

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

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**DRAFTING EUROPEAN
UNION LEGISLATION**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

DRAFTING EUROPEAN UNION
LEGISLATION

NOTE

Abstract

The process of drafting Union legislation is long and complex, involving large numbers of interveners in a multilingual and multicultural environment. Strong rules and procedural safeguards are essential to ensure that Union legislation satisfies the needs and expectations of 500 million citizens and of businesses in the 27 Member States.

This document was requested by the European Parliament's Legal Affairs Committee.

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LINGUISTIC VERSIONS

Original: EN

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Manuscript completed on April 2012.
© European Parliament, Brussels, 2012.

This document is available on the Internet at:
<http://www.europarl.europa.eu/studies>

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EXECUTIVE SUMMARY

Background

The process of drafting Union legislation begins in the Commission where the preparatory work is carried out by technical experts who produce a first draft. That draft is the subject of numerous interventions by other Commission staff before a legislative proposal is adopted by the Commission. The Commission's proposal passes to the Parliament and the Council, where it is also the subject of many and varied amendments. Any concern for quality of legislation may be outweighed by the need to find a compromise acceptable to all the parties. A number of disparate sources of rules and guidance apply to the drafting process and they are often overlooked or ignored.

Once published, Union legislation is often amended or corrected and it thus becomes less accessible. Consolidation, codification and recasting seek to mitigate that problem.

Aim

- There have been repeated calls for improvements in the quality of Union legislation. Measures agreed by the Parliament, Council and Commission in 1998 were designed to bring about a substantial improvement. Implementation of those measures so far has been patchy and problems continue to exist. Those measures must be urgently reviewed and fresh impetus given to their implementation by the three institutions.
- Parliament should set up a group of experts drawn from all the Union institutions, from the Member States authorities, and from academic and professional circles to consider how the preparation of Union legislation could be further improved.
- A binding requirement for Union legislation to be clear and understandable, coupled with a coherent set of rules on drafting, interpretation, publication, amendment and codification, would make a significant contribution to rendering Union legislation more user-friendly, for the benefit of citizens and businesses throughout the Union.

1. PREPARATION OF UNION LEGISLATION

1.1. Legal framework

1.1.1. General

As part of the 'Community method' established by the first European Treaties, basic legislation was adopted by the Council on the basis of a proposal from the Commission. The Assembly, as the European Parliament was originally known, had only a consultative role.

With successive amendments to the Treaties over the last half century the role of Parliament has been reinforced. Since the latest amendment by the Lisbon Treaty, almost all basic legislation is adopted jointly by the Parliament and Council on the basis of a proposal from the Commission. The codecision procedure is now the 'ordinary legislative procedure' under Article 294 of the Treaty on the Functioning of the European Union (TFEU). There are just a few fields where codecision does not apply, such as taxation, the common foreign and security policy, and the conclusion of international agreements.¹

Under the 'Community method' a central role is played in the legislative process by the Commission, which seeks to promote the general interest of the Union. Article 17(2) of the Treaty on the European Union (TEU) provides: 'Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise'.² It is the Commission alone which decides on the content of its proposal and on the form of act, unless that is specified by Treaty provisions.³

1.1.2. Language rules

Under Article 342 TFEU the rules governing the languages of the institutions are to be determined by the Council acting unanimously by means of regulations.

Those rules are laid down in Council Regulation No 1⁴, which provides that regulations and other documents of general application must be drafted in the 23 official languages and that the Official Journal must be published in all those languages.

1.2. How does the Commission prepare its legislative proposals?

1.2.1. Initial preparation

Some 23 000 staff members work in the Commission in over 30 departments, known as directorates-general (DGs) or services, each responsible for a particular policy sector. The President of the Commission is charged with 'ensuring that it acts consistently, efficiently and as a collegiate body'.⁵

The initial preparatory work for legislative proposals is in the hands of officials from the DG for the technical sector concerned, who are experts in that technical sector but who are often not lawyers and are not specialists in legislative matters. Apart from legislative proposals, they have responsibility for continuously monitoring developments in the sector across the Union and liaising with Member States and with stakeholders, preparing and

1 See Article 113 TFEU, Article 24 of the TEU, and Article 218 TFEU respectively.

2 Limited exceptions are provided by Article 289(4) TFEU: 'In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank'.

3 See Article 17(3), third subparagraph, of the TFEU: 'In carrying out its responsibilities, the Commission shall be completely independent. ... the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity'.

4 EEC Council Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

5 Article 17(6) TEU. See also Articles 1 and 3(2) of the Commission's Rules of Procedure (OJ L55, 5.3.2010, p. 60).

drawing up implementing and administrative acts in their sector, as well as advising on implementation and application of all provisions in the sector by Member States and business, which may entail the opening of infringement proceedings.

1.2.2. Coordination

All major items of planned legislation must be entered in the Commission's Legislative and Work Programme (LWP), which gives a multiannual overview of measures planned and helps stakeholders and other Union institutions plan their work with the Commission. The Commission sends the other institutions monthly reports on progress with the programme, and an overview of the Commission initiatives remaining until the end of each year. The programme and other aspects of strategic planning are the responsibility of the Secretariat-General, which coordinates the work of the various DGs and oversees the Commission's decision-making process. It has a staff of 600 and is led by the Secretary-General of the Commission, who reports direct to the Commission President and attends all the meetings of the Members of the Commission. The Secretariat-General is at the heart of the Commission machinery and as regards the legislative procedure in particular it also:

- supervises and coordinates the Commission's internal procedures by issuing rules and guidance;
- maintains databases on all internal procedures, on transposition of directives and on infringement proceedings;
- keeps the formal record of what the Commission has decided and transmits documents to the other institutions, the Member States or other addressees, or to the Publications Office for publication.

It has also been given special responsibility for key policies such as administrative simplification and different aspects of governance.

1.2.3. Consultation

Before drafting legislation, the DG for the sector concerned will carry out wide-ranging external consultations. While forms of consultation had long been part of the Commission's approach to policy making, a fresh impetus was given in 2001 by the governance initiative,⁶ with its emphasis on - amongst other things - openness, participation and effectiveness, and the follow-up package of measures, including in particular the Commission Communication on General principles and minimum standards for consultation of interested parties by the Commission.⁷ The requirement for consultation is now enshrined in the TEU⁸ and all consultations are publicly accessible on the Europa website.⁹

1.2.4. Impact assessments

It was also in 2001 that a fresh impetus was given to the impact assessments carried out as part of the preparation of Union legislation. The Commission has since then required for all major legislative proposals forming part of the Legislative and Work Programme integrated impact assessments covering the economic, social and environmental impacts of the measures envisaged. The aim is to promote a more analytical, evidence-based approach to policy making by analysing at an early stage what is the nature of the problem to be addressed and what are the policy objectives and then determining the available options and assessing the likely economic, social and environmental impacts of those options in order to compare their advantages and disadvantages.

6 See the Commission White Paper on Governance, COM (2001)428.

7 COM (2002)704.

8 See Article 11(3) TEU: 'The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's activities are coherent and transparent'.

