Deficient European Legislation is in Nobody's Interest

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A. The Interinstitutional Agreement of 1998: not a Terminus but a First Intermediate Station on the Road to Improving European Legislation

On 22 December 1998 the European Parliament, the Council of the European Union (the EU) and the Commission concluded an Interinstitutional Agreement (the Agreement) laying down common guidelines for the quality of the drafting of Community legislation.[1] In so doing these three institutions entered into mutual obligations to apply these guidelines in adopting decisions of a legislative character. These guidelines and the internal organizational measures, which were announced in the Agreement in order to promote compliance with them, will be discussed in greater detail in Section F below.

The fact that the Agreement even exists can, without a doubt, be ascribed to the efforts of The Netherlands. As a matter of fact the first initiatives to improve the quality of Community legislation were taken in the framework of the Dutch *MDQ* project (a project aimed at improving the functioning of the *M*arkets (competition), *D*eregulation and the *Q*uality of legislation) and were expressed in a report on this subject drafted by a working group under the chairmanship of the former European Court Justice (ECJ) Judge T. Koopmans (the Koopmans Working Group).[2] This initiative was given considerable impetus during the Intergovernmental Conference

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1 OJ 1999 C 73/1

2 Report on the Quality of EC-Legislation, Ministry of Justice, The Hague, 1995. Mr T. Koopmans, at the time, was Advocate-General at the *Hoge Raad* (Supreme Court of The Netherlands) and former Judge in the Court of Justice of the European Communities in Luxembourg.

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under the Presidency of The Netherlands in the first half of 1997. During the Dutch Presidency the Ministries of Justice and Economic Affairs organized a congress on the quality of European and national legislation in the Kurhaus in Scheveningen. During this congress the Koopmans Report was presented to an international group of representatives of the European Commission, the 15 Member States and European and national interest groups and organizations.[3]

The efforts of the Dutch Presidency with respect to the quality of Community legislation finally resulted in the adoption of Declaration 39 to the Treaty of Amsterdam,[4] in which the three institutions were incited to agree upon common guidelines for the improvement of the quality of drafting Community legislation. The Agreement, which was concluded one and a half years later, is the implementation of this Declaration.

In looking at the Interinstitutional Agreement, can one say that it is all gold that glitters? I do not believe so. In drawing up the profit and loss account of the Agreement comments can be made in respect of both sides of the account. As to the positive side it is to be welcomed that in concluding the Agreement the three EU institutions involved in the legislative process have for the first time laid down common guidelines in respect of the quality of Community legislation which are binding on them all. Although previously such guidelines – or first initiatives in that direction – did indeed exist, these were only binding for either the Council or the Commission as individual institutions. If the various sets of guidelines are compared, it appears that the guidelines laid down in the Interinstitutional Agreement are more comprehensive and are inherently more consistent.

However, a number of items should also be entered on the negative side of the balance sheet, certainly if account is taken of the ambitions which existed from the outset in The Netherlands. More particularly, I refer in this respect to the proposals in the Koopmans Report mentioned above, which in 1995 were adopted by the Dutch government of the day.[5] The Koopmans Report contains a number of guidelines for Community legislation which apply particularly to legislative *policy*. Thus, they include guidelines concerning the necessity of Community legislation, the proportionality of Community legislation and, in addition, a number of criteria concerning the choice as to which instrument, regulation or directive, should be used. The Interinstitutional Agreement, by contrast, is limited to the quality of drafting and therefore does not go beyond legislative *technique*. Moreover the Agreement merely announces a number of rather modest internal organizational measures to be adopted by the three institutions. The Koopmans Report goes further in this respect.

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[3] Congress from 23–25 April 1997 in Scheveningen, The Netherlands. For the results, see Kellermann *et al.* (eds.) 'Improving the Quality of Legislation in Europe' (TMC Asser Institute, The Hague, Kluwer International Law 1998). For a short discussion of the results of the conference, see A.E. Kellermann, (1998/99) 1/2 *European Journal of Law Reform* pp. 7–8.

[4] OJ 1997 C 340/139.

[5] Cabinet position on the quality of Community legislation, 11 July 1995.

In this report the organization of the Brussels' legislative machine is analysed from a broader perspective and this analysis provides the basis for proposals for a more radical adaptation of that organization. To be more precise, I refer to the proposal of the working group to set up an independent review body at Community level, which either of its own motion or on request could scrutinize Commission proposals for Community legislation in the light of the guidelines on legislative quality.[6]

In the light of these observations I can only conclude that the conclusion of the Interinstitutional Agreement is a rather modest result. However, I do not wish to leave it at that. In my view, in concluding this agreement the three EU institutions have indeed taken the first step towards improving the quality of Community legislation. A first step which should be followed by others. It is the object of this article to indicate which steps these should be. The discussion will be based on the following five questions:

(1) Why is it so important to ensure that the quality of Community legislation is at an adequate level?
(2) How can the necessary improvement of the quality of Community legislation be realized?
(3) Should the focus be on a national or a Community approach?
(4) If the Community approach is adopted: which proposals were drawn up within the framework of the Dutch *MDQ* project by the Koopmans Working Group and why did these proposals turn out to be a bridge too far for the Commission and a number of important Member States of the EU during the 1997 Intergovernmental Conference (the IGC)?
(5) And finally the key question: how to continue on the road entered into by the Interinstitutional Agreement?

These five questions will be addressed in Sections C-F below. The fifth question is, to my mind, the most important. In order to provide an answer to this question it would seem to be relevant first to consider in Section B below the efforts undertaken by a number of Member States of the EU to improve the quality of their own legislation. I have two reasons for this. As the Member States each have a considerably longer legislative tradition than the EU, it would seem likely that lessons can be drawn from their insights and experiences which could be useful for the development of a Community policy aimed at improving the quality of legislation. But there is also a second reason. National policy on legislative quality cannot be considered wholly separate from a corresponding policy at Community level, because of the direct and indirect influence of Community legislation on national legislation. From that perspective, it would seem useful first to look at policy aimed at the improvement of legislative quality in The Netherlands and some

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[6] It is striking that the Dutch Cabinet position of 11 July 1995 is rather ambivalent on this point. The proposal to set an independent review body is only given implicit support at most.

other EU countries and then to consider how these national policies could be matched by a European legislative quality policy.

B. Policy Relating to Legislative Quality in The Netherlands, the United Kingdom and Germany

In *The Netherlands*, since the 1980s, the objective of improving legislative quality has gradually become an element of government policy. The underlying thought was (and still is) that government stands to lose its credibility and ultimately its authority if citizens, as a result of the sheer quantity and complexity of legislation, are no longer capable of understanding the rules binding them and if, for the same reasons, these rules no longer appear to be practicable or enforceable. This basic thought led to a deregulation operation at national level in the early 1980s. Although the practical results of this operation in retrospect were rather disappointing, it did contribute to the growing awareness that drafting legislation is not just a question of *technique*, but should be set in the broader perspective of a clear legislative *policy*. This awareness was explicitly demonstrated in the Dutch government's policy paper *'Zicht op wetgeving'* (legislation in perspective), which set out ten fundamental requirements of legislative quality. This document marked the turning point at which the focus of attention shifted from legislative *technique* to legislative *policy*. Following the position taken by the government, the existing guidelines on the drafting of legislation were thoroughly reviewed and replaced by a more comprehensive and coherent set of guidelines, the *Aanwijzingen voor de regelgeving* (guidelines on legislation) of 1993, which since have been amended and expanded a number of times.[7] These guidelines give prominent attention to essential matters such as the necessity of legislating (are alternatives available, e.g. self-regulation?), the proportionality of the proposed rules (is there a balance between the interest to be protected and the chosen instrument?) and whether the proposed rules will be able to be implemented and enforced in practice.

