

Gender Neutrality in EU Legislative Drafting

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Abstract

In the English-speaking world the issue of gender-neutral drafting in legislation has been a much discussed topic for many years, and there are few legislative drafting manuals in the English-speaking world that do not address the issue.

The EU and its institutions also attach great importance to gender issues, as is shown by the solemn commitments in EU texts to gender equality, by the establishment at the EU level of bodies or committees to focus on those issues, and by the EU actions and policies that seek to address them. But the issue of gender-neutral drafting in legislation is not even mentioned in the guidance drawn up by the legislative drafting experts of the EU institutions.

This contribution, therefore, looks at how gender issues are dealt with in practice in the EU Treaties and in EU legislation. It finds signs of a traditional approach that is beginning to evolve but only slowly and somewhat unevenly.

The contribution considers some of the reasons behind the approach taken by the EU institutions to gender neutrality in drafting and the impact of the important EU principles of multilingualism and multiculturalism before seeking to draw some conclusions.

Keywords: legislative drafting, EU legislation, EU treaties, multilingualism, gender neutrality.

A Introduction

In the English-speaking world the question of gender-neutral drafting in legislation has been a much discussed topic for many years.¹

The EU and its institutions attach great importance to gender issues, as is shown by the solemn commitments in EU texts to gender equality, by the estab-

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1 See, for example, H. Xanthaki, *Thornton's Legislative Drafting*, 5th ed., West Sussex, Bloomsbury, Chapter 3 on Style, p. 80 ff; P. Butt & R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language*, Cambridge, Cambridge University Press, 2001, who wrote: "The modern style of drafting – as with writing generally – avoids the exclusive use of the male pronoun and deliberately adopts a gender-neutral approach" (p. 157). For the historical context see S. Petersson, 'Gender Neutral Drafting: Historical Perspective', *Statute Law Review*, Vol. 19, 1998, p. 93. For the evolution in the English-speaking world, see C. Williams, "The End of the "Masculine Rule"? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland", *Statute Law Review*, Vol. 29, No. 3, 2008, pp. 139-153, in particular part 2.

lishment at the EU level of bodies or committees to focus on those issues and by the EU actions and policies that seek to address them (see Part B).

But while there are few legislative drafting manuals in the English-speaking world that do not address the question of gender-neutral drafting,² the question is not even mentioned by the legislative drafting guidance drawn up by the drafting experts of the three institutions involved in the EU legislative process, the European Parliament, the Council of the European Union and the European Commission (see Part C).

For that reason it is necessary to look at how gender issues are dealt with in EU treaties and legislation in practice (see Part D). A brief, non-exhaustive survey reveals signs of a traditional approach that is beginning to evolve but only slowly and somewhat unevenly.

Some of the reasons behind the approach taken by the EU institutions to gender neutrality in legislative drafting are considered in Part E and Part F looks at the impact of the important EU principles of multilingualism and multiculturalism.³

Part G seeks to draw some conclusions.

B The Principle of Gender Equality in the EU

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the UN General Assembly in 1979, commits its State Parties “to embody the principle of the equality of men and women in their

2 See, in particular, for the United Kingdom, Office of Parliamentary Counsel, *Drafting Guidance*, July 2018, Part 2.1 Gender Neutrality: <https://www.gov.uk/government/publications/drafting-bills-for-parliament>. Scottish Government, *Drafting Matters*, Second Edition, 2018, Part 1 Drafting Technique, Gender neutrality: <https://www.gov.scot/publications/drafting-matters/>. Wales, Welsh Government, *Legislative Drafting Guidelines 2012*, Part 5, Gender-Neutral Drafting: [https://law.gov.wales/constitution-government/how-welsh-laws-made/understanding-legislation/welsh-government's-legislative-drafting-guidelines/?tab=overview&lang=en](https://law.gov.wales/constitution-government/how-welsh-laws-made/understanding-legislation/welsh-government's-legislative-drafting-guidelines/?lang=en#/constitution-government/how-welsh-laws-made/understanding-legislation/welsh-government's-legislative-drafting-guidelines/?tab=overview&lang=en). As far as can be seen, there are no publicly available legislative drafting guides for Northern Ireland or for Ireland or Malta.

3 This article focuses on drafting in English, which is now the language used for producing the original texts of almost all EU legislation. While it would be beyond the scope of this article to consider in detail drafting in all 24 official languages of the EU institutions, the issue of gender neutrality in some other languages is briefly touched on.

national constitutions”.⁴ The constitutions of a number of EU Member States take steps to comply with that commitment.⁵

The European Union (EU) does not have a constitution but it does have the founding treaties, which have been described by the Court of Justice of the EU (CJEU) as a “basic constitutional charter”.⁶ The present treaties are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) in the versions resulting from the Lisbon Treaty signed in 2007.⁷ The TEU and TFEU together establish the EU’s framework and its basic principles.

Article 2 TEU sets out the values of the EU:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3(3) TEU sets out the aims of the EU, which include, in particular, in so far as relevant here, to promote “equality between women and men” and also to “respect [the EU’s] rich cultural and linguistic diversity, and [...] ensure that Europe’s cultural heritage is safeguarded and enhanced”.

Article 8 TFEU provides more specifically that

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 6 TEU states that the EU recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU, which has the same legal value as the EU Treaties. One Title of the Charter concerns ‘Equality’ and includes a general article on non-discrimination, Article 21, under which any discrimination based on grounds such as, in particular, sex or sexual orientation is prohibited. Article 23 of the Charter provides that:

4 See Art. 2: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; ... (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.

