

Drafting of EU Acts: A View from the European Commission

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A. How is EU Legislation Adopted?

Almost all EU acts start life in the Commission. All substantive legislation is adopted by the European Parliament and the Council or by the Council alone. As part of the institutional balance, however, most articles in the EC Treaty¹ conferring power to adopt acts contain the formula: “on a proposal from the Commission.”

It is the Commission which determines whether it is appropriate to propose legislation and decides on both the form of act to be proposed (unless that is specified in the Treaty) and the content of its proposal. The other institutions can ask the Commission to present a proposal but they cannot oblige it to do so. The independence of the Commission is guaranteed by Article 213(2) of the EC Treaty, which provides that in the performance of their duties the Members of the Commission “shall neither seek nor take instructions ... from any other body.”

Apart from the legislative acts, a large number of essentially implementing and administrative acts are adopted by the Commission itself, generally under one of the procedures involving committees composed of representatives of the Member States.²

B. Drafting in the Commission

Each technical department or Directorate-General (DG) is responsible for preparing and drafting its own legislation.

All major items of planned legislation must be entered in the Commission’s work programme for communication to the other institutions. That programme

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¹ Under the Treaty on European Union the Commission does not have a monopoly of legislative initiative since acts may also be adopted at the initiative of the Member States.

² See Art. 202, third indent, and Art. 211, fourth indent, of the EC Treaty and Council Decision 1999/468/EC of 28 June 1999, OJ 1999 L 184/23 laying down the procedures for the exercise of implementing powers conferred on the Commission.

and other aspects of strategic planning are the responsibility of the Secretariat-General, which coordinates the work of the various DGs. It also manages the decision-making process and has been given special responsibility for administrative simplification and all aspects of governance.

Before drafting legislation, the DG will carry out wide-ranging external consultations and may issue Green Papers to expound problems and invite comment and White Papers to outline its ideas. On that basis it produces a preliminary draft which will form the basis for all subsequent discussions within the Commission. The first drafts are generally produced by technical experts, who may not be lawyers and may not have specific drafting expertise. Some DGs have, within their legal departments, lawyers who will offer some help with drafting.

Once a DG has formulated its preliminary draft, it submits it to the other DGs concerned as part of the Inter-Service Consultation (ISC). Under Article 23(4) of the Commission's Rules of Procedure³ the Legal Service must "be consulted on all drafts or proposals for legal instruments and on all documents which may have legal implications." The Legal Service acts as the Commission's in-house lawyer. It has a staff of some 400 and reports direct to the Commission President. In the ISC it checks the substantive legal aspects (legal basis, conformity with the law, consistency with other legislation) and the formal presentation and drafting of the act.

The originating DG takes account of the comments it has received from the ISC, some of which may be in the form of textual amendments, and may if necessary carry out further internal and external consultations. It then submits its revised draft for formal adoption by all the members of the Commission. The text may be revised by the Legal Revisers in all languages at this stage if required.

C. Languages

With effect from 1 January 2007 the Community has 23 official languages. Formally they are all working languages of the institutions.⁴ To enable the Commission to function efficiently, however, almost all acts are drafted in either French or English. Until recently most were drafted in French but a survey carried

³ Rules of Procedure of the Commission C(2000) 3614, OJ 2000 L 308/26.

⁴ Art. 290 of the EC Treaty provides: "The rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Rules of Procedure of the Court of Justice, be determined by the Council, acting unanimously."

Those rules were laid down by EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, OJ 1958 17/385, as amended by successive Acts of Accession, which provides

Article 1

The official languages and the working languages of the institutions of the Union shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish. ...

out within the Commission in 2000/2001 found that 55% of documents had been originally drafted in English, 42% in French and 1-2% in German. The trend towards increasing use of English appears to be continuing.

The drafting language is determined by the DG or unit and there is no requirement for a drafter to be a native speaker of the language concerned. A draft legislative act passes through all the internal discussion stages within the Commission in just one language but it must be translated into all the official languages before it can be submitted to the Commission for adoption.