These issues are also clearly at the heart of the *MDQ* operation which was initiated by the previous Dutch government and has been continued by the present government.[8] In this context reference should be made to the project 'Projected legislation' which was set up in the *MDQ* framework not only to assess the impact of proposed rules on business and the environment, but also to consider whether the rules will be workable and enforceable in practice.

Similar developments also occurred in other Member States of the EU. If we focus attention on the *United Kingdom* (UK) and *Germany* (FRG), it appears that

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[7] SDU Publishers, The Hague, The Netherlands.

[8] The meaning of *'MDQ'* is explaned in Section A above.

both countries set up deregulation operations in the early 1980's. In the UK the drive towards deregulation was combined with a substantial privatization operation initiated by the Thatcher government in 1980. The starting point in the FRG, at least at federal level, was marked by the government's declaration of 4 May 1983. In April 1994 the government leaders Major and Kohl launched a common initiative in this field. Starting from the thought 'that overregulation is a dangerous and growing threat to the competitiveness of business in the European Union' they set up a working group of British and German businessmen. One year later this working group adopted the report 'Deregulation Now' which contained deregulation proposals in respect of Community legislation in the field of chemicals, food stuffs and transport.[9] However, as in The Netherlands, both in the UK and the FRG attention has shifted more from deregulation to what in the UK is termed 'better regulation'. For this reason the 'Deregulation Unit' at the Cabinet Office in London was renamed 'Better Regulation Unit.' As a result of basic questions raised in this changing context as to whether legislation is necessary or whether there are alternatives for legislation attention for policy on legislative policy has been growing. Unlike The Netherlands with its *Aanwijzingen voor de regelgeving* of 1993, which were mentioned earlier, the UK and the FRG did not however draw up guidelines based on fundamental questions of this kind. Such questions were included in checklists, lists of questions to be answered in preparing legislation in order to determine whether legislation was indeed necessary and what type of government action was appropriate. These checklists focus primarily on the main aspects of legislative policy (Is legislation necessary? Are there alternatives?). The most recent checklist in the UK is the Better Regulation Guide which was issued last year and has been supplemented by a guide for assessing the effects of regulation (Regulatory Impact Assessment).[10] The FRG, too, uses checklists, namely *'die Blaue Prüffragen'* which have been used at federal level since 1994. At regional level, the *Land* Bavaria has its own *Prüfliste.*[11] The correct application of this instrument is reviewed by a so-called *Normprüfungsausschuss.*

The organization of the preparatory stages of the legislative procedure can also be decisive for the quality of the final product. For this reason I would like to briefly consider how the assessment of proposed legislation is organized in the UK.

Each department in the UK possesses a Better Regulation Unit. Such a unit must approve a proposed regulatory instrument before it can enter the following stage of the procedure. Measures which must be dealt with by the Cabinet are subsequently submitted to the Better Regulation Unit of the Cabinet Office (which was recently renamed again and is now called the Regulatory Impact Unit (the RIU)). Both the

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[9] Report of the Anglo-German Deregulation Group, 'Deregulation Now', 1995.

[10] 'The Better Regulation Guide and Regulatory Impact Assessment' (Cabinet Office, London, 1999).

[11] See Peter Christian Müller Grafin, 'Improving the Quality of Legislation in Europe', see *supra* note 3, pp. 111–128 (117).

departmental units and the RIU use the Better Regulation Guide, referred to earlier, as the basis for their assessment. If the Cabinet Office unit takes the view that the proposed regulation is unacceptable e.g., because it has too great an impact on business, the minister of the department involved is required to reconsider the regulation. If he nevertheless decides to persevere and retains his original proposal, the proposal and the RIU opinion are discussed together in the Cabinet. The RIU opinion may also contain an alternative for the proposed regulation. In this way the RIU is strongly placed vis-à-vis the other departments in view of the position of the Prime Minister in the Cabinet and given the direct line between the Head of the RIU and the Prime Minister.

C. Quantity and Quality of Community Legislation

I. Too Much Legislation and Obscure Legislation at Community Level

In 1992 the French *Conseil d'État* published a *Rapport Public* on Community law.[12] This report identifies a growing number of problems in respect of Community legislation and the analysis of the problem is convincing. However the solutions which are put forward by the *Conseil* are not so attractive. With the exception of the suggestion of establishing a review body in the vicinity of the Commission and the Council, which is not expanded upon, these solutions are all placed within the national framework of existing French institutions.[13]

Although Europe undoubtedly has a political and policy-oriented dimension, according to the *Conseil d'État* it is first and foremost a legal structure, consisting of a multitude of legal rules. This system of rules is characterized by the *Conseil* as 'abundant law' (*un droit naturellement foisonnant*) and as 'opaque law' (*un droit souvant opaque*).

The fact that there is an enormous body of EC regulations, directives and decisions is apparent from the 1999 Directory of Community legislation in force.[14] This tome lists all the Community measures in force and even though the contents of these measures is not reproduced, it is thicker than the telephone guide of the district of The Hague. At the same time it may also be pointed out that the annual increment of new EC regulations and directives is impressive. The French *Conseil d'État* based its findings on figures relating to 1991 (3,925 new regulations and 1,675 directives). The figures relating to that year are perhaps not so surprising, given the fact that

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[12] Rapport Public, 'Considérations générales sûr le droit communautaire' (Études & Documents, 1992), nr. 44, 1993.

[13] E.g. one proposal is that the law faculties of French universities should devote more attention to education in the field of Community Law. Another is to establish a Coordinating Centre for European Affairs in Strasbourg.

[14] Part 1, Directory of legislation in force, Analytical Part, 33rd edition (as of 1 June 1999).

much of the legislation adopted in that period was aimed at the implementation of the White Paper of 14 June 1985 on the completion of the internal market before 1 January 1993.[15] However, as is apparent from the figures for 1996,[16] not much more legislation was produced in that year.[17]

The volume of Community legislation is quite enormous, and it does not seem likely that it will diminish in the near future. Besides this quantitative aspect, Community legislation often contains various flaws of a diverse nature. In the category of trivial mistakes, I would refer to Decision 3/80 which lacked a provision determining when it was to enter into force[18] and Directive 94/2 which incorrectly did not provide for a transitional period.[19] Here, too, it is worth referring to Bracke's work. In Chapter III of his study he lists a large number of deficiencies in Community legislation which are, in part, related to Directive 94/62 on packaging and packaging waste and which he discusses in greater detail. Bracke also discusses Case C-212/91 in which the Court of Justice admonishes the Community legislator for the poor quality of Directive 76/768 concerning cosmetic products. I do not feel that it would be particularly useful to expand upon Bracke's litany here. Those who are patient, I refer to pages 53–73 of Bracke's dissertation. It would seem to be more interesting to briefly investigate the causes of the deficiencies that have already been identified.

Before doing so I would like to point out one other aspect of confusion in the Community legislation. I refer to the fading distinction between Community instruments, directives and regulations. This phenomenon, which was also mentioned by the *Conseil d'État* and the Koopmans Working Group, implies that certain directives are adopted which, contrary to Article 249 of the EC Treaty (formerly Article 189 EC), do not leave to the national authorities the choice of 'form and methods'[20] for achieving the result of the directive, and that certain regulations require so much implementation in national legislation that it would have been more appropriate to have adopted a directive. As examples of this lack of legislative discipline, reference may be made to the many directives on public procurement, which are all so detailed that it would have been more obvious to have adopted these as regulations, and the regulation on psychotropic substances[21] which is more like a directive.

