Proposals for Improving the Quality of European and National Legislation

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A. Introduction and General Remarks

I. The Hague Conference on the quality of European and national legislation and the Internal Market

This article was largely inspired by a research project carried out by the author in co-operation with other researchers at the TMC Asser Institute on behalf of the Ministry of Justice in the Netherlands in 1995 and 1996.[1] As a follow-up to the project an international conference was proposed and held from 23–25 April 1997 on 'The Quality of European and National Legislation and the Internal Market'.[2] At the Conference, various government, academic, industry and consumer representatives discussed the activities of national governments and EU institutions to improve the quality of legislation. The main objective of the Conference was to suggest ways of improving the quality of the legislation in the EU against the background of the Common Market. For this purpose, the Conference was to encourage an exchange of the experiences of Member States, as well as discussing experience within the institutions of the EU itself. Reports were given on the 'best practices' to promote the quality of the European legislation in a wider context. In this respect, the judicial quality as well as the economic significance of legislation was discussed.

The concern for the quality of legislation consists of a collection of ideas, actions and measures, such as the assessment of draft legislation; the simplification of existing legislation; the strengthening of market forces and technical quality. In

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1 T. Heukels *et al.* (eds.), *Achtergrondstudies Algemeen Wetgevingsbeleid, Kwaliteit Communautaire Wetgeving*, Deel 6 (AAW), Ministerie van Justitie, April 1996.

2 The Conference was organized on behalf of the Netherlands Ministry of Economic Affairs, the Ministry of Justice and the European Commission, by the TMC Asser Instituut in The Hague, 23–25 April 1997, during the Dutch Presidency. The Conference proceedings were published in Kellermann *et al.*, *Improving the Quality of Legislation in Europe* (The Hague, Kluwer Law International 1998)

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many Member States of the EU, as well as within the European institutions, actions have already been taken with regards to some of these items.

II. Legal questions concerning the quality of legislation

It may be useful to indicate and to comment on the most important legal questions which were discussed during the course of the Conference.

1. What is the usefulness of formulating quality requirements for legislation?

The concern for the quality of legislation was considered as a policy item because of the consequences of legislation for the freedom of the citizens, the order of society and the economic dynamics. Coherent approaches to ensure the quality of legislation are needed not only because of the Internal Market and the growing economic cohesion in Europe, but also because of developments in the economy and society at a national level.

2. What is the relationship between the quality of European legislation and the national legal order (i.e. the implementation of legislation, its enforcement by the Commission, Member States, and private persons and enterprises)?

The quality of legislation is a problem both at European and national levels. For various reasons, EC legislation suffers more than national legislation from poor quality. In this respect three key points should be stressed.

(a) It should be noted that the content and structure of European legislation are derived from different traditions and sources; the influence of the systems of both the Member States and public international law are evident. In turn, national legislation is influenced by EC legislation, because EC legislation often has to be implemented by national legislation in order to be effective. Therefore, attention to aspects of quality at both levels is necessary. Policy on the quality of national legislation must therefore take into account the quality of European legislation.
(b) The European system is relatively new and does not yet have a strong legislative tradition with its own distinctive features.
(c) EC rules often come after laborious and complicated decision-making procedures, which sometimes result in vague or, alternatively, very detailed texts, which are the result of compromises between Member States.

3. What is the usefulness of impact analysis of proposed legislation?

Impact analysis of proposed legislation is necessary in order to determine the effects of proposed legislation. The following example illustrates the consequences of an absence of impact analysis.

Recently there was a crisis in the Netherlands about a European law problem which may have been prevented if more attention had been paid to impact analysis of proposed legislation. The question arose from the *Securitel* judgment of the Court of Justice of 30 April 1996[3] concerning the question whether a breach of the obligation to notify, according to Article 8 of Council Directive 83/189/EEC, as amended by Directive 94/10/EC[4], constitutes a procedural defect in the adoption of the technical regulations concerned and renders such technical regulations inapplicable so that they may not be enforced against individuals. Since the Netherlands failed to notify around 400 technical regulations, the question arose whether these technical regulations were no longer applicable. The Dutch Government and Parliament were in a state of confusion. A three member commission comprising Justice Minister Winnie Sorgdrager, the Minister for Economic Affairs, Hans Wijers and the State Secretary for Foreign Affairs, Minister Michiel Patijn, was formed to investigate the matter.

One of the recommendations of the Commission for the national level was that each governmental department should pay greater attention to Europe in their daily operation in order to implement the obligation to notify. Yet this was not the only problem. From the above-mentioned 400 technical regulations the European Commission selected only around 240 for which the obligation to notify was applicable.

It seems that the main problem is that the obligation to notify is not always clear and often leads to misinterpretation, mainly because Article 10 of the Directive has already been amended several times. As an example, Article 10 is not applicable in cases of binding Community decisions or international obligations. The analysis and interpretation of the 240 Dutch technical regulations requires much time and work, not only for the European Commission, but also for the Ministries of the 14 other Member States, which have to comment on these regulations and check that they are compatible with the principle of the free movement of goods in the Internal Market. The procedures underlying this Council Directive seem to be an example of poor quality legislation, because they are neither very efficient nor effective!

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[3] Judgment of 30 April 1996 in Case C-194/94, *CIA Security International SA v. Signalson SA and Securitel SPRL* [1996] ECR I-2201–2230. *See* notes by J. Fronia, 'Europäische Zeitschrift für Wirtschaftsrecht' in (1996) *EuZW*, at pp. 383–384; F. Berrod, *Revue du Marche Unique Europeen* (1996), at pp. 217–219; U. Everling, 'Zeitschrift für das gesamte Lebensmittelrecht' (1996), at pp. 449–453; P. J. Slot (1996) *CML Rev*, at pp. 1035–1050; S. Lecrenier, (1997) *Journal des Tribunaux, Droit européen*, at pp. 1–9; and R. Barents (July 1997) 7 *Nederlands tijdschrift voor Europees recht*, at pp. 153–157.

[4] Council Directive 83/189/EEC of 26 April 1983, OJ L 109/8, has been amended several times. The latest amendment is Council Directive 94/10/EC of the European Parliament and Council, OJ 1994 L 100/30.