5 See, for example, the Constitutions of: Austria (Art. 7); Belgium (Art. 11 bis); Croatia (Art. 14); Finland (Art. 6); Greece (Art. 116); Italy (Arts 3, 51 and 117); Malta (Art. 45); Netherlands (Art. 1); Poland (Art. 33(1)); Portugal (Arts 9 and 13); Slovakia (Art. 12); Spain (Art. 1). Source: The Global Gender Equality Constitutional Database: <http://constitutions.unwomen.org/en>.

6 Case 294/83 *Les Verts v EP* [1986] ECR 1339, para. 23.

7 They stem from the Treaty establishing the European Economic Community signed in 1957 and the Treaty on European Union signed at Maastricht in 1992 but have been amended many times over the intervening years.

Equality between women and men must be ensured in all areas....

But apart from those principles set out in the EU Treaties and the Charter, the importance that the EU attaches to gender equality can be seen from the actions launched and structures established by the EU institutions in the field.

The EU has established the European Institute for Gender Equality (EIGE) as an autonomous body to contribute to and strengthen the promotion of gender equality, including gender mainstreaming in all EU policies and the resulting national policies, and the fight against discrimination based on sex, as well as to raise EU citizens' awareness of gender equality.⁸ The EIGE has a page on its website devoted to gender mainstreaming, which includes a toolkit to help parliament produce gender-sensitive legislation.⁹

The European Parliament has set up a Committee on Women's Rights and Gender Equality (FEMM), whose responsibilities include, in particular, "the definition, promotion and protection of women's rights in the Union and related Union measures" and "the implementation and further development of gender mainstreaming in all policy sectors".¹⁰

In 2008, the European Parliament became the first EU institution to issue its own specific gender-neutrality guidelines, which suggested various ways to write in a gender-neutral manner but added:

In formal contexts (legislative acts, Rules of Procedure) it may not always be possible to avoid the occasional generic use of 'he' or 'his', but strenuous efforts should be made to keep such use to a minimum.¹¹

In 2016 the European Parliament adopted a resolution on gender mainstreaming in which it strongly recommended a number of tools, including "focusing attention on the use of specific terminology and definitions in relation to gender equality issues" and "promoting ex-ante and ex-post assessment of draft proposals for legislation".¹²

In 2018 the European Parliament issued updated guidelines on Gender-Neutral Language in the European Parliament. That booklet of some 12 pages concluded with similar words of caution:

8 Under Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 (OJ L 403, 30.12.2006, p. 9). See its website: <http://eige.europa.eu/>.

9 Webpage: <https://eige.europa.eu/gender-mainstreaming/toolkits/gender-sensitive-parliaments/self-assessment-scoring-and-interpretation-parliament-gender-sensitivity/area-4-parliament-produces-gender-sensitive>.

10 See its website: www.europarl.europa.eu/committees/en/femm/home.html. The responsibilities of the FEMM Committee are set out in Point XIX of Annex V to the Rules of Procedure: www.europarl.europa.eu/sides/getLastRules.do?language=en&reference=RESP-FEMM.

11 *Gender-neutral drafting*, at 9 (first issued on 19 May 2008): [www.europarl.europa.eu/RegData/publications/2009/0001/P6_PUB\(2009\)0001_EN.pdf](http://www.europarl.europa.eu/RegData/publications/2009/0001/P6_PUB(2009)0001_EN.pdf).

12 Resolution of 8 March 2016 on Gender Mainstreaming in the work of the European Parliament, A8-0034/2016 (2015/2230(INI)). That resolution refers to other resolutions on aspects of gender mainstreaming of 13 March 2003, 18 January 2007, 22 April 2009 and 7 May 2009.

Parliament's role as a European legislator also must be taken into consideration when seeking to achieve gender-neutral language. Not all solutions that could otherwise be applied can be used in the context of legislation, which requires clarity, simplicity, precision and consistency.¹³

In 2019 the European Parliament adopted a resolution welcoming the revised guidelines with their practical advice and inviting "all Members of the European Parliament, as well as officials, to promote and apply these guidelines consistently in their work".¹⁴ It also welcomed the Gender-sensitive Parliaments Tool developed by the EIGE.¹⁵

The Council of the EU, for its part, in 2011 adopted the 2011-2020 European Pact for gender equality.¹⁶

The European Commission treats gender equality as an important plank in its policy on fundamental rights, on which it works with a high-level group on gender mainstreaming and networks of experts on gender equality. It has adopted a Strategic Engagement for Gender Equality 2016-2019 as the framework for work towards full gender equality, which includes the commitment that:

gender equality will continue to be promoted through the integration of a gender equality perspective into every aspect of EU intervention (preparation, design, implementation, monitoring and evaluation of policies, legal measures and spending programmes), *i.e.* gender mainstreaming.¹⁷

C EU Drafting Rules and Guidance

In view of the importance that the EU attaches to gender equality, it may appear somewhat surprising that the subject does not occupy a more prominent place in the EU drafting rules and is not mentioned at all in the specific guidance on legislative drafting.

It was not until 1998 that the three institutions involved in the process of drafting EU legislation adopted common drafting rules, consisting of 22 guide-

13 www.europarl.europa.eu/cmsdata/151780/GNL_Guidelines_EN.pdf. See p. 9.

14 European Parliament resolution of 15 January 2019 on gender mainstreaming in the European Parliament (2018/2162(INI)) P8_TA(2019)0010. See point 15.

15 *Ibid.*, point 29.

