European Economic and Social Committee

Section for the Single Market, Production and Consumption

Single Market Observatory

Letter No. 2762/2004 Brussels, 22 November 2004

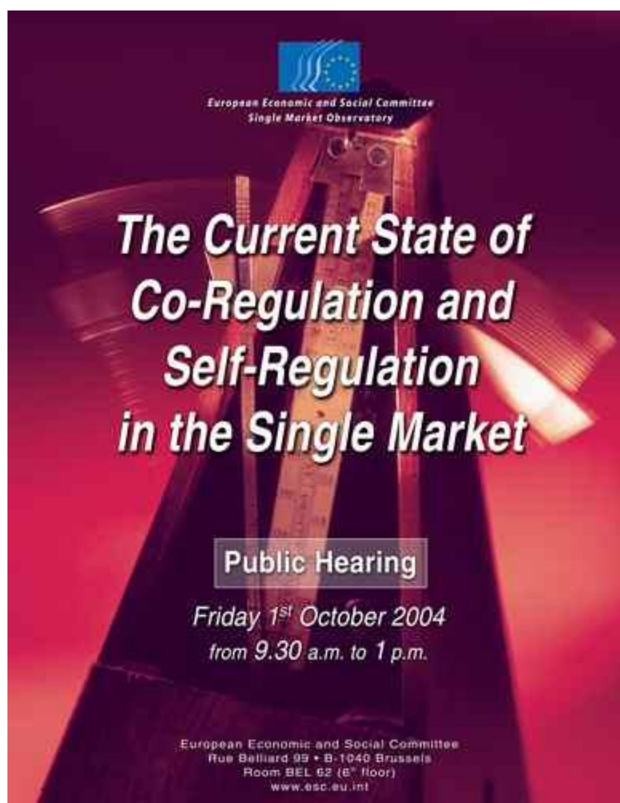
SUMMARY

OF

THE HEARING

on

The current state of co-regulation and self-regulation in the single market



Brief summary of the hearing of 1 October 2004

General remarks

The hearing was held on Friday 1 October 2004 at the Committee's premises; it was attended by some 110 delegates who essentially represented the umbrella organizations of civil society. The European Commission and European Parliament were also in attendance.

Course of the Hearing

Presentation by Panel 1

The inter-institutional agreement, Mr Mitek-Pedersen (European Commission)

Welcome address by Ms Eva Belabed, EESC (Group II, Employees), president of the study group on co-regulation and self-regulation

Ms Belabed depicted self-regulation as covering a wide variety of areas, in particular collective agreements and the social responsibility of businesses. She then discussed codes of conduct, notably those of the OCDE and of the directives covering *corporate governance*, the technical dimension of co-regulation and self-regulation with ISO certification as well as their worldwide scope through the UN.

She pointed out that one could not say that there were no disadvantages whatsoever to co-regulation and self-regulation for, whilst they may allow problems to be resolved more flexibly by making use of the skills of the parties in question, they could also appear to be exclusive; this raised the question of legitimacy, which was, ultimately, connected with the inter-institutional agreement presented during the hearing. This document made virtually no mention of social partners.

It would therefore be useful to ascertain whether self-regulation initiatives represented effective alternative solutions to regulation. Ms Belabed said that Austria had a code of conduct similar to that of *"corporate governance"*. For instance, six months after the launch of the scheme, it appeared that only one third of Austrian businesses had complied with the requirements they had imposed on themselves. Accordingly, she asked to what extent voluntary programmes were actually realistic.

From left to right: Mr L. Mitek-Pedersen (European Commission), Mr B. Vever (EESC member, President of the Single Market Observatory), Mr J.-P. Faure (EESC secretariat), Ms E. Belabed (EESC member, President of the study group on co-regulation and Self-regulation), Mr J. Pereira dos Santos (EESC secretariat)

Introduction by Mr Bruno Vever, President of the Single Market Observatory and rapporteur for the information report on the Current State of Co-regulation and Self-regulation in the Single Market.

Mr Vever told participants that their opinions would be taken into account in the information report currently being prepared, as would the questionnaires sent out with the invitations. He presented the work that would lead to the adoption of the report by the end of 2004 or the beginning of 2005. He referred to the inter-institutional agreement of 16 December 2003 as a source that specified the definition and role of co-regulation and self-regulation in the context of Community law.

