Managing the EU Acquis

William Robinson[*]

Abstract

EU legislation plays a key role in filling in the gaps in the framework created by the EU Treaties. The body of EU legislation known as the acquis has grown piecemeal over 60 years to a confused and confusing patchwork of over 100,000 pages. There is an urgent need for a more coherent approach to updating, condensing and revising that legislation to ensure that it is readily accessible. New mechanisms should be established for those tasks, or else the existing mechanisms should be enhanced and exploited to the full.

Keywords: EU, legislation, accessibility, updating.

A Introduction

I Institutional Framework of the European Union

The institutional framework of the European Union (EU) comprises, insofar as is relevant to the adoption of legislation, the European Parliament, the Council of the EU ('the Council'), the European Council and the European Commission ('the Commission'). The Court of Justice of the European Union (CJEU) has jurisdiction to rule on the interpretation and validity of EU legislation.[1]

The European Parliament is composed of 751 Members ('the MEPs') directly elected by EU citizens for five-year terms. It holds its plenary sessions in Strasbourg or Brussels and its committee meetings in Brussels. It exercises the EU's legislative and budgetary functions jointly with the Council.

The Council is composed of ministers from each of the 28 Member States and meets in different configurations depending on the subject under discussion. A Committee of Permanent Representatives of the Governments of the Member States (COREPER) prepares the work of the Council. The Council is chaired by the representative of the Member State holding the presidency of the EU on a six-month rotating basis.

The European Council is composed of the heads of State or government of the Member States together with the President of the Commission and the High Representative for Foreign Affairs and Security Policy. It elects its own president for a term of two and a half years, which is renewable once. It does not exercise

* Associate Research Fellow, Institute of Advanced Legal Studies, London.

1 *See* Art. 13 *et seq.* of the Treaty on European Union (TEU). Under Art. 132 of the Treaty on the Functioning of the European Union (TFEU) the European Central Bank may adopt legal acts in the field of monetary policy.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

legislative functions but defines the general political directions and priorities of the EU.

The Commission consists of one Member from each Member State appointed for a term of five years and is led by its President who is proposed by the European Council and elected by the European Parliament. The Commission ensures that the EU Treaties and EU law are applied, executes the budget and exercises executive and management functions. As part of those functions, it adopts a large number of subordinate legal acts.

The CJEU includes the Court of Justice and the lower General Court with judges from each Member State. The Court of Justice is also assisted by Advocates-General, who give advisory opinions before the final judgement. The judges and Advocates-General are appointed for a term of six years. The CJEU ensures that "in the interpretation and application of the Treaties the law is observed".[2]

II EU Legislative Procedure

1 Commission Proposal

The ordinary legislative procedure in the EU consists in the adoption of a regulation, directive or decision by the European Parliament and the Council on the basis of a proposal from the Commission.[3] The Commission alone decides whether to initiate the legislative procedure, and in formulating its proposal it seeks to "promote the general interest of the Union" and is "completely independent".[4]

The Commission is responsible for all the preparatory work. At an early stage, the Commission department responsible will consult the Member States and the interested circles about the policy options and may seek advice on technical issues from groups of experts. It may publish Green Papers or White Papers to outline tentative proposals and to invite comments. For all legislative initiatives, it publishes a roadmap describing the problems to be addressed, the possible policy options and the planned stages, holds public consultations and carries out an impact assessment, which is checked by a semi-independent Regulatory Scrutiny Board.

Finally the Commission, as a collegiate body, adopts its proposal consisting of a complete draft text of an act and an explanatory memorandum. The proposal is published and sent to the national parliaments, which may deliver a reasoned opinion on whether the draft act complies with the principle of subsidiarity.[5] Proposals must generally also be submitted to the EU's advisory bodies.[6]

2 Art. 19(1) TEU.

3 *See* Arts. 289 and 294 TFEU. In areas such as harmonization of rules on indirect taxes or those affecting the internal market the Council acts alone.

4 *See* Article 17 TEU and Arts. 289 and 294 TFEU. The Treaties specify a small number of cases where others may launch initiatives (*see* Art. 11(4) TEU and Arts. 225 and 289(4) TFEU).

5 In accordance with Arts. 2 and 3 of Protocol No 1 to the Treaties, which refers in turn to Protocol No 2.

6 The European Economic and Social Committee (*see* Art. 304 TFEU) and in appropriate cases the Committee of the Regions (*see* Art. 307 TFEU).

The proposal is scrutinized by the European Parliament and the Council at the same time. The text of the proposal forms the basis for all discussions in the European Parliament and the Council, and unanimity in the Council is generally required to amend it.[7]

2 European Parliament

Within the European Parliament, the proposal is assigned to the relevant committee and a rapporteur is chosen. The rapporteur is given a mandate and represents the European Parliament in the negotiations with the Council and Commission. When those negotiations are concluded, the rapporteur will present to the committee a draft report on the basis of which the committee submits its final report, comprising a draft legislative resolution and any amendments to the draft act, to a plenary sitting of all 751 MEPs for adoption.

3 Council

Within the Council, the proposal is examined by one of the specialized working parties and committees, composed of national experts from all the Member States and chaired by a representative of the country holding the six-monthly presidency of the Union. Administrative support is provided by the General Secretariat of the Council. The chair seeks to facilitate political compromises in the working party. After all technical aspects have been discussed by the national experts, the chair will ask COREPER or the Council itself (in the configuration of the ministers for the subject concerned) to define the mandate for the negotiations with the European Parliament and the Commission.

4 Trilogues

The negotiations between the three institutions are conducted in what are known as *trilogues*, which serve to bring the positions of the three institutions closer together and to enable the representatives of each institution to keep it informed of the direction of the negotiations.[8]

The trilogues have proved so effective that over 80% of legislative acts are now adopted at first reading, but if there is no agreement a second reading may be held. If that is unsuccessful, a Conciliation Committee drawn from the European Parliament and the Council will seek to agree a text for scrutiny in a third reading by the two institutions.[9] If, after all those steps, the European Parliament or the Council fails to approve the text, the proposed act is deemed not to have been approved.

5 Role of the Commission in the Co-Decision Procedure

The Commission may accept the amendments suggested by the other institutions or, if it finds that substantial changes are needed to take account of the other

7 Art. 293(1) TFEU.

8 *See* the Joint Declaration of 13 June 2007 on practical arrangements for the co-decision procedure [2007] OJ C 145/5.

9 *See* Art. 294 TFEU.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

institutions' concerns, may itself submit an amended proposal. However, if it finds that, as a result of the amendments made by the other institutions, the text no longer reflects the original intention, it may withdraw its proposal at any time before the adoption of the Council position, after which the act may no longer be adopted.[10] That power, while rarely exercised, gives the Commission a stronger position during the negotiations.

6 Publication

All legislation must be published in the *Official Journal of the European Union* (OJ) by the Publications Office of the European Union (Publications Office), an inter-institutional office answering to a Management Committee made up of senior staff of the institutions.[11]

III Official Languages of the EU

Multilingualism is one of the fundamental principles of the EU.[12] Regulation No 1 of 1958 lays down the list of the 'official languages' in which all legislation is to be drafted and the OJ is to be published.[13] Over the years, Regulation No 1 has been amended to add the languages of all the new Member States to the list, which now includes 24 languages.

