LAW SOCIETY OF ENGLAND AND WALES RESPONSE
Sub-Committee E (Law and Institutions): Inquiry into the Initiation of EU Legislation

Introduction

1. The Law Society of England and Wales ("the Society") welcomes the opportunity to contribute to the Sub-Committee E (Law and Institutions) inquiry on the initiation of EU legislation. The Society is the representative body of over 125,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and lobbies regulators and government in both the domestic and European arena.

2. The Society’s EU Committee previously undertook a “Better Law Making” campaign which examined some of the issues addressed in this inquiry. A number of the points set out here have also been raised in evidence previously submitted to the House of Lords Select Committee inquiry on the European Commission’s Annual Work Programme.

3. The Society is not in a position to respond to all the questions posed but will comment on the roles of the Institutions and certain other parties and will seek to highlight a number of key concerns relating to the initiation and development of legislation, particularly in the area of police and judicial cooperation in criminal matters. Where possible examples will be given to illustrate the points being made, including addition subjects over an above the three areas identified as being of special interest to the Committee.

European Commission

(a) Transparency

4. The Society agrees that the European Commission ("the Commission") operates to a great extent in an open and transparent way as regards development and initiation of legislation. This has been the result of a number of developments since the publication of the European Commission’s White Paper on European Governance in July 2001. It is not always possible, however, to pinpoint from where an idea originated. Despite the steps it has made towards transparency, this does not extend to the Commission disclosing with whom it has had contacts, other than through public consultation. The Society takes this opportunity to welcome and encourage the practice of the Commission in publishing the responses to its consultation exercises.

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2. These include the Commission’s Communication on better law-making, the adoption of minimum standards for consultation by the Commission, initiatives on simplification and impact assessment and initiatives by successive EU Presidencies such as the Six Presidency Better Regulation agenda. An interinstitutional agreement on better law-making between the Commission, European Parliament and Council of Ministers (the Council) was signed in 2003. Recent work on Better Regulation and simplification has also been welcome.
(b) Setting the agenda

5. The Commission’s Annual Work Programme is an effective tool for setting the agenda for the creation of legislative proposals as it clearly sets out the overarching strategic themes that will govern the Commission’s work - such as “prosperity; solidarity; security and freedom, and a stronger Europe in the world”. In addition it is clear that the political decisions taken by the European Council or the sector-specific Councils, such as the Justice and Home Affairs Council, do set the future legislative and political agenda and can determine priorities in terms of on-going legislation.

6. The Society considers that the Commission’s Work Programme does offer relevant information as to the key proposals that will be brought forward and the time-line foreseen. However it falls short of the effective instrument that it could be. Whilst it should stand as the overall strategy document for the work of the European Commission in particular, and the EU legislature collectively, by the time it is published many of the deadlines and indicative dates that are given are already out of date. This undermines its usefulness. Often, dates set by the Commission for specific proposals are only aspirational or indicative, but equally they are often overly ambitious and as a result are frequently not met.

7. Moreover, the Work Programme suffers from not being one single, coherent document. The information in these different documents is sometimes contradictory and it is not always clear which should be regarded as the definitive source. For example, some of the information contained in the “roadmap” is neither reproduced nor referred to in the indicative list of legislative and non-legislative proposals. It is often more effective to rely on sector specific action plans such as: the Financial Services Action Plan series, the Company Law Action Plan and the Hague Programme Action Plan in the area of freedom, security and justice.

8. Although recognising the need to balance adequate information with a manageable amount of information, we consider that there is insufficient detail about what is proposed so it is impossible for those potentially affected to judge the significance of any individual proposal or even what the proposal may be about. The Work Programme itself also gives no real indication of specific legislative priorities beyond broad political and policy statements. Again the information dealt with in sector-specific information has to supplement the Work Programme itself.

(c) Coherency in policy making and definition

9. The coherence of policies is sometimes an issue of concern but is also indicative of a possible lack of strategic overview of the Commission’s work. A current issue, collective redress (“class actions”), provides a good example. At least two Commission Directorates General are working on proposals – both DG Competition (DG COMP) and DG Health and Consumer Affairs (DG SANCO) are active in the matter. While the Society is supportive of both streams of work, that of DG COMP is, much further advanced (a White Paper was published in April 2008), compared to that of SANCO, which is conducting in-depth research. Commissioner Meglena Kuneva took office in 2007 when Bulgaria acceded to the EU, and it appeared that she gave a lot of political impetus and profile to the work of DG SANCO.