In October 2000, the Committee adopted a code of conduct for improving the quality of Community regulations and promoting alternative methods of regulation. The Committee had undertaken to regularly monitor the situation by setting up the PRISM[1] database, which would keep track of good practice, particularly in the field of self-regulation; it would also garner information on economic groups, social partners and civil society. Mr Vever reminded everybody that the information report was based on PRISM.

Mr Vever stated that his report represented an overview of what was known about self-regulation. He mentioned the four core axes of the report, starting with a background history that set out eight main areas of interest:

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1 *"Progress Report on Initiatives in the Single Market"*, base accessible via le site Internet du CESE à l'adresse suivante: http://www.esc.eu.int/Omu_Smo/Prism/default.htm

- standardisation (also referred to as *"the new approach"*),
- essentially service professions,
- the social sector, including social dialogue between the social partners,
- trade services – particularly in their relations with consumers,
- financial services, particularly in the context of a European financial zone set up through the introduction of the euro,
- industry and consumers,
- the environment – an area that had seen many voluntary initiatives,
- all other areas that were not covered by these categories and that could be identified during the course of the present hearing.

Mr Vever confirmed that the Committee was fully aware of the developments in cross-industry agreements, in particular between the UNICE, UAPME, the CEP and the ETUC. However, he argued that there was still a dearth of information about European sectoral social agreements, and he invited the participants to make contributions in this respect.

Mr Vever discussed the conditions necessary for successful self-regulation without making too long a list and called on the participants to contribute to this debate. He outlined five criteria that were conducive to self-regulation, namely:

- compatibility between individual interests and the common good,
- transparency of rules and procedures,
- representativeness of actors,
- monitoring and follow-up, including, where applicable, the application of sanctions,
- clauses for re-examining and reviewing the implementation of self-regulation in the light of current needs.

He then discussed the prospects for self-regulation, both in terms of advantages and limits. Starting with its advantages, Mr Vever listed five positive aspects of self-regulation:

- helps remove obstacles,
- simplifies the rules by putting Single Market users in touch with one another, rather than with administrative and political go-betweens,
- speeds up the Single Market and makes it more flexible,
- frees up legislative circuits,
- engenders a sense of co-responsibility among economic players of civil society, in the belief that people are more apt to apply rules drawn up by themselves rather than imposed on them.

Mr Vever went on to discuss the limits of self-regulation by referring to the terms of their application and to possible sanctions. He pointed out that establishing voluntary rules without having any mechanisms guaranteeing their application could be rather risky. Moreover, self-regulation could contravene existing legal provisions. As society was to a large extent law-based, problems of

compatibility could arise, even in cases where self-regulation applied to less regulated areas. Mr Vever mentioned other restrictive factors such as the fact that certain socio-professional organizations (lobbyists) could not apply co-regulation and self-regulation measures.

Lastly, he discussed the aspirations of the groups concerned and discussed two principles:

- optimising opportunities, i.e.:
  - to create more room for freedom in the regulations, particularly by making provision for them through the framework directives, to identify – as in the case of the new approach – necessary requirements, whilst leaving the socio-economic interest groups the task of specifying the data,
  - to make the socio-professional initiatives better known, thus providing an overview of self-regulation and allowing people to find their place within this general context;

- to alleviate the restrictions of self-regulation i.e.:
  - publicise best practices in the field of self-regulation (disciplinary courts, self-regulation mechanisms and sanctions),
  - develop a dialogue between players in the field of self-regulation and the authorities.

Mr Vever reminded the meeting that it was not possible to have self-regulation without prior co-regulation, as the latter effectively linked self-regulation to regulation. Self-regulation would remain subject to monitoring by the European legislator, who would be authorized to assume control in cases where he deemed this to be necessary (in cases of excess, the creation of obstacles or in cases of poor application). He specified that a statute and a definition of co-regulation and self-regulation were available for the first time following the inter-institutional agreement of December 2003.

Presentation of the inter-institutional agreement on Better lawmaking by Mr Lars Mitek Pedersen, European Commission

Mr Mitek Pedersen stated that today's hearing was the first truly significant cross-sectoral event discussing the issue of co-regulation and self-regulation. The Commission was delighted that the Committee had prepared a report, which was a first, proposing a systematic and well-documented analysis of developments in the field of co-regulation and self-regulation within the EU.

During this hearing, Mr Mitek Pedersen argued that he wished to go further than simply taking a positive view of the agreement and suggested that it would be in the common interest to examine its grey areas as well as the complex aspects remaining after the adoption and entry into force of the text. In effect, the renegotiation of the inter-institutional agreement was feasible.