All translations are produced by the Translation Directorate-General which has a large staff of permanent translators.

D. Legal Revision

It is clear that such a drafting process can give rise to particular problems. The Legal Revisers Group in the Legal Service attempts to resolve some of those problems. The Group was set up over 30 years ago and now consists of some 60 revisers with both legal and linguistic qualifications covering all the Member States. It has responsibility for the drafting quality of acts across all areas of the Commission's activities but has recently been split into three units in order to allow a degree of specialisation.

The first opportunity for legal revision is at the relatively early stage of the ISC. As part of the obligatory consultation of the Legal Service, compliance with the rules on drafting⁵ is checked by the legal revisers while a lawyer specialising in the technical sector concerned examines the substantive aspects.

The revisers' comments on drafting will generally be incorporated in the Legal Service response to the ISC and taken into account by the DG responsible for the text. In some cases the DG, the reviser and the lawyer may work together

Article 4

Regulations and other documents of general application shall be drafted in the official languages.

Article 5

The *Official Journal of the European Union* shall be published in the official languages.

Because of the difficulty of recruiting and training linguists for less widely spoken languages transitional measures may be adopted derogating from the requirement to draft and publish acts in all official languages. A transitional regime for Maltese was adopted by Council Regulation 930/2004, OJ 2004 L 169/1; it expired in 2007. When Irish was added to the list of official languages by Council Regulation 920/2005, OJ 2005 L 156/3 a transitional period of five years was laid down.

⁵ In particular the *Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of Legislation Within the Community Institutions* (<http://eur-lex.europa.eu/en/techleg/index.htm>), the *Commission's Rules on Legislative Drafting* (RTL), Annex VI to the Rules of Procedure of the Council, OJ 2006 L 285/47, the *Manual of Precedents*, drawn up by the Legal/linguistic experts of the Council (2005 edition), and the *Interinstitutional Style Guide* drawn up by the Office for Official Publications of the European Union (<http://publications.europa.eu/code/en/en-000100.htm>).

to resolve problems. Improving the quality of the original reduces the scope for misunderstandings or confusion in all subsequent consultations and negotiations and when the text is translated into the other languages.

The Legal Service's opinion will in most cases be accepted by the DG but the Legal Service cannot actually block the adoption of a text. A negative Legal Service response to an ISC can be overridden by a DG if justified by pressing political reasons. The Legal Service will give a negative response generally for substantive legal reasons and only exceptionally on grounds of drafting quality alone.

There may be a further opportunity to improve the quality of the text when a proposal is tabled for adoption by the full Commission. Revision at this stage may be requested by the DG concerned (often at the instigation of the Secretariat-General or the Legal Service). Such revision is necessarily limited in scope because the text has already passed through extensive external and internal consultations and is often the fruit of difficult compromises. It has also been translated into all the official languages and is to be adopted in a matter of days. As a result any rewriting or restructuring would be risky and revision focuses on correcting formal or terminological errors and ensuring that the legal scope is exactly the same in the different language versions.

In 2007, when some 2500 Community acts (regulations, directives and decisions) appeared in the Official Journal, the legal revisers examined 1700 texts. Most of the texts which were not revised covered routine management of the agricultural markets.

E. Quality Controls in the Subsequent Legislative Procedure

The proposal from the Commission is passed to the legislative authority, generally the European Parliament and the Council acting together in the codecision procedure, but in certain fields the Council acting alone. Under the EC Treaty, the proposal must generally also be sent to certain consultative bodies, such as the European Economic and Social Committee, for their opinion.

I. Council

Within the Council, the proposal is examined by a working party composed of representatives from all the Member States and chaired by the representative of the country holding the presidency. The representatives are generally technical experts rather than lawyers and their work focuses on technical issues and the text of the proposal before them. The proposal then passes to the Permanent Representatives Committee (Coreper), made up of the Member States' ambassadors, which ensures consistency in the work and resolves technical-political questions before submitting the dossier for decision by a vote of Ministers from the Member States.