16 Employment, Social Policy, Health and Consumer Affairs Council conclusions, 7 March 2011.

17 SWD(2015) 278 final. See, in particular, Part 4. The current strategy builds on the Strategy for equality between women and men 2010-2015 (COM(2010) 491). The strategy is accompanied by regular reports on equality between women and men in the EU (for 2019 see: <https://publications.europa.eu/en/publication-detail/-/publication/f3dd1274-7788-11e9-9f05-01aa75ed71a1/language-en/format-PDF/source-search>) and surveys (Special Eurobarometer survey 428 (March 2015)). See also the Commission website on gender equality: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality>.

lines drawn up in collaboration with the Member States.¹⁸ Those guidelines set out basic principles of drafting such as clarity, precision and consistency and refer to the need to take account of the person to whom an act is addressed, but they do not mention gender neutrality.

Nor is there any reference to gender-neutral drafting in the basic legislative drafting guide issued by the drafting experts of the three institutions, the Joint Practical Guide for persons involved in the drafting of EU legislation, a text of some 45 pages updated in 2013.¹⁹ It is noteworthy that in at least one instance the text of that guide itself is not drafted in gender-neutral terms:

The author must indicate how *he* intends to implement that provision (point 12.2).

There is no mention of the topic either in the Joint Handbook for the Presentation and Drafting of Acts subject to the Ordinary Legislative Procedure issued by the legal and legal-linguistic services of the three institutions.²⁰

To find any guidance on the topic for EU staff it is necessary to look at the general guides on style in the EU institutions. A brief reference is to be found in the Interinstitutional Style Guide, which is designed to harmonize documents of every kind produced by all EU bodies:

Much existing EU legislation is not gender neutral and the masculine pronouns ‘he’ etc. are used generically to include women. However, gender-neutral language is nowadays preferred wherever possible.²¹

That Guide goes on to give some general hints on gender-neutral writing, much of which is not applicable to legislative drafting.

Similar guidance is given in the English Style Guide issued by the English-language translators at the Commission in a section dealing more broadly with Inclusive Language.²²

It is worth noting that the EU’s legislative drafting experts are not involved in drawing up the English Style Guide and, while they are represented on the Working Group responsible for the Interinstitutional Style Guide, they will be far outnumbered by the other linguists, the translators, terminologists, editors and proofreaders.

18 Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation [1999] OJ C73/1. Before that date the only rules on legislative drafting in the EU institutions were those adopted in internal documents by the Council of the EU and separately by the European Commission, see W. Robinson, ‘Manuals for Drafting European Union Legislation’, *Legisprudence*, Vol. 4, No. 2, 2010, p. 129. Neither the Council rules nor the Commission rules mention gender-neutral drafting.

19 First drawn up in 2000 with the current, second edition published in 2013. Available from the EUR-Lex website: <https://eur-lex.europa.eu/content/techleg/EN-legislative-drafting-guide.pdf>.

20 January 2018 edition. See: https://www.consilium.europa.eu/media/32619/joint-handbook-en-january-2018_2018_01.

21 See Part Four, point 10.6: <http://publications.europa.eu/code/en/en-000500.htm>.

22 See Part I.1.5: https://ec.europa.eu/info/files/english-resources-english-style-guide_en.

D Gender in EU Legislative Drafting Practice

I Treaties

The classic approach in the English texts of the EU Treaties and legislation was that grammatically a person was masculine. For example, the treaty establishing the European Economic Community of 1957 contains such provisions as:

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. *He* may be re-elected. (Art. 167)

The Court of Justice shall appoint its Registrar and lay down the rules governing *his* service. (Art. 168)

In the last decade or so some variations on that approach have appeared, but that classic approach is still visible in the drafting of the basic treaties as last amended by the Lisbon Treaty signed in December 2007.

Prominent examples among the important articles at the beginning of the TEU include the following:

The President of the European Council shall, at *his* level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy (Art. 15 TEU)

The European Council ... shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end *his* term of office by the same procedure.

The High Representative shall conduct the Union's common foreign and security policy. *He* shall contribute by *his* proposals to the development of that policy, which *he* shall carry out as mandated by the Council. ...

.... *He* shall ensure the consistency of the Union's external action. *He* shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. ... (Art. 18 TEU)

The High Representative ... shall contribute through *his* proposals to the development of the common foreign and security policy *He* shall conduct political dialogue with third parties on the Union's behalf In fulfilling *his* mandate, the High Representative shall be assisted by a European External Action Service (Art. 27 TEU)

While there are no clear examples of gender-neutral drafting in the TEU, the TFEU, by contrast, shows a number of variants of gender-neutral drafting, some rather confusing.

At times it uses multiple personal pronouns:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address ... a petition to the European Parliament on a matter which comes within the

Union's fields of activity and which affects *him, her or it* directly (Art. 227 TFEU).

The very next article starts with gender-neutral drafting but then reverts to the classic treaty style:

A European Ombudsman ... shall be empowered to receive complaints from any citizen of the Union *He or she* shall examine such complaints and report on them.

In accordance with *his* duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on *his* own initiative or on the basis of complaints submitted to *him* ... (Art. 228(1) TFEU)

A later article starts in the classic treaty style with the personal pronoun "he" and the possessive adjective "his" but then switches to using two possessive adjectives:

Apart from normal replacement, or death, the duties of a Member of the Commission shall end when *he* resigns or is compulsorily retired. ...

In the event of resignation, compulsory retirement or death, the President shall be replaced, for the remainder of *his* term of office. ...