Mr Lars Mitek Pedersen, of the European Commission

He reminded the meeting of the action taken by the Commission in the areas of co-regulation and self-regulation. Although this type of *"soft law"* had existed for many years, the Commission had never really adopted a cross-sectoral or exhaustive approach to these two themes. For the Commission and the other institutions, therefore, this was a new situation, the roots of which were to be found in the White Book on European Governance, offering both a detailed view of the problems and issues facing the European Union, as well as an exhaustive list of the concrete action taken. It was precisely in order to eliminate the differences between Community legislative procedures and the reality (e.g. the Internet or electronic banking services) that it was proposed to deploy instruments that were not formally included in the Community catalogue and to more widely involve the players concerned.

Mr Mitek-Pedersen argued that the Commission had not put forward any detailed definition of co-regulation or self-regulation ahead of the Commission's discussions with other institutions. He explained that the very fact that it had been possible to reach agreement on this text represented a real development given that the Agreement proposed definitions that were the outcome of fierce negotiations, both at internal level within the Commission as well as with the parties involved.

Mr Mitek-Pedersen believed that it was not inconceivable for the other institutions to take the initiative to comply with the terms of the Agreement on Practices before it came into force, particularly with respect to transparency, monitoring and sanctions. Moreover, the inter-institutional agreement did not cover those forms of cooperation that had already been successfully applied, particularly in the area of social policy or based on Articles 138 and 139, or in the field of harmonization. Mr Mitek-Pedersen stated that the Agreement therefore clearly aimed to provide a framework for new initiatives pertaining to co-regulation and self-regulation. What is more, it focused almost exclusively on institutional matters and did not really discuss the functional aspects or disclose the position of the three institutions that had drafted the document. He declared that the Agreement allowed the Commission to establish how it could act with market players, at the same time specifying the monitoring mechanisms to be maintained by the Council and by Parliament. This was therefore a text that created assurances for transparency, monitoring and reporting procedures and which also

established sanctions, particularly in the area of co-regulation. Paragraph 20 of the inter-institutional agreement, which was very complex in nature, represented something of a last-minute compromise between the three institutions.

The aspects tackled by the inter-institutional agreement entitled *Better lawmaking,* such as simplification and impact studies, clearly demonstrated the interest shown in this issue by the Council, the Member States and the players involved, not to mention the institutions themselves. Accordingly, Mr Mitek-Pedersen believed the Agreement might be reviewed for reasons other than co-regulation and self-regulation, yet no request had yet been made in this respect. One should therefore expect the position of the new European Parliament and of the new Commission on this agreement to be that adopted at the end of 2003.

He argued that the inter-institutional agreement had not yet been implemented in respect of co-regulation and said that it was worth considering whether the established framework was not in fact too complex, insufficiently adapted or too demanding. As far as self-regulation was concerned, Mr Mitek-Pedersen believed that it was difficult for the Commission to apply the obligations stipulated by the Agreement, particularly the requirement to carry out regular reporting alongside evaluations of existing self-regulation practice. This difficulty was due to the fact that the Commission had to map out practices in the field of self-regulation for the entire EU whilst, at the same time, justifying why it was not adopting legislative initiatives. In this context, he argued that the European Economic and Social Committee could give the Commission some support and be a genuine source of inspiration.

Turning to *ex ante* and *ex post* co-regulation, Mr Mitek-Pedersen pointed out that whilst, on the one hand, the legislator identified objectives and called on operators to assist him in their realization, the Commission could, on the other hand, take into account existing self-regulation measures –voluntary agreements – in order to formalize and recognize them under Community legislation. However, as a certain number of examples had already shown, it was difficult to transform an existing agreement into Community legislation.

Mr Mitek-Pedersen concluded by reiterating that whilst the Agreement did contain items that still lacked stability, the Agreement was satisfactory and constituted a useful first step. It should be viewed as an enabling clause, though it remained to be seen what the addressees of this text would do with it. He reminded the meeting that they were all in a transitional period with a new European Parliament, new Commission and a series of EU presidencies that had targeted objectives jointly decided upon for the years ahead in order to ensure better lawmaking. The three institutions would continue to supervise the overall application of the agreement through the *High Level Technical Group* (Secretaries-general). The Commission also intended to continue improving its fact-finding and reporting mechanisms. It would also concentrate on impact studies, systematically planning to examine alternative instruments.