At the very end of the procedure a meeting is convened of the Council's Legal/linguistic experts, one for each language, who carry out the final revision of the text, often after its formal adoption. The Council experts have long experience of revising legislative texts but their revision is subject to the constraint that the text has been the subject of lengthy consultations and negotiations and cannot be changed lightly. The text is finalised at a meeting attended by representatives of the Member States who can veto changes suggested by the revisers.

II. European Parliament (EP)

Within the EP, the proposal from the Commission is assigned to the appropriate standing committee and a rapporteur is designated. The committee submits its report to the plenary and generally proposes amendments to the text of the proposal.

The text may pass through up to two readings in the EP and a conciliation procedure between the EP and the Council, unless it is approved at an earlier stage. The EP legal revisers are not as long established as the others but they are already the most numerous. They are involved at different stages of the EP's procedure and finally in the meeting of the Council's legal linguistic experts. They focus chiefly on the amendments by MEPs but are increasingly commenting on the drafting of the text as a whole.

The Commission has an important role to play in the negotiations on its proposal at the level of the legislative authority. It may amend its proposal to facilitate agreement. If, however, the Commission considers that a proposal has been altered by the other institutions to such an extent that it has become denatured, it may withdraw the proposal, whereupon the other institutions can no longer adopt an act.⁶

F. Historical Background to Concern for the Quality of EU Drafting

In 1992, the French Conseil d'état drew up a report which looked at the great influence of Community legislation on French law and expressed concern at the volume of Community rules and how difficult they were to understand. It was alarmed by seeing alien traditions of drafting creeping in, evoking French lawyers peering beyond their neatly trimmed box hedges and seeing the gracious disorder of an English garden.

⁶ See Art. 250 of the EC Treaty:

1. Where, in pursuance of this Treaty, the Council acts on a proposal from the Commission, unanimity shall be required for an act constituting an amendment to that proposal, subject to Article 251(4) and (5) [provisions on the Conciliation Committee].
2. As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Community act.

That same year the European Council adopted the Birmingham declaration with the pithy demand: “We want Community legislation to be clearer and simpler.”

In 1993 the Council adopted a Resolution setting out what are known as the ten commandments of legislative drafting.⁷ They were good as far as they went but they were merely a resolution and the results were limited.

Conscious of the increasing impact of European legislation on their own statute books, some Member States pursued the matter. In 1995 a report on the quality of Community legislation was produced by a committee of senior Dutch civil servants chaired by a former judge at the European Court of Justice, T. Koopmans.⁸ It recommended in particular the introduction of guidelines, like those used in the Netherlands, and the establishment of an independent vetting committee.

In 1997 the Netherlands together with the European institutions organised a Conference on the quality of European and national legislation whose report was published in book form.⁹ Later that year at the initiative of the Netherlands presidency of the Council, supported by the United Kingdom, the Amsterdam Intergovernmental Conference adopted Declaration No 39 on the quality of the drafting of Community legislation.¹⁰

The Conference noted 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 by the public and in business circles” and called on the institutions to “establish by common accord guidelines for improving the quality of the drafting of Community legislation ... and [to take] the internal organisational measures they deem necessary to ensure that these guidelines are properly applied.”

I. 1998 Interinstitutional Agreement

The European Parliament, the Council and the Commission then adopted the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation.¹¹

That agreement laid down 22 guidelines on drafting, 6 on general principles and 16 on specific points or parts of acts, based partly on suggestions from Member States. It also called for the publication of a Joint Practical Guide on drafting which was finalised in 2000. That guide is a key tool for all staff in the institutions who draft legislation. It was made available in all Community languages in booklet form (40,000 copies) and on the Internet. The agreement called for other organisational measures, including reorganisation of internal

⁷ Council Resolution of 8 June 1993 on the quality of drafting of Community legislation, OJ 1993 C 166/1.