In the event of resignation, compulsory retirement or death, the High Representative of the Union for Foreign Affairs and Security Policy shall be replaced, for the remainder of *his or her* term of office (Art. 246 TFEU)

There is one example in the TFEU of the personal pronoun "them" being used in the singular:

Everyone has the right to the protection of personal data concerning *them* (Art. 16(1) TFEU).²³

II Legislation

In modern EU legislation as well many different approaches to gender issues in drafting are visible. There is not one single approach. There is a lack of consistency between acts adopted at about the same time and sometimes even within a single act.

The classic approach is still to be found in quite recent legislation, as the following example from a 2016 regulation shows:

23 It is noteworthy that the corresponding provision in the Charter of Fundamental Rights, Art. 8(1), is: Everyone has the right to the protection of personal data concerning him or her.

An importer or distributor shall be considered a manufacturer for the purposes of this Regulation ... where *he* places a subsystem or a safety component on the market under *his* name or trade mark...²⁴

And again in a regulation published in 2019:

Member States shall ensure that appropriate collection or discard systems are in place for medicated feed and intermediate products that are expired or in case the animal keeper has received a bigger quantity of medicated feed than *he* actually used for the treatment referred to in the veterinary prescription for medicated feed.²⁵

However, the latter regulation is elsewhere largely written in gender-neutral style with much use of the plural or the passive and, in particular, much repetition of the nouns as in:

The veterinarian issuing the veterinary prescription for medicated feed shall verify that that medication is justified for the target animals on veterinary grounds. Furthermore *that veterinarian* shall ensure that the administration of the veterinary medicinal product concerned is not incompatible with another treatment or use and that there is no contra-indication or interaction where several medicinal products are used. In particular, *the veterinarian* shall not prescribe medicated feed with more than one veterinary medicinal product containing antimicrobials (Art. 16(9))

A search through regulations adopted between 2016 and 2019 reveals very few instances of use of “he” on its own, suggesting that, even in the absence of formal rules, those involved in drafting EU acts are generally aiming for gender neutrality. In many cases the potential problem is sidestepped (in English) by using plural forms or a passive construction.

In other acts “he or she” is used frequently, as in the following example from the General Data Protection Regulation of 2016:

The data subject shall have the right to receive the personal data concerning *him or her*, which *he or she* has provided to a controller, in a structured, commonly used and machine-readable format...²⁶

Since that regulation is on protection of data of natural persons, all those involved in drafting it were particularly aware of whom they were writing about

24 Art. 15 of Regulation (EU) 2016/424 of the European Parliament and of the Council on cableway installations (OJ L 81, 31.3.2016, p. 1).

25 Art. 18 of Regulation (EU) 2019/4 of the European Parliament and of the Council on the manufacture, placing on the market and use of medicated feed (OJ L 4, 7.1.2019, p. 1).

26 Art. 20(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ L 119, 4.5.2016, p. 1).

and indeed who were likely to be concerned by the regulation.²⁷ That awareness is evidenced by the references to the “controller” of data as “it” (for example in Article 4(7)) and the reference to the “Chair” of the European Data Protection Board (Art. 68). Of course, even the technique chosen in many provisions of that regulation of using “he or she” and so on is not actually gender-neutral since the masculine is always put before the feminine.²⁸ It is also rather cumbersome if over-used.²⁹

Similar objections can be raised against the following approach in the 2010 Decision organizing the European External Action Service (EEAS) to assist the High Representative for Foreign Affairs and Security Policy:

The EEAS shall support the High Representative in fulfilling his/her mandates as outlined, notably, in Articles 18 and 27 TEU:

- in fulfilling *his/her* mandate to conduct the Common Foreign and Security Policy (‘CFSP’) of the European Union, including the Common Security and Defence Policy (‘CSDP’), to contribute by *his/her* proposals to the development of that policy, which *he/she* shall carry out as mandated by the Council and to ensure the consistency of the Union’s external action,
- in *his/her* capacity as President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council,
- in *his/her* capacity as Vice-President of the Commission for fulfilling within the Commission the responsibilities incumbent on it in external relations, and in coordinating other aspects of the Union’s external action, without prejudice to the normal tasks of the services of the Commission....³⁰

Another objection is that the “he/she” and “his/her” constructions are short cuts that may be understandable in English but cannot be replicated in many other languages and are thus contrary to EU Guideline 5.³¹ The approach in that 2010 decision contrasts markedly with the provisions in the TEU on the office of the High Representative, which, as we have seen above, refer to the holder of that office with masculine personal pronouns and possessive adjectives (see the extracts from Art. 18 and Art. 27 TEU quoted above).

It is perhaps no coincidence that the first High Representative, who was in office when the EEAS was being set up, was a woman and a native English speaker.

27 See Guideline 3 of the 1998 IIA; JPG, p. 13, <https://eur-lex.europa.eu/content/techleg/EN-legislative-drafting-guide.pdf>.

28 See C. Miller & K. Swift, *The Handbook of Non-Sexist Writing* (revised British Edition), London, The Women’s Press Ltd, 1981, Chapter 5, p. 87.

29 The General Data Protection Regulation refers to “he or she” 10 times, to “him or her” 29 times and to “his or her” 44 times.

30 Art. 2(1) of Council Decision of 26 July 2010 establishing the organization and functioning of the European External Action Service (OJ L 201, 3.8.2010, p. 30). Such constructions occur some 18 times in a text of just 10 pages.

