditional practice is purely vertical, i.e. between the relevant member state and the Commission, with the latter being responsible for checking member states compliance with the legislative act. In the case of the Services Directive, it was feared that traditional legal tools, such as Art. 10 TEC on loyal cooperation, would prove insufficient. Therefore, the Directive includes several novelties which should in principle facilitate its implementation and further application:

- *Administrative simplification.* Chapter II of the Directive includes measures to deal with excessively complex national provisions and to facilitate compliance with several formal requirements. Art. 6 introduces innovations such as single contact points serving as one-stop-shops for administrative assistance and information to service providers.
- *Administrative cooperation.* Chapter VI of the Directive reverses a long standing belief/tradition that implementation and compliance with a directive is based on a vertical relation between member states and the Commission. Art. 28 of the Directive creates a framework for assistance and cooperation between member states during the implementation of the Directive. Other relevant provisions establish liaison points, alert mechanisms (in case of serious threats to the public by the service provider), and electronic systems for exchanging information on enforcement.
- *Mutual evaluation.* Art. 39 of the Directive provides one of the most important innovations: a system of mutual evaluation of implementation between member states. Under this system, the European Commission circulates reports produced by each member states to the other countries for feedback. This approach is expected to result in a healthy peer pressure among countries as well as a tool to pin-point relevant problems in the system and possibly identify 'defaulting' member states.

This system could be extended to other less complex areas, to increase the consistent implementation of Directives in the EU27.<sup>108</sup>

In addition, the Commission has adopted a very hands-on approach to the implementation of the Services Directive, with EU officials regularly travelling to national capitals to oversee and support implementation in each country. This step-by-step approach is aimed at ensuring a maximum degree of harmonisation across the EU, which is crucial to guarantee that such complex piece of legislation achieves its stated impact on the Internal Market. Should this strategy deliver the expected results, it could be used more regularly for major pieces of EU legislation where proper implementation is key.

Apart from the biannual Internal Market Scoreboard, since 2000 the Commission also publishes every two months the data on the progress in the notification of national measures implementing directives.<sup>109</sup> Although interesting, the content and presentation of this information suffer from important operational pitfalls, especially as regards access to the data and available search options. This shortcoming is particularly relevant, as concentrating the relevant information on transposition would benefit national civil servants and the broader public. First, national civil servants would find it easier to contact their homologues in other member states and exchange good practices. Secondly, businesses and citizens would have detailed information on the tools at their disposal to ensure that their rights are respected and would find additional information of their interest such as relevant case law. Today, this information is spread over a myriad of sites, SOLVIT, SMEs portal, Enterprise Europe Network, Your Europe-business, etc which makes it difficult for businesses to know their rights.

Other than delays in transposition, member states can engage in other 'bad practices' such as 'gold-plating', 'double-banking' or 'regulatory creep' which essentially lead to 'over-implementation' of EU legislation. The former implies going beyond the requirements of the directive when transposing into national law. 'Double-banking' appears when there are overlaps between national legislation and the newly transposed directive.

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<sup>108</sup> It should be stressed that similar systems demonstratively works (e.g. European Competition Network established by Recommendation 1/2003).

<sup>109</sup> See [http://ec.europa.eu/community\\_law/directives/directives\\_communication\\_en.htm](http://ec.europa.eu/community_law/directives/directives_communication_en.htm)

As for 'regulatory creep' it refers to uncertainty created about the status of the regulations or over-zealous enforcement.<sup>110</sup>

In order to avoid such bad practices in transposition, the European Commission has repeatedly insisted on the need for using and publishing concordance tables between the EU legal acts and national transposition measures.<sup>111</sup> This would increase the transparency of the transposition process and improve the access to and understanding of new legislation by all interested parties. In fact, this practice is already common for some legislative measures. However, member states tend to publish concordance tables only when the measure is fully binding and they neglect it when it is only recommended.