10. While the Society has not taken a position on the need for EU-wide and/or national class actions systems and what form they might take, it is nonetheless suggested that there could be greater consistency across the Commission / EU policy here. The basic policy objective is the better enforcement of Community law rights and access to justice. This objective might not be best served if, as appears to be the case, ideas are being developed in “policy silos”. One explanation for the present position could be to do with the stakeholder contacts and audiences the different Directorate Generals have. For example, DG SANCO will have greater contact with consumer affairs organisations and be sensitised to their issues. Indeed, the availability of collective redress could also be an issue of relevance in relation to other subject areas, for instance, employment law, environment law, securities law. It clearly seems to be an issue where joined –up thinking is needed.
(d) Fulfilling the remit

11. The Society also has concerns regarding the situation where the Commission is delayed in bringing forward legislation identified in the annual Work Programme or the equivalent sector specific action plan. This is particularly the case in the area of police and judicial cooperation where a number of proposals indicated in the Hague Programme Action Plan have not as yet been brought forward and it is not clear that they ever will be. For example, neither the Green Paper on handling of evidence, scheduled in the Hague Programme Action Plan for 2006, and the Green Paper on default (in absentia) judgments again scheduled in the Hague Programme for 2006, were presented in 2006 or indeed 2007. There was no public explanation for this and no obvious means by which to hold the Commission, or the Member States, to account for failing to follow the actions set out. However the Slovenian Presidency, in conjunction with a number of other Member States including the United Kingdom, brought forward a Member State initiative on in absentia judgments in January of this year.  

12. A key example of the failure to fulfil the remit of the Hague Programme Action Plan - the fault for which should be levelled at the Member States in the Council not the Commission - is in relation to procedural safeguards and the rights of the individual. The Hague Programme stated that: “the objective of the Hague programme is to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice “and: “the further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings”. Since then no legislation has been adopted that reflects this objective and the focus has been on police and prosecution authority cooperation and on legislation that has been introduced by Member State initiative outside of the Hague Programme. An example of which would be the Prüm Treaty, an initiative by seven Member States for common action for improving cooperation in combating terrorism and serious cross-border crime. This is now in the process of being incorporated into the European Union framework yet it has not been subject to impact assessment or stakeholder consultation and there has been limited democratic scrutiny.

The Council – the Member States

13. While the Commission generally has the right of initiative under the EC Treaty it would, we believe, be naïve to imagine that they did not take into the account the known or anticipated views of the Member States when formulating policies and proposals for legislation. Many opportunities exist for the Member States to make known their views, formally or informally, in general or in precise terms, collectively or individually. This said, there have been cases where on presentation by the Commission the response of the Council (or a sufficient number of Member States) has been radically different.

14. Take, for example, the Framework Decision on certain procedural rights in criminal proceedings, where the original Commission outline and the subsequent proposal were substantially different in scope and ambition in order to take into account the Member States’ views. As mentioned above, still no measure has been adopted. On the other hand it could be argued that the Commission should take more heed of the likely outcome in the Council before producing a piece of legislation. The “Rome III” proposal, the draft Regulation on jurisdiction and applicable law in matrimonial matters is a clear example of a piece of legislation that inevitably would face political and technical difficulties. In an area of unanimity voting, significant legal and cultural difficulties and one Member State (Malta) having no domestic divorce regime at all the outlook for this proposal was gloomy at best.

15. We comment in more detail below on the key area within freedom, security and justice, namely the Third Pillar, where the Member States have the right of initiative.

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The European Parliament

16. As regards the European Parliament it is clear that its role has been significantly enhanced due to the expansion of co-decision in a number of areas - civil judicial cooperation under the Treaty of Nice for example - and due to take place following the entry into force of the Treaty of Lisbon. The Commission and the Council have a greater awareness and sensitivity to the role of the Parliament in terms of initiating legislation and the legislative process as a whole. However, what is not certain is the Parliament’s influence when it takes an own initiative report to call on the Commission and Council to take action. For example, the European Parliament resolution on cross-border limitation periods, the Wallis report that contained a draft legislative proposals.\(^7\) It is not clear what action the Commission or Council since then. The European Private Company Statute, mentioned above, however, was subject to calls for legislation from the European Parliament and lobbying from business, including threats of litigations from certain MEPs, should the Commission decide not to take any action. This undoubtedly contributed to the priority given to this proposal.

17. Equally when the European Parliament responds to pre-legislative consultations, such as a Commission Green or White Paper, through an own-initiative resolution, this is of influence in shaping the future ambitions of the Commission. Such initiatives are often indicative of what legislative proposals Parliament could or could not accept, should they be proposed.

18. The Society considers that the likely reactions of the European Parliament are also a significant factor in triggering work or determining the scope and extent of proposed EU legislation during the development of proposals. There is clearly an awareness that there is a higher level of scrutiny and nervousness about having to withdraw and totally revise legislation because of failure to consider it properly in advance.