General discussion (1)

Ms Belabed reminded the meeting that the social partners had not been won over by the manner in which the debates had developed, debates that, for the main part, had involved the Commission, the Parliament and the Council. She noted, however, that the debate was not over yet, and that the views of the non-institutional parties involved could still be taken into account.

Response from Mr Tanberg, of the *European Direct Marketing Federation (FEDMA)*. Mr Tanberg highlighted the case of his organisation which had committed itself to a co-regulation programme as part of the negotiations with *Working Group Article 29* on the Directive on the Protection of Data of 1995, and which had, accordingly, drawn up a code of conduct. The Directive stipulated that this code of conduct should be applicable at European level. He noted that these negotiations had lasted seven years.

Response from Mr Portalier of ORGALIME. Mr Portalier stated that his umbrella engineering organisation was convinced of the usefulness of co-regulation, and had been involved in similar programmes for some 25 years. The key to the success of the "new approach" lay in co-responsibility, particularly in what was a highly complex and demanding society. He added that this assumed mutual confidence, particularly as regards the capacity of each player to respect the commitments undertaken, something that appeared to be difficult to guarantee at the present time. He felt that the impact study would provide an accurate picture of the actual stakes involved and argued that there was a lack of coordination between the Commission General directorates. He called for all institutions to give their political support to an impartial impact study whose findings would be acceptable for all the parties involved.

He quoted the example of the draft directive on the protection of workers exposed to optical fields which had been put forward by the Commission more than 12 years ago and which was still at the first reading stage at the Council. Unfortunately, no impact study had yet been realized and there was no information available regarding the number of accidents involved. However, he recalled that a certain form of self-regulation did exist thanks to the creation of international standards in this field.

Response from Mr Sapir of the European Trade Union Confederation (ETUC). Turning to the question of impact studies and knowledge of sectoral situations, Mr Sapir highlighted the monopoly held by businesses in the field of products and risks, particularly in the context of REACH. He called for an EU strategy which aimed to take stock of sectoral situations as well as striking a balance between a liberalized market and the protection of workers.

Mr Sapir, of the European Trade Union Confederation (ETUC)

Response from Ms Giovaninni, of ANEC. Ms Giovaninni specified that *"compliance with legislation"* should be *"presumed compliance with legislation"*. She regretted that the issue of application was often lacking in discussions on co-regulation and self-regulation.

Response of Mr Sagne of the Council of European Architects. Mr Sagne believed that the Committee's draft information report finally shed some light on the obscure zone covered by the *new approach*. Referring specifically to professions that were regulated, he asked Mr Mitek-Pedersen whether the high level working group mentioned earlier had intervened in matters of compliance and if it had carried out an *ex ante* evaluation of the impact on co-regulation and self-regulation of the actual implementation of the proposed Directives.

Response of Ms Berteletti Kemp of EUROCARE[2]. Ms Berteletti Kemp believed that the alcohol sector should not regulate itself, given that its products did not represent ordinary consumer goods and that their impact on public health was all too evident (according to the WTO, in Europe, one in four men and one in ten women consume alcohol at an level that is dangerous to their health).

2 Intitulé in extenso from this organisation: *Advocacy for the Prevention of Alcohol related Harm in Europe*.

Ms Berteletti Kemp, of EUROCARE (centre)

Response from Mr van Nuijs, *European Association of Distance Commerce*. Mr van Nuijs pointed out that in 1992 the sector that he represented became involved in a codification scheme through a convention. He felt that these types of initiatives were taken as much to guarantee a certain degree of legal security as to protect and cultivate a certain image. This was how self-regulation had developed in the Netherlands, for example, precisely because it protected businesses against possible legal proceedings, whilst at the same time reassuring consumers.

Answers given by Mr Mitek-Pedersen. Mr Mitek-Pedersen pointed out that the impact studies carried out by the Commission would take account of the alternative instruments for the implementation of its policies. This included soft-law options such as co-regulation and self-regulation. It could be that, following the results of an impact study, the Commission would decide not to legislate in favour of subsidiarity and added value. According to the principle of proportionality, the instrument should not, therefore, be too cumbersome.

Comment from Mr Vever. Mr Vever asked that co-regulation and self-regulation be considered in the context of both the European Union and in relation to other economies, notably the U.S. economy.

Answers given by Mr Mitek-Pedersen. Mr Mitek-Pedersen responded by saying that the Commission did not produce a comparative analysis for each Member State and that it concentrated on the Community dimension. He believed that, as far as competitiveness was concerned, it would indeed be useful to draw parallels with the EU's main competitor, the USA.