9 http://ec.europa.eu/yourvoice/consultations/index_en.htm

The Commission's impact assessments are carried out by the technical experts in the DG for the sector concerned, who must follow the Commission's Impact Assessment Guidelines.¹⁰

The Secretariat-General ensures that impact assessments are carried out in the appropriate cases and the quality of the impact assessments is checked by the Impact Assessments Board, a semi-independent body of senior Commission officials reporting direct to the President of the Commission.¹¹ The impact assessment accompanies the Commission's legislative proposal through the rest of the legislative procedure and is published on the Europa website.¹²

It should be noted that suggestions for improving the Commission's impact assessments, in particular to make them more independent, were made in the Niebler Report on guaranteeing independent impact assessments.¹³ In July 2011, the Parliament's bureau decided to set up in the Directorate-General for Internal Policies of the Union a Directorate for Impact Assessment charged with the scrutiny of Parliament's amendments to legislative proposals, as well as a supervisory board.

1.2.5. First draft

In the light of the outcome of the consultations and the evidence of the impact assessments the DG for the sector concerned determines the policy it considers most appropriate. Where legislation is the chosen option, a first draft is produced by the technical experts in the DG. They rarely have specific expertise in legislative drafting (although one or two DGs have, within their own legal units, lawyers to help with drafting). That first draft will form the basis for all subsequent discussions within the Commission.¹⁴

1.2.6. Inter-Service Consultation

Once a DG has formulated its first draft, it submits it for comment to the other DGs concerned as part of the Inter-Service Consultation (ISC), which is designed to ensure that the Commission works in an effective and coordinated manner. Under the Commission's Rules of Procedure: 'Before a document is submitted to the Commission, the department responsible shall [...] consult the departments with a legitimate interest in the draft text in sufficient time'.¹⁵ So, for example, if the DG SANCO wished to propose legislation on animal health, it might have to consult DG AGRI which is concerned with all agricultural matters and DG MARKT which is concerned with trade within the EU, as well as DG TRADE which is responsible for international trade.

Under Article 23(4) of the Rules of Procedure the Commission Legal Service must 'be consulted on all drafts or proposals for legal instruments and on all documents which may have legal implications'. The Legal Service acts as the Commission's in-house lawyer providing it with legal advice and representing it in all court cases. Its Director-General reports direct to the Commission President.

As part of the Inter-Service Consultation the Legal Service lawyer specialising in the sector concerned checks that what the draft act sets out to do is indeed provided for in the legal basis and that the draft act does not go beyond the legal basis, that it complies with the Treaties and with the fundamental principles of the Union, and is consistent with the other Union legislation in the sector and with any case-law of the European Court of Justice.

10 http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm

11 See its website: http://ec.europa.eu/governance/impact/iab/iab_en.htm

12 http://ec.europa.eu/governance/impact/ia_carried_out/cia_2012_en.htm

13 A7-0159/2011

14 According to the Commission's internal rules, the originating department is responsible for producing a 'stable, short, quality original' draft (SEC (2001)2031: Memorandum on the simplification and rationalisation of the language process in Commission decision-making procedures).

15 Decision C (2000) 3614 published in OJ L 308, 8.12.2000, p. 26 (as subsequently amended). See Article 23(3).

At the same time, the formal quality of the draft is checked by the Legal Revisers in the Legal Service's Quality of Legislation team. The Commission has some 60 legal revisers, all lawyers with language skills. They check that the draft complies with all the rules as to form, that it is drafted clearly and precisely, and that the terminology is consistent both within the draft legislative act itself and with other Union legislation in the sector.¹⁶

The legal revisers have to analyse the draft to determine exactly what is wanted since there is rarely any separate indication of the policy aims. Then they reformulate the text in a way that is legally correct. They aim for a strong basic structure that is as clear and simple as possible, because they know that numerous amendments will be made later in the procedure which will add to or alter the original draft.

1.2.7. Linguistic quality

The technical experts who produce the first drafts are not drafting specialists and their job is made even harder by the fact that most of them have to draft in a language other than their mother tongue to enable the draft to pass through all the Commission's internal procedures. Nowadays almost all Commission texts are first drafted in English but only a very small proportion of the drafters are native English speakers. A survey carried out by the Commission's Translation DG in November 2009 'showed that 95 % of Commission drafters wrote mainly in English, although only 13 % of them were of English mother tongue. It also revealed that 54 % of them, that is more than half of the entire Commission population drafting documents, rarely or never have their documents checked by a native speaker'.¹⁷

As a result the linguistic quality of the first drafts may be poor. They will often contain grammatical mistakes or errors of idiom or register. They may also be formulated in a clumsy way as the non-native speaker has sought to make use of phrases or sentence structures copied from earlier acts or other sources (copy paste).

The linguists in the Translation DG have long recognized the problem and offered an editing service to address the issue. The service undertakes to revise a text to a fit standard quickly and without altering the substance. As part of the Inter-Service Consultation – or indeed at an earlier stage – any DG may ask the Translation DG's Editing Service to check the linguistic quality of the text. That linguistic check is not compulsory however and unfortunately too few drafters avail themselves of the service.

A campaign has recently been launched by the Translation DG, the Secretariat-General, the Legal Service and others to encourage all Commission staff to pay more attention to their writing. The Clear Writing Campaign comprises a booklet of ten guidelines for writing clearly, which is publicly available,¹⁸ an internal website, training courses, and seminars and other initiatives to make all Commission staff aware of the issue.

1.2.8. Conclusion of the Inter-Service Consultation

The Secretariat-General ensures that the Inter-Service Consultation is carried out in accordance with the prescribed rules, that all those who should be consulted are consulted and that the deadlines are all complied with. Since the Secretary-General is required by the

¹⁶ According to the Manual of Procedures: 'The Legal Revisers Group of the Legal Service bears primary responsibility within the Commission for the quality of drafting of Community legislation. ... It ensures that in the drafting of Commission acts and proposals for acts to be adopted by the other institutions the rules on legislative drafting are complied with. It also checks the legal and linguistic consistency of Commission acts in the various official languages of the Communities.'

Revision by the Legal Revisers serves in particular to ensure that acts comply with the rules as to form and are drafted clearly and precisely, that the legal terminology in each language is correct, and that the legal implications of acts in the different languages are identical'.

¹⁷ See:

http://ec.europa.eu/dgs/translation/publications/magazines/languagetranslation/documents/issue_01_en.pdf, page 4.

¹⁸ http://ec.europa.eu/dgs/translation/publications/brochures/clear_writing/how_to_write_clearly_en.pdf

Commission's Rules of Procedure to 'see that documents submitted to the Commission are of good quality in terms of substance and comply with the rules as to form'¹⁹, the Secretariat-General comments on those aspects in its own reply to legislative proposals submitted for Inter-Service Consultation.

The originating DG takes account of the comments it has received from the Inter-Service Consultation, which often take the form of textual amendments, and may if necessary carry out further internal and external consultations. The final text will then be translated.

While the Inter-Service Consultation plays a key role in ensuring that the quality of the first drafts is improved considerably, the system has a number of weaknesses, in particular:

- deadlines for submitting comments are short, generally just ten days;
- there are few direct contacts between those taking part, only an exchange of electronic messages, leaving considerable scope for misunderstandings;
- the draft may be substantially changed by one of the departments consulted, especially by the Legal Revisers, and the other departments involved generally do not see the changed text until it is too late to react again;
- the originating DG is responsible for taking account of all the comments it receives but sometimes the comments from different departments may overlap or be contradictory, making it impossible to take account of all of them;
- it is difficult for a procedure actually to be blocked, even if another DG has reservations about the quality or about the content of the draft act.