While the Treaties themselves are expressly stated to be authentic in all the official languages,[14] neither the Treaties nor Regulation No 1 specify what the authentic texts of EU legislation are. However, the CJEU has long recognized the importance of EU legislation being interpreted and applied uniformly in all the Member States and hence of taking account of the different language versions.[15] In the *CILFIT* case, it stated that "it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic."[16]

IV Court of Justice of the EU (CJEU)

1 General

The most important cases brought before the CJEU are heard by the Court of Justice itself but other cases are heard by the General Court against whose decision an appeal lies to the Court of Justice.

10 *See* Art. 293(2) TFEU. Some limits on the power of withdrawal have been laid down by the CJEU in Case C-409/13 *Council v. Commission* [2015] ECR I-0000 (ECLI:EU:C:2015:217).

11 *See* Dec. 2009/496/EC, Euratom [2009] OJ L 168/41. Since 2013, the electronic version of the Official Journal is authentic, *see* Council Reg. (EU) No 216/2013 [2013] OJ L 69/1.

12 *See* Art. 3(3) of the TEU and Art. 342 of the TFEU and the Charter of Fundamental Rights, Arts. 21 and 22.

13 [1958] OJ 17/385, *see* Arts. 1, 4 and 5.

14 *See* Art. 55 TEU and Art. 358 TFEU.

15 For some of the earliest expressions of this principle, *see* Case 19/67 *van der Vecht* [1967] ECR 345 and Case 29/69 *Stauder* [1969] ECR 419, at para. 3.

16 Case 283/81 *CILFIT* [1982] ECR 3415, para. 18.

The main heads of jurisdiction relevant to EU legal acts are actions for annulment, references for preliminary rulings and infringement proceedings brought by the Commission against Member States.[17]

A Member State, an EU institution or, in certain cases, a natural or legal person may bring an action before the CJEU under Articles 263 and 264 TFEU for a review of the legality of an EU legal act, and if the action is well founded the act will be declared void.

The Court of Justice has jurisdiction under Article 267 TFEU to give preliminary rulings in response to questions referred to it by national courts on the interpretation of the Treaties or on the validity or interpretation of EU legal acts. Its preliminary rulings are binding on the national court that referred the question to it and on other national courts before which the same problem is raised.

If the Commission considers that a Member State is failing to fulfil an obligation under the Treaties, it may initiate infringement proceedings under Article 258 TFEU. In the pre-litigation stage, the Commission first initiates a dialogue with the Member State by means of a letter of formal notice and then a reasoned opinion. Most disputes are resolved already at this stage but, if not, the Commission may bring proceedings before the CJEU for judgement against the Member State. In the rare cases where the Member State fails to comply with the CJEU's judgement, the Commission may again bring the case before the CJEU which then has jurisdiction to impose financial penalties on the Member State.

2 *Interpretation of EU Law*

The EU legislative authority has laid down no rules on the interpretation of EU legislation (apart from one short regulation on time limits).[18] The approach to interpretation of EU law has been developed by the CJEU on the basis of principles derived from the law of the Member States and international law and differs from the literalist approach of courts in common-law countries.

The CJEU has referred to "the characteristic features of Community law and the particular difficulties to which its interpretation gives rise" and stated that

> every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[19]

The CJEU accordingly takes a broad approach to interpreting a text, relying on core meanings of terms. It may compare the different language versions and attempt to find a "common interpretation which best reflects the sense in all the languages".[20] It has established the principle that all the language versions must

17 *See* Art. 258 *et seq*. TFEU.
18 Reg. (EEC, Euratom) No 1182/71 of the Council [1971] OJ L124/1).
19 Case 283/81 *CILFIT* [1982] ECR 3415, paras. 17-20.
20 Case 80/76 *North Kerry Milk Products* [1977] ECR 425.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

be treated equally[21] and ruled that "the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect."[22]

In interpreting a provision in its context and in the light of the aims of the act,[23] the CJEU looks in particular at the recitals in the preamble[24] and may also look at the *travaux préparatoires*, such as the Commission proposal and the explanatory memorandum. It also takes account of general principles of EU law such as legal certainty[25] and fundamental rights.[26]

B The Body of EU Legislation or 'Acquis'

I Growth of the Acquis

The EU Treaties established a basic framework, and legislation adopted by the EU institutions has been used to fill out that framework. That body of legislation, known as the *acquis*, has not grown in a rational manner according to a coherent plan worked out in advance. Legislative acts have been adopted as and when agreement could be reached between the EU institutions and between all the Member States with their changing political constellations. Some acts may remain stuck in the negotiation process for years[27] but others pass quickly to respond to urgent needs.

Each legislative act has to have a precise legal basis in the Treaties, and this requirement affects the way acts are framed.[28] An act may have to be given a narrow scope in order to respect the legal basis. This may lead to the need to adopt a series of acts to regulate one area. Those acts may be prepared by different Commission departments, follow different procedures and be adopted at different times. Sometimes the content of acts will have been skewed in order to avoid the consequences of certain legal bases. In the past, a particular legal basis might have been chosen in order to allow an act to be adopted by the Council alone, or by

21 Case C-152/01 *Kyocera Electronics Europe* [2003] ECR I-13821, at para. 32.

22 Case C-103/01 *Commission v. Germany* [2003] I-5369, at para. 33.

23 *See, e.g.*, Case C-136/91 *Findling Walzlager* [1993] ECR I-1793, para. 11.

24 *See, e.g.*, Case C-355/95 P *TWD* [1997] ECR I-2549, para. 21.

25 *See, e.g.*, Joined Cases 42 and 49/59 *S.N.U.P.A.T.* [1961] ECR 53; Case T-171/00 *Spruyt* [2001] ECR FP IA-187, II-855, paras. 70-72.

26 Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof v. Österreichischer Rundfunk and Others* [2003] ECR I-4989, para. 68.

27 Reaching agreement on a unitary patent for the EU took almost 40 years. A Convention for the European patent for the common market (Community Patent Convention) was adopted in 1975 but never ratified ([1976] OJ L 17/1). It was not until 2012 that the two regulations setting up the unitary patent system were finally adopted (Reg. (EU) No 1257/2012 ([2012] OJ L 361/1) and Reg. (EU) No 1260/2012 ([2012] OJ L 361/89).

28 The requirement follows from the principle of conferral in Article 5 TEU. The effects that may ensue for the framing of EU acts are discussed in C.W.A. Timmermans, 'How to improve the quality of community legislation: the viewpoint of the European Commission', *in* A. Kellermann *et al.* (Eds.), *Improving the Quality of Legislation in Europe*, The Hague, Kluwer Law International 1998, pp. 39, 42.

more favourable voting rules.[29] Within the Commission, the framing of an act may have been influenced by the wish of one Commission department to keep control over measures rather than involving other Commission departments.

The content of legislation and the style of drafting have also been affected by differences of approach to legislation between the three EU institutions concerned and between different Commission departments. It was not until 1998 that the first common drafting guidelines were agreed between the European Parliament, Council and Commission.[30]

Some 25 to 30% of EU acts each year amend existing acts.[31] To keep EU legislation as accessible as possible, the EU institutions decided that amendments should "take the form of text to be inserted in the act to be amended".[32] While this certainly makes it easier to produce updated texts of EU legislation, it also increases the volume of the acquis and its complexity.[33]

In addition, it was formerly common to adopt new legislation without repealing the earlier rules in the same field, in reliance on the doctrine of implied repeal.