31 JPG, p. 16, <https://eur-lex.europa.eu/content/techleg/EN-legislative-drafting-guide.pdf>.

In a 2018 regulation gender-neutral drafting is served by use of “he or she” (and “it” for a legal person) and repetition of nouns.³²

(12) ‘consumer’ means any natural person who is acting for purposes which are outside *his or her* trade, business, craft or profession;

(13) ‘customer’ means a consumer who is a national of, or has *his or her* place of residence in, a Member State, or an *undertaking* which has *its* place of establishment in a Member State, and receives a service or purchases a good, or seeks to do so, within the Union, for the sole purpose of end use; ...

(18) ‘trader’ means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in the name or on behalf of the *trader*, for purposes relating to the trade, business, craft or profession of the *trader* (Art. 2).

Another approach to achieving gender neutrality can be seen in a 2017 regulation that uses “it” to refer to an importer, even though that term is defined as including both natural and legal persons.³³

If a Union importer of minerals pursues risk mitigation efforts while continuing trade or temporarily suspending trade, *it* shall consult with suppliers and with the stakeholders concerned (Art. 5(2))

Where a Union importer can reasonably conclude that metals are derived only from recycled or scrap sources, *it* shall, with due regard for business confidentiality and other competitive concerns:

(a) publicly disclose *its* conclusion; ... (Art. 7(4)).

E Some Features of the EU Drafting Process Relevant to the Approach to Gender-Neutral Drafting

The legislative-drafting process in the EU institutions is very different from that in most common-law countries where legislative drafting is generally done by quite small teams of specialized counsel. In the EU system drafting is a collaborative process in which numerous participants contribute to shaping the text at different stages. Within each of the three institutions involved in the legislative process, the EP, the Council and the Commission, technical experts with different specialities, lawyers, linguists and political staff are all involved in the drafting process.

32 Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 60I, 2.3.2018, p. 1).

33 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores and gold originating from conflict-affected and high-risk areas (OJ L 130, 19.5.2017, p. 1). See the definition of ‘Union importer’ in Art. 2(l).

The first version of an EU legislative act starts life in the Commission in one of the 30 or so technical Directorate-Generals. The other Directorate-Generals concerned by the subject make comments on that first draft, as do the so-called horizontal departments, the Secretariat-General and the Legal Service. So the Commission's proposal, the prerequisite for starting the legislative process, is already the result of negotiation and compromise between many different participants.³⁴ The Commission submits its proposal to the EP and the Council, which together form the legislative authority.

Any of the 751 Members of the European Parliament or any representative of one of the 28 Member States in the Council of the EU who wishes to change the policy must, under their internal rules, do so by suggesting a change to the text of the Commission proposal.³⁵

In the three institutions, the drafting experts, the lawyer-linguists, traditionally were involved only at the end of the drafting process when they revised the text resulting from the negotiations between all the other participants. More recently, the lawyer-linguists have moved upstream but they still generally do not actually draft themselves so much as advise others on drafting matters and then revise the end product. If, at that final stage, the lawyer-linguists do seek to change a draft to make it gender neutral they may be asked whether they can guarantee that the meaning of the text has not been changed in any way. With many of the techniques employed it is often not possible to give such a guarantee.

The texts of the EU Treaties date back in part to 1957 (EEC Treaty) and 1992 (TEU). Many of the current legislative acts are also based on old texts going as far back as the 1950s and 1960s. While many amendments have been made over the intervening years, the influence of an earlier era is still visible. Even if the texts have been substantially amended since then, those amendments have been affected by the concern to maintain consistency with earlier texts, which have been applied by the administrations and interpreted by the courts.

F The Impact of Multilingualism and Multiculturalism

The EU is committed to respecting its "rich cultural and linguistic diversity".³⁶ Its legislation must be drafted in all 24 official languages of the EU, each of which

34 See W. Robinson, 'Drafting European Union Legislation in the European Commission: A Collaborative Process', *Theory and Practice of Legislation*, Vol. 2, No. 3, 2014, pp. 249-272, at p. 250ff.

35 See M. Guggeis & W. Robinson, "'Corevision': Legal-Linguistic Revision in the European Union 'Codecision' Process", in C.J.W. Baaij (Ed.), *The Role of Legal Translation in Legal Harmonisation*, Alphen aan den Rijn, Kluwer Law International, July 2012, pp. 51-81, at p. 66.

36 See Art. 3(3) TEU quoted in Part B above. The importance of this principle was also underlined by the German Constitutional Court in 2009: European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions. This applies in particular to ... political decisions that rely especially on cultural, historical and linguistic perceptions ... These important areas also include cultural issues such as the disposition of language (BVerfG, Judgment of the Second Senate of 30 June 2009, para. 249 cc): www.bverfg.de/e/es20090630_2bve000208en.html.

has equal status under the EU language rules.³⁷ An important corollary of that equal status is that there is not one original language version of EU legislation and 23 translations.³⁸ Although the first draft of an EU act is produced in English and the negotiations at each stage focus mainly on the English text, every effort is made to treat all the language versions equally at all stages.

According to the EU legislative drafting rules:

Throughout the process leading to their adoption, draft acts shall be framed in terms and sentence structures which respect the multilingual nature of Union legislation....³⁹

It follows that those involved in the EU drafting process must look for solutions in the drafting language that work in all the other languages. They must not use any expressions in English that cannot be readily translated into the other languages or that will lead to lack of clarity or clumsy wording in the other languages.

Inevitably, this imposes constraints on the English that can be used in EU drafting in order to guarantee translatability and exact equivalence across all 24 language versions.