1.2.9. Translation

All proposals for legislative acts must be translated into all the official languages before they can be submitted to the Parliament and the Council. Any legal acts which the Commission is going to address to all the Member States must also be translated into all the official languages.²⁰

Within the Commission all translations are produced under the authority of the Translation DG which has a large staff of permanent translators (some 1750) and a stable network of free-lancers. About one-third of its work is the translation into all the official languages of legislation and policy documents of major public importance. For the rest it translates documents relating to the internal administration and other work and translates documents coming from outside the Commission into one of the internal working languages, increasingly English.

The Translation DG produces a very large volume of high-quality translations. For its translations of legislative proposals, however, it does not have specialist teams of legal translators; in fact only a small minority of its translators have legal qualifications. They have only limited access to the authors of the text, who in any case may no longer be altogether sure of the precise meaning of the text as a result of the input of others during the internal procedures. When translating a complex and lengthy legislative proposal the translators cannot always know when one of the choices made by them will alter some nuance in the text or undo a carefully crafted compromise.

It is important to note that in the vast majority of cases the translators produce the final text in all the official languages other than the drafting language, without input from elsewhere. They guarantee the concordance of their translations with the original.²¹

¹⁹ See Article 20(2).

²⁰ There is a special regime in place for the Irish language until the institutions are able to recruit and train enough Irish-speaking linguists: see Council Regulation (EC) No 920/2005 (OJ L 156, 18.6.2005, p. 3).

²¹ SEC (2001)2031: Memorandum on the simplification and rationalisation of the language process in Commission decision-making procedures.

In a very few cases each year the Legal Revisers in the Legal Service will revise a legislative proposal just before its adoption by the Commission. At that late stage the proposal will have been translated into all the official languages and the revisers will be primarily concerned with checking that the various language versions all have the same legal meaning ('linguistic concordance') and that the legal terminology is correct in all the languages. There will be little scope for major improvement of the quality of drafting.

1.2.10. Submission of the legislative proposal to the other institutions

The College consisting of all the Members of the Commission adopts its proposal, generally by a written procedure. It submits it in all the official languages simultaneously to the Parliament and the Council in accordance with Article 294(2) TFEU.

The proposal must generally also be submitted for consultation to the European Economic and Social Committee²² and may have to be submitted to the Committee of the Regions too.²³ In addition, it is forwarded to national parliaments, which may deliver a reasoned opinion on whether the draft act complies with the principle of subsidiarity.²⁴

The proposal will be published as a 'COM document' on EUR-Lex, the database of European Union law.²⁵ Lists of COM documents are published periodically in the electronic version of the *Official Journal of the European Union* (OJ C E series) and the documents are made publically available in the Commission's own register of documents.²⁶ All Commission proposals, together with full information on the subsequent procedure, can also be found in the Commission's database of inter-institutional procedures, PreLex.²⁷

1.3. Legislative procedure in the Parliament and in the Council

1.3.1. General

The text of the Commission's proposal forms the basis for all discussions in the other institutions. Article 293(1) TFEU states: 'Where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously, except in the cases referred to in' a small number of Treaty provisions.

Even though the proposal has been submitted in all the official languages, for practical reasons most of those discussions focus on just one language version, now generally the English version but in a small proportion of cases the French version.

In the codecision procedure over 70% of legislative acts are now adopted at first reading.²⁸ If the Parliament and the Council do not agree on the Commission proposal at first reading, it passes to a second reading,²⁹ after which, if there is still no agreement, a conciliation procedure is launched.³⁰

22 See Article 304 TFEU.

23 See Article 307 TFEU.

24 In accordance with Articles 2 and 3 of Protocol No 1 on the Role of National Parliaments in the European Union, which refers in turn to Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality.

25 <http://eur-lex.europa.eu/en/index.htm>

26 <http://ec.europa.eu/transparency/regdoc/recherche.cfm?CL=en>

27 PreLex follows all Commission proposals (whether on legislative dossiers, budgetary dossiers, or the conclusion of international agreements) and communications from their transmission to the Council or the European Parliament:

<http://ec.europa.eu/prelex/apcnet.cfm?CL=en>

28 See Article 294(3) to (6) TFEU. Concerns have been expressed that the pressure to reach agreement quickly at first reading undermines transparency of the process and reduces the scope for full scrutiny of the legislation, with negative implications for its quality (see amongst many others, for example: the Seventeenth Report of the UK House of Lords European Union Committee

(<http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/125/12502.htm>) at para. 108 ff; Statewatch analysis no 84: <http://www.statewatch.org/analyses/no-84-ep-first-reading-deals.pdf>.

29 See Article 294(7) to (9) TFEU.

30 See Article 294(10) to (12) TFEU.

The basic principle of the codecision procedure is that the same text is adopted by the two institutions. Article 294 TFEU provides:

'The European Parliament shall adopt its position at first reading and communicate it to the Council.

If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament'.³¹

1.3.2. Parliament

Within the Parliament the proposal is assigned to the competent Committee³² and a Rapporteur is chosen. The Rapporteur will present to the Committee a draft report comprising a draft legislative resolution and, where appropriate, amendments to the draft act. The Rapporteur is given a mandate by the Committee and represents the Parliament in the negotiations with the Council and Commission. When those negotiations are concluded, the Committee submits to the Plenary for voting its final report, again comprising a draft legislative resolution and any amendments to the draft act.³³

In most cases, the Parliament proposes textual changes, known as 'amendments', to the Commission's proposal. In the procedure at first reading, amendments may be tabled by any committee member at the committee stage, while in the plenary amendments are admissible only if they are tabled by the committee responsible, by a political group or by forty MEPs.³⁴

1.3.3. Council

Within the Council, the proposal is examined by a working party competent for the sector concerned (of which there are now some 160) 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 and usually consists of a civil servant from the Directorate-General for the sector concerned and a member of the Legal Service. The chair seeks to facilitate political compromises in the working party. In the case of codecision procedures, the chair will be given a mandate for the negotiations with the Parliament and Commission in the trilogues. In the most sensitive cases the working party may ask the Committee of Permanent Representatives of the governments of the Member States (generally known by its French acronym 'COREPER') or the Council itself (in the configuration of the ministers for the sector concerned) to define a 'general approach' which constitutes a negotiating mandate.

The Member States' representatives on the working parties are generally all technical experts rather than lawyers and the system encourages them to reach a compromise over texts. According to the Council's Rules of Procedure:

'When discussing texts, delegations shall make concrete drafting proposals, in writing, rather than merely express their disagreement with a particular proposal'.³⁵

To accommodate the different interests of all Member States, numerous textual changes to the Commission's proposal are generally suggested.