Those problems are compounded by the fact (probably attributable in part to the EU's multilingual nature) that all too often corrigenda or correcting acts are needed to correct mistakes in one or more language versions of EU acts, with some having to be republished in their entirety. It led a distinguished commentator (now a judge at the CJEU) to describe EU law as 'quicksand'.[34]

The volume of the acquis has grown considerably. In 2001, the Commission estimated that the total acquis comprised "about 80,000 Official Journal pages", with "about 2,500 new pieces of legislation (representing some 5,000 OJ pages) generated each year".[35] Just over a decade later, despite a decline in the average number of new acts each year to between 2,200 and 2,300,[36] insiders working on the translation of the acquis in preparation for the accession of Croatia to the EU in 2013 estimated that they had to translate some 160,000 pages.[37]

29 Under point 25 of the 2016 IIA on Better Law-Making "the choice of legal basis is a legal determination that must be made on objective grounds which are amenable to judicial review."

30 Inter-institutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation [1999] OJ C73/1. The Guidelines were expounded in the Joint Practical Guide for the drafting of EU legislation (JPG), available at: <http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf>. Accessed 14 May 2016.

31 *See* <http://eur-lex.europa.eu/statistics/legislative-acts-statistics.html>. Accessed 14 May 2016.

32 *See* JPG Guideline 18. The JPG does add in point 18.14 that recourse to substantive amendment is permissible in limited circumstances.

33 *See* W. Robinson, 'Accessibility of European Union legislation', *The Loophole*, 2011, p. 79, at 86 *et seq.*, available at: <https://www.opc.gov.au/calc/docs/Loophole/Loophole_Feb11.pdf>. Accessed 14 May 2016. EU drafting is in this respect cited as a model for others to follow by L. Brightman, 'Drafting Quagmires', *Statute Law Review*, Vol. 23, No. 1, 2002.

34 *See* M. Bobek, 'Corrigenda in the Official Journal of the European Union: Community Law as Quicksand', *Erasmus Law Review*, 2009, p. 950 and W. Robinson, 'Time for Coherent Rules on EU Regulation', *The Theory and Practice of Legislation*, Vol. 2, No. 3, 2015, pp. 257-278, at section C.3.

35 *See* COM(2001)645, point 1.3. The pages are the A4 pages of the Official Journal.

36 For a statistical breakdown of EU acts, *see* <http://eur-lex.europa.eu/statistics/legislative-acts-statistics.html>. Accessed 14 May 2016.

37 M. Bratanić & M. Lončar, 'The myth of terminology harmonisation on national and EU level', *in* S. Šarčević (Ed.), *Language and Culture in EU Law*, Farnham, Ashgate 2015, p. 207.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

II Tackling the Problem

The volume of the acquis and the resulting difficulties facing the Member States responsible for applying it, the users obliged to comply with it and the citizen wishing to understand the relevant rules have led to various responses.

One of the first was in 1989 when the European Parliament adopted a Resolution on the simplification, clarification and codification of Community law which stated that

> in a Community governed by the rule of law general provisions imposing obligations or prohibitions on or giving rights to public authorities and private individuals must be clear, simple and accessible,
>
> ... the Community decision-making process is, on the contrary, sometimes confused and uncoordinated.[38]

The Member States have frequently called for action. In 1992, the European Council expressed its views very plainly in the Birmingham Declaration: "We want Community legislation to be clearer and simpler." Later the same year in Edinburgh the European Council called for the simplification of Community legislation and for easier access to it. It stated,

> While the technical nature of most texts and the need to compromise among the various national positions often complicate the drafting process, practical steps should nevertheless be taken to improve the quality of Community legislation ....
>
> Community legislation can be made more readily accessible in a concise and intelligible form through a speedier and more organized use of consolidation or codification; an improvement of the CELEX-database system should also be considered.[39]

The 1997 Amsterdam Intergovernmental Conference of heads of State and government 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." Accordingly it adopted Declaration 39 on the quality of the drafting of Community legislation in which it stressed that "Community legislation should be made more accessible," welcomed "the adoption and first implementation of an accelerated working method for official codification of legislative texts" and declared that "the European Parlia-

38 Doc. A2-152/89, [1989] OJ C158/386.

39 Further calls for action have been made in particular by the European Councils of Madrid 1995, Amsterdam 1997, Lisbon 2000, and Seville 2002. The conclusions of the European Councils can be found on the Council website: <www.consilium.europa.eu/en/european-council/conclusions>. Accessed 14 May 2016. *See* also the Joint Initiative on Regulatory Reform of 2004, available at: <http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/media//47C54/jirf_0104.pdf>. Accessed 14 May 2016.

ment, the Council and the Commission ought to ... make their best efforts to accelerate the codification of legislative texts."[40]

Numerous reports have been commissioned by the EU or by Member States looking into the problems at EU level.[41] The EU institutions had to respond to those concerns and adopted a number of Inter-institutional Agreements (IIAs) and Joint Declarations on aspects of regulation.[42]

The 2003 IIA on Better Law-Making set out the EU institutions' common commitment to improving the quality of law-making by better preparation of legislation, greater transparency, better drafting, improved accessibility, keeping the regulatory burden as light as possible, improved follow-up after adoption and in particular by updating and condensing the acquis by means of repeals, codification and recasts.[43]

In March 2016, the EU institutions adopted a new IIA on Better Law-Making, which replaces the 2003 IIA but addresses many of the same themes. In particular, it gives the European Parliament and the Council more influence over the EU's legislative programming, stresses the importance of an evidence-based approach to legislation by means of reinforced impact assessments and ex post evaluation of legislation, establishes some ground rules for delegated and implementing acts, and outlines measures to improve transparency and to keep regulatory burdens in check.

As is to be expected in view of its position in the EU's institutional structure, it is the Commission that has been most active in addressing the problems of the

40 [1997] OJ C340/139.

41 In particular Sutherland (1992), available at: <http://aei.pitt.edu/1025/>. Accessed 14 May 2016 – on the follow up to the Sutherland Report, *see* COM(93)361; the French Conseil d'état (1992), Rapport public 1992, Le droit communautaire (Etudes et documents n. 44); Molitor (1995), *see* COM(95)288; T. Koopmans, *De kwaliteit van EG-regelgeving – Aandachtspunten en voorstellen*, 1995; 'Mandelkern Group on Better Regulation', 2001, available at: <http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf>. Accessed 14 May 2015; 'Davidson Review', available at: <http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file44583.pdf>. Accessed 14 May 2016; E. Stoiber, 'Cutting Red Tape in Europe', 2014, available at: <http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/08-10web_ce-brocuttingredtape_en.pdf>. Accessed 14 May 2015.