It is beyond the scope of this article to examine approaches to gender-neutral drafting in all the 24 official languages of the EU. But it is perhaps indicative to look briefly at the approach taken to the drafting of one important EU text, the Charter of Fundamental Rights in English, French and German.⁴⁰ The Charter is not part of the EU Treaties but, under Article 6 TEU, has “the same legal value as the Treaties”. Since the Charter contains an article designed to ensure equality between the sexes it may be expected to aim for gender-neutral drafting.

The English version sets out to achieve a measure of gender neutrality by using “he or she”, “his or her” and “him or her” on numerous occasions.

In the German version quite different issues arise. The “he or she” in English is never actually reproduced in German. But when the English text refers (in Art. 39, for example) to “citizen of the Union” the German text refers to “*die Union-sbürgerinnen und Unionsbürger*” (female citizens and male citizens). Significantly, it puts the feminine before the masculine and uses the plural with the result that it is not necessary to use the masculine and feminine pronouns in the singular. Similarly, when the English text refers (in Art. 28 for example) to “workers and employers”, the German text refers to “*Die Arbeitnehmerinnen und Arbeitnehmer*”.

37 See Art. 4 of Regulation No 1 for the EEC: OJ 17, 6.10.1958, p. 385/58, and the case-law of the Court of Justice of the EU, in particular Case 283/81 *CILFIT* [1982] ECR 3415, paras. 17 to 20.

38 W. Robinson, ‘Translating Legislation: The European Union Experience’, *Theory and Practice of Legislation*, Vol. 2, No. 2, 2014, see in particular Part 4.

39 Guideline 5 in the 1998 IIA. See also the Joint Practical Guide, points 5.1 to 5.4.

40 Those three languages have a special status within the institutions. They are recognized within the Commission as “procedural languages” in which texts must be available at key stages in internal procedures. Moreover, in the early years French was the predominant language and the drafting language of all the EU institutions (as it still is at the Court of Justice).

sowie die Arbeitgeberinnen und Arbeitgeber” (female workers and male workers, as well as female employers and male employers).

In the French text too the “he or she” in English is never actually reproduced. Pronouns correspond to grammatical gender, as in “*Toute personne*” and “*elle*” in Article 17 and “*Nul*” and “*il*” in Article 19.

There are interesting differences here between the original French version published in 2000⁴¹ and the version now applying,⁴² suggesting something of a retreat from a demonstratively gender-neutral approach to a more conservative reliance on the grammar rules. Article 39 again provides an example:

Original version: “Tout citoyen ou toute citoyenne de l’Union a le droit de vote et d’éligibilité aux élections au Parlement européen dans l’État membre où il ou elle reside”

(literally “Each male citizen or each female citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides”).

Current version: “Tout citoyen de l’Union a le droit de vote et d’éligibilité aux élections au Parlement européen dans l’État membre où il reside”

(literally “Each citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he resides”).

In the English version of the Charter the only gender-related change between the version from 2000 and the current version was to change “men and women” to “women and men” in Article 23 on gender equality. A similar change of word order was made in the German version.

Those examples illustrate the fact that the approach to gender neutrality in other languages is quite different from that in English for both linguistic reasons, the grammar and syntax and also cultural reasons.

This is emphasized in the French version of the Federal Legislative Drafting Guide for Canada, where federal legislation is bilingual in English and French:

the question of gender does not by any means take the same form in English and in French and [...] in any event the solutions cannot be the same. What may be good for English may be catastrophic or ridiculous in French, on that all the specialists are agreed.⁴³

The same point is also made in the French version of the Guide for non-sexist drafting of administrative and legislative texts of the Swiss Confederation which also has a multilingual system:

41 OJ C 364, 18.12.2000, p. 1.

42 Art. 6(1) TEU states: The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

43 See the Guide fédéral de jurilinguistique législative française (JLF) under the heading Désexualisation: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/juril/no39.html>.

As regards non-sexist drafting it is perhaps not inappropriate to recall that the solutions adopted are not the same for all the official languages: this guide applies therefore exclusively to the French language which allows fewer extravagantly imaginative [*fantaisiste*] solutions than German for example.⁴⁴

A standard French textbook on legislative drafting states starkly:

Feminisation cannot extend to the syntax, unlike in English. French has only the unmarked gender in the masculine. A drafter will therefore not write the following which is both incorrect French and ridiculous:

« le supérieur ou la supérieure immédiat(e) informe l'employé(e) qu'il ou elle aura le droit de prendre son repas quand il ou elle le désirera ». ⁴⁵

A French Government Circular of 2017 states categorically:

In legislative texts the masculine is a neutral form which should be used for terms which are applicable to women as well as to men.

It also proscribes forms such as "l'employé(e)" by instructing drafters not to use:

so-called inclusive writing which refers to drafting and typographical practices replacing the masculine when used in a generic sense by a form of writing demonstrating the existence of a feminine form. Apart from respecting the degree of formality appropriate to acts of a legal nature, the State administration must comply with the rules of grammar and syntax, in particular in order to ensure that norms are understandable and clear.⁴⁶

The broader cultural angle and the sensitivity of the issue is illustrated by a Declaration adopted unanimously by the Académie Française in 2017 giving a strong warning against inclusive writing, which, it said, could undermine the unity of the

44 See the Guide de formulation non sexiste des textes administratifs et législatifs de la Confédération: <https://www.bk.admin.ch/bk/fr/home/documentation/langues/aides-redaction-et-traduction/guide-de-formulation-non-sexiste.html>. Dictionary renderings of *fantaisiste* include: fantastical, whimsical and unorthodox.