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[15] COM (85) 310 final, nr 60 et seq.

[16] N.E. Bracke, 'Voorwaarden voor goede EG-regelgeving' (SDU Publishers, The Hague, The Netherlands, 1996), pp. 55–59.

[17] C.W.A. Timmermans points out in 'Improving the Quality of Legislation in Europe', *supra* note 3, that as from 1992 the Community has produced less legislation (at p. 40). However, even as less extra legislation is produced, the overall volume will still increase.

[18] Decision No. 3/80 of the Association Council on the application of the social security schemes of the Member States of the EC to Turkish workers and members of their families, OJ 1983 C 110/60. See Case C-277/94, *Taflan-Met et al.* [1996] ECR I–4085.

[19] See *infra* note 42.

[20] See Art. 249 of the EC Treaty.

[21] Regulation 3677/90, OJ 1990 L 357/1.

II. Causes of Superfluous, Complex and Obscure Legislation

The volume of Community legislation can be explained by a number of factors.

First, a large number of regulations is needed in the context of the common agricultural policy (the CAP). The direct intervention by the Community in this field, particularly in respect of prices, requires the adoption of many regulations and amendments to these regulations. Despite this fact, still a large quantity of Community legislation remains, as is apparent from the Directory of Community legislation in force. Looking at that body of legislation it appears that there is a greater inclination in Brussels to use legislation as an instrument than is the case in a Member State like The Netherlands.[22] According to the Dutch Guidelines on legislation (*Aanwijzingen voor de regelgeving*), legislation should not be used if an objective can be achieved with alternative instruments, such as self-regulation. Examples of self-regulation are provided by codes of conduct which are entered into by companies in The Netherlands, e.g. on advertising for tobacco products. This particular form of self-regulation will soon be replaced by a Community directive on advertising for tobacco products.[23] In some cases the Community opts for legislation where in The Netherlands a covenant between government and industry would be considered sufficient, as for instance in the field of energy saving. Finally, there are the principles of subsidiarity and proportionality which were laid down in Article 5 (formerly Article 3B) of the EC Treaty by the Treaty of Maastricht.[24] In contravention of this principle various subjects are regulated at Community level which should be left to the Member States either individually or between themselves. One example of this is the Directive on time-sharing,[25] which is designed to provide a legislative solution for a problem which in fact only concerns English buyers and Spanish sellers of apartments. In my view it would have been more obvious for the UK and Spain to have arranged this matter on a bilateral basis. Again, and certainly in retrospect, there is no place for a Community directive on doorstep selling. Indeed, in the *Keck* Judgment[26] the Court of Justice determined that rules concerning selling arrangements are not affected by Article 28 (formerly Article 30) and, moreover, it appears to me that doorstep selling can hardly have any effect on intra-Community trade or services. One final contributing factor to the volume of Community legislation is the fact that it is often very detailed as is the case with the various directives in the field of public procurement and the amendments to these directives.

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[22] There is a possibility that this might change. In its report to the European Council 'Better Law Making', COM (1999) 562, the Commission announced that it intended to explore alternatives for legislation e.g., covenants.

[23] Directive 98/43 of 6 July 1998 (OJ 1998 L 213/9) which is to be implemented by 30 July 2001.

[24] OJ 1997 C 340.

[25] Directive 94/47, OJ 1994 L 280/83

[26] Joined Cases C-267/91 and C-268/91, *Keck* [1993] ECR I–6097.

Why is Community legislation often complex and obscure? In order to provide an answer to this question I would like to make the following observations.

First, compared to the 15 Member States, the Community only has a relatively short legislative tradition, dating from 1957 when the European Economic Community (the EEC) was established. This is one of the reasons, perhaps the most important, why a policy on legislative quality and the instrumentation of such a policy at Community level is still in its infancy, certainly compared to the situation in a number of Member States (see Section B above).

For the same reason, relatively speaking, the organization of the legislative function in Brussels is still in its initial stages. Legislation is shaped and drafted primarily within the more than 20 Directorates-General of the Commission. These are not well enough equipped for this task. As legislative units are lacking, drafting is in the hands of policy-makers and technical experts, whereas there is insufficient central screening of the quality by the legal service of the Commission. Because a clear policy on legislative quality does not exist at Community level, negotiators from the Member States are able to operate on the basis of their own national legislative culture. For instance, whereas the French aim for conciseness in legislation, the English have a preference for enumerations of a more explanatory nature. The *Conseil d'État* in Paris refers to Community law in this context as *droit bâtard*, bastard law, which derives its concepts and terminology from various legal cultures.[27]

Last but not least, as a fourth reason, I would refer to the complexity of the negotiation process in Brussels. Community legislation is the result of complicated negotiations in which the European Commission and many negotiation delegations on the behalf of the 15 Member States (in the case of unanimity, even all of them) ultimately must reach agreement on the outcome. Given the number of negotiating parties, compromises cannot be avoided. The fact that each Member State negotiates in its own language is an extra complicating factor. The compromise character of Community legislation entails that the resulting legislative measure is often complicated and obscure and very often this is intended to allow the Member States to interpret the measure in different ways.

III. Deficient Legislation is in Nobody's Interest

The consequences of the fact that Community legislation is not always necessary and, where it is, it is often complex and obscure, are not negligible. As I pointed out in Section B above, government stands to lose its credibility and ultimately its authority if citizens, as a result of the sheer quantity and complexity of legislation, are no longer capable of understanding the rules binding them and if, for the same reasons, these rules no longer appear to be practicable or enforceable. In the light of the foregoing this process is well underway as far as Community legislation is

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[27] Rapport Public (see *supra*) note 12), pp. 42–43.

concerned. This does not only cause problems for citizens in Europe, but also for companies operating at international level and for the Member States themselves, in so far as they are obliged to apply these rules and are not always capable of understanding the exact meaning of these rules. Or in the words of former Commission President Jacques Delors:

> European citizens are not involved in the process of the preparation of Community legislation, but in the meantime the totality of that legislation has created a monument of darkness, in which they either cannot find their way or can only find the way with great difficulty.[28]

At this point, I would like to deal more specifically with the consequences of obscure legislation. It may be the case that the compromise character of Community legislation creates unclarity, but this also means that in implementing these Community measures each Member State can act according to their own insights so that ultimately there is no workable compromise. Where for example directives in the field of the internal market, based on Article 95 of the EC Treaty (formerly Article 100A EC), are not clear enough, this will certainly create the situation that Member States will interpret these according to their own needs and will transpose them in different ways in their national legislation. In this situation new national barriers to trade will be created, so that the ultimate objective of creating a level playing field for international business will not be achieved. In their common endeavour to create the internal market, the European Commission and the Member States apparently have achieved more than is in fact the case.

There are also negative consequences for another institution of the European Communities, the Court of Justice. Unclarity in Community legislation increases the workload of the Court of Justice. The increasing burden on the Court of Justice has already led to the establishment of the Court of First Instance which in certain specific fields has taken a large number of cases out of the hands of the Court. Besides the workload of the Court, there is also a problem of principle. Because of the vagueness and the complexity of the texts of Community measures, the Court does not have much to go on and must therefore allow itself a certain margin of discretion in interpreting these texts. In that case Community policy is not determined by the institutions which should be responsible (Council, Commission and European Parliament), but by the Court. The fact that this creates a situation (which was described by the French *Conseil d'État*, with some exaggeration, as a *'gouvernement des juges'*) which is not acceptable from the point of view of a democratic government and more particularly undermines the control function of the European Parliament, in my view, does not require further explanation.