⁸ T. Koopmans, *De Kwaliteit van EG-Regelgeving – Aandachtspunten en Voorstellen* [The Quality of EC-Regulation – Points of Attention and Proposals] (1995).

⁹ T.M.C. Asser Instituut, *Improving the Quality of Legislation in Europe* (1998).

¹⁰ OJ 1997 C 340/139.

¹¹ OJ 1999 C073/1.

procedures to involve the legal revisers earlier, training, greater use of computers, increased cooperation both between the Member States and the institutions and between the institutions themselves. The institutions have taken the requisite steps and duly reported on what they have done, albeit rather briefly.¹²

In 2000, the European Council in Lisbon “set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.”¹³

To pursue that strategy a high-level group was established by the Member States under the chairmanship of Mr Mandelkern of the French Conseil d'état. Its report stressed the importance of regulation that was adapted to needs and recommended measures to achieve that aim as well as to improve access and provide sound administrative structures.

In March 2001 the Stockholm European Council welcomed the report of the Committee of Wise Men on the Regulation of European Securities Markets (the Lamfalussy report) and concluded: “The proposed four-level approach (framework principles, implementing measures, co-operation and enforcement) should be implemented to make the regulatory process for European Union securities legislation more effective and transparent, thus improving the quality of the legislative measures proposed.”

II. Governance

The European Commission launched its major governance initiative in July 2001, stating that the EU “must pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts.”¹⁴ In a paper later that year it admitted that results so far had been disappointing and called for a new strategy and a new culture of simplification of regulation.¹⁵ In June 2002 it adopted a

¹² On 12 March 2001 the Council adopted its report 5882/01 JUR 37. The Commission covers such aspects in its annual reports on “Better Lawmaking” (most recently COM(2007) 286).

¹³ Point 5 of the Council Conclusions. *See also* point 14:

The competitiveness and dynamism of businesses are directly dependent on a regulatory climate conducive to investment, innovation, and entrepreneurship. Further efforts are required to lower the costs of doing business and remove unnecessary red tape, both of which are particularly burdensome for SMEs. The European institutions, national governments and regional and local authorities must continue to pay particular attention to the impact and compliance costs of proposed regulations, and should pursue their dialogue with business and citizens with this aim in mind.

¹⁴ European Commission, *European Governance – A White Paper* (COM(2001) 428), at point 3.2.

¹⁵ *See* Interim Report on Improving and Simplifying the Regulatory Environment (COM(2001) 130), at 3; and the Communication on Simplifying and Improving the Regulatory Environment (COM(2001) 726), at 2.

package of measures as part of the governance initiative designed to lead to better lawmaking, including an Action Plan on simplifying and improving the regulatory environment.¹⁶

III. 2003 Interinstitutional Agreement

Responding to an invitation from the European Council in Seville in June 2002, the European Parliament, the Council and the Commission adopted another Interinstitutional Agreement in December 2003¹⁷ affirming their common commitment to improving the quality of lawmaking and to promoting simplicity, clarity and consistency in the drafting of laws. The agreement calls in particular for improved transparency and accessibility of EU legislation, a new culture of keeping the regulatory burden as light as possible and improved follow-up to legislation adopted.

At the end of 2003 the United Kingdom Foreign and Commonwealth Office presented a report examining the drafting of EU legislation and identifying problems relating to the application and interpretation of EU legislation in Member States.¹⁸

In January 2004 the four countries holding the rotating presidency of the European Council in 2004 and 2005 launched a Joint Initiative on Regulatory Reform¹⁹ to maintain the momentum in implementing the Commission's Action Plan on simplifying and improving the regulatory environment. That initiative has been taken up by other Member States and Better Regulation is now regularly included amongst the priorities of each presidency.

G. Steps to Improve the Quality of EU Legislation

The three institutions involved in the legislative process are committed by the 2003 Interinstitutional Agreement to building on the process initiated by the 1998 Interinstitutional Agreement and to improving the coordination of their work and the information they give on it.