According to the Commission Decision of 1987 instructing its services to draw up, after the tenth amendment of a legal Act, a Commission proposal (COM (96) 642 final) for codification or refonte, has been made on 13 December 1996.

The legal consequences of non-notification after the *Securitel* judgment may lead to further misunderstandings in the Netherlands about the applicability of Dutch laws and regulations.

One of the possibilities of improving the quality could be an *ex ante* estimation of the effects of a Commission proposal for an amendment of Council Directive 83/189/EEC. In other words, an impact analysis of proposed legislation of the *Securitel* Directive could have prohibited the resulting confusion in the Netherlands and the inefficiency of the system. The Commission proposal mentioned in note 4 to this article is another possibility to improve the quality of legislation.

4. *What are the current proposals/initiatives with respect to quality requirements for legislation?*

There are proposals with both a legal and an economic dimension. The quality of each regulation is of extraordinary importance in the context of European integration, which rests substantially on a shared framework of market regulations. But it is also important outside of Europe in the context of global integration, and there is wide scope for the continued and ever-growing information sharing and co-operation between the Member States, the institutions of Europe and global institutions such as the OECD.

Therefore there are proposals at the national, Community and the international levels. Examples of proposals with an economic, international and European dimension are the OECD Recommendations and the UNICE (Union of Industrial and Employers' Confederations of Europe) Regulatory Report 1995.

At the national level the Koopmans Report (1995)[5] was mentioned; at the European level the Sutherland Report (1992),[6] the Council Resolution of 8 June 1993 on the Quality of Drafting of Community Legislation,[7] the Inter-Institutional Agreement of 20 December 1994 on an Accelerated Working Method for Official Codification of Legislative Texts,[8] the Molitor Report (1995)[9] and the SLIM Initiative[10] were referred to; and at the international level reference was made to the OECD Reference Checklist for Regulatory Decision Making 1995.

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[5] The report by the Quality of EC Legislation Working Party was released in the spring of 1995. The Working Party was chaired by Dr. T. Koopmans, Advocate-General of the Supreme Court, The Hague. Report of the Working Party on the Quality of EC Legislation. Netherlands Parliamentary Papers II 1994/1995 23 900 VI No. 30.

[6] (SEC (92) 2044); *see also* the Commission Communication of 16 December 1993 on the follow-up to the Sutherland Report: legislative consolidation to enhance transparency of Community law in the areas of the Internal Market, COM (93) 361 final.

[7] OJ 17 June 1993 C 166/1.

[8] OJ 8 November 1995 C 293/2.

[9] Molitor Report 1995 (Legislative and Administrative Simplification), COM (95) 228.

[10] SLIM Initiative 1996 (Simplification of Legislation Regarding the Internal Market, COM (96) 204 and COM (96) 559).

5. How can legal protection be improved?

According to the case law of the European Court of Justice (for example the court decision in Joint Cases 212–217/80, *Amministrazione delle Finanze dello Stato v. Salumi*), Community legislation must be clear and precise for those who are subject to it. Good quality legislation, therefore is essential for legal protection.

6. By whom and in which way should the actual application of quality requirements be reviewed or controlled?

The review could be made by existing bodies or institutions, new institutions, or informal groups of experts.

7. What are the advantages and disadvantages of centralizing the responsibilities for the quality of legislation?

Centralization has the advantage of uniformity in the quality of legislation, whereas decentralization has the advantage that, according to the subsidiarity principle, different traditions of the Member States may be taken into account.

8. Which requirements may be imposed on the contents of general guidelines?

The most frequently mentioned requirements for the 'model' legislative text were that it should be clear, consistent, comprehensible, accessible, transparent, accurate, effective and enforceable.

9. How does the complexity of the decision-making procedures affect the quality of legislation?

There are too many decision-making procedures which are so complicated that even experts in European law find them difficult to understand. In order to improve the quality of legislative drafting, it would be advisable to take measures for the simplification of the co-decision procedures, the codification of legislation and the revision, tidying and updating of the texts. A start has already been made by the proposals of the Treaty of Amsterdam to simplify EC legal texts, as is discussed below.

10. What are the criteria for choosing between a directive and a regulation?

The difference between directives and regulations is becoming less and less clear in a number of ways. According to the wording of Article 189 EC, directives are intended to determine the result that is to be achieved and leave the choice of the form and method by which it is to be achieved to each Member State. Regulations, on the other hand, have general application, are binding in their entirety and are directly applicable in all Member States.

However, directives often contain very detailed rules. Therefore, in practice, the freedom to choose the form and method may be greatly limited by the detailed nature of the directive. This frequently entails inefficiency. Problems of compatibility arise where the rules and concepts used in the European rules are also found in a different (national) context. This can cause misunderstandings and possible misinterpretation.

The answers to these questions are *in extenso* to be found in the reports and proceedings of the Conference[11] and in the main Conference findings which were presented by the Dutch State Secretary for Foreign Affairs, M.M. Patijn, as a follow-up of the Conference, to the attention of the Internal Market Council and Inter-Governmental Conference (IGC). They are summarized below.[12]

III. The main Conference findings

In order to improve the overall quality of legislation it is important not only to simplify existing legislation, but also to provide a better foundation for new legislation. The assessment of proposed legislation should be carried out at the earliest possible stage of the legislative process.

Concern for legislative quality requires an ongoing policy, both at the national and at the EU level. One of the ways this can be achieved is by giving specific attention to the quality of the text of the EU Treaty and the secondary legislation which has been, and which will be, adopted under it.

National and Community initiatives should be co-ordinated. Because Member States carry a major share of the responsibility for high quality legislation, one of the suggestions has been to appoint legal experts to the delegations sent to the Council Meetings. The creation of legislative units in the various Directorate Generals of the European Commission, where legislation is drafted, was also proposed. Furthermore, there were suggestions for an external assessment of the quality of legislation, to be carried out alongside the decision-making process by a small number of highly qualified and independent legislative experts.

However, the quality of a piece of legislation is not merely determined by its wording but also by an assessment of its likely effects in combination with an economic analysis. Since high quality legislation is vital in exploiting the opportunities afforded by the Internal Market, the EU institutions should continue in their efforts to ensure that activities aimed at simplifying laws and creating a more efficient Internal Market (such as SLIM and the elaboration of the Monti Report) are integrated into a structural framework with implementation in mind.