And how about the Member States? Although they are ultimately responsible for the creation of unclear legislation within the Community, they also bear the negative

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[28] J. Delors, 'La France pour l'Europe' (Impr Grasset, 1988).

consequences. Community legislation is part and parcel of national law either directly in the case of regulations or indirectly – through transposition – in the case of directives. Where Member States have taken steps (see Section B above) to improve the quality of their own legislation in the past years, these attempts or initiatives may be undermined by Community legislation which is qualitatively inferior. In the case of directives the Member States are not always sure how these should be transposed where the directive is not sufficiently clear.

In addition, in relation to uncertainty, unclear Community legislation creates legal uncertainty for citizens and companies within the Community which may result in problems being submitted to national courts. However the basic problem is more fundamental. I agree with Timmermans of the European Commission's legal service that the improvement of the quality of Community legislation should be aimed at increasing the legitimacy of Community legislation and the acceptance by citizens, business and society in general. This is particularly relevant because according to Timmermans legitimacy and acceptance are still the weak points of Community law. 'Bringing the Union closer to its citizens can only succeed if the quality of its rule-making is properly ensured'.[29] This automatically leads to the next aspect: the need for a policy on legislative quality at Community level.

D. Towards a Policy on Legislative Quality at Community Level

I. Necessity of Developing a Policy of Legislative Quality

The French *Conseil d'État* characterizes Community law as '*droit diplomatique*'.[30] It is clear, in my view, that Community law shows all the hallmarks of that fact. It is often observed that this is unavoidable. In order to reach any results at all in the negotiations between the Commission and the Member States, compromises have to be made which excel in unclarity and which allow each Member State to pursue its own course. I believe that this conclusion is the expression of intolerable cynicism and that we cannot and may not simply settle for that. As was explained in the previous paragraph, unclear Community legislation is in nobody's interest. That is the essential lesson to be drawn from the observations in Section C above. The victims of deficient legislation include businesses, consumers and, more in general, the citizens of the EU. However, the EU also belongs to the victims (see, too, Chris Timmermans' remarks referred to in the previous paragraph), especially the institutions which belong to the Brussels legislative machine. More particularly, I have in mind:

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[29] C.W.A. Timmermans in 'Improving the Quality of Legislation in Europe', *supra* note 3, at p. 46.

[30] Ibid. p. 49 *et seq.*

(1) the European Commission;
(2) the Member States, which are represented by their ministers in the Council; and
(3) the European Parliament.

It may be expected from them that they make an effort to improve the quality of Community legislation. This involves more than just improving legislative technique, or in the words of the Interinstitutional Agreement, the quality of drafting. In addition, other, more fundamental questions should be raised, such as: is there a good reason for preparing Community legislation or is there an alternative, in the light of the principle of subsidiarity of Article 5 of the EC Treaty? And if there are no useful alternatives, are the proposed Community instruments proportionate to the interest to be protected? It will be clear that questions such as these do not concern legislative *technique*, but legislative *policy*.

Member States, both individually and within the framework of the various Councils of Ministers and the European Council, and the European Commission have also taken certain initiatives in order to improve legislative quality at Community level. These initiatives will be discussed in the following sections under two headings, the national approach and the Community approach. Thereafter, in Section E below, I will consider which approach stands to offer the best chance of success.

II. National Approach

As far as The Netherlands is concerned, in the policy paper '*Zicht op wetgeving*' (legislation in perspective), which was published in 1989, the Dutch government observed that the quality of Community law is insufficient and that it is in the interests of The Netherlands to strive towards improvement on this point within the Community framework.[31] Subsequent Dutch governments thereafter took certain initiatives. First, I refer to the Dutch Guidelines on legislation (*Aanwijzingen voor de regelgeving*) which in Chapter 8 include a number of so-called Euro-guidelines.[32] Dutch negotiators must comply with these guidelines in negotiations on Community legislation. Guideline 329 lays down that Dutch negotiators must give due consideration to the requirements of proper legislation set out in paragraph 2.1 of the Guidelines. It is quite a different matter whether these negotiators, who are usually more policy oriented than legally minded, actually adhere to these guidelines. I do not have many illusions on that point, but I will leave that for what it is.

Secondly, the enactment of general laws, with an umbrella function, can also contribute to legislative quality. One such example is the Dutch General Act on administrative law, although this act too could be simplified in a number of respects.

A further, quite different approach, is that followed by the Dutch Working Group on Projected Legislation (*Werkgroep Voorgenomen Regelgeving* (the WVR)). For the

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[31] Ibid. pp. 24–25.
[32] Guidelines pp. 328–347.

past two years, each year this working group has selected three to four Community proposals for directives or regulations which are eligible for a national assessment of their effects on business and the environment and of their workability and enforceability in practice. The idea is that Dutch negotiators use the results of these assessments during negotiations in Brussels.

Parallel developments to those in The Netherlands have also occurred in other Member States. In the UK, the Cabinet Office recently published a Guide to Better European Legislation[33] which in fact compliments the Better Regulation Guide mentioned in Section B above. The Guide to Better European Legislation is intended to provide officials, who are involved in negotiations on Community legislation in Brussels on behalf of the UK, with a number of guidelines which are aimed at improving the quality of Community legislation. Besides a checklist, this Guide lists the fundamental requirements which Community legislation must comply with. It also contains recommendations on conducting negotiations; these recommendations are on the whole based on practical experience ('good practices'). It appears from the Guide that an important step in analysing the proposed Community measure is a Regulatory Impact Assessment to be performed in the UK. Given the fact that in the context of such an assessment special attention is given to the costs and benefits for business and to the workability and enforceability in practice, these assessments are comparable with the Dutch *WVR* screening.

III. Community Approach

EU institutions also use similar instruments.

As for the European Commission, reference may be made to the *Règles de Technique Législative*, as well as the *fiche financière* and, for the effects of a proposal for business, the *fiche d'évaluation d'impact*. For a description of these three instruments I refer to paragraph 5.4.2 of the Dutch Koopmans Report.

The Council uses a collection of models with guidelines on the structure, lay out and numbering of acts. In addition, during the Edinburgh Summit, the Council issued a set of ten guidelines of a rather technical nature. Obviously these guidelines only apply to the Council itself.[34]

Thirdly, there is the Interinstitutional Agreement of 1998. This instrument lays down guidelines on the quality of the drafting of Community legislation which, in contrast with the instruments just mentioned, do not apply separately to the EU institutions, but collectively to the three institutions which together make up the Community legislator. I will discuss these guidelines and the differences between them and the guidelines proposed by the Koopmans Working Group in Section F, paragraph II of this article.

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[33] The Guide was drafted in 1999 by the Better Regulation Unit, as it was then called, of Cabinet Office. The Guide is available via the Internet at < http:/www.cabinet-office.gov.uk > .

[34] Council Decision of 17 June 1992, OJ 1993 C 166/1.

As far as the effects on businesses are concerned, since 1998 under the European Business Panel pilot project it has been possible to assess the effects of proposed Community legislation on businesses by means of questionnaires. Up until now, however, not much experience has been gained with this panel.