In this respect, the organisation of regular meetings between national authorities and the creation of dedicated networks to share, discuss and exchange advice on transposition issues would gradually foster a sense of ownership and lead to better implementation results in the long run.<sup>112</sup> Moreover, businesses cannot clearly establish whether a particular legislation is 'purely' national or whether it is the result of the transposition of European legislation. This leads to strong misperceptions on the legislative activity of the Community that is traditionally accused of excessive regulation whereas in many cases the relevant legislation is 'purely' national.

While the above approaches outline a viable strategy to prevent the creation of future regulatory barriers stemming from the transposition of EU legislation, this still leaves unresolved the issue of the barriers already in place and whose real extent is difficult to measure. In this respect, the Services Directive offers an unprecedented opportunity to uncover the real magnitude of regulatory initiatives undertaken at the national level. In particular, Art. 39 of the Directive mandates a screening of national legislation on services to be used as a basis for the future review of the Directive. This screening is the best chance that the EU has to open a

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<sup>110</sup> For a thorough discussion of these practices, see also the 2006 Davidson review on the implementation of EU legislation ([http://www.hm-treasury.gov.uk/independent\\_reviews/davidson\\_review/davidson\\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/davidson_review/davidson_index.cfm)).

<sup>111</sup> See for instance COM(2007)502.

<sup>112</sup> One possibility in some areas would be the creation of transparent and effective networks of national agencies, as already occurs in the field of antitrust with the European Competition Network.

transparent and non politicised debate on all existing services law and to identify outdated or problematic regulation. As a result, the screening could possibly lead to the elimination of unnecessary rules without damages to the Internal Market and more importantly it would provide policy-makers with a sound basis/evidence for future decisions. The significance of this screening exercise cannot be overstated.

### 3.2.2 *Enforcement and infringements management*

On a preliminary note, it is worth stressing that despite the existence of the enforcement and infringement management tools discussed below, available resources do not allow the European Commission to oversee and correct in a timely manner all implementation problems. It is thus necessary to prevent problems from occurring ex-ante, by paying attention to implementation and enforcement issues right from the start of policy/legislative formulation at the EU level, in line with the suggestions put forward in the previous Chapters.

The added value of European legislation does not only hinge on its correct transposition but also on its homogeneous application and enforcement. Yet, as pointed out by Nicolaides and Oberg,<sup>113</sup> member states may fail to comply with EU legislation because they are unwilling (domestic political opposition), unable (legal and administrative obstacles and/or lack of human and material resources) or they are simply unaware of their obligations. There are two aspects of compliance that must be considered: transposition, which has been addressed in length in the previous section, and the role of the national judges who ultimately enforce European legislation.

National judges are assisted by the European Court of Justice through preliminary rulings. The procedure, described in Art.234 TEC, allows any national court to question the European Court of Justice about Community law before issuing a ruling. The system therefore promotes cooperation between the national courts and the European Court of Justice while ensuring the homogeneous application of EU legislation in all member states.

In addition to traditional means of enforcement through national courts, which often entail costly and lengthy judicial procedures, an

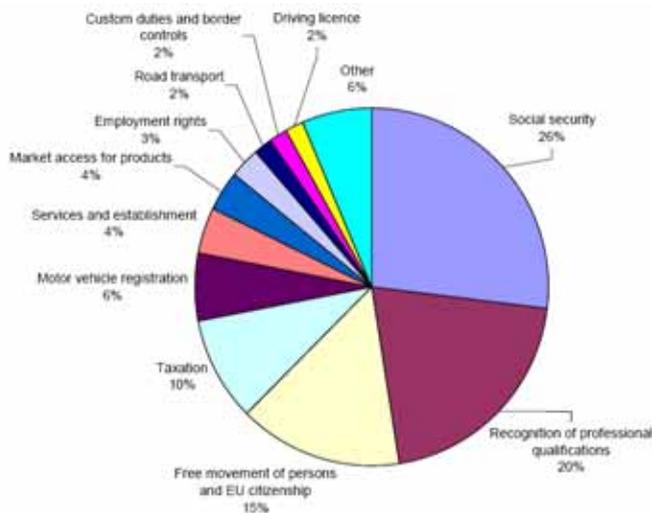
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<sup>113</sup> Op. cit. (2006).