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[11] *See supra* note 2.

[12] The main Conference findings were presented by the Dutch State Secretary for Foreign Affairs M.M. Patijn for the attention of the Internal Market Council and the IGC, in an Annex to a letter of 2 May 1997: 'The conference produced some interesting findings on the three topics mentioned above. These are enclosed in a short resumé. The full proceedings of the conference will be made available later this year.'

Efforts to simplify legislation lead to better results, namely efficiency, if a link is established between the quality of legislation and economic policy. Institutions which pursue a more customer-based approach find that their information-gathering exercises are more efficient and effective for all parties concerned. Reduction of administrative costs generates more support from the business sector for a policy of regulatory reform and encourages compliance.

In addition to technical law-making guidelines, administrative procedures and rules to ensure that the (side) effects of proposed legislation are sufficiently taken into consideration, are also important.

The results of the (economic) assessment of proposed legislation and of subsequent consultations, as well as the opinions concerning the (textual) quality of legislation, should generally be published.

IV. Relevant articles, protocols and declarations of the Treaty of Amsterdam

This short resumé of suggestions and conclusions was discussed in the Internal Market Council and during the IGC in preparation for the European Council of Amsterdam (16–17 June 1997) where the representatives of the governments of the Member States concluded the Treaty of Amsterdam.[13] The Treaty recalls earlier

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[13] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (97/C 340/01), OJ 10 November 1997 C 340, p. 1 et seq., in particular:

proposals for improving the quality of Community legislation. These proposals highlight the most important factors to be considered. These are subsidiarity, proportionality, effectivity, enforcement, quality of drafting, accessibility, accelerated consolidation and codification, establishment of common guidelines, preference for directives, and simplification.

Most of the Conference findings and suggestions were repeated generally in the documents of the Amsterdam Treaty, as we will see in the following Articles and texts.[14]

Part Two – Simplification

Article 6
The Treaty establishing the European Community, including the annexes and protocols thereto, shall be amended in accordance with the provisions of this Article for the purpose of deleting lapsed provisions of the Treaty and adapting in consequence the text of certain of its provisions. [...]

Part Three – General and Final Provisions

Article 12
1. The articles, titles and sections of the Treaty on European Union and of the Treaty establishing the European Community, as amended by the provisions of this Treaty, shall be renumbered in accordance with the tables of equivalences set out in the Annex to this Treaty, which shall form an integral part thereof. [...]

Protocol on the Application of the Principles of Subsidiarity and Proportionality

Article 4
For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators. [...]

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cont.

	51st Declaration on Article 10 of the Treaty of Amsterdam	p. 142
	DECLARATIONS OF WHICH THE CONFERENCE TOOK NOTE	
	Consolidated version of the Treaty on European Union	p. 145
	Consolidated version of the Treaty establishing the European Community	p. 173
[14]	PART TWO, Article 6	p. 58
	PART THREE, Article 12.1	p. 78
	TABLES OF EQUIVALENCES	p. 85
	PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY	pp. 105–106
	DECLARATIONS ADOPTED BY THE CONFERENCE	
	39th Declaration on the quality of the drafting of Community Legislation	p. 139
	42nd Declaration on the consolidation of the Treaties	p. 140

Article 6
The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods.

Declaration on the Quality of Drafting of Community Legislation

The Conference notes that the quality of the drafting of Community legislation is crucial if it is to be properly implemented by the competent national authorities and better understood both by the public and in business circles. It recalls the conclusions on this subject reached by the Presidency of the European Council in Edinburgh on 11 and 12 December 1992, as well as the Council Resolution on the quality of drafting of Community legislation adopted on 8 June 1993.

The Conference considers that the three institutions involved in the procedure for adopting Community legislation, the European Parliament, the Council and the Commission, should lay down guidelines on the quality of drafting of the said legislation. It also stresses that Community legislation should be made more accessible and welcomes in this regard the adoption and first implementation of an accelerated working method for official codification of legislative texts, established by the Interinstitutional Agreement of 20 December 1994.

Therefore, the Conference declares that the European Parliament, the Council and the Commission ought to:

- establish by common accord guidelines for improving the quality of the drafting of Community legislation and follow those guidelines when considering proposals for Community legislation or draft legislation, taking the organizational measures they deem necessary to ensure that these guidelines are properly applied;
- make their best efforts to accelerate the codification of legislative texts.

Declaration on the Consolidation of the Treaties

The High Contracting Parties agreed that the technical work begun during the course of this Inter-Governmental Conference shall continue as speedily as possible with the aim to draft a consolidation of all relevant Treaties, including the Treaty on European Union.

They agreed that the final results of this technical work, which shall be made public for illustrative purposes under the responsibility of the Secretary-General of the Council, shall have no legal value.

The text of the Treaty on European Union of 1991 was already very complicated. We regret to conclude that the text of the European Union Treaty after the Amsterdam amendment is still inaccesible and difficult to consult because of the insertion of many new Protocols, Declarations and Articles. This pertains not only to the general public but also for the administrators themselves.

The legal structure of the 1991 Treaty text comprised one Union resting on three pillars, the first of which is subdivided into three Communities: the EC; Euratom; and the ECSC. The Communities are legal persons, but the Union itself does not share this status, a fact which leads to considerable confusion. Unfortunately this situation has not been further improved by the proposed Amsterdam amendment.

The text of the 1991 Treaty, subjected to continual amendment, was a veritable hotchpotch. A number of articles were and are out of date. Articles have sometimes been given numbers, at other times letters, and in some cases, a combination of numbers and letters.

We appreciate, therefore, the proposals of the Amsterdam draft to simplify, consolidate and renumber the Treaty text. A start has been made on the simplification of the legislative process, by virtually abolishing the co-operation procedure first introduced by the Single European Act, except in the few cases which concern the area of Economic and Monetary Union. A further step towards simplification has been taken by limiting assent to a few special cases. In consequence, the number of decision-making procedures has been diminished. The main reform of simplification is the abolition of the so-called 'third reading' in the co-decision procedure.