19. In the company law field for instance, pressure from the European Parliament seems to have led the Commission to announce that it would bring forward a proposal for a European Private Company Statute, while the public consultation on the desirability of such a measure had not ended. Similarly the Commission had been working to produce a proposal on the transfer of a company’s registered seat from one Member State to another. This was felt to be a useful initiative but the Commission has now decided not to bring it forward. It would appear that the measure took account of the likely outcome of negotiations in the European Parliament and Council. It was concluded that it was likely that the measure would be diluted to such an extent that it was not worth bringing forward a proposal at all.

The European Court of Justice

20. As regards the European Court of Justice the Society considers that judgments of the Court do have an impact in terms of the initiation of legislation, particularly as regards the proper legal basis and the division of competence between the first and third pillar. The prime example here would be case C-176/03 European Commission v Council of the European Union\(^8\) where the Framework Decision on 2003/80/JHA on the protection of the environment through criminal law was annulled as the provisions of the Framework Decision encroached on the powers conferred by the EC Treaty in relation to first pillar environmental law policy. The Commission then followed up with a Communication which highlighted a number of existing legislative instruments and outstanding proposals that it would review in light of the Court’s decision.

21. The European Court judgments clearly also play a role in the making of legislation. Take for example the Alcatel\(^9\) case (C-81/98) which was a case on the interpretation of Directive 89/665/EEC relating to public procurement and review procedures and the revised Directive amending Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

22. The Court’s judgments also play a role in the creation of soft law instruments such as Commission communications and guidelines, examples of which can be found in the Competition, Procurement and State Aid field. In the Procurement area see the new IPPP Notice on procurement law which is based primarily on the interpretation of the Stadt Halle\(^{10}\) case (C-26/03) and those that followed. In addition the "Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives " which is based on the Commission’s interpretation of ECJ judgments concerning the application of the free movement provisions of the Treaty in procurement not covered by the Directives.

23. Similarly ongoing litigation in the field of Article 82 (abuse of dominant positions) has had a significant impact on the Commission’s work to produce guidelines on exclusionary abuses. The fact, however, that cases such as the judgment in the Microsoft\(^{11}\) case (T-201/04) were still pending did seem to cause the Commission to pause these initiatives.

24. The Commission has also ended up bringing forward initiatives where it might not otherwise have done so as a result of ECJ case law. Although there is very limited EC Treaty competence to adopt EC legislation in the field of taxation, and competence lies primarily with the Member States, national tax rules must comply with the general principles of Community law and the rules on freedom of movement. A series of ECJ case law has condemned national tax measures, such as the Marks & Spencers\(^{12}\) case (-309/06) and as a result the Commission published a series of communication in 2006, trying to clarify these judgments as well as encourage greater coordination between Member States of their tax systems. Ironically, in certain circumstances, the Commission may find its hands tied, where the Court has been able to apply general principles to issues not falling within the Treaty’s competence.

25. It could also be argued that a line of cases, including Crehan\(^{13}\) (C-453/99), has given impetus and direction to the Commission’s work on private enforcement in relation to antitrust breaches. While the ECJ already had established case law on the direct effect of Community law and the entitlement to damages, Crehan was the first time that the ECJ had expressly noted the right to seek damages in civil actions for breaches of Articles 81 and 82. This ruling was given in 2001, the Commission commissioned research in 2003, which was completed in 2004, and the Green Paper was published in 2005\(^{14}\).

**Stakeholder input and external influence**

**(a) Stakeholders**

26. A wide variety of factors may influence the preparation, proposal, negotiation and ultimate content of EC legislation. Certainly it is the Society’s experience that legislation can be influenced in the drafting and preparatory stages. This is the stage at which views of interested parties such as non-governmental organisations, professional bodies and pressure groups can have an impact and can influence the shape of the proposal. In terms of the influence of the general public it appears that the Commission often relies on surveys such as the Euro barometer in expressing the opinion of the public at large.\(^{15}\)

27. In terms of consultation and the ability for external stakeholders to feed into the development of legislation in a particular field, the Society is positive about the Commission’s action in this area. The Commission is effective in seeking out ideas and expertise and systematically issues consultations during the preparatory stages of legislation. These are often followed up by public hearings or experts meeting which allow for further deliberation and input from stakeholders.

\(^{10}\) http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&numaff=c-26/03


\(^{15}\) http://ec.europa.eu/public_opinion/index_en.htm
28. In some cases, the stakeholders involved with certain policies or pieces of legislation might be from a limited group who are in regular contact. For instance, there are many competition law practitioners and industry lobbies in Brussels. Commission officials decide on legislation on policy, as well as enforce and apply it. This happens in few other areas of Community law, where Member States normally implement and enforce the law. It might be of interest to look in further detail at the interaction of stakeholders and officials in this field.