effective alternative is provided by SOLVIT. SOLVIT is a network created seven years ago by the Commission and the member states with the aim of solving problems of misapplication of Internal Market legislation. Each member state has a SOLVIT centre that cooperates directly with its counterparts in other countries and with the Commission via an on-line database to solve the problems in a rapid and functional manner. The latest report on the performance of the SOLVIT network shows a clear increase in the number of cases submitted to SOLVIT, with Spain, Germany, France, Poland, the United Kingdom and Italy being the countries with the highest case flow.<sup>114</sup> The success of SOLVIT is mainly due to the high resolution rates and its rapidity. Yet, the data still reflect a potential for a further use of the network.

The incredible increase in the number of cases submitted by citizens' with respect to businesses is an additional proof of the success of the network and an interesting reflection of what appear to be the more problematic areas (according to the number of cases submitted): social security and professional qualifications.

*Figure 3.1 Cases handled in 2007 by problem area*



*Source:* Solvit 2007 report.

<sup>114</sup> Available at <http://ec.europa.eu/solvit/>.

Should this trend persist in the future, it might be wise to create specialised divisions within SOLVIT to ensure an efficient treatment of every case independently of the case submitter. Other problems also need addressing, namely the large number of non-SOLVIT cases received which should encourage member states to create similar structures to address problems with national legislation, and more worrying the lack of legal expertise to handle the cases efficiently and the unwillingness of recipient authorities to cooperate. Member states should act accordingly by improving the quality and the number of resources attached to their SOLVIT centres so as to be able to cope with the increasing workload. Moreover, cooperation between administrations across member states should be further encouraged to bring down the remaining resistances of some administrations.

The European Commission as ‘guardian of the Treaties’ has also a central role to play in ensuring the homogeneous application and enforcement of EU law in all member states. This includes infringement procedures (Arts. 226 and 228 TEC) to tackle the non-implementation or misapplication of EU Law by individual member states.<sup>115</sup> However the average length of such procedure limits its effectiveness. In this respect, the Expert Group welcomed the Commission’s initiative to prioritise the management of cases according to their expected risks and their potential impact for citizens and businesses and the most persistent infringements have been confirmed by the Court.<sup>116</sup> Against this background, as pointed out by BusinessEurope,<sup>117</sup> possible solutions could be the adoption of fast-track mechanisms for less relevant or repetitive cases and improved transparency and information towards the general public and the business sector in particular for the cases related to the functioning of the Internal

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<sup>115</sup> Additionally, private parties also have the possibility to pursue member states and claim damages in national courts for the misapplications of EU law by individual member states. Damages can also be claimed in the case of manifest misapplication of EU law done by the highest judiciaries (the so-called *Koebler* doctrine). Although these legal avenues ensure – in principle – a complete system of legal remedies in the EU, their practical application can prove an extremely difficult and time consuming task. The risks of high costs and protracted litigation can make those remedies relatively unattractive in the eyes of private individuals and SMEs.

<sup>116</sup> Op. cit., European Commission (2007c).

<sup>117</sup> Op. cit. (2007).

Market. In this vein, the Commission has recently agreed to outline its priorities in the annual reports on the application of Community law which is a much welcomed decision to increase the transparency and credibility of the system.