45 C. Bergeal, *Rédiger un texte normatif, Manuel de légistique*, 7th ed., Paris, Berger-Levrault, 2012, at p. 305.

46 Circulaire du 21 novembre 2017 relative aux règles de féminisation et de rédaction des textes publiés au Journal officiel de la République française (JORF n°0272 du 22 novembre 2017): ELI: <https://www.legifrance.gouv.fr/eli/circulaire/2017/11/21/PRMX1732742C/jo/texte>. Those instructions are reflected in the French Guide de Légistique (Legislative Drafting Guide) at section 3.3.1. (La Documentation française, Paris 2017, ISBN: 978-2-11-145578-8): <http://ialorg.wpengine.com/wp-content/uploads/2018/02/France-Guide-2018.pdf>. By contrast, there does not appear to be any reference to gender-neutral drafting in the Belgian drafting rules laid down by the Council of State, Principes de technique législative - Guide de rédaction des textes législatifs et réglementaires: www.raadvst-consetat.be/?lang=fr&page=technique_legislative.

language and “lead to confusion bordering on unreadability”.⁴⁷ Again in 2019 the Académie Française, while noting the need for language use to evolve and endorsing some feminization of job titles, warned that any evolution had to “respect the basic rules of the language and be in accordance with the spirit of French law”.⁴⁸

The approach to gender neutrality in German is different again. The Rules of Procedure for the Federal Ministries in Germany set out the principle:

Draft legislation should reflect the equality of men and women by linguistic means.⁴⁹

The German legislative drafting rules expand on that requirement over six pages, seeking to strike a balance between the concern for gender neutrality, the conventional grammatical rules and the need for clear legislation.⁵⁰

In Switzerland too the German texts of new laws are to be drafted in accordance with the principles of linguistic equality under a decision of the Federal Council.⁵¹

However, some German speakers with a particular interest in language matters believe that the grammatical rules alone should prevail. In 2019 the Association for the German Language issued a stirring “appeal for resistance” against some forms of gender-neutral writing saying:

Let the German language prevail against this gender nonsense.⁵²

G Final Words

There has been a slow evolution in the approach to gender in EU drafting.

The early EU Treaties said nothing about gender equality and made no attempt to adopt a gender-neutral style. That had a long-term impact on all drafting practices, whether the texts concerned were simply based on the EU Treaties

47 Déclaration de l’Académie Française sur l’écriture dite « inclusive » (26 October 2017): www.academie-francaise.fr/actualites/declaration-de-lacademie-francaise-sur-lecriture-dite-inclusive.

48 Rapport sur La féminisation des noms de métiers et de fonctions (28 February 2019): www.academie-francaise.fr/actualites/la-feminisation-des-noms-de-metiers-et-de-fonctions.

49 Die Gemeinsame Geschäftsordnung (GGO), para. 42(5), second sentence (version of 1 September 2011): <https://www.bmi.bund.de/DE/themen/moderne-verwaltung/verwaltungsmodernisierung/geschaeftsordnung-bundesministerien/geschaeftsordnung-bundesministerien-node.html>.

50 Handbuch der Rechtsförmlichkeit, Bundesanzeiger, 22 October 2008, Nummer 160a, Section 1.8, points 110 to 123: <http://hdr.bmj.de/vorwort.html>.

51 See point 3 of the Bundesratsbeschluss of 7 June 1993 on equal treatment of women and men in legislative and administrative language. See also the 192 pages of detailed guidance on gender-neutral drafting in the German texts of Swiss laws in *Geschlechtergerechte Sprache – Leitfaden zum geschlechtergerechten Formulieren im Deutschen* which can be downloaded from: <https://www.bk.admin.ch/bk/de/home/dokumentation/sprachen/hilfsmittel-textredaktion/leitfaden-zum-geschlechtergerechten-formulieren.html>.

52 Verein Deutsche Sprache, 6 March 2019: Schluss mit dem Gender-Unfug: <https://vds-ev.de/gegenwartsdeutsch/gendersprache/gendersprache-unterschriften/schluss-mit-dem-gender-unfug/>.

or were referring to them directly or indirectly. Even today there is certainly not one single uniform approach, as the examples quoted in Part D show. Those examples suggest that Williams was premature in claiming that gender neutrality was a consolidated principle in EU drafting by 2004.⁵³

There are various factors explaining why the evolution is so slow and why there are so many divergent approaches.

The process of drafting EU legislation is, as we saw in Part E, a long and difficult one. The resulting texts are delicately balanced compromises that are the fruit of many months or years of multilateral negotiations.

Many different people are involved in writing the initial version of EU legislation in the drafting language, now almost always English. They range from technical experts of different kinds, to politicians and political scientists, to lawyers and lawyer-linguists, and editors. Most of the technical experts and politicians will be far more concerned about substantive issues, technical complexities or political compromises, than what they would perceive as linguistic issues. The lawyers will be primarily concerned to have texts that are as clear and precise as possible and convey exactly the same meaning in all the 24 official languages. The linguists are more conscious of the issue of gender neutrality but they have little influence over the original text in the drafting language and are required to ensure that the texts in the other languages correspond as closely as possible to the original.

The lawyer-linguists do have the opportunity to improve the draft in the original language. But there is nothing in their drafting rules that they can point to in order to explain to a drafter why a text must be made gender neutral. It can be hard for a lawyer-linguist to convince a drafter to accept changes to a text that is actually grammatically correct. All too often, the drafters will ask whether the lawyer-linguists can guarantee that the changes they propose will not alter in any way whatsoever the substance of the text (which is the result of lengthy negotiations and delicate compromises).