(b) Lobbyists

29. The Commission is currently putting in place a register for lobbyists, which would require them to abide by a code of conduct and disclose clients, the interests represented, and certain financial information.\(^\text{16}\) It would cover a range of bodies include public affairs consultancies, trade associations, NGOs and also lawyers. Discussions in the European Parliament, however, have seen support for the idea of a legislative “footprint”\(^\text{17}\). As such, the European Parliament’s legislative reports would list those who had lobbied in relation to the proposal at hand. Rather than, or as well as, imposing obligations on stakeholders who are outside the Commission, it should consider first the transparency of its own procedures and decision making. Improving the transparency of decision making is the purpose of the initiative and more rigorous reporting or disclosure of the lobbying that influences the Commission seems the most appropriate means of achieving this.

(c) Other actors

30. Often the international dimension plays an important role. In many fields, including the environment, transport, telecommunications, securities and competition law, there are forums where governments, regulators and policy makers meet to discuss common problems. In relation to antitrust in particular, the global nature of companies and certain anti-competitive behaviour necessitates effective cooperation. The European Competition Network, for instance, has played an important role in the adoption of similar leniency policies at EU and Member State level. The role of organisations such as the OECD and the International Competition Network should be also recognised in this context.

31. Finally, as regards national parliaments it is clear that under the Treaty of Lisbon national parliaments will have an enhanced role as regards proposals for legislation particularly from the perspective of subsidiarity. Although in terms of the Council deliberations there is mechanism of the parliamentary scrutiny reserve, to date however it is not clear whether national parliaments have had an impact in terms of the initiation of legislation.

Initiation of legislation under the Third Pillar - police and judicial cooperation in criminal matters

32. It is the Society’s view that proposals for Framework Decisions brought forward by Member States may undermine the overall coherence and consistency of approach in the area of police and judicial cooperation. For example, the Tampere Conclusions 1999 and the Mutual Recognition Programme of 2000 had already foreseen action in the area of conflict of jurisdictions and ne bis in idem. However during the Greek Presidency 2003 a proposal was brought forward by Greece specifically on the question of ne bis in idem or “double jeopardy”\(^\text{18}\). The draft framework decision was never adopted and the general consensus appeared to be that it would be better to wait for the Commission to take action in this area, despite the fact that a significant amount of negotiation had taken place in the Council, and the European Parliament had completed the First Reading process.

33. Experience would suggest that individual Member State proposals are often designed to address pressing domestic political issues rather than a collective European interest. For example, the Spanish Presidency in 2002 proposed a European network for the protection of public figures which consisted of the national police services and other services responsible for the protection of public figures\(^\text{19}\). A second Spanish proposal was for a Framework Decision on suppression by customs administrations of illicit

\(^{16}\) The European Transparency Initiative http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm


trafficking on the high seas\textsuperscript{20}. Neither objective had appeared in the Tampere Conclusion 1999 or the subsequent Mutual Recognition Programme of 2000. In addition the Belgian government proposed an initiative on combating the sexual exploitation of children and child pornography relating to the recognition and enforcement of prohibitions arising from convictions for sexual offences\textsuperscript{21}. Although this proposal did meet a Hague Programme objective it was driven by the domestic political considerations of the day. This latter text has not yet been adopted and negotiations have stalled.

34. Moreover, proposals that are presented during a Presidency “jump the queue”, suddenly becoming a legislative and political priority. The Presidency’s goal of adoption of the text within its six month term may cause other longer-term proposals to be put on hold or to be severely delayed. For example, the joint French and German initiative on recognition, supervision and execution of suspended sentences and alternative sanctions the so-called “probation proposal”\textsuperscript{22} immediately took precedence over other proposals on the table such as the European Supervision Order which was a Commission proposal\textsuperscript{23}.

35. Significantly, Member State proposals are not subject to any prior study or analysis or consultation process at European level and there is little room for external stakeholder participation. Explanatory memoranda are frequently short and impact assessment non-existent. By contrast, a Commission proposal would be normally subject to detailed preparatory work and inter-service consultation to allow for input from different Directorates General. Proposals are published with explanatory memoranda and impact statements. No such process relates to Member States’ initiatives.\textsuperscript{24} Moreover there is little control over the drafting of Member States’ texts, which on occasion may leave much to be desired.

36. The Society hopes that these comments offer some useful examples for the Committee’s consideration. Please do not hesitate to contact us for further information.

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\textsuperscript{20} \url{http://register.consilium.europa.eu/pdf/en/02/st05/05382en2.pdf}  
\textsuperscript{21} \url{http://register.consilium.europa.eu/pdf/en/04/st14/st14207.en04.pdf}  
\textsuperscript{22} \url{http://register.consilium.europa.eu/pdf/en/07/st05/st05325.en07.pdf}  
\textsuperscript{23} \url{http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0468en01.pdf}  
\textsuperscript{24} Although it should be noted that the recent proposal on \textit{in absentia} judgments stemming from the Slovenian Presidency and others, including the UK, has been put out to consultation by the UK Government.