### **3.3 National legislation: Coordination between the EU and member states**

Improving the links between national and EU administration at every stage of the legislative process is key to the success of any legislative measure. And yet, as pointed out by the European Economic and Social Committee: “National coordination and policy-making has never been deeply discussed at EU level, partly because of subsidiarity, partly because of a lack of genuine interest among the decision-making bodies in Brussels and in the capitals....But it is clear that the way national coordination and policy-making are organised and function may well have substantial effects on decision-making in Brussels and subsequently on transposition and implementation of EU law.”<sup>118</sup>

Some member states have already introduced the necessary administrative reforms to be involved in the decision-making process at an early stage e.g. participating in Commission consultations.<sup>119</sup> Further involvement is expected in the future once national Parliaments formally start to check on subsidiarity. The Commission should also assist member states during the transposition phase and favour the establishment of one-stop shops (a single contact point for information and completion of formalities).<sup>120</sup>

In this context, a potential step forward would be to involve implementing officials as early as possible in the work of the national negotiating team at EU level. While there are no specific rules regarding the cooperation between delegates at the EU level and national civil servants,

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<sup>118</sup> EESC (2006).

<sup>119</sup> The EESC (2006) considers that “the next step in the cooperation between EU institutions and national authorities in the implementation of EU law and policies is strengthening or streamlining of national administrative capacity for policy application, as it is currently being done by some member states.” On this point, see also the previous section on the administrative changes adopted by the UK, Ireland and France.

<sup>120</sup> *Op. cit.*, BusinessEurope (2007).

and every member state is free to choose the degree of involvement of implementing officials, increasing their participation in the decision-making phase would strengthen the preventive approach to problems advocated above and increase the chances of proper implementation.

Following the adoption of the Inter-institutional agreement in 2003, a High Level Group of national experts was created by the Commission. The initiative has not received sufficient back up from member states so the activities of the Group have remained unknown to the general public. A formal political support from the Council would be advisable, since the exchange of information and especially the organisation of meetings would create a sense of ownership among civil servants and facilitate the exchange of good practices. The experience of SOLVIT has proven that this kind of initiatives coordinated by the Commission can be extremely successful.<sup>121</sup>

In particular, reinforcing the visibility of valuable/helpful EU recommendations and guidelines is crucial for a correct understanding and implementation of EU legislation by the member states. Moreover, additional networking activities between national administrations and between the national and EU levels should be envisaged. More specifically, further action could prove particularly useful in the following areas: administrative cooperation; other obligations of cooperation (such as SOLVIT); the training of national civil servants; creation of contact points and organisation of regular meetings; and other means to facilitate communication (e.g. various platforms where people can exchange information on legislation, etc.). Visible steps in this direction have already been taken with a pilot project managed by the Commission's Secretariat General to monitor infringement procedures. The outcome/result of this initiative should be monitored to draw useful lessons for future similar initiatives as those suggested in this section.

Finally, there is a strong need for greater communication towards the broader public and in particular towards businesses directly affected by EU legislation in their daily work. In this respect, the European Commission has the expertise and the tools necessary to overcome this gap. It could for instance, facilitate the organisation of meetings bringing together businesses and promoting the exchange of information. The European

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<sup>121</sup> This kind of initiative is strongly supported by the Commission as explained in its recent 2007 communication on "Applying community law".

Commission has a clear added-value in putting into place a legal framework, IT facilities and making resources available for this type of initiatives. As mentioned above, a similar approach has been already used with positive results for SOLVIT, whose success calls for an expansion to other areas. In the long run, one can expect that increased support to businesses in their daily interaction with EU rules will contribute to a greater integration of the Internal Market with positive spillovers for consumers and citizens.

### 3.4 Concluding remarks

In this section, we suggest a set of key recommendations for a better and more consistent implementation of EU law. For ease of reading, the suggestions are divided between tasks to be performed at the EU level and suggestion directed to the member states. After all, only a combination of efforts at European and national level (and sub-national, when relevant) will guarantee the good functioning of the Internal Market and deliver a suitable regulatory environment for European business.

At the **EU level**, the Expert Group formulated the following recommendations:

- The Commission should issue practical technical guidelines on the application of the subsidiarity principle.
- There should be a single EU website directed to businesses.