In order to improve the quality of the Treaty text and the secondary legislation, however, all the above-mentioned Articles, Protocols and Declarations should be implemented. It is appreciated that the technical work of consolidating the draft Treaty text has continued as speedily as possible and that the renumbering is ready (see consolidated versions of the Treaties as mentioned in note 13 to this article).

The Treaty of Amsterdam is now being submitted according to Article N of the EU Treaty, together with the text of the consolidated versions, to the European Parliament and to the 15 national parliaments. This process will take between one and two years. The advantage of submitting the consolidated versions to the national parliaments is that they are able to study the consolidated texts immediately, and give an opinion on these texts, which have, according to the Declaration on the consolidation, no legal value, but which shall be made public for illustrative purposes. If the national parliaments agree on the consolidated and renumbered text, it will facilitate the political debate in the second stage of the ratification by the national parliaments, where the text may then receive the necessary legal force.

In this way, the quality of the Treaty text will be improved. However, some questions remain concerning the quality of the text of the consolidated version, namely, the usefulness of Article 12 of the Treaty of Amsterdam (where the renumbered text has legal value) in relation to the Declaration on the consolidation of the Treaties (where the renumbered text has no legal value). The purpose of the consolidated version is questionable, as exemplified in Article 52 (ex Article R) of the

Treaty which provides that the Treaty shall enter into force on 1 January 1993, whereas Article 14 of the Amsterdam Treaty declares that the Treaty shall enter into force on the final day of the second month following that in which the instrument of ratification is deposited by the last signatory state, which will be in 1999.

In the short run, renumbering gives a lot of problems for legal practice, research, data bases, etc. In the long run, however, the Treaty text, especially the consolidated version of the Treaty establishing the European Community, will be more accessible and easier to understand for new students and the new numbers will very soon become familiar.

B. Other Proposals, Conclusions and Initiatives at Community Level

The following proposals, conclusions and initiatives concerning the improvement of the quality of Community legislation have been put forward since 1992.[15]

The Sutherland Report,[16] requested by the Commission, concluded that every new proposal for Community action should be assessed on the basis of five criteria (the need for action, the choice of the most effective form of action, the proportionality of the measure, consistency with existing measures, and wider consultation of the circles concerned during the preparatory stage), and recommended that existing legislation be systematically consolidated.

The Edinburgh European Council adopted an overall approach to the application of the subsidiarity principle and Article 3b of the EC Treaty. It asked for new Community legislation to be clearer and simpler and for guidelines to be adopted for improving the quality of drafting of Community legislation.[17]

The official codification of Community Acts should make existing legislation more accessible. As a follow-up to the conclusions of Edinburgh, the Council adopted, in June 1993, a Resolution on the Quality of Drafting of Community Legislation.[18] In October 1993 the European Parliament, the Council and the Commission adopted an Inter-Institutional Agreement on Subsidiarity followed by an Inter-institutional Agreement, in December 1994, on an Accelerated Working Method for the Official Codification of Legislative Texts.[19]

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[15] They are, in general, based on contributions made by Jean-Claude Piris (Legal Adviser to the Council, Director-General of the Council Legal Service) and Christiaan Timmermans, (Deputy Director-General Legal Service European Commission) at the Conference of 24–25 April 1997 at The Hague (*see supra* note 2); *see also* Timmermans (1997) *CMLRev.*

[16] *See supra* note 6.

[17] *See* Presidency conclusions (1992) 12 *EC Bulletin* 9 et seq.

[18] *See supra* note 7. *See also* commentary by R. Wägenbaur (1993) *EuZW* 713 et seq., where the author is of the opinion that the Resolution of 8 June 1993 also has a bearing on the European Parliament and the Commission.

[19] *See supra* note 8.

In June 1995 the Molitor Group, a working party of experts set up by the Commission, submitted its report on legislative and administrative simplification,[20] which followed the Sutherland Report in recommending that work on the consolidation of legislation should be speeded up, that all new legislation should be tested against a set of criteria, and that existing legislation should be simplified.

Finally, in May 1996 the Commission launched the SLIM pilot project, designed to simplify certain areas of the Community's Internal Market legislation.[21]

The Commission's views on legislative policy are clearly summarized in a short memorandum adopted in early 1996 on general guidelines for legislative policy to be applied by the Commission's services.[22] These guidelines aim to ensure that legislative texts are of the proper quality and consistency, that the drafting process is open, planned and co-ordinated, and that the monitoring and evaluation procedures are more thorough. Reference is made to the various existing tools. To ensure that these guidelines are properly applied, five actions are suggested:

(a) consistency;
(b) rationalization and modernization of assessments of the impact of proposals;
(c) systematic monitoring of legislation as to its effectiveness and possible secondary effects;
(d) wider external consultations;
(e) the preparation of a legislative checklist which contains the following ten points:
    (i) justifications and objectives;
    (ii) legal basis;
    (iii) the text should be reader-friendly and user-friendly;
    (iv) subsidiarity and proportionality;
    (v) simplification;
    (vi) consistency with other Community policies;
    (vii) external consulations;
    (viii) general assessment;
    (ix) assessment of fraud risks;
    (x) financial statement (budgetary implications).

Instruments which directly relate to these objectives of quality control of Community rule making are Commission Guidelines for drafting and presentation, in addition to the following:

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[20] *See supra* note 9.

[21] COM (96) 204 final, of 8 May 1996. *See also* Council Resolution of 8 July 1996 on legislative and administrative simplification in the field of the Internal Market (OJ 1 August 1996 C 224/5) and the Commission's report on the SLIM pilot project, COM (96) 559 final, of 6 November 1996.

[22] SEC (95) 2255; *see also* Report of the Commission to the Dublin European Council 'Mieux légiferer' 1996 CSE (96).

- The *Internal Manual for Legislative Drafting* (*Règles de technique législative*) (1997, 3rd edn), published by the Commission's Legal Service.
- The *Manual of Operational Procedures* released by the Secretariat-General of the Commission. In setting out working methods and internal procedures this document also contains some rules on drafting and presentation of texts.
- The 1996 Legislative Checklist.
- Specific instructions communicated to the Commission services by the Secretary-General and the Director-General of the Legal Service, regarding particular issues, e.g., the legal basis for the conclusion of international agreements and the repeal of obsolete provisions.
- The Commission Decision of 1987 instructing its services to draw up, after the tenth amendment of a legal Act, a proposal for codification or refonte.