The lawyer-linguists' task becomes harder if the new text is based on older texts drafted to standards prevailing in the last century. It is harder still if those working on language versions other than English can see that no change is needed in their language.

Those are some of the explanations for the present situation, but they cannot serve as excuses for the inconsistent and unsatisfactory approach.

It cannot be acceptable when drafting legislation in English in the 21st century to continue to use just the masculine pronoun. The EU drafters cannot even purport to rely on the existence of an overarching provision that the masculine

53 C. Williams, 'The End of the "Masculine Rule"? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland', *Statute Law Review*, Vol. 29, No. 3, 2008, pp. 139-153 (see in particular p. 144): by the time the Charter of Fundamental Rights of the European Union was drafted three years later, gender neutrality was already established.... Since then gender neutrality would appear to have become a consolidated principle in the drafting of major documents.

includes the feminine as is often found in Interpretation Acts in the common-law countries.⁵⁴

The widely used device of writing “he or she”, “his or her” and so on is far from satisfactory. As mentioned in Part D, that device is not actually gender neutral since the masculine is always put before the feminine.⁵⁵ That is bad enough in ordinary writing, but it is even more serious in legislative drafting, where particular attention is focused on the order of referring to things. There are detailed EU rules establishing the protocol order for referring to the EU institutions and the order of citation of the EU treaties, countries, languages and currencies.⁵⁶ All those involved in the drafting process must be aware that the order of referring to things in legislation is highly significant. Continuing to rely on the “he or she” device merely serves to bolster ideas of priority of the masculine condemned by Mary Wollstonecraft in 1792.⁵⁷

The technique found in the EU Treaties (admittedly only once) of using the plural pronoun “them” after an antecedent “everyone” is still far from being accepted by native English speakers (and has been fiercely criticized in the House of Lords).⁵⁸ What is more, in the EU’s multilingual system it could confuse non-native speakers and possibly lead to translation difficulties or errors.

- 54 For Ireland, *see* the Interpretation Act 2005, section 18(b):
- i A word importing the masculine gender shall be read as also importing the feminine gender;
 - ii In an Act passed on or after 22 December 1993, and in a statutory instrument made after that date, a word importing the feminine gender shall be read as also importing the masculine gender;
- For the United Kingdom, *see* the Interpretation Act 1978, section 6:
- In any Act, unless the contrary intention appears,—
- a words importing the masculine gender include the feminine;
 - b words importing the feminine gender include the masculine;
 - c words in the singular include the plural and words in the plural include the singular.
- The only provision of that kind in EU law is in Art. 1c of the Staff Regulations laying down the rules governing the service of all staff of the EU institutions:
- Any reference in these Staff Regulations to a person of the male sex shall be deemed also to constitute a reference to a person of the female sex, and vice-versa, unless the context clearly indicates otherwise.
- While the basic text of the Staff Regulations dates back to 1968 (OJ L 56, 4.3.1968, p. 1), Art. 1c was inserted in 2004 (OJ L 124, 27.4.2004, p. 1).
- 55 *See* Miller & Swift, 1981, Chapter 5, p. 87.
- 56 *See* the Interinstitutional Style Guide, respectively Part Three, point 9.5.1 and Part One, point 3.4: <http://publications.europa.eu/code/en/en-000100.htm>.
- 57 “Men, in general, seem to employ their reason to justify prejudices, which they have imbibed, they can scarcely trace how, rather than to root them out”, M. Wollstonecraft, *A Vindication of the Rights of Woman*, New York, Everyman, 1982, Chapter I.
- 58 The use of that technique in UK legislation has been strongly criticized in the House of Lords: <https://hansard.parliament.uk/Lords/2013-12-12/debates/13121276000394/> LegislationGender-NeutralLanguage. It is noteworthy that the corresponding provision in the Charter of Fundamental Rights, Art. 8(1), is: Everyone has the right to the protection of personal data concerning him or her.

It is clear that there is not one single solution in English.⁵⁹ It is also clear that it will be challenging to find solutions in the English version of EU legislative texts that will not lead to divergences between the versions in the other 23 official languages. But the fact that it is difficult and delicate should not be allowed to justify the legislative drafting experts failing even to address the issue in their guidance.

The EU drafting rules should at least address the subject of gender neutrality. They should set out the issues at stake and explain why they are important, referring to the general EU principle of gender equality as set out in Part B. A broad policy should be laid down on gender neutrality in legislative drafting giving some guidance on the balance to be struck between gender equality and clear and simple drafting. The guidance should also consider the consequences of the EU's multilingual system. That would help to harmonize the disparate practices currently applied, to guide the legislative drafting experts, and to give them some support when they seek to suggest gender-neutral forms to others involved in the EU legislative process. It would also assist the EU translators in their job of ensuring that all the language versions of EU legislation have the same legal effects and are clear and understandable to their readers.

Specific guidance should be given on the position in each of the EU's 24 official languages. It should cover the various techniques available for each language and the strengths and weaknesses of each. The guidance for the English language should also cover the impact on other languages of the choices of techniques in English.

The drafting guidance for other multilingual jurisdictions, such as that for Wales, Switzerland and Canada referred to in this article, could provide some inspiration for how those issues are to be addressed in the EU system, although the large number of languages involved in that system does complicate matters.

59 For an analysis of the various possible approaches in English see D. Greenberg, 'The Techniques of Gender-neutral Drafting', Chapter 5, in C. Stefanou & H. Xanthaki (eds.), *Drafting Legislation – A Modern Approach*, Farnham, Ashgate, 2009.