42 IIA of 20 December 1994 on an accelerated working method for official codification of legislative texts [1996] OJ C102/2; IIA of 22 December 1998 on common guidelines for the quality of drafting of Community legislation [1999] OJ C73/1; IIA of 28 November 2001 on a more structured use of the recasting technique for legal acts [2002] OJ C77/1; IIA of 16 December 2003 on better law-making [2003] OJ C321/1; Inter-institutional 'Common Approach to Impact Assessment', November 2005, available at: <http://ec.europa.eu/smart-regulation/impact/ia_in_other/ia_in_other_en.htm>. Accessed 14 May 2016; Joint Declaration on practical arrangements for the co-decision procedure [2008] OJ C 102E/111; Framework Agreement on relations between the European Parliament and the European Commission of 20 October 2010 [2010] OJ L304/47, replacing the Framework Agreements on relations between the European Parliament and the Commission of 2000 and 2005 ([2001] OJ C 121/122 and [2006] OJ C117E/125); Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents [2011] OJ C369/14; Joint Political Declaration of 27 October 2011 of the European Parliament, the Council and the Commission on explanatory documents [2011] OJ C369/15). IIA of 2016 on Better Law-Making [2016] OJ L123/1.

43 [2003] OJ C 321/1; *see* in particular point 35.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

acquis. It has launched one programme after another, with the early measures tending to concentrate on formal quality and specific issues while the later ones are more holistic and take account of the overall burden of regulation. The major programmes are:

- Better Regulation (2001 onwards), focusing in particular on evidence-based regulation;
- Smart Regulation (2010), paying attention to the whole of the regulatory cycle;
- Regulatory Fitness (2012), extending the focus to include existing acts as well as new ones; and
- The Better Regulation Package (2015), including a Commission Communication on "Better regulation for better results – An EU agenda" and guidelines and a toolkit for Commission staff.

These measures are considered in more detail in Section C.II.

C Techniques Used to Update and Simplify EU Legislation

I Formal Updating

1 Consolidation

Consolidation is a mechanical process whereby the enacting terms of an act (the articles and any annexes but not the recitals, which set out the reasons for the act) and all amendments and corrections to them are brought together in a single new text. The resulting consolidated text is for information only and has no legal status. It is not published in the OJ, but is made available on EUR-Lex. The original act remains in force with all its various amendments.

The Publications Office carries out the consolidation of EU legislation in all the official languages under the supervision of the inter-institutional Working Group on Consolidation.[44] It consolidates all acts that have been amended, other than those of short duration, and states that "on average the consolidated version is available in EUR-Lex within 2-3 weeks after the entry into force of an amendment published in the OJ."[45]

The consolidated texts are not authentic but are an invaluable tool for all users of EU law. They also serve as the basis for the work of codifying and recasting of EU legislation. Some 14,000 consolidated texts of acts are listed in the Directory of European Union Consolidated Acts.[46]

2 Codification

Codification is the process whereby a new act is adopted by the legislative authority bringing together in a single text all the provisions of an existing act and all amendments and corrections already made to those provisions, without making

44 *See* COM(2001)645, point 2.2.

45 *See* <http://eur-lex.europa.eu/content/legis/avis_consolidation.html>. Accessed 14 May 2016.

46 *See* <http://eur-lex.europa.eu/browse/directories/consleg.html>. Accessed 14 May 2016.

any new amendment. More rarely, a codification will be made of two or more parallel acts. The title and the preamble of the new act indicate that it is a codification and it includes a complete and coherent statement of reasons.

As long ago as 1974, the Council called for the codification of "Regulations or Directives which have been amended several times".[47] In 1994, the European Parliament, the Council and the Commission adopted an IIA on an accelerated working method for codification.[48] The new act passes through the whole legislative procedure starting with a proposal from the Commission, which is largely prepared by the Commission Legal Service. The Commission undertakes to make no 'substantive changes' to the act being codified, and it must satisfy a Consultative Working Party consisting of the legal services of the three institutions that is the case. In practice, this is achieved by means of special word-processing templates in which the source of each part of the text of the act being codified is identified. The Commission proposal is examined in the European Parliament solely by the Legal Affairs Committee and in the Council solely by a special Codification Working Group.

When the European Parliament and the Council adopt the new act, it is published in the OJ and it repeals the earlier act and all amendments to that act. The new codified act supersedes all the earlier provisions and becomes the authoritative text.

3 Recasting

In 2001, the three institutions recognized that codification was not producing all the desired results and adopted an IIA on a procedure for recasting acts as "part of the measures undertaken by the institutions to make Community legislation more accessible".[49]

Recasting is the process whereby a new act is adopted that brings together in a single text all the provisions of an existing act (or a number of parallel acts in the same field) and all amendments and corrections already made to those provisions. It differs from codification in that new amendments are also made; indeed, the act may be completely restructured. In particular, recasting offers an opportunity to take account of any judgements of the CJEU in the relevant field. The title and the preamble of the new act indicate that it is a recast and it includes a complete and coherent statement of reasons.

The new act passes through the whole legislative procedure starting with a proposal from the Commission, which is prepared by the Commission Directorate General concerned and the Legal Service. Special word-processing templates are used in which the source of each part of the text of the act being recast is identified. The part of the text that corresponds to existing provisions is treated as a codification and the parts that are new are subject to the normal legislative procedure.

47 *See* Council Resolution of 26 November 1974 concerning consolidation of its acts ([1975] OJ C 20/1). The English terminology of consolidation and codification had not then been fixed.

48 [1996] OJ C 102/2.

49 [2002] OJ C 77/1.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

When the European Parliament and the Council adopt the new act, it is published in the OJ and it repeals the earlier act and all amendments to that act. The new recast act supersedes all the earlier provisions and becomes the authoritative text.

4 Repeal

Because of the existence of the doctrine of implied repeal in civil law, it was formerly common for new EU acts to be adopted without any provision repealing the earlier acts in the same field. It was only in 1998 that formal guidance was laid down that: "Obsolete acts and provisions shall be expressly repealed. The adoption of a new act should result in the express repeal of any act or provision rendered inapplicable or redundant by virtue of the new act."[50]

In 2003, the institutions undertook to update and condense EU legislation "through the repeal of acts which are no longer applied and through the codification or recasting of other acts".[51] The Commission accordingly launched a programme to reduce the bulk of EU law by identifying and repealing all acts that are obsolete.[52] As part of that programme, independently of the adoption of a new act, staff of the Commission Legal Service began the painstaking task of screening the whole of the acquis in an attempt to identify acts that were no longer applied in order to have them repealed. The Commission can only repeal acts that it adopted itself while legislative acts must be repealed by provisions in legislative acts adopted by the European Parliament and the Council. Where it is technically not possible to repeal acts because there is no longer a legal basis, the Commission has issued formal declarations that those acts were obsolete.[53]

II Regulatory Reform Programmes

Apart from those formal techniques to update and simplify the acquis, the Commission has taken steps to improve the regulatory environment, especially for business. Early examples were:

- The self-explanatory Simpler Legislation for the Internal Market (SLIM) initiative, adopted in response to the Molitor report;[54]
- The Business Environment Simplification Taskforce (BEST), set up by the Commission in September 1997 at the invitation of the Amsterdam European Council of June 1997 to consider "simplification of existing and new legal and administrative regulations in order to improve the quality of Community legislation and reduce its administrative burden on European business".[55]

50 *See* the 1998 IIA on drafting quality ([1999] OJ C 73/1), Guideline 21.

51 *See* the 2003 IIA on better law-making ([2003] OJ C 321/1), point 35.

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

53 *See, e.g.*, the Communication from the Commission establishing formal recognition that a certain number of acts of Community law in the field of agriculture have become obsolete ([2009] OJ C 30/18).