1.3.4. Trilogues

The negotiations between the three institutions are conducted in what are known as 'trilogues'.³⁶ The trilogues serve to bring the positions of the three institutions closer

31 Paragraphs 3 and 4.

32 There are currently 22 standing committees and 2 special committees. See: <http://www.europarl.europa.eu/activities/committees/committeesList.do?language=EN>

33 Information on the parliamentary procedure can be found in the European Parliament Legislative Observatory: <http://www.europarl.europa.eu/oeil/index.jsp?language=en>

34 Rules of Procedure of the European Parliament, Rule 195 and Rule 156 respectively.

35 Annex V, Point 15.

together and to enable the representative of each institution to keep it informed of the direction of the negotiations. In the 'informal trilogues' the Parliament is generally represented by the Rapporteur of the competent Committee, the Council by the representative on the appropriate Working Party of the Member State holding the six-monthly presidency of the Union and the Commission by the representative of the DG for the sector concerned. In the 'formal trilogues', which may be convened for particularly sensitive negotiations, the representatives will be at a higher level and the Parliament Rapporteur will meet, for example, the Chair of COREPER and the competent Director General from the Commission. Meetings of the trilogues are generally also attended by staff of the Parliament and by staff of the General Secretariat of the Council (usually a civil servant from the Directorate-General for the sector concerned and a member of the Legal Service).

Meetings continue at intervals for months or years. In the majority of cases, the trilogues proceed smoothly and the act is now usually adopted at first reading.

But in some 30% of cases a proposal will go to a second reading, after which, if there is still no agreement, it goes to conciliation.

1.3.5. Role of Commission in the Codecision Procedure

If the Commission takes the view that, as a result of the amendments made by Parliament and Council, its proposal has been 'denatured', that is, changed to such an extent that it no longer reflects the original intention, it may withdraw its proposal at any time before its adoption,³⁷ after which the act may no longer be adopted. That power theoretically gives the Commission a stronger position during the negotiations with the other two institutions but in practice it is hardly ever exercised. Indeed, if it becomes evident in the course of the negotiations that substantial changes to a proposal are needed to take account of the other institutions' concerns, the Commission may agree to submit an amended proposal.

1.3.6. Revision by the lawyer-linguists of the Parliament and the Council

Parliament

The Parliament has some ninety lawyer-linguists, who are in the Legislative Quality Units of the Directorate for Legislative Acts in the Directorate-General for the Presidency of the Parliament. Traditionally they focused on the amendments proposed by the Members of the European Parliament and were involved at the final stage of the parliamentary procedure but they are now increasingly becoming involved at earlier stages when they offer advice on drafting and legislative matters generally.

Council

The ninety lawyer-linguists in the General Secretariat of the Council are part of its Legal Service. Since 2007 a 'quality team' has been designated to follow each proposal for a codecision act as it passes through the procedures. The quality team comprises a lawyer-linguist as 'quality adviser' and a legal adviser who work closely together. The quality adviser attends the meetings on the proposal where necessary and, in close collaboration with the legal adviser, may make drafting suggestions.

36 See the Joint Declaration on practical arrangements for the codecision procedure (OJ C 102E, 24.4.2008, p. 111).

37 See Article 293(2) of the TFEU: 'As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Union act'.

Legal-linguistic finalisation

Before the vote in Plenary the Parliament's lawyer-linguists work to revise in all the languages the consolidated text comprising the Commission's proposal together with any amendments agreed by Parliament and Council.

The text voted on by the plenary constitutes the 'position' of the Parliament³⁸ and cannot be altered substantially after that vote.³⁹ Ideally, therefore, the lawyer-linguists of the Parliament and of the Council must start to work together to agree a final text as soon as political agreement has been reached between the two institutions on a reasonably finalised text (that is when the Chair of COREPER confirms to the Chair of the relevant parliamentary committee that a trilogue has been successful) and their revised text should be ready before the vote in Plenary. The task of leading the finalisation work by the lawyer-linguists is shared equally between the two institutions, as is the work of translating the final amended text into all the languages.

During the legal-linguistic revision the text is passed to and fro between the Parliament and the Council lawyer-linguists in a procedure that takes some six to eight weeks. For each text the Parliament appoints a 'file coordinator' and the Council a '*chef de file*' to coordinate the work. They work together with experts on the file from the three institutions to establish a base text in one language (usually English) ahead of the final revision meeting, known as the 'jurist-linguists meeting'.

The jurist-linguists meeting is attended by:

- Member States representatives: the representative of each Member State on the working party;
- Parliament representatives: the file coordinator and the English-language lawyer-linguist;
- Council representatives: the *chef de file*, who chairs the meeting, one lawyer-linguist for each official language, and the administrator for the Directorate General concerned in the Council General Secretariat;
- Commission representative: the expert (generally the person who drafted the Commission's proposal).

The jurist-linguists meeting goes through the whole text in English and agrees on the final English text which is then distributed to the Council lawyer-linguists for all the other languages. By this stage it is difficult to improve the quality of drafting significantly because of the risk of undoing a delicate political compromise. Furthermore, changes may be opposed by the Member States' representatives.

The jurist-linguists meeting does not consider any points that are specific to other languages, unless they raise issues that can be resolved only by changing the original. The process of editing the original text to eliminate inconsistencies or lack of precision or clarity in order to ensure that all the twenty three language versions can have the same meaning is known in the jargon as 'retroaction'.

After the jurist-linguists meeting each Council lawyer-linguist goes through the text in his or her own language with the national experts for Member States which use that language to produce the final versions, which they send to their Parliament counterparts for final checking.

1.3.7. Final steps in the Council

The finalised text is submitted to COREPER and to the Council for formal adoption and:

- placed on the public register;
- sent to the capitals of the Member States and to the Permanent Representations;
- adopted by the Council;

38 See Article 294(3) TFEU.

39 After the vote, only obvious mistakes and formal errors may be corrected.

- prepared for signature (this text is known in the jargon as the 'LEX version');
- submitted for signing by the Secretaries-General and Presidents of the Parliament and of the Council;
- sent to the Publications Office for publication in the Official Journal;
- formally lodged in the Council archive.

1.4. Publication

Article 297 TFEU requires the publication in the Official Journal of all legislative acts, of all regulations, and of all directives which are addressed to all the Member States.

The Publications Office of the European Union is responsible for publishing all Union legislation.⁴⁰ Since the inception of the European Communities it has published the Official Journal on paper for a modest subscription. The Official Journal contains not just legislation but also information, notices, calls to tenders and notices of staff vacancies. Over the years, therefore, it has developed a complex structure that may make it less accessible to ordinary users.⁴¹

Since 1998 an online version has also been published but the electronic versions are not authentic. In 2011 the Commission submitted to the Council for adoption by special legislative procedure a proposal to make the electronic version authentic which is still pending.⁴²

In addition, in response to the calls for improved accessibility of Union law over the years, the Publications Office has developed a system of websites and databases covering all aspects of Union law. Between 2003 and 2005 it created a single portal, called EUR-Lex, for accessing all that information.⁴³ That portal gives access free of charge in particular to:

- the electronic version of the Official Journal;
- collections of the treaties, international agreements, legislation in force, legislation in preparation, case-law, parliamentary questions – all accessible via hyperlinks;
- search engines for legislation and related measures; and
- consolidated texts of legislation, that is to say non-authentic texts combining the enacting terms of original acts and all amendments to them (covering some 3 000 acts).

The Europa website also includes 3 000 summaries of Union legislation divided into 32 subject areas.⁴⁴ The summaries have no legal force but they are "validated" by the relevant DG of the Commission and updated regularly.

The Union institutions also maintain large databases of information about the legislative process and its preparatory stages.⁴⁵ The Parliament goes to great lengths to offer access

40 See Decision 2009/496/EC, Euratom of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions on the organisation and operation of the Publications Office of the European Union (OJ L 168, 30.6.2009, p. 41).