Finally, two instruments should be mentioned which are aimed at the application of the principles of subsidiarity and proportionality laid down in Article 5 (formerly 3B) of the EC Treaty. These are, on the one hand the Interinstitutional Agreement on the application of the principle of subsidiarity of 1993[35] and later the Protocol on the application of the principles of subsidiarity and proportionality adhered to in the Treaty of Amsterdam.[36] The basic principles in these documents are on the whole less concrete than the guidelines of the Interinstitutional Agreement of 1998 and they are more political in character. Nevertheless, both the 1993 Agreement and the Protocol to the Treaty of Amsterdam contain certain provisions which quite could have easily been incorporated in the Interinstitutional Agreement on the quality of the drafting of Community legislation of 1998, if the latter (as was initially propounded by the Dutch government) had had a wider scope than merely the quality of drafting. In this respect I would refer to point 9 of the Protocol which lays down that the Commission in its proposals for new Community legislation should take into account the fact that burdens, both financial and administrative, on the Community, the national governments, local government, businesses and citizens are kept to a minimum and should be proportionate to the objective to be achieved.

E. Focus of Attention: A National or Community Approach?

How can the quality of Community legislation best be improved: by means of a national or a Community approach? Possibly both roads lead to Rome. Nevertheless, as so many obstacles may be encountered on the 'Route Nationale', I am convinced that the quality of Community legislation can only be improved by following the Community approach. This does not mean that Member States can simply lean back and leave it at that. On the contrary, it is absolutely necessary that Member States increase their efforts to improve the quality of Community legislation if ultimately any results are to be achieved at all. My preference for focusing on the Community approach is based on the following considerations.

First, there is some truth in what is called 'the power of the first concept.' As the European Commission has the exclusive power of initiative in proposing Community legislation to the Council, it is important that the Commission ensures

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[35] Bulletin of the European Communities 10–93, p. 128.
[36] OJ 1997 C 340/105.

that such a first proposal is well prepared and complies with fundamental requirements of good legislation. If not, it is practically impossible to effectuate qualitative improvement in the context of the negotiations between 16 parties (Commission and Member States). In other words a national approach will be to no avail in such situations so that a Community approach is a necessary condition for achieving better quality.

A second consideration is that in some cases Member States are either not or only marginally involved in the preparation of Community legislation. I refer here to situations in which the Commission has the power under the EC Treaty or Community framework legislation to adopt directives or regulations independently. Following a national approach in such cases cannot be effective.

Thirdly, and perhaps the most important consideration, is that Member States do not appear to be capable, either individually or collectively, of bringing about a change for the better. As was observed in Section C, paragraph II above, the 15 Member States are too divided among themselves to achieve this and it may be expected that this will only increase with the further expansion of the Community to 25 or 30 members.

Finally, as was also explained in Section C, paragraph II above, national negotiators often do not pay enough attention to aspects of legislative quality. The fact that they are misguided in their attitude was illustrated in Section C, paragraph III above. It is, however, a fact of life.

F. Strengthening the Instrumentation and Organization of the Legislative Function at Community Level

I. Preliminary Remarks

The message of Section C above is that the quality of Community rules is not good and that ultimately this causes inconvenience for everybody, from the European Commission to the citizens and businesses of Europe. As explained in Section E above, a change for the better cannot be achieved without adequate measures being taken at Community level. In this paragraph I will consider what this entails for the instrumentation and organization at Community level. In other words, the question is whether the Community legislative apparatus should operate in a different way and whether perhaps it should be equipped differently?

To be clear, I would like to emphasize that this paragraph focuses on measures aimed at improving the modus operandi of the EU institutions in respect of *new legislation*. As such it would also be interesting to look at Community initiatives for the simplification of *existing legislation*. I refer here to the Simpler Legislation for the Internal Market (SLIM) initiative, which more or less may be regarded as the counterpart of the Dutch *MDQ* project and which is aimed at trimming down existing Community legislation. New developments in this field are that the

European Commission, in cooperation with the Member States, has launched a assessment programme on SLIM[37] and that, given the rather disappointing results of SLIM up until now, The Netherlands, together with the UK and Denmark has submitted proposals for improving this operation.[38] No matter how interesting they may be, the SLIM results and ways to improve them will not be discussed for the purposes of the present article: developing a legislative policy at Community level. For the same reasons I will not discuss the initiatives of the Sutherland Committee[39] for the simplification of existing Community legislation or the Business Environment Simplification Task Force (BEST) Report.[40] However, these two initiatives will be dealt with below to the extent that they relate to the functioning and the organization of the legislative process within the Commission.

II. Strengthening Instrumentation at Community Level

As was observed in Section D, paragraph III above the EU institutions which either separately or collectively constitute the Community legislator all use different instruments for the improvement of the quality of their legislation. The most recent instrument is the Interinstitutional Agreement of 22 December 1998 which lays down 22 guidelines for the quality of the drafting of Community legislation and in the final section of the Agreement, eight measures for the implementation of these guidelines.[41] At the same time this is also the most interesting instrument as all three institutions have agreed to be bound by it.

The clearest statement of the objective of these guidelines is provided by the first recital of the preamble to the Agreement: clear, simple and precise drafting of Community legislative acts is essential if they are to be transparent and readily understandable by the public and economic operators. It is also a prerequisite for the proper implementation and uniform application of Community legislation in the Member States. Then the Agreement lists a number of guidelines which indeed are almost wholly focussed on the quality of drafting Community legislation. I say almost wholly focussed on the quality of drafting, because the requirements laid down in the guidelines in some respects go beyond the quality of drafting. In this respect I would refer to guideline 20 which states that, rather than setting precise dates for the transposition of directives, provisions on deadlines for the transposition and application of directives will be expressed in months or years in such a way as to

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[37] See the Commission's report to the European Council: 'Better Law Making 1999', COM (1999) 562 final.

[38] These proposals were discussed for the first time in the Internal Market Council of 28 October 1999.

[39] 'The Internal Market After 1992 – Meeting the Challenge', Report to the European Commission by the High Level Group on the Operation of the Internal Market.

[40] For the report se COM (98) 222 final.

[41] Whereas the 22 guidelines are dealt with in Section F, paragraph II, Section F, paragraph III (1) will give an explanation of the measures.

guarantee an adequate period for transposition. This will certainly be advantageous for national legislative bodies involved in transposing directives. For, if this guideline is properly applied, past situations can be avoided, in which fixed dates for the transposition, which were included in a proposal for a directive, were retained unchanged in the final directive following protracted negotiations and by that time were quite unworkable.

Apart from that, it is regrettable that the Agreement does not include a guideline to incite the Community legislator to consider providing for transitional rules in directives or regulations. This is regrettable because in the past various accidents have occurred on precisely this point.[42]

This last subject, the lack of necessary transitional provisions, brings me to the 17 guidelines which were developed by the Dutch Koopmans Working Group. When compared with the guidelines of the Interinstitutional Agreement it is apparent that these guidelines are quite different in character and that they hardly touch upon the quality of drafting of Community legislation. Rather, they focus on matters such as the necessity and proportionality of Community legislation, the clear definition of conferred powers, alternative methods for transposing directives, more discipline in making the choice between the directive and the regulation as the most appropriate instrument, workability and enforceability and, as I already pointed out, the necessity of providing for transitional measures. In other words, the guidelines proposed by the Dutch Working Group concern just as many aspects of legislative quality. Moreover, with a view to increasing the accessibility of Community legislation, the Dutch working group proposed adopting a guideline requiring the European Commission to ensure that proposals which it submits to the Council are usually accompanied by an explanatory memorandum. The differences between both sets of guidelines, Interinstitutional Agreement guidelines and the Koopmans guidelines, are striking. This is especially so given the fact that during its Presidency of the EU in 1997, the Dutch government had tabled the proposals of the Koopmans Working Group in the negotiations on the Treaty of Amsterdam. Nevertheless this only resulted in a declaration annexed to the Final Act adopting the treaty which was restricted to the quality of drafting of Community legislation. In my view this was in part a missed opportunity.