Presentation of Panel 2
Case Study: EASA[3], Mr Graham

Presentation by Mr Graham, President of the European Advertising Standards Alliance (EASA) and Director-General of the Advertising Standards Authority[4]. Mr Graham stated that the ASA, a British self-governing organisation in the advertising sector, had dealt with some 14,000 complaints in 2003. Of the 11,000 advertisements concerned, more than 1,000 had been changed or withdrawn.

Mr Graham, President of the *European Advertising Standards Alliance* (EASA) and Director-General of the British *Advertising Standards Authority* (ASA).

He pointed out that the EASA had been set up in 1992 to bring together self-governing advertising organizations from across Europe, but that it did not have the final say as far as alcohol abuse was concerned. He intended to show how the EASA had taken EU enlargement into account, as well as the growing importance of the Single Market. He felt that self-government functioned effectively.

Turning to the incentives that encourage a sector to commit itself to self-regulation, Mr Graham stated that the advertising sector was, by definition, happy to go down this path as it had a particular interest in ensuring that consumers had confidence in its message. Indeed, to be effective, advertising had to be credible and well-received. Self-regulation was therefore seen as being something of an investment. It allowed for a flexible approach and a certain independence from the legislative process and, by so doing, provided a direct link with rapidly developing contexts, particularly in the digital field, and with issues of society such as obesity or alcohol abuse where the legislator was not reacting quickly enough.

3 *European Advertising Standards Alliance – Alliance européenne pour l'éthique en publicité.*

4 *Advertising Standards Authority.*

The industry took the issue of social responsibility very seriously and was conscious of the different levels of sensitivity in individual Member States, and would not dream of placing itself under a centralizing "Diktat". The basic principles binding the private sector were based on the code of conduct of the international Chamber of Commerce *"(...) an advert should be legal, decent, honest and truthful, be conscious of its social responsibility and respect the rules of loyal competition."* This system was financed by the private sector itself.

The importance of sanctions needed no explaining and it was important to eliminate bad practices in advertising. Accordingly, the principles of *"pre-clearance"* and *"copy advice"*, i.e. examining adverts before they were issued, played a leading role in this process. Mr Graham felt that the EASA's approach could greatly contribute to co-regulation as it involved cooperation with the regulator. Four of the ten new Member States had advertising self-regulation bodies (Hungary, Czech Republic, Slovakia and Slovenia) while four others (Poland and the Baltic States) would be setting up similar organizations within the next six months. Cyprus and Malta would follow. The cross-border dimension had been an important issue since the very beginning of EASA's activity in 1992 as some 200 cases were dealt with each year.

Turning to the British ASA, created in 1962, Mr Graham stated that whilst it was neither semi-public nor state-financed, the *Office of Fair Trading* did recognize it as an instrument for dealing with misleading adverts. This was a clear example of good cooperation between the legislator and operators. He cited the case of *Ofcom*, the official British audiovisual regulatory body that, under the Communication Act[5] of 2003, had been entrusted with fostering self-regulation and identifying alternative instruments for communications in Britain. Ofcom handed over the responsibility for monitoring audiovisual advertising to the ASA on 1 November 2004. This model discussed by Mr Graham, which could open up a new approach, left responsibility for defining the overall framework to the legislator whilst delegating the screening of audiovisual advertising to a recognized self-regulation body.

Mr Graham pointed out that whilst the bottom-up approach was pragmatic, it was advisable to maintain the principle of a country of origin and to ensure mutual recognition of the case law of the various Member States. Moreover, representativeness would be a guarantee that global agreements would be reached and that a "one-stop" self-regulation system would be implemented, allowing consumers to find out to whom they should turn to for help. He called on the support of the Commission and the EESC to develop self-regulation at European level. He regretted that the Commission had withdrawn the provisions relating to the Single Market from its proposal on unfair commercial practices (Art. 4.1.) He asked that the Commission strengthen Article 10 by giving true recognition to self-regulation. Mr Graham emphasized that cooperation was needed between the authorities, which were active in the legal and political environment, and self-regulation, which would manage day-to-day activities.

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5 *Communication Act.*

Mr Graham invited the Committee to include information in its information report that would illustrate the functioning behind self-regulation in simple terms.

Response from Ms Berteletti-Kemp from EUROCARE. **Ms Berteletti-Kemp** emphasised that as far as alcohol was concerned, the code of conduct was open to interpretation, which lessened the impact of the advertising self-regulation body. She pointed out that Ofcom had established that alcohol advertising could influence young people.