On the other hand, **member states** should:

- Launch an in-depth screening exercise of national regulations that hinder the Internal Market.
- Appoint national coordinators of EU policy.
- Consider appointing a responsible for subsidiarity and proportionality in each national Parliament.
- Adopt national implementation plans for EU legislation.
- Improve information on transposition and implementation through the use of concordance tables.
- Create networks of officials to improve the transposition and implementation of EU legislation.
- Create specialised divisions within SOLVIT.

## 4. CONCLUSIONS - THE WAY FORWARD: BOOSTING LONG-TERM EUROPEAN COMPETITIVENESS

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The previous sections have illustrated the ideas discussed by our three Expert Groups for improving the quality of EU legislation. Most of these ideas can be tackled in the short term, as they require no Treaty change, and are addressed at the upcoming EU Presidencies as suggestions to shape the European Union of the future. Our suggestions aim at transforming Europe into a community in which a world-class administration (the Commission) leads political agents (the Parliament, the Council, national parliaments, implementing officials) towards the achievement of real better regulation, to the benefit of society as a whole; a community in which dialogue between the EU and member state level finally speaks the same language – the language of better regulation; and a community in which businesses face lower compliance costs, and have easy access to institutions when compliance becomes a problem. We believe that implementing these ideas could significantly improve the effectiveness of EU policy, to the benefit of all Europeans. In this context, it is worth remembering that the Single Market with its four freedoms of movement is the core of the European project: this should be taken as a starting point for any reform effort, as completion of the Single Market will deliver benefits in other areas.

In particular, when looking forward to the post-Lisbon decade, the EU should also do more in terms of eliminating barriers to the Internal Market, by identifying and removing inconsistent legislation in member states and thus facilitating cross-border operations by businesses and consumers. We believe that this objective could be achieved only if the harmonisation of legislation is given a more prominent role in the EU

debate, both at the policy formulation stage, and in the implementation at national level. Businesses and especially SMEs, need harmonised rules to cross their national borders and become real EU players. In the long run, the resulting increased competition and variety of products would enormously benefit European consumers.

Looking at Europe in a few years from now, the current patchwork of national rules should be replaced by a set of common rules and standards. In order to achieve this goal, legislation should be harmonised in stages, starting from the areas in which rules differ without any overarching reason. Accordingly, the Commission's initiative of reviewing the Single Market is welcome. It is crucial that sectoral reviews lead to the identification of areas where harmonisation is needed, and that this in turn leads to policy action to remove barriers.

Will this be enough? We suspect not. Discussions between CEPS experts and senior staff at the Confederation of Swedish Enterprise have led to the identification of a number of initiatives that may significantly boost Europe's growth and competitiveness in the years to come. Too often the harmonisation of legislation is hampered by national prerogatives and the need to protect domestic firms. Advocating a smooth transition towards harmonised rules in key policy domains is simply utopia, as of today. As long as national interests remain a real bottleneck – for example, in Council negotiations – this process may never be completed. Currently, EU institutions can decide not to harmonise legislation in certain fields without actually providing any justification. At a minimum, we believe that EU institutions should motivate their decision not to remove barriers to the Internal Market when they take action to formulate new legislation or review existing ones. This is why we propose to “reverse the burden of proof”, by establishing a presumption that new EU rules in areas in need of harmonisation should in principle be regulations, or directives that leave very limited discretion to member states in the implementation phase.

Implementing this vision in practice means following a number of steps:

- *Review the stock of legislation and identify areas where harmonisation is needed.* This is what the Commission has started to do within the framework of the Single Market Review, and should be expanded and transformed into an in-depth screening. But sectoral analyses should be presented together with a clear description of the baseline: such description can be used as ‘zero option’ in future Impact Assessment work.