I. Transparency and Accessibility

Actual drafting quality is being tackled by the increased involvement of legal revisers in the process. The three groups of revisers have collaborated to produce and distribute to all staff the Joint Practical Guide. The Commission's revisers offer technical staff introductory courses in drafting designed to familiarise them

¹⁶ COM (2002) 275, 276, 277 and 278.

¹⁷ Interinstitutional Agreement on better law-making of 16 December 2003, OJ 2003 C 321/1.

¹⁸ R. Bellis, *Implementation of EU Legislation*, an Independent Study for the FCO (2003), available from: <http://www.fco.gov.uk>.

¹⁹ Initiative of the Irish, Dutch, Luxembourg and United Kingdom Presidencies of the EU: <http://www.finance.gov.ie/viewdoc.asp?DocID=1804&CatID=1&StartDate=1+January+2004&m>.

with the Guide and with the basic rules and principles applying to drafting. The Commission has adapted its internal procedures to enable its revisers to revise early drafts as well as the final texts for adoption. To raise awareness of legislative issues the Commission revisers organise seminars for all those concerned by quality of EU legislation inside and outside the institutions to hear views from the Member States and beyond.²⁰

A key role in ensuring access to EU legislation is played by the Office for Official Publications of the European Communities (OPOCE), the publishing house for the institutions and other bodies of the European Union. Since the inception of the Communities it has published the Official Journal on paper, still the only source for the authentic text of EU legislation. For some years it has made the texts available electronically as well but those versions are not authentic.

In addition, in response to the calls for improved accessibility of EU law over the years, it has developed a system of websites and databases covering all aspects of EU law. It has created a single portal, called EUR-Lex, for accessing all that information which is now free of charge. That portal gives access in particular to: the main search engine for legislation and related measures; Pre-Lex, the database on the interinstitutional decision-making process; the electronic version of the Official Journal; collections of the treaties, international agreements, legislation in force, legislation in preparation, case-law, parliamentary questions – which can be accessed via hyperlinks; and a site on legislative drafting.

Gathering all information on a single, clearly structured site offers a one-stop shop, a major improvement on the former situation when users might have to search a number of the institutions' independent sites before finding all the information required.

A key element in making law accessible is the 'consolidation' and publication on EUR-Lex of Community legislation in all the official languages. Consolidation means combining in a single text an initial act and all amendments to it. The consolidated texts are not authentic but offer citizens and professionals rapid and generally reliable information about the current state of the law. They also serve as the basis for the codification and recasting of Community legislation.

II. Tidying up the Statute Book

As long ago as 1974, a 'codification' programme began to tackle the problem of legislation that had been amended.²¹ 'Codification' consists of merging an original act and all amendments to it in a new act which replaces the original act and the amending acts. The new act must pass through the whole legislative procedure, starting with a proposal from the Commission and ending with adoption by the European Parliament and the Council or by the Council alone. Provided that no substantive changes are made, a fast-track procedure is applied. The drafts are

²⁰ Information on seminars (and on other aspects of the revisers' work) is available from: http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm.

²¹ See Council Resolution of 26 November 1974 concerning consolidation of its acts, OJ 1975 C 20/1 and the Interinstitutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts, OJ 1996 C 102/2.

prepared by a group within the Commission Legal Service and a joint working party monitors the process. Fresh impetus was given to codification in 2001 when an ambitious project was launched to codify the whole of the Community *acquis*²² with a view to reducing the volume of legislation to be translated by new Member States.²³

At the same time, the three institutions recognised that codification was not affording all the desired results and adopted an agreement on a procedure for recasting acts.²⁴ Recasting consists in the adoption of a new legal act which incorporates in a single text an original act and any amendments already made to it while at the same time making any further changes that are necessary, including restructuring. As in codification, the new act has to pass through the full legislative procedure.

Both codification and recasting are all too often labours of Sisyphus: even a fast-track procedure can take so long that further amendments are needed before the new act can be adopted.

