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11. Reiterates that the traditional legislative instruments should continue to be used as a general rule in order to attain the objectives laid down in the Treaty; considers that co-regulation and self-regulation could usefully supplement or replace legislative measures where those methods make improvements of equivalent or broader scope than legislation can provide; stresses that any use of alternative regulatory arrangements should be in compliance with the Interinstitutional Agreement on better law-making; points out that the Commission has to lay down the conditions and limits which the parties must observe when employing such methods, and that these should in any event be used under Commission supervision and without prejudice to Parliament's right to object to their use;
12. Calls on the Commission to make every effort to ensure that the process being promoted at European level to simplify regulation and generally to improve its quality is not undermined at national level by internal rules or technical barriers; calls on the Commission to guide and monitor this process also at national level, for instance by acting as a centre for collecting and disseminating the best practices developed within the European Union and its Member States and, not least, responding to indications from stakeholders;
13. Stresses that regular and thorough impact assessments play a key role in the simplification process and that such assessments should be considered by the Council and Parliament when amendments are made to a proposal during the legislative process;
14. Instructs its President to forward this resolution to the Council and Commission, and to the governments and parliaments of the Member States.
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P6_TA(2007)0366**Use of 'soft law'****European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments (2007/2028(INI))***The European Parliament,*

- having regard to the EC Treaty, and in particular Articles 211, 230 and 249 thereof,
 - having regard to Rule 45 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Constitutional Affairs, the Committee on the Internal Market and Consumer Protection and the Committee on Culture and Education (A6-0259/2007),
- A. whereas the notion of soft law, based on common practice, is ambiguous and pernicious and should not be used in any documents of the Community institutions,
- B. whereas the distinction between *dura lex/mollis lex*, being conceptually aberrant, should not be accepted or recognised,
- C. whereas so-called soft law instruments, such as recommendations, Green and White Papers or Council conclusions, do not have any legal value or binding force,
- D. whereas 'soft law' does not provide full judicial protection,

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- E. whereas extensive recourse to 'soft law' instruments would signify a shift from the unique Community model to that of a traditional international organisation,
- F. whereas there is currently a dispute as to how to make the regulatory function of the European Union more efficient with regard to both 'soft law' and 'hard law',
- G. whereas in *Van Gend en Loos* the Court of Justice of the European Communities held that the Treaty 'is more than an agreement which merely creates mutual obligations between the Contracting States. ... [T]he Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. ... Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community' ⁽¹⁾,
- H. whereas, consequently, Community law may be distinguished from public international law by reason of the fact that it is binding, not only on States but on individuals, who derive legally enforceable rights from it, and involves a set of institutions, including the European Parliament, which is directly elected by Union citizens; whereas, moreover, the European legal order is based on democracy and the rule of law, as Article 6 of and the preamble to the EU Treaty make clear,
- I. whereas this means that the EU institutions may only act in accordance with the principle of legality, that is to say, where a legal basis confers competence and within the limits of their powers, and whereas there is a European Court to ensure that they do so,
- J. whereas where the Community has legislative competence, the proper way to act is through the adoption of legislation by the democratic institutions of the Union, Parliament and the Council, in so far as this still appears necessary having due regard to the principles of subsidiarity and proportionality; whereas it is only by means of the adoption of legislation through the institutional procedures laid down in the Treaty that legal certainty, the rule of law, justiciability and enforceability may be secured, and whereas this also entails respect for the institutional balance enshrined in the Treaty and allows for openness of decision-making,
- K. whereas, in general, where the Community has competence to legislate, this precludes the use of 'soft law' or '[r]ules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain — indirect — legal effects, and that are aimed at and may produce practical effects' ⁽²⁾, which have been used historically to alleviate a lack of formal law-making capacity and/or means of enforcement and as such are typical of public international law,
- L. whereas, where the Treaty expressly provides for them, soft law instruments are legitimate, provided that they are not used as a surrogate for legislation where the Community has legislative power and where Community-wide regulation still appears necessary having due regard to the principles of subsidiarity and proportionality, since this would also constitute a breach of the principle of conferred specific powers, and whereas this applies a fortiori to Commission communications purporting to interpret Community legislation; whereas preparatory instruments, such as Green and White Papers, also constitute a legitimate use of soft law, in common with notices and guidelines published by the Commission in order to explain how it applies competition and state-aid policy,
- M. whereas such instruments, which can be used as interpretative or preparatory tools for binding legislative acts, should neither be treated as legislation nor be given any norm-setting effectiveness,
- N. whereas such a situation would bring confusion and insecurity to a field in which clarity and legal certainty should prevail, in the interests of the Member States and of the citizens,

⁽¹⁾ Case 26/62 *Van Gend & Loos* [1963] ECR 1.