41 The OJ is divided into three series, the L series for legislation, the C series for information, and the S series, a supplement with public procurement notices. The C series has two annexes: the C A series with notices of staff vacancies and such things as common catalogues of plant varieties; and the C E series with links to electronic texts that are not published in the paper version of the OJ, often of preparatory materials from the legislative procedure.

The L series itself is divided into section I 'Legislative acts', section II 'Non-legislative acts', section III 'Other acts' and 'Corrigenda'.

Section I 'Legislative acts' may be divided into: 'Regulations', 'Directives' and 'Decisions'.

Section II 'Non-legislative acts' may be divided into: 'International Agreements', 'Regulations', 'Directives', 'Decisions', 'Recommendations', 'Acts adopted by bodies created by international agreements'.

42 COM (2011)162.

43 <http://eur-lex.europa.eu/en/index.htm>

44 http://europa.eu/legislation_summaries/index_en.htm

45 See the websites of the Union institutions accessible from their common server Europa:

to its sessions.⁴⁶ When the Council deliberates and votes on draft legislation, its sessions are open to the public.⁴⁷ Most Commission DGs maintain public websites offering explanatory material about legislation in their respective sectors.⁴⁸

http://europa.eu/about-eu/institutions-bodies/index_en.htm

European Parliament Legislative Observatory:

<http://www.europarl.europa.eu/oeil/index.jsp?language=en>

European Commission database on the Union decision-making process:

<http://ec.europa.eu/prelex/apcnet.cfm?CL=en>

⁴⁶ See <http://www.europarl.europa.eu/eng-internet-publisher/eplive/public/default.do?language=en>

⁴⁷ See Article 7 of its Rules of Procedure, OJ L 325, 11.12.2009, p.35.

⁴⁸ http://ec.europa.eu/about/ds_en.htm

2. DRAFTING RULES AND MANUALS

2.1. The Treaties

The Treaties say little about the form of Union legal acts but some basic rules are laid down in the TFEU. Article 288 sets out the different types of legal act, Article 296 provides that legal acts must state the reasons on which they are based and refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties. Article 297 requires all acts to be signed and to be published in the Official Journal. Articles 290 and 291 refer to 'delegated' and 'implementing' acts respectively.

In 1997 the Intergovernmental Conference attached to the Amsterdam Treaty Declaration 39 on the quality of the drafting of Community legislation.⁴⁹ It stated that 'the quality of the drafting of Community legislation is crucial if it is to be properly implemented by the competent national authorities and better understood by the public and in business circles' and called on the institutions to 'establish by common accord guidelines for improving the quality of the drafting of Community legislation ... and [to take] the internal organisational measures they deem necessary to ensure that these guidelines are properly applied'.

2.2. Rules of Procedure of the Council and the Parliament

As part of the internal organisational measures called for by Declaration 39, the Council in 1999 inserted in its Rules of Procedure an article underlining the importance of the quality of drafting and confirming its Legal Service's role in that regard.⁵⁰ That article has since been amended and now reads:

'In order to assist the Council in its task of ensuring the drafting quality of the legislative acts which it adopts, the Legal Service shall be responsible for checking the drafting quality of proposals and draft acts at the appropriate stage, as well as for bringing drafting suggestions to the attention of the Council and its bodies, pursuant to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation.

Throughout the legislative process, those who submit texts in connection with the Council's proceedings shall pay special attention to the quality of the drafting'.⁵¹

Annex VI to the Council's Rules of Procedure guarantees a minimum level of uniformity in the form and presentation of Union legal acts. It sets out the standard format for the Council's legal acts, covering such matters as: the form and content of the title, the form and content of the preamble (which includes the citations of legal bases and procedural requirements and a statement of reasons), the structure of the enacting terms, and the closing formulas.

The Parliament has now, since it is co-legislator with the Council, included similar rules on form and presentation of acts in its own Rules of Procedure.⁵²

49 OJ C 340, 10.11.1997, p. 139.

50 Council Decision 1999/385/EC, ECSC, Euratom of 31 May 1999 adopting the Council's Rules of Procedure (OJ L 147, 12.6.1999, 13).

51 Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure (OJ L 325, 11.12.2009, 35); see Article 22.

52 OJ L 116, 5.5.2011, p. 1. See Rule 73 on 'Requirements for the drafting of legislative acts'.

2.3. Interinstitutional Agreement on drafting quality, 1998

The drafting guidelines and organisational measures called for by Declaration 39 were duly laid down by the Parliament, the Council and the Commission in 1998.⁵³ They agreed 22 guidelines covering general principles, the different parts of Union acts, drafting techniques and amendment and repeal. Although the guidelines were solemnly adopted by the three institutions and published in the Official Journal in all the official languages, they are not legally binding.⁵⁴

The institutions also agreed on the organisational measures called for by Declaration 39, including: adoption and publication of a joint guide to drafting; reorganisation of internal procedures to involve the lawyer-linguists or legal revisers earlier; establishment of drafting units; ensuring staff receive training in legal drafting; greater use of computers; and increased cooperation both between the Member States and the institutions and between the institutions themselves.

2.4. Joint Practical Guide for the drafting of Community legislation

The first of the organisational measures called for was a joint practical guide for persons involved in the drafting of legislation.

The Joint Practical Guide (JPG) was drawn up in 2000 by experts from the Legal Services of the Parliament, the Council and the Commission. The Joint Practical Guide set out to develop the content and explain the implications of the guidelines, by commenting on each guideline individually and illustrating them with examples. It is made accessible by avoiding technical language and references to other legal texts and by incorporating models to follow. The Joint Practical Guide has been translated into all the official languages and has been widely disseminated both within the institutions and in the outside world. Some 40 000 copies of a paper version have been distributed and electronic versions in various formats have been published on the EUR-Lex website.⁵⁵

2.5. Other drafting guidance

2.5.1. Commission Manual on Legislative Drafting

The Legal Service of the Commission has drawn up a manual for its lawyers and other staff involved in the drafting process. It is for internal use only but the current English version (1997) is publicly available on the Secretariat General's Better Regulation website⁵⁶.

2.5.2. Council's Manual of Precedents

The Council's Manual is drawn up by the lawyer-linguists of the Council Legal Service in consultation with their counterparts in the Parliament and the Commission and is updated at regular intervals. It sets out all types of acts in schematic form, showing the usual method of presentation and the most common formal provisions; it also contains general information on the structure of acts and drafting matters. It is for internal use only.

53 Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation of 22 December 1998 (OJ C 73, 17.3.1999, p. 1).

54 See recital 7 in the preamble.

55 <http://eur-lex.europa.eu/en/techleg/index.htm> .

56 http://ec.europa.eu/governance/better_regulation/access_eu_law_en.htm

2.5.3. Interinstitutional Style Guide

The Interinstitutional Style Guide of the Publications Office is publicly available in all the official languages⁵⁷ and aims to guarantee a harmonised style, format and presentation of texts of all kinds produced by the Union institutions. The guide is drawn up by the proofreaders of the Publications Office with some consultation of the staff of the Union institutions. It includes a number of sections relevant to the drafting of legislation.