54 COM(96)204 and COM(96)559.

55 Commission Communication on Promoting Entrepreneurship and Competitiveness (COM(98)550).

They were followed by a succession of comprehensive programmes.[56]

1 Governance

In 2001, the Commission adopted the White Paper on Governance, which stated that the EU "must pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts". That White Paper and the associated measures came to form part of the better regulation programme.[57] Also in 2001, a codification programme was launched with the ambitious target of reducing the size of the acquis by some 40%.[58]

2 Better Law-Making and Better Regulation

The 2003 IIA on Better Law-Making became a cornerstone of the Commission's Better Regulation programme in which a leading role is played by the Commission Secretariat-General.[59] The 2003 IIA took a holistic approach to regulation and placed particular emphasis on impact assessments and consultation.

In 2005, the Commission adopted a strategy for the simplification of the regulatory environment[60] and begun a rolling programme for simplifying and improving existing EU law, identifying areas where action should be taken with input from stakeholders. It reported regularly on its programme and progress made.[61] In 2007, the Commission launched an Action Programme for Reducing Administrative Burdens (ABR).[62]

3 Smart Regulation

In 2010, the Commission launched the Smart Regulation project incorporating the Better Regulation principles and tools and embracing the whole cycle of regulation including implementation and post-adoption scrutiny.[63] It adopted in particular a simplification agenda covering the current Multi-annual Financial Framework, measures to improve the business environment for small businesses, and a red-tape reduction programme for the period 2007-2012.[64]

56 For an overview of these measures, *see* W. Voermans *et al.*, 'Codification and Consolidation in the European Union: A Means to Untie Red Tape', *Statute Law Review*, Vol. 29, No. 2, 2008, p. 65, at p. 67.

57 COM(2001)428. *See* also the follow up communications on simplification of regulation (COM(2001)130 and COM(2001)726) and 'European Governance: Better lawmaking' (COM(2002)275) and the action plan on simplifying and improving the regulatory environment (COM(2002)275, 276, 277 and 278).

58 COM(2001)645, *see* point 2. *See* also the final report on the project COM(2009)17.

59 *See* website on Better Regulation, available at: <http://ec.europa.eu/smart-regulation/index_en.htm>. Accessed 14 May 2016.

60 COM(2005)535.

61 COM(2006)690, COM (2008) 33, COM (2009) 17.

62 COM(2007)23.

63 COM(2010)543, at point 2.4. *See* <http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm>. Accessed 14 May 2016. The Smart Regulation agenda itself forms part of the Europe 2020 strategy, which seeks a way out of economic crisis by initiatives to deliver smart, sustainable and inclusive growth (COM(2010)2020, at point 2.1).

64 COM(2012)42, 'Simplification Agenda for the MFF 2014-2020'. COM(2011)803, 'Minimising regulatory burden for SMEs'.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

4 REFIT

In 2012, the Commission launched its Regulatory Fitness and Performance programme, REFIT, designed to make EU law 'fit for purpose', to simplify it and to reduce regulatory costs.[65] Apart from measures to improve new regulation (in particular impact assessments, consultation and evaluation, to ensure that all new initiatives are evidence based and prepared in a transparent manner), it focused attention on existing legislation, in particular to make it simpler, to improve implementation and evaluate its effectiveness and to reduce regulatory burdens.

5 Better Regulation Package 2015

In May 2015, the new Commission adopted a package of measures "to deliver better rules for better results" including a new agenda and extensive guidance for its staff in Better Regulation Guidelines and a Better Regulation Toolbox. It established a REFIT platform composed of high-level experts from business, civil society, social partners, the Member States and the EU's advisory bodies to make suggestions for reducing regulatory burdens and an independent Regulatory Scrutiny Board to advise the Commission.[66]

D Do Those Solutions Work?

I Techniques for Formal Updating of EU Legislation

1 Consolidation

Consolidation is an invaluable tool for making EU legislation that has been amended more accessible and it is the basis for work on codification and recasting.

One serious weakness is that it does not include the recitals, the statement of reasons published in the preamble of each act, which play an important role for the interpretation of the act. Another problem is the weak status of consolidated texts which are accompanied by a most off-putting disclaimer:

> Consolidated texts are intended for use as documentation tools and the institutions do not assume any liability for their content. Please note that these texts have no legal value. For legal purposes please refer to the texts published in the OJ.[67]

The institutions should recognize the great practical importance of consolidation and enhance its value. The consolidated texts should be expanded to include an updated version of the recitals.

65 *See* the Commission communication on EU Regulatory Fitness (COM(2012)746). It drew, amongst other sources, on the 2012 OECD Recommendation on Regulatory Policy and Governance: <www.oecd.org/gov/regulatorypolicy/49990817.pdf>. Accessed 14 May 2016.

66 COM(2015)215, COM(2015)2016 and other documents, available at: <http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm>. Accessed 14 May 2016.

67 *See* <http://eur-lex.europa.eu/collection/eu-law/consleg.html>. Accessed 14 May 2016.

The importance of the distinction between texts that are authentic and those that serve information purposes should not be overestimated. It was only in 2013 that the electronic version of the OJ became authentic, but it had been extensively relied on by the majority of users for many years before that. The institutions should recognize that even though the consolidated texts are not authentic they are indispensable: if an act has been amended five times, almost all users of EUR-Lex will consult the consolidated text there rather than piecing together for themselves the authentic text of the original act and of the five amending acts.

In the same way as users would rely on the electronic texts of EU legislation even before they became authentic, users should be able to rely on the consolidated texts. Donelan refers to Malta and Estonia as examples of systems where users may rely on consolidated texts of legislation published on official sites.[68] In the EU system too there should be a presumption that the consolidated texts issued by the Publications Office reflect the latest state of EU legislation. To make this possible, the institutions should provide the resources to make the consolidation work as reliable as possible.

2 Codification

The 1994 IIA on official codification should be scrapped as being no longer fit for purpose. The very term 'official codification' has long been superseded by 'codification'.

In fact, though, it should now be plain that the technique of codification in the EU sense is of little use, since it does not allow any new 'substantive change' to be made to an old act. A codification cannot, therefore, take any account of practical developments, a serious weakness in our rapidly changing world, or of the case-law of the CJEU, which often has far-reaching impact on the effect of EU legislation. Codification can only incorporate all the textual amendments to an act, but not substantive amendments. While it is true that the drafting rules express a strong preference for textual amendment,[69] there are numerous examples in EU acts of 'substantive amendment', such as where operation of an act is partially suspended, often for a considerable time.[70]

68 E. Donelan, 'European Approaches to Improving Access to and Managing the Stock of Legislation', *Statute Law Review*, Vol. 30, No. 3, 2009, p. 147, at Section 3.C(i). *See* also Voermans *et al.* 2008, p. 65, at 78. At p. 81 the authors cite Slovenia as an example of best practice insofar as, whenever an act is amended, parliament adopts a consolidated version of the text at the same time, removing any doubts as to authenticity.

69 Guideline 18 in the 1998 IIA states, "Amendments shall take the form of a text to be inserted in the act to be amended." But the Joint Practical Guide (JPG) adds that substantive amendments may be justified "for reasons of urgency or for other practical reasons and for the sake of simplicity" (at point 18.15). D. Berry, citing G.C. Thornton, *Legislative Drafting*, 4th edn, 1996, p. 407, lists the numerous advantages of textual amendment in 'Keeping the Statute Book up-to-date – A personal view', *The Loophole*, No. 3, 2007, p. 33, at 42.