C. Proposals, Conclusions and Initiatives at the International and Business Level

The starting point will be the OECD Council Recommendation of 9 March 1995 on improving the quality of government regulation, including the OECD Reference Checklist for Regulatory Decision-Making.[23] The Checklist contains ten questions about regulatory decision making which can be applied at all levels of decision and policy making. These questions reflect principles of good decision making that are used in OECD countries to improve the effectiveness and efficiency of government regulation by upgrading the legal and factual basis for regulations, clarifying options, assisting officials in reaching better decisions, establishing more orderly and predictable decision processes, identifying existing regulations that are outdated or unnecessary, and making government action more transparent.

In June 1997 the OECD published its Report on Regulatory Reform. The recommendations of this report constitute a plan for action. In May 1997, Ministers welcomed this report and agreed to work towards the implementation of its recommendations in their countries. Ministers asked the OECD to conduct reviews of regulatory reform efforts in Member countries beginning in 1998, based in part on self-assessment, and noting that further work will be carried out in sectorial and policy areas.

It is worth noting the definitions of 'regulation' and 'regulatory reform'. Regulation refers to the instruments by which governments place requirements on enterprises, citizens, and government itself, including laws, orders, and other rules issued by all levels of government and by bodies to which governments have delegated regulatory powers. Regulatory reform aims at improving regulatory quality, whether it is the revision of a single regulation or of regulatory institutions or the improved processes for making regulations and managing reform.

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[23] Recommendation adopted on 9 March 1995.

The recommendations on regulatory reform are drawn from OECD country experiences, as elaborated in the sectorial and thematic background reports that form the basis of its report. The recommendations, which should be viewed as an integrated package, apply broadly across sectors and policy areas. Their implementation in countries will vary, depending on differences in public policies, policy trade-offs, reform priorities and needs, and legal and institutional systems.

The UNICE Report,[24] which also takes account of the Report on Administrative and Legislative Simplification by the Molitor Committee, explores how to lower the regulatory hurdles faced by European companies, particularly by small and medium-sized enterprises (SMEs). This would release the potential of business in the Union to compete, grow and provide employment. The report suggests improvements to the regulatory process which would lead to less regulation, which in turn would be more effective and efficient.

The report specifically recommends that:

(a) the European Union should make immediate and significant changes in the process by which future European legislation is developed by adopting a Statement of Regulatory Policy for the Union, by introducing the OECD Regulatory Checklist, and by appointing a Commissioner to manage the regulatory process;
(b) governments at all levels should draw up, publish and implement programmes of reform which will improve the quality of future regulations;
(c) governments should agree on the priorities for the reform of the existing regulatory framework.

In the long run, a change in attitudes will have the greatest effect on improving the regulatory process. This change can be promoted by modifying the way in which regulatory decisions are taken in the EU and Member States, through:

(a) the development and introduction of new and legally binding procedures for early and effective consultation with businesses and other affected parties;
(b) the adoption and introduction of regulatory checklists as a mechanism for improving the quality of future regulations;
(c) the development and introduction of new and independent methods of impact assessment which build upon traditional cost-benefit techniques;
(d) the establishment of programmes to develop, test and introduce effective alternatives to 'command and control' regulation; and
(e) the development and introduction of a system of 'post-project evaluation'.

The Member countries of the OECD and the governments of the Member States of the EU (the national level) play a vital role in the implementation of the reports and

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[24] UNICE Regulatory Report 1995: Releasing Europe's Potential Through Targeted Regulation, pp. 1–66.

recommendations on the European and international level. In the following section we will see how the proposals and initiatives are carried out at the national level.

D. Proposals, Initiatives and Conclusions at the National Level

This section will focus on four EU Member States: the Netherlands, Germany, France and the United Kingdom.

I. The Netherlands

There has been a growing awareness in the Netherlands that the quality of the drafting of legislation should be improved.[25] The problem has received special attention in three official documents. The first of these is the so-called Deetman Report, named after the Chairman of the Parliamentary Committee which drafted it, W.J. Deetman, who was also President of the Lower Chamber of Parliament at the time. The second of these documents is a policy memorandum published in March 1991 by the Ministry of Justice, entitled *Zicht op Wetgeving* ('Legislation in Perspective'). In this document, six sets of criteria are listed with the help of which the quality of legislation should be maintained. The third document is a study prepared by the Governmental Committee for the Assessment of Legislation Projects. The document discusses the various parameters and criteria to be used in making choices as to whether legislative intervention is justified and if so, what its form and substance should be.

The 1992 Dutch Instructions on legislation, or Directives on Legislative Quality, are an important instrument.[26] They are not only intended for civil servants charged with drafting legislation, but also for public servants engaged in policy making.

What are the main differences between the Dutch Instructions of 18 November 1992 and the Council Resolution of 8 June 1993? From the text of the Resolution it is obvious that the guidelines contained in it are not binding; they are only suggestions to the Legal Service of the Council. The Dutch Instructions, however, are binding on the Ministers, Under-Secretaries and the persons under their authority. Another important difference is the fact that the Council Resolution

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[25] *See* A.E. Kellermann, 'The Quality of Community Legislation Drafting', in *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers* (Kluwer, Dordrecht, 1994) at pp. 251–262. *See also* J.H. Kreveld, The Netherlands' Initiatives and Experiences on Quality of Legislation, Report for the Conference, at *supra* note 2.

[26] Decision by the Minister-President of 18 November 1992, No. 92M008337, published together with accompanying memorandum, 26 November 1992, 230 *Nederlandse Staatscourant*, p. 13. The full text of the instructions is published in C. Borman. (ed.), *Aanwijzingen Voor De Regelgeving* (Zwolle, 1993).

contains no prescriptions for the enforcement of Community legislation. The Instructions, however, contain a condition that a rule which cannot be enforced may not be drafted. In the Dutch Instructions special rules are given for the implementation of Community legislation, whereas in the Council Resolution no instructions are given for the implementation of Community legislation in the national legal orders.