2.5.4. LegisWrite

To take account of the special characteristics of its decentralised drafting system, the Commission has developed a word-processing program to facilitate the work of those involved in the legislative procedure. The program, called LegisWrite, is a tool which is integrated in Word and standardises the basic structure, presentation and formatting of legal acts, even if they include contributions from different departments within the Commission. It also ensures that the computer formatting remains stable when an electronic version of a text is sent from one institution to another that uses a different computer system. Since 1999 it has been mandatory to use LegisWrite within the Commission for all legislative texts that are to be sent to the other institutions.

The actual content of the LegisWrite templates is devised by the legal revisers of the Commission. At present the templates are rather skeletal but the intention from the outset was to use LegisWrite to offer drafters more help and to aim for more standardisation in legal acts wherever possible.⁵⁸

In 2009 a project was launched to develop LegisWrite by incorporating a Drafter's Assistance Package (DAP), offering more assistance to drafters by means of standard formulations and guidance.

2.6. Governance and better lawmaking

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

In the same year the Member States established a high-level advisory group, the Mandelkern Group, to examine regulatory quality in Europe. In its Final Report presented to the European Council in 2001 it called for an action plan of over 30 measures to improve regulatory quality and stated:

'The lack of simplicity, clarity and accessibility of European provisions – such as unclear, confusing terminology, incomplete or inconsistent regulations or use of vague terms – constitute significant problems'.⁵⁹

In 2001 the Commission adopted a White Paper on European Governance, calling for 'constant attention to improving the quality, effectiveness and simplicity of regulatory acts',⁶⁰ followed by a report and a communication recommending a new strategy and a new culture of simplification of the regulatory environment.⁶¹ In 2002 it adopted further measures as part of the governance initiative including an action plan for simplifying and improving the regulatory environment.⁶²

In 2003, the Parliament, the Council and the Commission affirmed their joint commitment to improving the quality of legislation in every respect by agreeing a series of measures:

57 <http://publications.europa.eu/code/en/en-000500.htm>

58 See the Joint Practical Guide, in particular point 10.19.3.

59 http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf . See Point 8.3.2.1.

60 COM (2001) 428.

61 COM (2001) 726.

62 COM (2002) 278.

- better preparation of all legislation by means of, in particular, more systematic consultation of interested parties and impact assessments of all the options;
- further efforts to improve drafting quality;
- closer coordination between the work of the different Union institutions;
- greater transparency throughout the legislative process, especially by giving more explanation in the explanatory memoranda for legislative acts, broadcasting of public debates and holding joint press conferences when legislation is adopted;
- improved access to Union legislation through EUR-Lex and a new culture of simplifying and reducing the volume of legislation, including: considering non-legislative solutions, reducing administrative burdens, inserting revision clauses in new acts, updating existing legislation and repealing obsolete legislation;
- better follow-up to adopted legislation: transposition and application by the Member States.⁶³

In a 2010 agreement the Parliament and the Commission set out a series of measures to improve their cooperation as regards legislative procedures and better lawmaking issues.⁶⁴

63 Interinstitutional Agreement of 16 December 2003 on better law-making (OJ C 321, 31.12.2003, p. 1).

64 Framework Agreement on relations between the European Parliament and the European Commission (OJ L 304, 20.11.2010, p. 47).

3. POST-PUBLICATION ISSUES

3.1. Amendment

The Commission estimates that on average 40% of its proposals each year relate to amendment of existing legislative acts.⁶⁵ Since it is clearly vital to keep Union legislation as accessible as possible, the institutions have agreed that amendments should 'take the form of text to be inserted in the act to be amended'.⁶⁶ This makes it possible to produce almost mechanically consolidated texts of the law in force at any given moment and also to codify and recast legislative acts that have been amended (see sections 3.3, 3.4 and 3.5 below).

3.2. Corrigenda

A particular problem with Union acts is the number of times they have to be corrected after adoption by means of corrigenda published in the Official Journal for one or more language versions.

When an act contains errors, an incorrect text applies until the corrected version is published, and then the new version applies retroactively from the date of the adoption of the act, which may be months or even years in the past. Users have to familiarise themselves with whole text twice and there is still a risk that a user will rely on the wrong text because it is still in the Official Journal or database.

It is not easy to ascertain the extent of the problem because corrigenda do not appear as a separate searchable category in EUR-Lex. A search in EUR-Lex for acts published in 2011 of which the Parliament was the author showed 48 regulations but 28 corrigenda to regulations and 22 directives but 30 corrigenda to directives.

At times the numbers are alarming. In 2004 the Union institutions rushed to publish a large number of acts before the accession of 10 new Member States made it necessary to work in another 9 official languages. Evidently there was not time to prepare them as thoroughly as usual and after accession no less than 20 issues of the Official Journal containing 2897 pages had to be republished in their entirety in all the official languages.⁶⁷

Again shortly after the accession of Bulgaria and Romania in 2007, it was necessary to republish in all languages as corrigenda the acts contained in 14 Official Journals totalling 3225 pages.⁶⁸

It is a cause of concern so many corrigenda to Union legislation are necessary, especially as sometimes, under the innocuous heading of corrigendum, an entire act is reprinted in all the official languages. There is a danger that citizens and business operators will lose their trust in Union law, and indeed one commentator has described the issue as a 'quicksand'.⁶⁹

3.3. Consolidation

Consolidation is a mechanical process whereby the provisions of a legal act (the articles and any annexes but not the recitals) and all amendments and corrections to them are brought

65 See http://ec.europa.eu/governance/better_regulation/codif_recast_en.htm (last accessed on 7.4.2012).

66 See Guideline 18 in the Interinstitutional Agreement on quality of drafting (OJ C 73, 17.3.1999, p. 1).

67 See the list of Official Journals concerned inside the back cover of OJ L 244, 16.7.2004.

68 See the list of Official Journals concerned inside the back cover of OJ L 190, 21.7.2007.

69 See Michal Bobek, 'Corrigenda in the Official Journal of the European Union: Community law as quicksand', *ELRev* 2009, 950.

together in a single new text. The resulting consolidated text is for information only and has no legal status. The original act remains in force.

The Publications Office carries out the consolidation of Union legislation in all the official languages under the control of the inter-institutional Working Group on Consolidation.⁷⁰ It publishes its consolidated texts on EUR-LEX.⁷¹ Although the consolidated texts are not authentic, they are a valuable tool for all users of Union law. They also serve as the basis for the work of codifying and recasting.

3.4. Codification

Codification is the process whereby a new act is adopted which brings together in a single text all the provisions of an existing act and all amendments and corrections already made to those provisions, without making any new amendment. The new act includes a complete and coherent statement of reasons. When the new act is adopted the original act and all the amendments to it are repealed.

In 1994 the Parliament, the Council and the Commission agreed on an accelerated working method for official codification of legislative texts.⁷² The Commission proposal is examined in the Parliament solely by the Legal Affairs Committee and in the Council solely by a special "Codification" Working Group and is subject to the "I/A items" procedure in COREPER (point 5 of the Interinstitutional Agreement).

In 2001 the Commission adopted a Communication on codification which indicated that 27 codified texts had so far been adopted replacing 280 pre-existing acts, with a further 11 in the pipeline.⁷³ It stated that all the *acquis* should be codified within some five years in order to make Union law more accessible and to reduce the burden of translating the *acquis* for new Member States. It noted:

'According to Commission estimates, the total *acquis communautaire* (secondary legislation) currently comprises about 80 000 Official Journal pages (all acts regardless of the institution adopting them). With about 2 500 new pieces of legislation (representing some 5 000 Official Journal pages) generated each year, this figure will increase to some 90 000 pages in 2003, if the existing legislative procedures are maintained.