As part of the governance initiative the institutions began to look more closely at their statute book. In March 2001 the total volume of the Community *acquis* was estimated at “some 70,000 pages” of the Official Journal. By December that year the estimate was “over 80,000 pages”. In February 2003 a comprehensive survey produced a figure of 97,000 pages.

A programme is under way to identify all acts which are obsolete.²⁵ Wherever possible they will be repealed. If that is not possible the institution concerned will publish a formal notice declaring them obsolete.

III. New Culture

A number of steps are being taken as part of the new legislative culture called for by the governance and better-lawmaking initiatives.

- Increased emphasis is being placed on consultation and impact assessments in order to define policy clearly before an act is drafted and on fuller explanation of choices made.
- The Commission will keep the regulatory burden to a minimum by proposing legislation only if other alternatives will not do and ensuring that new legislation is simple and easy to apply.

²² On a broad interpretation, the Community *acquis* includes the whole of Community law, including the case-law of the Court of Justice and non-binding acts such as resolutions and recommendations. In Commission documents it is used in this context as covering only binding secondary legislation, that is regulations, directives and decisions as referred to in Art. 249 of the EC Treaty (see COM(2003) 71).

²³ Communication on the Codification of the *Acquis communautaire* (COM(2001) 645).

²⁴ Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ 2002 C 77/1.

²⁵ Under the Communication on Updating and simplifying the Community *acquis* (COM(2003) 71).

- New legislation will include review clauses, other mechanisms to check whether it works and expiry clauses.
- Existing legislation is to be screened to identify areas for simplification by means of repeals, codifications or recasts or replacement of old acts by new simpler acts.

The Commission is seeking to bring together all its various measures to improve legislation by better coordination and networks.²⁶ Recognising that in the past results have fallen short of expectations, it now produces reports and tables analysing progress made. This is essential if it is to move beyond mere lip service to the aim of quality legislation.

H. Problems Specific to the EU

A unique feature of EU law is that it applies in 27 countries which in many respects have quite different cultures.²⁷ As a result, rules often have to be complex and they are perceived as alien by some of those to whom they are addressed.

Multilingualism compounds the difficulties. The process of producing 23 language versions leads to thorough examination of the drafting of the original. That original will, however, have been subject to changes suggested at various stages by numerous interveners who are not specialist drafters and generally not native speakers of the language of the original. And however good the original, it is difficult to ensure that all the language versions which are finally produced carry exactly the same meaning.

I. Some Proposed Solutions

A number of commentators have suggested that the quality of EU legislation could be improved by the creation of an independent body to review acts either at the stage of the Commission's proposal or just before they become law, on the model of the French Conseil d'état or similar bodies in some Member States.²⁸ It appears difficult, however, to insert such a body into the delicately balanced legislative procedure. It is partly because of that difficulty that another suggestion is to create an EU Legislative Drafting Office independent of the present institutions.²⁹

Either solution would entail major changes to the present structures and possibly amendment of the Treaties. Until any such step is taken, it is up to the three institutions to redouble their various efforts to improve European

²⁶ Comprehensive information about all the different measures and programmes is to be found on the Commission's Better Regulation website: http://ec.europa.eu/governance/better_regulation/index_en.htm.

²⁷ See White Paper, *supra* note 14, at 13.

²⁸ See the guest editorial by G. Sandström, *Knocking EU Law into Shape*, 40 Common Market Law Review 1307 (2003) and the other authors cited in fn. 4 to that editorial.

²⁹ See Bellis, *supra* note 18, who refers also to an article by R. Wainwright, *Technique of Drafting European Community Legislation: Problems of Interpretation*, 17 Statute Law Review 7 (1996).

legislation. They should strengthen the position of their respective groups of legal revisers and improve coordination between them, as was called for by the 1998 Interinstitutional Agreement.

The Commission's Legal Revisers have already moved to improve the quality of drafting at all stages of the Commission's internal procedures. If they also become involved at later stages of the legislative process – in collaboration with the revisers of the other institutions – they could provide the continuity that is now signally lacking.