⁽²⁾ Linda Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where do they meet?', EJCL, Vol. 9, 1.1.2005.

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- O. whereas, as well as respecting the right of initiative of the Commission, Parliament also upholds its own right to invite the Commission to make a legislative proposal (Article 192 of the EC Treaty),
- P. whereas the open method of coordination can be of service in promoting the achievement of the internal market but it is regrettable that the involvement of Parliament and the Court of Justice therein is very weak; whereas, because of this democratic deficit in the so-called open method of coordination, it should not be misused to replace the Community's lack of legislative competence and in this way to impose *de facto* obligations on the Member States that are tantamount to legislation but arise outside the legislative procedures laid down in the Treaty,
- Q. whereas Article 211 of the EC Treaty provides that '[i]n order to ensure the proper functioning and development of the common market, the Commission shall formulate recommendations ... on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary', but, according to Article 249, fifth paragraph, recommendations have no binding force and, according to the Court, are 'measures which, even as regards persons to whom they are addressed, are not intended to produce binding effects'⁽¹⁾ and do not create rights upon which individuals may rely before a national court⁽²⁾, and whereas Article 230 of the EC Treaty precludes the annulment of recommendations, since they are not binding,
- R. whereas, none the less, the Court has held that such acts 'cannot ... be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions'⁽³⁾,
- S. whereas it is possible that the recommendations, if used without sufficient care, may result in certain acts of the Commission being *ultra vires*,
- T. whereas Article I-33 of the Treaty establishing a Constitution for Europe contains a similar provision to Article 211 of the EC Treaty, but adds that 'When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question',
- U. whereas in 2005 the Commission adopted a recommendation on the cross-border management of copyright for legitimate online music services on the basis of Article 211 of the EC Treaty, described as 'a soft-law instrument ... designed to give the market a chance to move in the right direction' and ostensibly designed to flesh out the existing directives on copyright in the information society⁽⁴⁾ and on rental right and lending right and on certain rights relating to copyright⁽⁵⁾, and whereas, since its main aim is to encourage multi-territorial licensing and recommend how it should be regulated, the Commission is putting particular policy options into effect by soft-law means,
- V. whereas the Commission has contemplated or seems to be considering acting by recommendation in other areas in which the Community has legislative competence, including the regulation of copyright levies and caps on auditors' liability,
- W. whereas, in addition, the European contract law project remains still in the nature of soft law,
- X. whereas, where the Community has legislative competence but there seems to be a lack of political will to introduce legislation, the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality under Article 5 of the EC Treaty, and may result in the Commission's acting *ultra vires*,

⁽¹⁾ Case C-322/88 *Grimaldi* [1989] ECR 4407, paragraph 16.

⁽²⁾ *Grimaldi*, paragraph 16.

⁽³⁾ *Grimaldi*, paragraph 18.

⁽⁴⁾ Directive 2001/29/EC (OJ L 167, 22.6.2001, p. 10).

⁽⁵⁾ Directive 2006/115/EC (OJ L 376, 27.12.2006, p. 28).