Indeed, the Agreement is certainly a step in the right direction. Now the EU institutions concerned must ensure that they comply with it. However, in the light of the deficiencies in Community legislation described in Section C above, the Agreement would have been of much greater value if the guidelines proposed by the Dutch working group had been included in it. Unfortunately, this was not to be.

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[42] See e.g., Commission Directive 94/2/EC with regard to energy labelling of household electric refrigerators, freezers and their combinations: OJ 1994 L 45/1. As no transitional provisions had been included in this directive, Italian fridges, which for example had already been offered for sale in Dutch stores, had to be relabelled, which required Dutch distributers to contact Italian producers in order to obtain the necessary labels. It is not very likely that this will have led to much.

This was due to the complexity of the negotiations on the substance of the Agreement. They were negotiations conducted with a Commission which was inclined to regard proposals for guidelines as a form of criticism of its own performance and with Member States with differing ideas on the rationale of legislation and on what should be deemed to be 'good legislation'.

I do not believe that the last word has been spoken on the Interinstitutional Agreement. In this respect in an article published early this year in a leading Dutch legal journal, the *Nederlands Juristenblad* (NJB), the Dutch Minister of Justice Korthals stated that (I must say once again) The Netherlands aspires to a leading role in the further development of a Community policy on legislative quality. This ambition stands in marked contrast with the European Commission's attitude which in its report 'Better Law Making 1999' says nothing about the possibility of expanding the Interinstitutional Agreement with guidelines which are aimed at more than just the quality of drafting. Nevertheless, it may be presumed that sooner or later the Agreement will develop in the direction envisaged by Minister Korthals i.e., that it will become an instrument of a Community policy on legislative quality. Indeed, at some point it will be realized at Community level and within the Member States, that improving the quality of drafting can only solve some of the problems of Community legislation. Problems such as those identified in Section C, paragraph I above concerning the surplus of Community legislation, the complexity of legislation, and legislation which is excessively burdensome for citizens and business, will not be solved by giving more attention to the quality of drafting alone. That is why I expect that the same transition which took place in The Netherlands in the 1980s and 1990s whereby the focus of attention switched from legislative technique to legislative policy, will also occur at Community level. Such a transition could be realized in the Interinstitutional Agreement along the following lines:

(1) Expand the Agreement with guidelines elaborating the principle of subsidiarity and proportionality of Article 5 of the EC Treaty. Both the Agreement of 1993 and the Protocol mentioned at the end of Section D, paragraph III above can be used for this purpose if the contents are made more concrete.

(2) This should be supplemented with the inclusion of the guidelines developed by the Koopmans Working Group in the Agreement. As has already been pointed out, these guidelines concern legislative *policy* more that legislative *technique* and deal with such matters as the necessity and proportionality of legislation. These proposals correspond in part with the proposals of the Sutherland Committee.[43] In addition, and once again in line with the Koopmans proposals, I could also imagine guidelines being included in the Agreement aimed at introducing more discipline on the part of the

[43] The Sutherland Committee uses five criteria: necessity, effectiveness, proportionality, consistency and communication.

Community legislator in choosing between the directive and the regulation as the most appropriate instrument.

(3) In order to complete these guidelines it would be advisable to add a further guideline to the Agreement obliging the Commission to publish an explanatory memorandum in the C-series of the Official Journal when it submits a proposal for new Community legislation to the Council and the European Parliament. This was also suggested by the Dutch working group and could, in my view, greatly contribute to creating a better understanding of Community rules with those groups to whom they are addressed (citizens and Member States, particularly where the transposition of directives is involved) and ultimately the courts (both national courts and the Court of Justice in Luxemburg) who are to decide cases before them on the basis of these rules.

(4) The three EU institutions should develop a practical method for assessing the impact of proposed Community legislation on businesses, especially in respect of the administrative burdens it imposes. The screening methods used in the UK and The Netherlands[44] could be used for this purpose, as could, quite obviously, the Business Panel mentioned in Section D, paragraph III above. The results of this assessment should be published.[45] The fact that assessing the impact of proposed Community legislation on businesses is very important is made clear by a study of the *Nederlandse Economisch Instituut voor het Midden- en Kleinbedrijf* (Netherlands Economic Institute for Small and Medium-Sized Enterprises). This study revealed that no less than 57 per cent of Dutch legislation with an impact on businesses was directly related to Community legislation.[46]

III. Strengthening the Organization of the Legislative Process

1. An Independent Review Body?

As was observed in the previous paragraph, the guidelines of the Interinstitutional Agreement will only be able to have any effect if the EU institutions apply them rigorously. And that is the crux of the problem. Can they be expected to apply the Agreement to the full? I am not overly optimistic as far as this is concerned. The Commission's proposal for a directive on certain legal aspects of electronic commerce in the internal market, which was presented to the Council on 23

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[44] This is explained in Section B above.

[45] See, too, A.E. Kellermann, *supra* note 3, at p. 13.

[46] EIM/Bedrijfseffectenrapportages (EIM/Reports on the impact on businesses), Report '*Verkenning regelgeving met bedrijfseffecten 1990–1993*' (Survey of legislation with an impact on businesses 1990–1993).

December 1998,[47] is a case in point. It is quite clear that this proposal was not screened in the light of the guidelines of the Interinstitutional Agreement and, unfortunately, this also applies to the common position of the Council of 7 December 1999. The proposed directive is still so complex and obscure that it would not pass the test set by the guidelines of the Agreement. This means that two of the three EU institutions which have signed the Agreement, the Commission and the Council, have not complied sufficiently with their own guidelines in respect of such an important directive as the directive on electronic commerce. It is not to be expected that the third institution, the European Parliament, will contribute much in this respect.

Nevertheless, it cannot be said that the drafters of the Agreement were unaware of the fact that the Agreement might remain a dead letter. The final section of the Agreement therefore specifies eight measures (measures (a) up to and including (h)) to be taken by the institutions for the implementation of the guidelines. These measures, most certainly, are useful. For instance, measure (a) requires the drafting of a common manual for the benefit of all experts of the Commission, Council and Parlement, who are involved in the legislative process at Community level. Very recently this manual was brought about: *le guide pratique commun* of 16 March 2000. Measure (b) requires *inter alia* the Commission to organize its internal procedure in such a way that its legal service can make drafting suggestions in good time in respect of the legislative proposals of the various Directorates-General. Although the involvement of the legal service at an early stage may seem to be self-evident, this was certainly not standard practice within the Commission.

The question arises, however, whether the eight implementing measures aimed at the internal organization of the three institutions are sufficient in order to ensure proper compliance with the guidelines. I do not believe that this is the case. These three institutions are all directly involved in the decision-making process in respect of Community legislation. As was pointed out in Section C, paragraph II above, this process will usually be aimed at reaching compromise, certainly in more complicated cases. Where the focus of attention is on reaching a compromise, requirements of legislative quality tend to disappear from sight during negotiations. This is why the Koopmans Working Group suggested setting up a review body at Community level, which would be able to issue an opinion on the quality of proposed Community legislation, independently of the interests involved and of considerations related to reaching compromises. The French *Conseil d'Etat* had already made similar suggestions to those made by the Koopmans Working Group.[48] However, in contrast with the *Conseil d'État*, the Dutch working group gave a detailed description of various aspects of an independent review body, such as its position vis-à-vis the three legislative EU institutions, its size, the moment at which it should exercise its consultative function, the subject of its opinions and the status of its

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[47] OJ 1999 C 30/4.