According to Commission estimates, it would be possible to reduce the *acquis* by about 30 000 to 35 000 pages if it were codified. 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)' (point 1.3).

However the actual results proved disappointing, partly because of the need to produce the texts in all the official languages and also because, whenever further amendments became necessary to an act being codified, the procedure had to be restarted from the beginning. After completion of the exercise in 2009 the Commission reported:

'The Commission has finalised a total of 229 codification acts so far. Of these, 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'.⁷⁴

70 See COM (2001)645, point 2.2.

71 <http://eur-lex.europa.eu/en/index.htm>

72 Interinstitutional Agreement of 20 December 1994 on the accelerated working method for official codification of legislative texts (OJ C 102, 4.4.1996, p. 2.

73 COM (2001)645; see point 2 of the Explanatory Memorandum.

74 COM (2009) 17 final, point 5.

3.5. Recasting

Recasting is the process whereby a new act is adopted which brings together in a single text all the provisions of an existing act and all amendments to those provisions. It differs from codification in that new amendments are also made. The Commission prepares a proposal and submits it to the legislative authority. When the new act is adopted, the original act and all the amendments to it are repealed.

In 2001 the Parliament, the Council and the Commission adopted an Interinstitutional Agreement on a more structured use of the recasting technique for legal acts.⁷⁵ In a recast the part of the text that corresponds to the existing provisions as already amended is treated as a codification and the legislative authority undertakes not to reopen discussion on those parts. The parts that are new are subject to the normal legislative procedure.

3.6. Simplification and repeal

Concern at the increasing volume of Union legislation led to a commitment from the Union institutions to simplify and repeal legislation wherever possible.⁷⁶

The rule has been formally laid down that: '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'.⁷⁷

In addition, independently of the adoption of a new act, the *acquis* is being screened by staff of the Commission Legal Service to identify acts that are no longer applied and to repeal them.

The Commission has, since adopting its strategy for the simplification of the regulatory environment in 2005,⁷⁸ run a rolling programme for simplifying and improving existing Union law identifying areas where action should be taken with input from stakeholders. It reports regularly on its programme and progress made.⁷⁹ It notes that: 'By simplifying and codifying legislation, the Commission has reduced the *acquis* by almost 10% since 2005 - about 1 300 legal acts and 7 800 pages of the Official Journal have been removed from the Community statute book'.⁸⁰

Despite all the efforts made the *acquis* continues to grow. In 2001 it was estimated at some 80 000 pages.⁸¹ Unofficial estimates of the current size of the *acquis* in connection with the translation of all binding Union law into Croatian put it at some 130 000 pages.

The official statistics of acts adopted each year over the last ten years show that the number of regulations adopted each year has fallen almost every year while the figures for directives and decisions are more erratic but still show a downward trend, although less marked than for regulations (See Figure 1). It should be noted that in all but one of those years the figure of 2 500 new pieces of legislation a year mentioned in the Communication on Codification was exceeded, usually by a large margin.⁸²

75 OJ C 77, 28.3.2002, p. 1

76 See Interinstitutional Agreement of 16 December 2003 on better law-making (OJ C 321, 31.12.2003, p. 1), point 35.

77 Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ C 73, 17.3.1999, p. 1), Guideline 21.

78 COM(2005)535

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

80 http://ec.europa.eu/governance/better_regulation/simplification_en.htm (accessed on 7.4.2012).

81 See COM (2001)645, point 1.3 (cited in section 3.4 above).

82 COM (2001)645.

Table 1 Number of acts adopted each year from 2002 to 2011

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Regulations	2563	2403	2407	2350	2253	1918	1578	1946	1569	1234
Directives	136	163	171	133	244	181	205	262	166	105
Decisions	781	808	925	763	860	849	828	889	816	723
Total	3480	3374	3503	3246	3357	2948	2611	3097	2551	2062

Source: EUR-Lex - <http://eur-lex.europa.eu/Stats.do?context=legislative&ihmlang=en>

4. HOW COULD THE DRAFTING OF UNION LEGISLATION BE IMPROVED?

4.1. Awareness of the importance of quality of legislation

The system generates a pressure on all concerned to reach agreement on a text quickly, even if it is a weak text.⁸³

It is, however, essential for all those involved in shaping Union legislation to be reminded that their political concerns and desire for results must not be allowed to override the need for clear and precise legislation, as already suggested by the Mandelkern Group.⁸⁴

The obvious danger is that if Union legislation is poor the Court of Justice will at some time have to be called upon to determine what it actually means. That process takes time, leaving the law in a state of uncertainty for too long. The Court of Justice has a large and growing case-load and cannot easily reduce the time it takes to resolve its cases. In any case, it is undesirable in a Union governed by the rule of law for unelected judges to have to try to second-guess what was the intention of the legislative authority.⁸⁵

4.2. Measures set out in the 1998 Interinstitutional Agreement on drafting quality

When considering how to improve Union legislation the measures set out in the 1998 Agreement on drafting quality are an obvious starting point since they were drawn up following a process of reflexion and consultation by experts from the Member States and the institutions and were specifically tailored to the Union's fragmented drafting system. It is time to review each of the measures, seeing what has already been done to implement it and considering what more could be done. The Mandelkern Group called for such a review no later than December 2002 as just one element in its comprehensive package of measures to improve regulatory quality in Europe, which themselves merit close study.⁸⁶

83 The tendency of those involved in the European Union legislative process to rush to adopt acts has been sharply criticized by a Swedish expert, who had experienced the haste first hand as representative of Sweden in negotiations in Brussels and then seen the ensuing problems in his own country as judge of the Swedish Supreme Administrative Court and a member of Lagrådet; see G. Sandström, 'Knocking EU law into shape', *Common Market Law Review* 40, 1307 (2003). He quoted G. Lambertz, who was later Swedish Chancellor of Justice: 'It is not easy to see why many of Europe's legislators allow themselves to be carried away by the temptation to demonstrate their rapidity rather than to assume their responsibility for ensuring that the laws are properly worked out. Short-term gains in rapidity almost always entail long-term structural defects and enormous costs, not least in the form of distrust and lack of respect for the European legislative apparatus. The mania for being clever and the desire to impress which are bound up with the obsession with rapidity – often accompanied by the quite pathetic arguments that "The people of Europe are waiting impatiently for these rules" or "We shall be overtaken by events if this act cannot be adopted immediately" – are in my view irresponsible. Sweden should work energetically and single-mindedly to ensure that endeavours to improve the quality of EU legislation are not merely confined to paper' (Svensk Juristtidning 2000, p. 247).

84 'All parties should pay more attention to the precision, clarity and coherence of European legislation during the negotiating process', Mandelkern report, Action Plan, final paragraph.

85 An Advocate General of the Court of Justice, Eleanor Sharpston QC, has pointed out that she and her colleagues do not relish having to seek the meaning of Union legislation that has not been well drafted and that they would rather that the legislative authority established clearly the intended meaning. See the Sir William Dale Memorial Lecture 2011: <http://www.sas.ac.uk/videos-and-podcasts/law/drafting-comprehensible-legislation-multi-lingual-multi-legal-system-environ>

86 'The Commission to present to the European Parliament and Council no later than December 2002 a review of the implementation of the Inter-Institutional Agreement on common guidelines for the quality of drafting of Community legislation', Mandelkern report, Action Plan, under Access to Regulation, fourth paragraph.