Response from Mr Bedossa, member of the WHO. Mr Bedossa raised the question of compliance, and felt that self-regulation was absolutely necessary, particularly for non-regulated professions. He argued that it helped contribute to greater transparency and to consumer protection. He was adamant that self-regulation was indispensable for the application of texts and that it therefore complemented the actions of both the Commission and the Parliament.

Response from Mr Teyssier, president of the Bureau de vérification de la publicité (BVP) (Advertising Verification Office). Mr Teyssier stated that the BVP was France's self-regulatory advertising body. He emphasised the conceptual strength behind the principle of self-regulation. In effect, it gave all professional players a sense of responsibility. As advertising was aimed at a large audience, its seductive rhetoric in his opinion required a self-regulation mechanism, something that the advertising world had taken on board some time ago. Mr Teyssier felt that the absence of any compulsory sanctions meant that the advertiser had to consider the consequences of his own actions. Quoting Rousseau, he reminded the meeting that *"real law is that which one imposes on oneself freely"*.

Mr Teyssier accepted that self-regulation tied in well with the values of the European Union, which were founded on the principle of liberty and not on regulatory constraints. He gave the example of some 13,000 TV commercials that had all undergone a professional ethical examination by the BVP during the 48 hours prior to their broadcasting.

Response from Mr Santiago Dos Santos of the European Commission, DG Entreprise. Mr Santiago Dos Santos stated that he was responsible for regulatory matters. DG Enterprise dealt with a large proportion of the *acquis communautaire*, where the co-regulation systems had clearly proven their worth. With regard to self-regulation in the advertising industry, he pointed out that it would be advisable to have a case-by-case approach insofar as there was no universal self-evaluation system, and added that the Commission favoured alternative regulatory instruments or approaches. He emphasised that it was important to ensure that these sectoral rules were applied effectively.

Response from Mr Retureau, member of WHO. Mr Retureau argued that if professional groups applied codes of conduct and good practice that functioned well, then they should be left to act as they saw fit. There were, however, a number of failings, and it was here that the legislator could intervene or, as was the case in France, provide self-regulation within a legal framework.

Remarks from Mr Graham. Mr Graham remarked that self-regulation was in the interest of the private sector provided that it was not imposed on the sector and that it was developed on its own initiative. He cited the British example of *Ofcom*, which had delegated the monitoring of commercials to ASA precisely due to the high esteem in which the ASA was held. He stated that consumers saw the organization as a one-stop solution for their complaints. Mr Graham rejected the idea of a restrictive legal framework that did not improve the level of participation. Moreover, the private sector itself provided financing for self-regulation operations, and did not have recourse to public funds.

Turning to the question of sanctions, he argued that withdrawing an advert or losing legal proceedings could cost those businesses that refused to respect the professional code of ethics valuable segments of the market. He therefore invited the Commission to think of self-regulation as an alternative, as an instrument that was more effective than the constant adoption of laws. Mr Graham asked that the Directive on Unfair Commercial Practices be allowed to follow its course and that it be submitted to Parliament. He called for the debate to be made wider in order to provide a global vision of self-regulation, its advantages, its limits and to establish that which could still be improved.

Response of Mr Santiago Dos Santos. Mr Santiago Dos Santos announced that his DG was about to carry out an impact study of possible legislation for tissue engineering for which self-regulation would not be appropriate given the stakes involved, including economic, ethical and sanitary issues. This example clearly illustrated well the need for a case-by-case approach and the need for the legislator to take action to establish rules.

Conclusion by Mr Vever. Mr Vever argued that the inter-institutional agreement of December 2003 opened up the Single Market to the ideas of co-regulation and self-regulation, and gave it a statute, established definitions and set conditions for its effective functioning. He mentioned the pro-active approach of the institutions and the market players, and called on the former to improve their impact studies and to legislate less in favour of alternative options, and on the latter to remain aware of their rights whilst not ignoring the need for monitoring procedures.

Whilst few things were ever perfect, he was of the opinion that legislation could benefit from the assistance provided by co-regulation and self-regulation, to ensure more flexibility, effectiveness and the sharing of responsibilities. This was both a modern and a democratic approach.

Mr Vever pointed out that the report would aim to bring the legislator and the players in the field of co-regulation and self-regulation closer together in the spirit of participatory democracy. He deplored the lack of information on existing agreements.

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