The Council Resolution provides only one page consisting of ten guidelines for the quality of Community legislation drafting, whereas the Dutch Instructions, 346 of them, cover 112 pages. Even though the Dutch Instructions are more extensive, the same criteria are included in the Council Resolution.

The European level of legislation has been the target of special attention and political initiative in the Netherlands. A Working Party was established in 1995 within the framework of the Legislative Projects Review Committee to make recommendations for improving the quality of EC legislation. The Working Party was chaired by T. Koopmans and most of its members were senior civil servants who are regularly involved with the establishment and implementation of EC legislation. It operated under the *aegis* of the civil service committee and the ministerial committee for market forces, deregulation and the quality of legislation.

The Koopmans Working Party addressed possible general measures to improve legislation and focused, in particular, on judicial quality.[27] The objective was to suggest ways of improving the quality of Community and national legislation with respect to better legal protection, decision making and implementation; taking away and preventing unnecessary restrictions; and introducing straightforward legislation in the Internal Market. Based on the Koopmans Working Party, the Dutch Government has presented a proposal to the IGC to promote the quality of legislation. The Working Party had already proposed in 1995 a draft set of general guidelines for the quality of European legislation, which should be binding on all European institutions. In order to monitor the quality of EC legislation, the Working Party felt that it be worthwhile instituting a permanent committee, consisting of a small number of independent legal experts, to review EC legislation at the earliest possible stage of the drafting process, referring among other things to the guidelines formulated for this purpose, and to set out the results of this assessment in a public report.

Further to the Koopmans' Report, a research project was carried out in 1996 by the TMC Asser Institute, on behalf of the Ministry of Justice of the Netherlands.[28] The intention of this project was to find out whether any new ideas were submitted on behalf of the Member States for the improvement of the quality of European legislation, and whether the suggestions of the Koopmans Working Party would be supported. Many examples, national experiences and recent initiatives on the improvement of the quality of legislation in the EU and in the Member States were

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[27] *See supra* note 5.
[28] *See supra* note 1.

discussed. Experts from the European institutions and the Member States presented their national experiences and made suggestions for changes on the following items:

(a) consolidation, co-ordination and codification;
(b) transparency, accessibility and publication;
(c) national and European institutions for reviewing the quality of legislation;
(d) national versus European guidelines;
(e) enforcement and effectivity;
(f) fraud prevention;
(g) deregulation and simplification versus administrative costs;
(h) expected costs and benefits;
(i) implementation of EC legislation.

It appears that the Member States and the EC institutions are interested in the problems discussed in the Koopmans Report. The subject of the quality of legislation, however, does not form a particular point of special interest in most of the countries investigated. Specific parts of this subject do come up for discussion, such as accessibility of the legislation and ambiguity found in the texts, enforceability, the quality of drafting (codification, consolidation), transparency and the publication, suitability and efficiency (proportionality).

II. Germany

In Germany[29] initiatives for the improvement of the quality of legislation exist at the federal and state levels.

1. Federal level

Already in 1983 the objective was voiced by the Federal Government to simplify the law and to abolish over-regulation. An independent Commission for the Simplification of Law and Administration (*Unabhängige Kommission für Rechts- und Verwaltungsvereinfachung*) was established which has presented expert opinions on this topic.

In 1984, a so-called Blue Checklist (*Blaue Prüffragen*) was issued by the Federal Government. This list contains 48 specific and detailed questions that are grouped under ten main questions:

(a) Has anything to be done at all?
(b) Do alternatives exist?
(c) Is there a need for an action by the Federation?
(d) Is there a need for the enactment of a statute?
(e) Is there a need for an action now?

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[29] This summary is based on P.C. Müller-Graff, 'The German Experiences and Initiatives', forthcoming in *The Quality of European and National Legislation* (Kellermann *et al.* (eds.)).

(f) Is the scope of the proposed project necessary?
(g) Is it possible to put a time limit on the regulation?
(h) Is the regulation understandable and acceptable to citizens?
(i) Is the regulation practicable?
(j) Can costs and benefits be considered to be in an adequate relation?

It should be noted that the so-called Blue Checklist issued by the Ministries of Home Affairs and Justice also contains ten guidelines. Most of the points are similar or the same as the ten guidelines in the OECD Checklist.

In the wake of the debate on deregulation a temporary commission on deregulation was established. The final report, 'Marktöffnung und Wettbewerb', was presented in 1991. It contains a long list of statutes that are considered to constitute unnecessary restrictions of economic freedom and prosperity in seven areas.

In 1989 the Federal Government tried again in a new decision to strengthen a policy to improve legislation in general. The programme that binds the federal ministerial departments not only provides for the reduction, structuring, order and examination of administrative regulations, it also contains measures for the training of staff and the edition of a handbook of all relevant regulation, decisions and recommendations for the preparation of legal rules, as well as recommendations for a uniform structuring of drafts.

In order to enforce this policy a permanent group of experts was established by the Federal Government called the 'Lean State' or 'Slim State' (*Schlanker Staat*), whose goal is to develop concepts and initiatives to slim down state activities in general.

2. *State level*

Bavaria already created binding guidelines in 1984, in particular for the organization of introducing a strict and detailed binary yes/no checklist. It established a special institution for checking drafts (*Normprüfungsausschuss*).

In Baden-Württemberg the state ensures that the ongoing, federally financed work on guidelines for a cost compliance assessment for legal rules (*Gesetzesfolgen-abschätzung*) is continued.

III. France

In France[30] the lack of clarity as regards Community texts has been highlighted by the literature as well as by the *Conseil d'Etat* and the *Assemblée Nationale* (Parliament). The terminology used thereby forms a less extensive problem than does the complexity

[30] *See* especially the 1992 Report 'Rapport Public, Republique Francaise, Journal Officiel, Circulaire du 2 Janvier 1993 relative aux règles d'élaboration, de signature et de publication des textes au Journal Officiel et a la mise en oeuvre de procédures particulières incombant au Premier ministre' (*Journal Officiel*; (lois et décrets) of 7 January 1993, Annex No. 5).

and coherence thereof. The *Conseil d'Etat* has requested that extra attention be given to the uniform interpretation of legal concepts from different legal systems. Furthermore, the *Délégation de l'Assemblée Nationale pour l'Union Européenne* has established that either the Commission is often too late in sending proposals, or the proposals are incomplete. Often the (draft) texts have not yet been translated and are hastily accepted so that the requisite deadlines are not thereby exceeded.