70 For example, the requirement for all EU acts to be drafted in Irish was partially suspended by Council Reg. (EC) No 920/2005 ([2005] OJ L 156/3) and there is no sign of that suspension being removed even after more than 10 years.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

On the formal level, it should be noted that the approach to drafting EU acts has evolved considerably.[71] For example, modern EU acts focus more on the needs of the user by including such things as introductory articles setting out subject matter, scope and definitions, and headings for articles and more precise references. Codification of older acts without those elements would lead to texts that fail to meet modern drafting standards.

In fact, there cannot be many cases where it is worth the trouble of readopting without change a series of provisions from an old act and all its amendments. Even though the 1994 IIA refers to an accelerated working method, the codification process imposes a heavy burden on the three institutions which have to prepare, process, translate and adopt texts in 24 languages, with plenty of scope for errors and delays. The process takes time and if during that time it becomes necessary to amend the act (something that may well become apparent when the old act is subjected to close scrutiny in the course of the preparatory work), the codification must be restarted from the beginning. It also adds to the burden on the Publications Office, which has to publish the new texts in all 24 languages and update all its databases and links.

Those burdens far outweigh the marginal benefit for users of access to a single new text since users already have access to the Publications Office's consolidated (but not authentic) text of the articles together with any amendments.

Nor does the added value justify the burden on the users who have to familiarize themselves with a new act. That act will bear a new number and so any references in other legislative provisions or in guidance at EU and national level and any links on websites will have to be adapted. When the new act is published, users are not given guidance as to which parts of the text are taken from which act, whether the original act or an amending act. As the proposal for a codification passes through the legislative procedure, the text of the proposal is scrupulously marked to show which act the various provisions are taken from. Only knowledgeable users who are aware that those indications are in the Commission proposal will be able to track them down.

In fact, the codification process has never worked well. The choice of texts for codification was arbitrary. For many years, the criterion for choosing an act for codification was merely how often the original act had been amended, rather than whether codification would be useful. The earliest criterion was that an act had to be codified at the latest when it came to be amended for the tenth time.[72] For the 2001 codification project, the criterion was changed and so any act that had been amended just once was 'codifiable'.[73]

71 *See* W. Robinson, 'Evolution of European Union Legislative Drafting', *The Loophole*, No. 1, 2014, p. 7, available at: <http://www.opc.gov.au/calc/docs/Loophole/Loophole_Jan14.pdf>.

72 According to the Commission Manual on Legislative Drafting, p. 59, citing Commission Decision COM(87) Min 868 of 1 April 1987, "codification must be undertaken whenever an act or set of acts has been amended several times, and no later than after the tenth amendment", available at: <http://ec.europa.eu/smart-regulation/better_regulation/documents/legis_draft_comm_en.pdf>. Accessed 14 May 2016.

73 *See* point 1.3 of COM(2001)645: "Some 70 000 pages of the acquis could benefit from this operation (some 10 000 pages never having been amended and therefore not being codifiable)."

Few codification procedures have been completed. Between 1994 (when the accelerated procedure for codification was introduced) and 2001, only 27 codified texts were adopted.[74] Timmermans suggests that the reasons for the low figure were the technical difficulties of producing texts in many languages, the reopening of discussions on points of substance, and the need arising during the codification process for further amendments.[75]

In 2001, an ambitious five-year project was launched to codify the whole of the acquis, estimated to amount to some 80,000 pages of the OJ, with the stated aim of reducing it by over 40%.[76] However, the project took much more than five years and on its completion in 2009 the Commission had to report that it had codified just 142 acts, of which 40 were co-decision acts, and reduced the acquis by only 1,300 pages.[77] Wainwright suggests that this is a common problem with projects that aim to be all-embracing.[78]

Since that project came to an end, the number of codified texts adopted each year has varied but no official statistics seem to be available. The Commission Work Programme for 2016 does not envisage any codifications.[79] In fact appropriate use of the recast technique, coupled with enhancement of consolidation, should make codification redundant.

3 *Recasting*

Recasting is a valuable technique for allowing amendments to be made while maintaining legal stability, but the approach to recasting and the 2001 IIA on recasts[80] should be revised.

The usefulness of recasts should not be overstated. The added value of a recast text over an amending act, which will then be consolidated, is often not enough to justify the administrative and procedural burdens placed on the institutions and the burden on the users of familiarizing themselves with a new act, as described above.

74 *See* COM(2001)645, point 2 of the explanatory memorandum.

75 Timmermans 1998, pp. 39, 57 and 58.

76 "According to Commission estimates, it would be possible to reduce the acquis by about 30 000 to 35 000 pages if it were codified," COM(2001)645; *see* point 2 of the Explanatory Memorandum.

77 "142 acts have been codified, adopted and published in the Official Journal (102 Commission acts and 40 acts of the European Parliament and the Council). These 142 codified acts replace 729 previous acts, corresponding to about 1 300 pages of the Official Journal. 87 acts are still pending before the Council and the European Parliament" (COM(2009)17 final, point 5). The 1994 IIA applies only to legislative acts, not Commission acts.

78 J. Wainwright, 'Keeping the Statute Book up to Date – A Self-Help Guide', *The Loophole*, No. 2, 2009, p. 55, at 57: "The quest for completeness, worthy as it is in principle, is inimical to the attainment of significant benefits in the short term, because 'big bang' exercises are prone to lengthy lead times as a result of their sheer size. This is a problem that is exacerbated by the inclusion of many titles that are of low priority for various reasons, such as their sheer unimportance, the limited audience to which they are addressed and their uncomplicated legislative history."

79 COM(2015)610, Ann. II – list of REFIT initiatives.

80 [2002] OJ C 77/1.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

In striking the balance between maintaining the stability of the law and ensuring that the statute book is fit for purpose, the technical question arises again of how many provisions from old acts meet modern drafting standards.

The choice of what to maintain unchanged and what to amend is often a political choice and the three institutions may disagree fundamentally about where to draw the line. The Commission may use a recast to try to avoid the legislative authority reopening discussions on points agreed in the original act. But in fact the European Parliament and the Council will reopen some of those discussions whatever happens and as a result some recast procedures may become completely blocked.[81]

Both the codification and recast procedures are so cumbersome for staff of the EU institutions that they may often avoid them and instead propose repealing and replacing an old act. Where a new act is to include technical rules, the common technique is to put all the technical rules in an annex so that when they need to be amended the whole annex can be replaced.[82] The advantages are that a complete, authentic text of the technical rules is always available and the number and title of the act remains unchanged.

No official statistics for recasts adopted each year seem to be available but the figure is not high. The Commission Work Programme for 2016 envisages only one recast.[83] In the 2016 IIA on Better Law-Making, the EU institutions "confirm their commitment to use the legislative technique of recasting for the modification of existing legislation more frequently" and state that if recasting is not appropriate, the Commission is to submit a proposal for codification as soon as possible and if it does not do so it must state its reasons.[84]

If that commitment is followed to the letter a heavy burden will fall on the institutions. In the five years from 2011 to 2015, the European Parliament and the Council adopted 177 amending acts. If the 2016 IIA had applied, most of those acts should have been recasts, or else have led to a codification. It is easy to see that the volume of the texts passing through all the procedures, being produced in 24 languages and then published in the OJ, is going to increase many times over, bringing with it administrative problems for the institutions, but also for the users who will constantly have to familiarize themselves with new acts. Such an ill-advised commitment will almost certainly remain a dead letter and should be reviewed or repealed at the first opportunity.