- ***For these areas, 'reverse the burden of proof'***. This means that the Commission introduces in the IA guidelines a new 'harmonisation test' (or a 'modified subsidiarity test'), where the burden of proof is on the Commission to depart from regulations to adopt more flexible instruments. Of course, this approach should be adopted only once the need for action has been adequately justified (as already occurs in Commission impact assessments). In a nutshell, if the Commission wants to adopt a directive in an area where harmonisation has been considered necessary (e.g. privacy legislation), then the Commission services in charge of the IA would have to make the case for such a choice. If they fail, the IAB should impose them to revise the IA or propose the adoption of a different instrument. This system can be adapted and refined. For example, besides calling for more regulations, it can also apply to the degree of flexibility left by directives to member states, so that the rules are as harmonised as possible, unless there is evidence that more flexibility would bring a clear added value. For example, in some cases mutual learning and competition between legal systems may lead to a 'race to the top' that the Commission could never achieve.
- ***Add new areas***. Once the process has started, new sectoral analyses should be launched to complete the Single Market Review, leading to more baselines to be used as a starting point for the harmonisation of legislation. This ensures that EU institutions and member states keep the momentum in overcoming harmful discrepancies in national legislation.
- ***Constantly monitor legislation***. The use of *ex post* evaluation should become more widespread and important, so that areas in which barriers to the Internal Market are not gradually removed are kept under constant scrutiny and are potentially subject to further intervention. In doing this, the use of indicators appears of utmost importance: in particular, efforts should be devoted to developing both indicators of governance and regulatory quality; and indicators that focus on the daily life of businesses, which provide a clear picture of the remaining 'cost of non-Europe' from the perspective of operators. The latter indicators can be derived from the expansion of the Standard Cost Model to compliance costs; as well as by improving upon the concept of 'doing business' indicators currently used by the World Bank.

This long-term strategy crucially depends on the implementation of many of the suggestions identified in the previous Chapters. For example:

- An effective presumption in favour of harmonisation in certain policy domains becomes possible only if the Commission updates the IA for major proposals after they are amended by the Parliament and the Council. This way, if MEPs or national governments resist the achievement of the Internal Market by amending Commission proposals in a less 'Europe-ist' way, they would have to do it against the evidence brought by the Commission, which points to a need for harmonising rules.
- The expansion of the Standard Cost Model to compliance costs can help the Commission and member states in identifying areas where the daily life of a business (and later, possibly also citizens) is significantly affected by the lack of common rules, through evidence of cases in which the cost and patterns of compliance with EU legislation widely differ throughout the territory of the EU.
- The possibility for businesses to present evidence of the need for harmonisation during a consultation on draft IAs is key for establishing a climate in which priority is given to the Single Market. In many cases, large and small businesses know better than legislators where the potential for lowering barriers lies, and are able to provide evidence of the potential benefits of further harmonisation.
- Convergence between EU and national better regulation strategies ensures that the efforts put into improving the quality of EU legislation are not lost due to a patchy and widely diverging transposition and implementation. The same can be said for the establishment of a common set of indicators, as well as for the appointment of national coordinators of EU policy.
- The increased use of *ex post* evaluation is necessary for the monitoring of the performance of individual pieces of legislation, especially if coupled with the use of indicators. In this respect, the availability of concordance tables significantly facilitates the monitoring phase.
- The adoption of practical technical guidelines on subsidiarity can significantly prevent the risk of over-implementation, especially if coupled with the appointment of responsible persons for subsidiarity and proportionality in National Parliaments, and the creation of networks of implementing officials for complex pieces of legislation.

The same can be said for the Task Force of representatives of National Parliaments.

- Finally, from the perspective of businesses, the availability of a single website for businesses containing, *inter alia* information on the implementation of legislation and responsible officials in member states, can prove particularly effective in reducing the current degree of unawareness of certain EU policies. Should problems emerge, a more effective and specialised SOLVIT can help businesses in filing complaints and find an effective solution in a short timeframe.

# ANNEX: LIST OF PARTICIPANTS OF THE EXPERT GROUPS

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*While the report has benefited from the discussions among the members of the three Expert Groups, it should be noted that its contents are the sole responsibility of the five rapporteurs. The views expressed are those of the rapporteurs and do not represent the views of the members of the Expert Groups, nor do they necessarily represent the views of CEPS or any other institution with which the rapporteurs or members have been or are currently associated.*

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