The national guidelines for legislation are laid down in a Circular of 2 January 1993 by the French Prime Minister. In these guidelines requirements are provided as regards the drafting, referencing, alteration, repeal and codification of legal texts. Moreover, regulations are given which apply to procedures before Parliament and the *Conseil d'Etat* as well as the judicial review by the Constitutional Council (the *Conseil Constitutionnel*). The *Conseil d'Etat* in Paris suggests that a legal body be set up at the European Commission and the Council, that is charged with monitoring the quality and coherence of Community legislative proposals.

As mentioned before, in France the effectiveness and suitability of European legislation are dealt with in the Report by the *Conseil d'Etat*. Article 88, section 4 of the French Constitution (1992) empowers the French Parliament to adopt resolutions concerning proposals for EC legislation.

The French Parliament, however, is trying to improve its role as regards the conversion and supervision of the application of Community law. Article 86, paragraph 6 of the Regulation of the *Assemblée Nationale* offers means by which to guarantee the 'Euro-conformity' of the legislative decisions which it takes. Finally, a Bill foresees an improvement in the implementation of Community legislation by means of the creation of a Parliamentary Office.

IV. United Kingdom

According to Edward Caldwell, the following arrangements have some bearing on the quality of primary and subordinate legislation in the United Kingdom:[31]

(a) professional legal drafters are employed by the government to draft primary legislation and important or complex subordinate legislation;
(b) there are separate drafting offices for the United Kingdom as a whole (including Scotland and Northern Ireland);
(c) government legislation is prepared within the privacy of the government machine, which tends to give those responsible for preparing it more room to explore solutions than might otherwise be the case;
(d) the Cabinet Committee is charged with giving final clearance to legislation before it is introduced;
(e) except in the case of emergency legislation, the parliamentary process is long and draft legislation is submitted to close scrutiny, both by the members of each House and by outside parties, a process which lasts many months;

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[31] *See* Caldwell's comments for the Conference, *supra* note 2.

(f) the Law Commission and the Scottish Law Commission make a steady stream of recommendations for substantive law reform in those areas of the law which are within their remit;
(g) Committees of both Houses of Parliament are charged with the duty of scrutinizing certain subordinate legislation and Community legislation.

In the United Kingdom attention is further given to the limitation placed upon the quantity of Community legislation by a review of the principle of subsidiarity. The principle is employed pragmatically as an instrument by which to improve efficiency. This problem is frequently debated in the House of Commons and in the House of Lords. Thereby, in the House of Lords the possibilities for providing criteria for issuing directives and regulations have been investigated. Moreover, complaints have been voiced in both Houses about the quantity and alleged poor quality of European legislation. As far as a system of enforcement is concerned, the House of Lords argues that this should be transparent, fair, speedy and deterrent.[32]

It may be of interest to note that in the United Kingdom, attention has also been paid to the cost aspect of legislation, where cost means the cost to users, i.e. businesses.[33] Furthermore, all legislative Bills must be checked, as regards the costs of application and enforcement, against the Guide to Compliance Costs Assessment. A striking feature is that there are special regulations for European legislation contained in Appendix 1 thereof. It should be noted that since 1986 the European Commission has employed a system of judicial review for legislative proposals similar to that which exists in the United Kingdom.

E. Some Conclusions

I. Political agenda

The quality of legislation, deregulation and the working of the Internal Market is on the political agenda in most of the Member States. This is a fortunate development because there are serious disadvantages caused by poor quality. It is more acute in the case of European legislation because instruments are breaking new, usually highly technical, ground and must be produced in several languages and follow a complicated decision-making process.

The Union requires that legislation, adopted at an appropriate level, which meets its objectives, is as simple as possible, accessible and fraud-proof, and offers the least

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[32] *See* House of Lords, Session 1993–1994, Select Committee on the European Communities, Enforcement of European Competition Rules. *See also* Steenbergen, 'The House of Lords and the Enforcement of Competition Law' (1996) 3 *Sociaal-Economische Wetgeving* 97 et seq.

[33] Department of Trade and Industry (ed.), *Checking the Cost to Business – A Guide to Compliance Cost Assessment*. This Guide has been distributed since 1985.

expensive solutions for individuals, companies and government departments. There is a correlation between the economic and the legal dimensions of quality of legislation.

It is important to raise the interest of the public opinion for quality of legislation because it is still considered as a concern only for lawyers. The relationship between democratic deficit and democracy as a criterion for the quality of legislation should be emphasized with respect to the inter-relationship between national and European matters.

II. Legal protection and national courts

According to the settled case law of the European Court of Justice and the Court of First Instance the point of departure is that legal certainty entails that Community legislation must be clear and predictable for those who are subject to it. Are there further victims of bad quality legislation? Yes, the national courts. Who is taking advantage of bad legislation? The lawyers, solicitors, barristers etc., because litigation is increasing as the texts are not clear and understandable.

National courts have to deal with many interpretation problems; they often lack proper information and references about the background and intended purpose. It appears to be inevitable that national courts will increasingly assume a greater role in interpreting Community legislation, which will have serious implications for the quality of legislation. It will be vital to have clear provisions, drafted in a way which can be understood in the national context. It will be necessary that the national court can understand the text in its own language and is not required to examine a dozen different versions.

III. Different legal traditions and cultures

Different legal traditions and cultures influence national guidelines and instructions relating to the quality of legislation: some countries have a broad scope and pay more attention to cost-benefit analysis, *fiche d'impact* and efficiency and effectiveness, whereas other countries focus more on legislative drafting techniques, whereas some Member States refer to both these aspects.

The concrete elaboration and approach relating to quality of legislation varies throughout the Community, although we found similar criteria and goals in all the Member States.

The Maastricht Treaty's Declaration No. 18 on estimated costs should be considered when considering cost and benefit analysis. We found similar criteria in the Council Resolution of 8 June 1993, the OECD Checklist as well as in the guidelines, checklists and instructions of several Member States.