The rules in the 2001 IIA on recasting should be comprehensively revised. A new IIA should be drawn up to cover all aspects of formal updating of the acquis (see Section E.III below).

81 One notorious example is Reg. (EC) No 1049/2001 on public access to documents of the EU institutions ([2001] OJ L 145/43). In 2008, because the regulation was out of date the Commission proposed a recast (COM(2008)229). No agreement could be reached on that proposal and in 2011 the Commission therefore proposed an amendment (COM(2011)137) but still in 2016 that has not yet been adopted either.

82 *See* Guideline 22 of the 1998 IIA.

83 COM(2015)610, Ann. II – list of REFIT initiatives.

84 Point 46.

As far as recasting is concerned, the new IIA should lay down ground rules for cases where the Commission proposes changes limited to certain parts of an existing act but the legislative authority wishes to reopen discussions on other parts. Such cases can now be identified and addressed at an early stage since the 2016 IIA on Better Law-Making gives the European Parliament and the Council a greater say in determining the content of the Commission Work Programme.[85]

In addition, provision should be made for users of legislation to be given easily accessible information on precisely which parts of a recast act are unchanged and which parts are new, perhaps by publishing the marked-up versions used by the institutions in the adoption process.

4 Repeal

In 2012, the Commission stated, "Since 2005, the Commission approved 640 initiatives aimed at simplification, codification or recasting. More than 4450 acts have been repealed, of which 1750 as a result of codification and recasting."[86] That may sound impressive until it is compared with the number of new acts adopted over the same period: 16,176.[87]

The Commission Work Programme for 2016 lists the 28 repeals that are envisaged. It is striking that after all the efforts going back many years to remove obsolete acts from the acquis, the list for 2016 still includes such items as acts relating to visas for the Olympic Games in Athens in 2004 and in Turin in 2006 or prices for fishery products in 2004 and in 2009.[88]

The REFIT programme should identify some obsolete acts with its targeted approach. The problem should be becoming less serious since the obligation to repeal obsolete acts whenever a new act is adopted was introduced in 1998 and the obligation to consider including review clauses and sunset clauses in new acts was introduced in 2016.[89]

To deal with the problem of older acts, the EU institutions should establish a formal presumption that all acts over a certain age are obsolete and must, therefore, be reviewed with a view to being either repealed or replaced by a modern act in accordance with modern standards of preparation and drafting. A first exercise might review all acts adopted before 1980, a second exercise all acts before 1990, and so on. In time, the review requirement could apply automatically to all acts that are, for example, 10 years old or more.

II Regulatory Reform Programmes

The Commission has adopted a succession of programmes to tackle the problem of the volume and complexity of the EU acquis. It is, however, often unclear

85 *See* Section II, points 4 *et seq.*

86 COM(2012)746, point 4.2.

87 Acts adopted between 2006 and 2012, available at: <http://eur-lex.europa.eu/statistics/legislative-acts-statistics.html>. Accessed 14 May 2016.

88 *See* COM(2015)610, Ann. V. The acts concerned are, respectively, Reg. (EC) No 1295/2003, Reg. (EC) No 2046/2005, Reg. (EC) No 2326/2003, and Reg. (EC) No 1299/2008.

89 Guideline 21 of the 1998 IIA on drafting guidelines and point 23 of the 2016 IIA on Better Law-Making, respectively.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

whether one programme has ended and another taken its place or whether successive programmes coexist. And since the Commission is responsible for almost all efforts to update EU legislation, it is not always possible to see what it is doing in order to improve the technical quality of the regulatory framework and what is in the name of reduction of burdens. The main focus of REFIT is made clear by its first heading: "Smart Regulation: responding to the economic imperative" although it does also refer to "Managing the quality of the legislation".[90]

Those factors make it difficult to weigh the merits of any one programme and to assess the results in order to hold the Commission to account.

The 2016 IIA improves the position by giving the European Parliament and Council a greater say over the Commission Work Programme and bringing more transparency. The closer collaboration between the three institutions in drawing up the work programme should also help address the issue of the institutions' differing priorities for regulatory reform for, as Palmer points out, "All law reform projects contain within them the seeds of political controversy."[91]

E Final Words

I General

The EU legislative process is highly complex, involving three independent institutions with different interests, but also different structures and timetables. The European Parliament is geared to its five-year cycle between the elections across the whole EU. The Presidency of the Council rotates every 6 months but the ministers making up the Council change in accordance with their own national electoral cycles. The Commission has now fallen into step with the European Parliament's five-year cycle.

The division of responsibilities between many different bodies and departments across the three institutions leads to a lack of transparency, making it difficult to see who does what. While outsiders may be able to say that the volume of EU legislation and its complexity are a problem, they often cannot determine exactly who should be addressing that problem.

II Are New Structures Needed?

The classic position was that the Commission was responsible for monitoring the application of EU law and for ensuring that EU law was of good quality. It was regarded as an independent technocratic body serving only the European interest.

But the Commission is no longer just a technocratic body (if it ever was one) but an overtly political one. Before the elections to the European Parliament in 2014, the candidates for the post of President of the Commission set out their political agendas. Jean-Claude Juncker was appointed President of the Commis-

90 COM(2012)746, point 1 and point 4.2.

91 G. Palmer, 'The Law Reform Enterprise: Evaluating the Past and Charting the Future', *LQR*, 2015, p. 402, at 410, citing G. Zellick (Ed.), *The Law Commission and Law Reform*, London, Sweet and Maxwell 1988.

sion with his political agenda, and soon after his appointment he duly presented his Political Guidelines for the Commission to the European Parliament.[92]

Does it matter that the European Commission is a political body, and does the EU need a law commission? One of Donelan's main conclusions is that "for most countries there should be a trusted and well-respected body created or conferred with the responsibility to make sure the stock is accessible and coherent" (presumably on the model of the Law Commissions in Ireland, Malta and the United Kingdom that he had referred to earlier) and that it should have powers covering aspects of formal updating.[93] Palmer lists the strengths of law commissions and concludes that they "have forged superior methods of designing law compared with those employed by executive governments and parliaments".[94]

Palmer also quotes what he calls a 'striking passage' by John Locke:

> And because it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government.[95]

We have seen the European Commission's central role in the making of EU law (its monopoly of the legislative initiative and its strong position in the negotiations on legislation with the legislative authority) and its role in the execution of EU law (overseeing the application of EU law under Art. 17 TEU). The question may be asked whether it should also keep in its hands its present powers regarding both formal updating and substantive reform of EU law.

It is perhaps natural to those coming from an Irish, Maltese or United Kingdom background to point to the role of the Law Commissions in their own legal systems and suggest that the EU needs something similar. Other Member States, however, do not see the same need.