[48] Rapport Public (see *supra* note 12), p. 65.

opinions.[49] The Dutch working group explicitly rejected the idea of situating the review body within the legal service of one of the three institutions. As these services are part of the internal organization of the institutions involved they would not be able to issue independent opinions and these opinions would not be able to be published. Moreover I would like to point out here that one positive side-effect of the establishment of an independent review body is that this would contribute to the strengthening of the position of the legal services of the EU institutions. It is not to be expected that the European Commission would welcome a negative opinion of such an independent body on one of its proposals. In order to prevent that eventuality it is likely that the Commission would take measures to ensure that its legal service would scrutinze the quality of Commission proposals, particularly in the light of the common guidelines. Apparently the European Commission's legal service is not completely aware of this positive side-effect. At the 1997 Congress in Scheveningen, which was referred to in Section A above, there was no sign of sympathy or support for the establishment of an independent body from that side.

In my view the stance of the Commission's legal service is not completely understandable in the light of the experience of the legal services of Dutch Ministries. As far as the quality of legislation is concerned, their position vis-à-vis departmental policy-makers is strengthened by the fact that at a later stage in the legislative process the Dutch Council of State issues an independent public opinion on the quality of proposed legislation.

Looking more closely at the Koopmans proposal, it may be said that as far as the review body is concerned a rather modest approach was chosen. The proposal was to focus attention in the initial stages on technical legal aspects. There were at least two reasons for this approach. The working group wished to avoid making any proposals which would entail an amendment of the EC Treaties and it anticipated criticism that the establishment of an independent review body would unnecessarily contribute to increasing Brussels bureaucracy. This is also why the working group carefully avoided any suggestion that it was proposing to establish a European Council of State.

Unfortunately this was all to no avail. During the IGC of 1997 it became apparent that the establishment of an independent review body was, for the time being, a bridge too far. The Federal Republic of Germany doubted whether it was really necessary. France and Spain were completely opposed to the idea. Besides one Scandinavian country, only the UK clearly supported the proposal.[50] In retrospect it is my impression that this support was possibly fatal for the proposal of the Dutch working group, given the fact that other Member States may have regarded this

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[49] Report 'Quality of EC-Legislation' (see *supra* note 2), pp. 29–36.

[50] Information on the position of the various countries in respect of the proposal to establish an independent review body was derived from visits paid to a number of capital cities of EU Member States by a Dutch interdepartmental working group, led by Joris Demmink. For the assignment of this working group see *supra* note 1.

support with suspicion. In other words, it was probably seen as an extra instrument for the UK to thwart the Community legislative process.

2. Organizational Changes Within the Commission

To be right or to be proved right. The difference between the two is, I believe, clearly illustrated by the Dutch proposals in respect of creating a form of independent review. I am convinced that there is no chance, for the time being, of the establishment of an independent review body, given the outcome of the debate on this subject in the past two or three years. In this situation other avenues should be explored.

My first thought would be to bring about certain organizational changes within the Commission. As I observed earlier, the role this institution plays in the legislative process strongly determines the final quality of Community legislation. There are various possibilities of strengthening the legislative function within the Commission. The most radical measure would be to create a legislative monopoly by concentrating the legislative function within the legal service. This would put an end to the present situation in which Directorates-General prepare legislation despite the fact that they are not sufficiently equipped for this task. This may be the result of the fact that the Directorates-General do not possess enough 'critical mass' to engage legislative capacity and expertise. However, I do not believe that such a radical measure is feasible. It would mean that one single member of the Commission (the President or a Commissioner) would be responsible for the whole legislative apparatus and that the other members of the Commission would consequently be entirely dependent on him for the preparation of 'their own' legislation.

This leaves two alternatives:

(1) Strengthening the position of the legal service vis-à-vis the various Directorates-General. This is the route which appears to be indicated, albeit hesitantly, by the Interinstitutional Agreement; see, in particular, implementing measure (b) of the Agreement.

(2) Setting up a specific organizational unit to scrutinize compliance with fundamental requirements of good legislation, such as the usefulness and necessity of legislation, proportionality, effects on business etc. This unit should not be situated within one of the Directorates-General. It would have to be placed centrally, preferably under the responsibility of the President of the Commission. Such a unit would occupy a position similar to that of the Regulatory Impact Unit in the UK.[51]

Proposals to set up a separate unit within the Commission in order to supervise the quality of proposed Community legislation have been put forward before. The Sutherland Committee proposed setting up a legislation coordination unit to avoid

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[51] See Section B above.

discrepancies which are often caused by an excessively sectoral approach by the Commission.[52] This latter judgment, by the way, is formulated in unusually hard terms, taking into consideration that Mr Sutherland was a member of the European Commission for many years. A more recent proposal on this point came from the task force BEST. It suggested setting up a Better Regulation Unit under the direct responsibility of the President of the Commission. This unit would be responsible for promoting good working methods within the relevant services and for checking whether the proposed legislation is really necessary as well checking that sufficient consultations have taken place, that enough information has been provided and that the assessment of the impact of the proposed measure was carried out properly.

Assuming that the establishment of an independent review body is indeed a bridge too far at the moment, my preference would be to set up such a central unit as a next best solution. Unfortunately, the European Commission has not yet reached this stage. In its communication in reaction to the BEST Report the Commission completely dismisses the proposal to set up a separate unit. According to the Commission the tasks which would be assigned to this unit are already performed by its Secretariat General.[53]

Is this an adequate reaction by the Commission? No, it is not. Although earlier Commission reports and also the latest report 'Better Law Making 1999' demonstrate that the Commission is aware of the need for significant improvements in the field of legislation, this does not mean that there has been a real boost to the quality of Community legislation. I refer to my general observations in Section C above and, as far as the SLIM initiative is concerned, to Section F, paragraph II above. In the light of experiences up until now, it is not obvious to presume that it will be possible to realize a real improvement in the quality of Community legislation in the present organization of the Commission. This is why, in my view, the suggestion to set up a separate review unit within the Commission should be given more serious consideration than the Commission has been prepared to do up to now.

Which tasks could be performed by a separate unit as proposed by the BEST task force? In my view there are two main tasks to be performed:

(1) As far as the specific legislative products of the Directorates-General are concerned, to monitor compliance with the guidelines on the quality of drafting of Community legislation. By this I do not mean the guidelines of the Interinstitutional Agreement. The type of screening I have in mind would concern strategic matters of legislative policy. In other words, screening on the basis of new guidelines which, in my view, should be added to the Interinstitutional Agreement (see, in this respect, points 1–3 at the end of Section F, paragraph II above).

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[52] Recommendation 15 of the Sutherland Report.
[53] Communication of the Commission to the Council, COM (98) 550 final.

(2) To consider at an early stage whether specific legislative products should be subjected to an assessment of the impacts on business and to check at a later stage whether that assessment has been carried out correctly (see point 4 in Section F, paragraph II above).

Why do I presume that the Commission's legal service could not be charged with this type of monitoring? Actually it already performs this task, but in practice this does not appear to be particularly effective. If there is to be concentrated attention for more strategic matters such as the usefulness and necessity of a legislative measure and, more importantly, exerting influence on such matters, I believe that more is to be expected from a separate unit which has been set up for that purpose. This would be a unit which would come under the direct responsibility of the President of the Commission. In my judgment the Commission's legal service will have enough work in implementing measures (a) to (h) of the Agreement. Consider for example measure (b) which obliges it to make drafting suggestions in good time in order to improve the quality of proposed legislation.