Criteria requiring that legislation should be clear, simple, transparant and comprehensible, are also stated by the Court of Justice in Joint Cases 212–217/80.[34]

[34] *See supra* p. 10–11.

It is worthwhile to note that these criteria are clear as a bell and similar, although they are to be found in different legal traditions and cultures.

IV. Guidelines, checklists, and blue lists

The Commission, in particular, has adopted a very large number of measures, described in its annual 'Better Law-making' reports. All three institutions have adopted specific measures on drafting, such as manuals on legislative drafting and the Council Resolution on drafting. In some countries the guidelines possess a certain formal status, because in the preparation of new legislation certain external bodies (the Council of State, Law Council, *Normprüfungsausschuss*, etc.) take into account whether the guidelines are applied.

The common factor in the following guidelines comprised the key number of ten points:

(a) the Resolution of the Council of 8 June 1993;
(b) the Recommendation of the OECD on improving the quality of government regulation adopted on 9 March 1995, including the reference checklist for regulatory decision making;
(c) the Checklist of the Federal Government of 20 December 1989;
(d) the Dutch Policy Paper 'Legislation in Perspective' (1989); and
(e) the guidelines of the Commission for legislative policy (SEC (95) 2255).

It seems that the number ten has a magical attraction, perhaps inspired by the 'Ten Commandments'. We further discovered that there is an inter-relationship between the criteria and contents of the respective national, European, and international guidelines (Blue Checklist of Germany/ OECD, UNICE Report/ Molitor etc.).

To summarize, the guidelines contained in the Resolution are not binding, but are only suggestions to the Legal Service of the Council. The Dutch Instructions on Legislation however are binding on Ministers and Under-Secretaries and the persons under their authority. The Parliament and the Council of State in the Netherlands, are however, not bound by these instructions. The OECD Recommendation is also not binding, and is only an agreement between 29 governments of OECD Member States. Perhaps the adoption of the OECD Checklist by the national parliaments of the OECD Member States would improve the impact of these instructions. The recommendations of the UNICE Report 1995 to promote the change in attitudes through checklists, consultation and assessment will have, in the long run, the greatest effect in improving the regulatory process. Finally, the conclusions of the Koopmans Report are still relevant and of interest.

V. The role of national parliaments

The role of national parliaments varies; some Member States have scrutiny committees, whereas others have a mechanism through which proposals for new EC legislation are submitted to the national parliaments. This ensures that the democratic content of the EC legislation may be improved.

The Guidelines of OECD and Member States have not been adopted by the national Parliaments. As Parliaments are legislative bodies, it seems natural and desirable that these guidelines and instructions should pass through the Parliaments.

VI. Preparation and implementation of Community laws

Member States have different ways of implementing EC legislation, due to differences in legislative systems, procedures and techniques. We have noted that the Council in its Resolution did not provide criteria for the implementation of Community legislation in the national legal orders, whereas some national instructions contain detailed criteria for implementing Community legislation.

The consultation of national legislative experts during the legislative process at Community level can contribute to a better and more effective implementation of EC legislation at a later stage. This conclusion was already put forward in an Asser Colloquium held on 23 March 1972 in The Hague. This conclusion is still relevant and of interest. In short, improving the quality of Community legislation will have no effect so long as the corresponding national legislation is cumbersome and complicated.

VII. Review by independent authorities

The fundamental problem is still how to implement the common guidelines and ensure their effectiveness. One view is that an independent consultative body (i.e. a committee, etc.) comprised of national legal experts should be created. Other views prefer to make use of the structures of the institutions themselves and give them more responsibility.

At the national level, the Councils of State, Parliaments and special committees should review new legislative proposals in accordance with the respective guidelines. The existence of guidelines in the sense of a uniform cross-sectional checklist for legislative projects has proven to be an indispensable requirement for the quality control of legislation. Institutions at different levels are a key component in the quality control process. They should combine internal and external control, as well as *ex-ante* and *ex-post* control.

VIII. Training of lawyers

The training of lawyers in legislative drafting relating to the quality of legislation is considered very important. Quality control systems alone will do little to improve quality. It is the quality of those involved in the legislative process that plays a vital role.

There needs to be greater reliance within the Community system on lawyers with experience of the legislative process. In most Member States several courses on legislative quality, procedures and drafting have been established by the Ministries of Justice for the training of lawyers. For these courses the guidelines, directives and instructions on legislation and other checklists are very useful and should be included in study materials.

IX. Limiting the quantity of legislation is improving the quality

With the increasing quantity of legislation, both at Community and national levels, it will become increasingly difficult to assess the effect of new legislation and to translate and publish the texts in 11 languages.

Since 1993, the Commission has adopted measures to simplify existing legislation considerably, and in 1996 a new method involving all concerned was launched for the Single Market (SLIM).

Since the Community introduced the subsidiarity, proportionality and efficiency test for newly proposed legislation, the number of regulations have decreased, demonstrating that quantity is as much a problem as quality. Comprehensive restatement of existing law by frequent consolidation is an important objective.

X. Different procedures and constitutions in the Member States

The Member States have different ways of implementing EC legislation, because of differences in legislative systems, procedures and techniques. In some countries there are special guidelines for implementing EC legislation. The quality of EC legislation and the quality of national legislation depend to a large extent on each other. Therefore it is necessary to work on the quality of EC law and national law in mutual connection, and in doing so, the work must be co-ordinated with the international field.

Only by such 'joint ventures' between the law-making bodies of the 15 Member States and the three institutions of the EU (the European Parliament, the Council and the Commission) can better quality of legislation be achieved. It seems to be of great importance that the three European Institutions which are concerned with the coming into being of Community legislation should also be involved in the establishment of eventual European guidelines, which are clear, cohesive and comprehensible.

XI. The Treaty of Amsterdam contains proposals of great importance for improving the quality of Community legislation

The Treaty of Amsterdam[35] recalls earlier proposals for improving the quality of Community legislation. These proposals highlight the most important factors to be considered, namely: subsidiarity; proportionality; effectivity; enforcement; quality of drafting; accessibility; accelerated consolidation and codification; establishment of common guidelines; preference for directives; and simplification.

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[35] *See supra* note 13.