In a recent article in which I suggested that the EU now needs a new standing body on technical aspects of EU regulation, I pointed out that the various calls made in the past for some joint structures to improve aspects of EU regulation had always been resisted by the institutions that were unwilling to see their independence compromised or the EU legislative process complicated still further.[96]

92 A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, available at: <http://ec.europa.eu/priorities/publications/president-junckers-political-guidelines_en>. Accessed 14 May 2016.

93 Donelan 2009, p. 147, *see* section 5, Conclusions.

94 Palmer 2015, p. 402, at 415 and 416.

95 J. Locke, 'Second treatise on Civil Government – an essay concerning the true original, extent and end of civil government', *in* E. Barker (Ed.), *Social Contract – Locke, Hume and Rousseau*, London, Oxford University Press 1958, p. 122, para. 143.

96 Robinson 2015, p. 257, in particular section C(2).

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

The present delicate institutional balance is enshrined in the Treaties, and the Commission jealously guards its monopoly of the legislative initiative. The insertion of any new body into the EU structure would probably entail change to the Treaties, something that would be extremely complicated and require approval by each Member State in accordance with its own procedures, which may include a referendum. There is little or no appetite for such a process at the moment.

III Exploit Existing Structures

Because of the difficulty of creating any new entity, it is essential first to ensure that the present procedures and structures are exploited to the full.

More attention should be given to future-proofing regulation. Already the increased attention to impact assessments and extensive consultation should reduce the need to revisit rules soon after their adoption. Increased awareness that the world is changing fast should make regulators even more cautious about adopting prescriptive solutions. The EU institutions have made it clear that part of the solution lies in light-touch regulation, and increased reliance on standardization, performance-based regulation, and self-regulation and co-regulation.[97]

All those involved in the drafting of EU rules need to be reminded of the importance of future-proofing those rules. They must not allow provisions to become too detailed. They must avoid any substantive amendments. All amendments should indeed be framed as changes to the text of the original acts, and precise instructions should be given as to where they are to be made. The drafting rules already state, "Preference shall be given to replacing whole provisions ... rather than inserting or deleting individual sentences, phrases or words,"[98] but drafters must be aware of other factors that make consolidations or codification more difficult or impossible, such as over-complex provisions on dates of application of different parts of amending acts.

The EU institutions should draw up an IIA on managing the acquis. It should bring together all the ground rules on formal updating, including an enhanced form of consolidation, codification, recasting and repeals. It should establish a coherent framework for all those tasks and establish a fundamental commitment

97 On standardization in EU law, *see* Regulation (EU) No 1025/2012 ([2012] OJ L 316/12). On performance-based rules in an EU context, *see, e.g.*, the European Aviation Safety Agency report on A Harmonised European Approach to a Performance Based Environment, available at: <https://www.easa.europa.eu/system/files/dfu/Report%20A%20Harmonised%20European%20Approach%20to%20a%20Performance%20Based%20Environment.pdf>. Accessed 14 May 2016. Self-Regulation (which includes such things as codes of conduct adopted by industry) and Co-regulation (where the legislator establishes objectives but leaves the parties concerned to determine how best to meet those objectives) were expressly mentioned in the 2003 IIA on Better Law-Making at point 16 *et seq*. They are not mentioned in the 2016 IIA on Better Law-Making, but are still referred to on the European Commission's Smart Regulation website under Simplification, available at: http://ec.europa.eu/smart-regulation/refit/simplification/index_en.htm. Accessed 14 May 2016. *See* also L. Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?', *Electronic Journal of Comparative Law*, Vol. 9, No. 1, 2005, available at: <www.ejcl.org/91/art91-3.PDF>. Accessed 14 May 2016.

98 Guideline 18 of the 1998 IIA.

to updating and simplifying the acquis and improving access to all EU law. More detailed guidance could then be adopted on the basis of the ground rules in the IIA.

The Publications Office is an inter-institutional office serving all the institutions of the European Union.[99] It is already responsible for all EU publications including the Treaties, the OJ, the case-law of the CJEU, databases of EU law and the consolidated texts of EU legislation. It should be given a greater role in making EU law more accessible to the millions of users who already consult EUR-Lex each month. In addition to the formal OJ publication, there should be an Internet version of all major legislative acts assisting the user with more explanation and clearer Internet-based presentation making full use of hyperlinks.[100]

All proposals for textual amendments to acts could be accompanied throughout the legislative procedure by a consolidated text showing what the text would be if the proposed amendments were incorporated. That would assist the legislative authority in its scrutiny of the proposal. When the amending act is adopted, the consolidated text would be available immediately. As mentioned in Section D.II above, the status of those consolidated texts should be enhanced.

A similar approach could be taken to proposals for recast acts to assist the legislative authority in the course of the legislative procedure, and once a recast is adopted an annotated text should be published on EUR-Lex showing clearly what is old and what is new.

IV Improve Reporting on Legislation and Oversight

For many years, the Commission produced an annual report on better law-making. Those reports used to cover a range of the technical measures taken to improve the quality of law-making. For example, the first report for 2001 had sections on consultation, quality law-making, legal drafting, recasting, consolidation and codification, and simplification.[101]

In recent years, however, the reports have barely mentioned such technical measures. Instead, they have focused almost exclusively on the principles of subsidiarity and proportionality and the process for handling the opinions on those principles by national parliaments.[102]

It would be useful to have separate reports devoted solely to technical aspects of law-making, drafting, publication and accessibility of legislation. The Commission should draw up an annual report according to a prescribed format ensuring that each aspect gets due coverage. It should be accompanied by detailed statistics according to a standard model giving a breakdown of acts. The other institutions and the Publications Office should also submit reports on their related activities in the same format and at the same time.

99 *See* Dec. 2009/496/EC, Euratom, [2009] OJ L 168/41.

100 *See, e.g.*, hyperlinks within the text of an act to the explanatory memorandum point corresponding to each provision and for defined terms, references to other acts, and for annexes.

101 COM(2001)728.

102 *See* the report for 2014, COM(2015)315.

European Journal of Law Reform 2016 (18) 3
doi: 10.5553/EJLR/138723702016018003004

The three institutions should coordinate the annual reporting exercise and the scrutiny of the reports in the European Parliament and the Council. It could be the occasion for a real appraisal of regulation in the EU and a broad debate amongst all parties concerned, and the Member States.

V Accessibility of Legislation as Part of the Rule of Law

The rule of law is mentioned in Article 2 TEU as one of the values on which the EU is founded. It is also mentioned in the preamble to the TEU and in the Charter of Fundamental Rights and has been referred to by the CJEU in cases dating back to 1986.[103]

Bingham wrote that a key ingredient of the rule of law was:

> The law must be accessible and so far as possible intelligible, clear and predictable.[104]

He cites three reasons for those requirements:

1 We must be able to find out without undue difficulty what we must or must not do on pain of a criminal penalty.
2 We must be able to know what our rights under civil law are if we are to claim them and what our obligations under civil law are if we are to perform them.
3 A body of accessible legal rules governing commercial rights and obligations is a prerequisite for the successful conduct of trade, investment and business generally.

The combination of serving the fundamental values of the EU and promoting the competitiveness of EU businesses should be compelling arguments for the EU institutions and the Member States to do their utmost to make the EU acquis as accessible as possible.

103 Case 294/83 *'Les Verts' v. European Parliament* [1986] ECR 1339, para. 23.
104 T. Bingham, *The Rule of Law*, London, Allen Lane 2010, p. 37 *et seq.*