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- Y. whereas soft law also tends to create a public perception of a 'superbureaucracy' without democratic legitimacy, not just remote from citizens but actually hostile to them, and willing to reach accommodations with powerful lobbies in which the negotiations are neither transparent nor comprehensible to citizens, and whereas this may raise legitimate expectations on the part of third parties affected (e.g. consumers) who then have no way of defending them at law in the face of acts having adverse legal effects for them,
- Z. whereas the better-legislation agenda should not be subverted in order to allow the Community executive effectively to legislate by means of soft-law instruments, thereby potentially undermining the Community legal order, avoiding the involvement of the democratically-elected Parliament and legal review by the Court of Justice and depriving citizens of legal remedies,
- AA. whereas no procedure is laid down for consulting Parliament on the proposed use of soft-law instruments, such as recommendations and interpretative communications,
1. Considers that, in the context of the Community, soft law all too often constitutes an ambiguous and ineffective instrument which is liable to have a detrimental effect on Community legislation and institutional balance and should be used with caution, even where it is provided for in the Treaty;
2. Recalls that so-called soft law cannot be a substitute for legal acts and instruments, which are available to ensure the continuity of the legislative process, especially in the field of culture and education;
3. Stresses that each EU institution, including the European Council, must consider both legislative and non-legislative options when deciding, on a case-by-case basis, what action, if any, to take;
4. Considers the open method of coordination to be legally dubious, as it operates without sufficient parliamentary participation and judicial review; believes that it should therefore be employed only in exceptional cases and that it would be desirable to consider how Parliament might become involved in the procedure;
5. Deplores the use of soft law by the Commission where it is a surrogate for EU legislation that is still necessary per se, having due regard to the principles of subsidiarity and proportionality, or where it extrapolates the case-law of the Court of Justice into uncharted territory;
6. Urges the institutions to act by analogy with Article I-33 of the Constitutional Treaty by refraining from adopting soft-law instruments when draft legislative acts are under consideration; considers that, even under existing law, the requirement arises from the principle of the rule of law under Article 6 of the EU Treaty;
7. Urges the Commission to make a particular effort to guarantee transparency, visibility and public accountability in the process of adopting non-binding Community acts, as well as to increase the use of impact assessment in the decision-making process;
8. Calls on the Commission to give special consideration to the effect of soft law on consumers and their possible means of redress before proposing any measure involving soft-law instruments;
9. Is of the opinion, as regards Commission communications, that Green and White Papers do not give rise to any direct legal obligations; takes the view, however, that the adoption of consultation papers and political declarations of intent should not be seen as implying any legal obligation to enact the corresponding regulations;

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10. Is of the opinion that Commission interpretative communications serve the legitimate purpose of providing legal certainty but that their role should not extend beyond that point; considers that, when they serve to impose new obligations, interpretative communications constitute an inadmissible extension of law-making by soft law; maintains that, when a communication lays down detailed arrangements not directly provided for by the freedoms established under the Treaty, it is departing from its proper purpose and is thus null and void⁽¹⁾;

11. Is of the opinion that communications satisfying the criteria referred to above should consequently be issued only in those cases where Parliament and the Council, in other words the legislature, have instructed the Commission to draw up the necessary interpretative communications; considers that translating the Treaty into reality is the responsibility of the legislature and that its interpretation is the responsibility of the Court of Justice;

12. Is of the opinion that standardisation and codes of conduct are important elements of self-regulation; considers, however, that standardisation must not lead to overregulation and hence constitute an additional burden for small and medium-sized enterprises in particular; believes, therefore, that the legal bases concerned should incorporate built-in safeguards against overregulation;

13. Points out that, whereas it is legitimate for the Commission to make use of pre-legislative instruments, the pre-legislative process should not be abused nor unduly protracted; considers that, in areas such as the contract-law project, a point must come where the Commission decides whether or not to use its right of initiative and on what legal basis;

14. Emphasises that Parliament, as the only democratically elected Community institution, is not currently consulted about the use of so-called soft-law instruments, such as Commission recommendations, based on Article 211 of the EC Treaty, and interpretative communications and other documents of a similar nature;

15. Considers that interinstitutional agreements can produce legal effects only on relationships between EU institutions and that they therefore do not constitute soft law defined in terms of a legal effect in relation to third parties;

16. Calls on the Commission to develop, in cooperation with Parliament, a *modus operandi* that guarantees the participation of the democratically elected bodies including, possibly, by means of an interinstitutional agreement, and thus more effective monitoring of the need for the adoption of 'soft-law' instruments;

17. Calls on the Commission to discuss with Parliament how Parliament may be consulted before the Commission adopts soft-law instruments, in order to enable proposed soft-law measures to be scrutinised and to avoid any misuse of powers on the part of the executive; accordingly proposes opening talks on concluding an interinstitutional agreement on this subject; considers that such an agreement should in particular aim to resolve the contradiction that has arisen between the provisions of Articles 211, 249(5) and 230 of the EC Treaty and the case-law of the Court of Justice of the European Communities, when the Court requires the national courts to take due account in current legal disputes of recommendations which are *per se* non-binding under the Treaty;

18. Reiterates the importance of Parliament's participating, as the main representative of the interests of EU citizens, in all decision-making processes, in order to help reduce their current mistrust in European integration and values;

19. Stresses that the expression of soft law, as well as its invocation, should be avoided at all times in any official documents of the European institutions;

20. Instructs its President to forward this resolution to the Council and the Commission, and to the governments and parliaments of the Member States.

⁽¹⁾ Case C-57/95 *France v Commission* [1997] ECR I-1627, paragraphs 23 to 26.