G. Summary and Conclusions

The Introduction to this article ends with five questions that are subsequently answered in Sections C-F above. On the basis of these questions and a shorter rendition of the corresponding answers in this paragraph I present a summary of my findings and draw some conclusions.

I. Why is it so Important to Ensure that the Quality of Community Legislation is at an Adequate Level?

In Section C, paragraph I above I gave a number of examples of Community legislative measures which were either superfluous or could not be easily reconciled with the principle of subsidiarity and proportionality laid down in Article 5 EC. Furthermore I pointed out that Community legislation is often complex and unclear and I indicated what the underlying reasons are for this (Section C, paragraph II above). Thereafter I discussed the consequences of these findings (Section C, paragraph III above). My conclusion is that these consequences are not negligible and that the proposition that the complexity of the negotiation process in Brussels automatically leads to obscure rules should not be readily accepted. This proposition I described as the expression of intolerable cynicism. Obscure legislation is in nobody's interest and indeed there are many affected by it. Besides the three legislative institutions of the EU and the European Court of Justice, the victims of deficient legislation include European businesses, consumers and generally the citizens of the EU. Improvements in this field are therefore absolutely necessary to enhance the authority and acceptance – still weak points – of Community law. Or, in the words of C.W.A. Timmermans of the European Commission: 'Bringing the Union closer to its

citizens' can only succeed if the quality of its rule-making is ensured'.[54] I am convinced that achieving this goal is not just a question of improving *legislative technique*. More is needed, namely the development of a *European legislative policy* and discipline on the part of the European legislator to adhere strictly to that policy.

II. How can the Necessary Improvement of the Quality of Community Legislation be Realized?
III. What Should be the Focus?

In Section D above two roads to improving the quality of Community legislation are described: the national and the Community approach. The first approach starts with the national negotiation delegations. These delegations, who are bound by the Interinstitutional Agreement which after all was also signed by the Council, must ensure that the results of the negotiation process at least comply with the quality requirements laid down in that Agreement. Following the discussion of the national approach in Section D, paragraph II above, the Community approach is discussed in Section D, paragraph III above. This paragraph lists a number of initiatives taken separately by the Commission and the Council as well as the joint initiative of the three legislative institutions: the Interinstitutional Agreement of 22 December 1998 laying down 22 common guidelines for the quality of the drafting of Community legislation and eight measures to be taken by the institutions for the implementation of these guidelines.

Section E above provides a concrete answer to the third question. It is submitted that although both roads may lead to Rome, so many obstacles may be encountered on the national route that the improvement of the quality of Community legislation can only be adequately achieved by following the Community route.

This preference for the Community route is based on the following considerations:

(1) what is called 'the power of the first concept' (the Commission has the exclusive right of initiative and it appears that if the Commission's proposal is in some way defective at the outset, it is almost impossible to remedy this at later stages);
(2) Member States are not involved in the preparation of all Community legislation; and
(3) 15 Member States are too diverse a group to be able to turn things round for the better as far as the quality of Community legislation is concerned (this is, by the way, disregarding the situation in an EU of 25 or 30 Member States).[55]

Both a Community and a national approach are required. I am not therefore

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[54] See 'Improving the Quality of Legislation in Europe' *supra* note 3.
[55] This is disregarding the fact that the aspect 'quality of legislation' usually tends to be one of the first items to disappear from the negotiating table. See Section C, paragraph II above and Section E above.

suggesting that a choice should be made for either the one or the other. In order to realize an improvement in legislative quality additional efforts of the Member States are absolutely necessary.

IV. Which Proposals Were Drawn Up by the Koopmans Working Group and Why Did These Proposals Turn Out to be a Bridge Too Far for the Commission and a Number of Important Member States During the 1997 IGC?

The Koopmans Working Group clearly concentrated on the Community approach. First, the working group drew up a number of guidelines on the quality of Community legislation. In addition, in order to guarantee discipline in the application of these guidelines by the Community institutions, the working group proposed setting up a body composed of a small number of independent legal experts to review proposed legislation at as early a stage as possible and to publish an opinion on such draft legislation. Both proposals were submitted to the IGC in 1997 by the Dutch government. However, as is apparent from Declaration 39 to the Treaty of Amsterdam, these proposals unfortunately did not find much support. If the set of guidelines of the Interinstitutional Agreement are compared with those drawn up by the Koopmans Working Group, it is clear that the first concentrate on *legislative technique* whereas the second deal with *legislative policy*. Moreover, the Interinstitutional Agreement does not announce the establishment of an independent review body; it merely states that a number of modest internal organizational measures (the eight measures mentioned above) will be taken.

The resistance against the Koopmans proposals on the part of the Commission and Member States such as Germany and, to a stronger degree, France and Spain, was not so much aimed at the proposed guidelines, but at the independent review body. In their view there was a danger that such a body and its public opinions would considerably complicate or delay the decision-making process in Brussels in respect of proposed legislation. The fact that the United Kingdom unconditionally supported the Koopmans Report only added fuel to the fire.

V. How to Continue on the Road Entered into by the Interinstitutional Agreement?

The Interinstitutional Agreement will probably be evaluated within a period of one to two years. Acting on the presumption that this will be the case the Dutch Minister of Justice, Korthals, in a recent publication in the Dutch legal journal, *NJB*, announced that The Netherlands will take further initiatives within the framework of an evaluation aimed at the development of a Community policy of legislative quality. In this regard I would suggest that in the interests of the development of a Community policy of legislative quality the Dutch government should announce initiatives aimed at adapting the character of the Institutional Agreement in at least two respects. First, new guidelines should be added which are more concerned with legislative *quality* than legislative *technique*. The four ways in which this extension of

the guidelines could be realized were discussed in Section F, paragraph II above. Secondly, I could imagine the Dutch government announcing initiatives in respect of the organizational aspects. It is a moot point, however, whether this government should again propagate the establishment of an *independent* review body. In my view the establishment of such a body is still the logical compliment of the guidelines and should not be regarded as a mere luxury, certainly not if the recent output of the Brussels legislative machine is taken into consideration.[56] The most important function of such an independent review body would be that, particularly as a result of the fact that its opinions would be public, it could force the Community legislator to adhere to its own guidelines. However, although it may be desirable to set up an independent review body, in a more realistic vein, it is the question whether the proposal to establish such a body would stand a chance in a next round of discussions.

If the issue is to be raised again, given the negative attitude of the French government in respect of independent monitoring of the quality of Community legislation during the IGC of 1997, it would be helpful if that happened after the current French Presidency of the EU, e.g. during the subsequent Swedish (as from January 2001) or Belgian Presidencies (as from July 2001). In the event that the establishment of an independent review body is rejected even then an alternative is presented in Section F, paragraph III (2) above: the establishment of a separate review unit under the direct responsibility of the President of the Commission. In my view this unit would be charged with:

(1) reviewing proposed legislation from a more strategic perspective having regard to the necessity of the proposed measure, subsidiarity and proportionality; and
(2) considering which legislative measures should be subjected to a business impact assessment and subsequently evaluating the results of such an assessment.

In contrast with the independent review body mentioned above, such an internal unit would not be able to issue an independent opinion which could be published. Nevertheless, if it were able to gradually acquire the authority of a unit such as the Regulatory Impact Unit of the Cabinet Office in the United Kingdom, perhaps a lot would be gained.

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[56] See for example my remarks on the proposal for a directive on the legal aspects of electronic commerce in the internal market and the common position on that proposal in Section F, paragraph III (1) above.