4.2.1. Joint Practical Guide for drafting

The Joint Practical Guide was drawn up in 2000 and makes basic drafting guidance widely available. It is, however, short and incomplete; moreover, it is not followed by all the staff of the institutions or indeed known to them. Staff of the Council place greater reliance on the Council's own, more comprehensive and up-to-date Manual of Precedents.

To counter the danger of divergent practices continuing to develop between the institutions the Joint Practical Guide should be completely revised and extended in order to consolidate its status as the first point of reference for all those involved in drafting Union legislation. Apart from unifying the practices of the three institutions, the Joint Practical Guide serves to raise awareness of the importance of good quality legislation amongst all those involved in the drafting process and forms a good basis for staff training. Since it is published on EUR-Lex it helps make the Union legislative process more transparent.

4.2.2. Reorganisation of internal procedures to involve the lawyer-linguists earlier

The three institutions have taken steps to involve their lawyer-linguists earlier but those efforts should be stepped up. The lawyer-linguists' involvement should be systematic from the outset and their authority on questions of drafting enhanced.

4.2.3. Establishment of drafting units

Within the Commission the first draft of each legal act is still almost invariably produced in the DG concerned by experts in the technical subject matter, not drafting experts. They are generally not lawyers and most of them have to work in a language that is not their own. Inevitably the standard of those drafts is suboptimal.

It is time that the Union institutions recognised that the preparation of legislation is a skill and that experts will produce a better result than laypersons. Investment in improving the very first drafts would pay off at every subsequent stage of the legislative process.

The Commission should establish centres of drafting expertise in every DG which is involved in the legislative process. Native speakers of the language with legal training and drafting experience would produce better first drafts. It is imperative that the drafts produced by the Commission should be of the highest quality because it becomes progressively harder to improve drafting quality at later stages in the legislative process.

4.2.4. Giving staff training in legal drafting

Member States such as the Netherlands have shown the importance they attach to training their own civil servants with the creation of the *Academie voor wetgeving*.⁸⁷ This has inspired the establishment in 2009 of the European Academy for Law and Legislation.⁸⁸

The Union institutions provide little training in legislative drafting for their staff. The Parliament and the Council have now set up a joint course for their lawyer-linguists, to foster a common drafting culture. That is a good start. But since so many other members of the institutions' staff intervene in the Union drafting process, they should all be required to follow training covering every aspect of legislation, as called for by the Mandelkern Group.⁸⁹

4.2.5. Cooperation with the Member States on drafting matters

A structure should now be put in place to enable the Member States to give regular feedback on their views on drafting matters, new developments, or problems they encounter in implementing Union law, as recommended by the Davidson Review

87 See its website: <http://www.academievoorwetgeving.nl/>

88 See its website: <http://www.eall.eu/>

89 'The Commission, European Parliament, Council and Member States should establish new or improve existing joint training programmes at European level for officials on aspects of better regulation such as impact assessment, use of alternatives, consultation, simplification and codification (and other forms of consolidation)', Mandelkern report, Action Plan, General, second paragraph.

commissioned by the United Kingdom in 2006 to examine the impact of European Union regulation.⁹⁰

4.2.6. Computer assistance for drafting

The three institutions should work closely together to develop real computer assistance to drafters and also step up their cooperation with the Publications Office to take full advantage of the new technological possibilities for drafting, publishing, amending and updating legislation. This will become all the more urgent once the Union moves to a system in which the text of its legislation published on the Internet is authentic.

4.2.7. Collaboration between the institutions' departments responsible for drafting quality

The legal revisers of the three institutions have improved their contacts at different levels. Common approaches to new problems are sought by meetings of management, the institutions consult each other on matters of common concern that arise and there are informal contacts between the individual revisers themselves.

To avoid the proliferation of divergences in drafting practice, which may merely be a minor annoyance to staff of the Union institutions but can cause real confusion to outsiders, the three institutions should set up stronger mechanisms for agreeing on common approaches to all drafting matters and to develop further the guidance offered to drafters and the standardisation that will lead to greater efficiency within the institutions and greater consistency to the benefit of users of Union legislation.

4.2.8. Reports on implementation of the 1998 Agreement on drafting quality

In 2001, the Council issued a report on the steps it had taken to comply with the Agreement.⁹¹ The Commission for its part has never produced a report specifically on the implementation of the Agreement. While it does cover aspects of its efforts to improve regulatory quality, as well as compliance with the principles of proportionality and subsidiarity, in its annual reports on 'Better Lawmaking',⁹² those reports have rarely included more than a fleeting reference to drafting and more often omit the topic altogether.

If the question of drafting quality is to be given the attention it deserves, each institution should draw up each year a report genuinely devoted to drafting issues. That is what seems to be called for by the Agreement itself, under point (h) of which 'the institutions ... shall instruct their respective legal services to draw up periodically, each for the institution to which it belongs, a report on the measures taken in pursuance of points (a) to (g)'.

For its part, the Mandelkern Group called for a comprehensive annual report on regulation in Europe covering not just the Union institutions but the Member States as well.⁹³

4.3. Other measures

4.3.1. Group of experts

The Parliament could commission a group of experts drawn from all the Union institutions, from the Member States authorities, and from academic and professional circles to examine

90 Davidson Review: 'Implementation of EU legislation, Final Report', HMSO 2006, see point 5.2.6 ff. and Recommendation 16.

91 Report 5882/01 JUR 37 of 12 March 2001.

92 Those reports are all available on the Better Regulation site of the Commission Secretariat General: http://ec.europa.eu/governance/better_regulation/reports_en.htm.

The most recent report available is that for 2010: COM(2011)344.

93 'As of 2003, the Commission should produce an annual report to the European Parliament and to the spring European Council on developments in better European regulation by the EU and each Member State, bringing together existing reports in overlapping areas (e.g. Better Lawmaking, better regulation elements of the Cardiff report)', Mandelkern report, Action Plan, General, first paragraph.

all aspects of Union legislation and consider what problems it poses and how it could be improved.

Aspects that might be considered by the new group include:

- preparation of Union legislation: impact assessments, consultation;
- technical drafting matters: formal structure, linguistic quality;
- publication: paper and internet versions, how findable are they?
- stability: amendment and consolidation;
- effectiveness: are the rules workable and do they work?
- evaluation after adoption;
- interpretation of Union legislation.

The group should produce a report based on broad consultations of all interested circles. That report could be discussed at a conference convened by the Parliament of representatives from all the Union institutions and the Member States to consider measures to improve the quality of Union legislation.

With internet and modern communications, the process could be more open than has been possible in the past and more inclusive, less focused on insiders from the Union institutions. It could involve citizens and consumer interests and embrace experts in communications, computer technology and plain language.

A role should be played by academic bodies specialising in legislative matters,⁹⁴ and specialist associations in the field.⁹⁵

Ideally the outcome should be structures that bring a lasting improvement to Union legislation and perhaps even a system that is capable of healing itself in future.

4.3.2. Binding requirement for Union acts to be clear and understandable

One question the group should consider is whether the Union needs a binding requirement for its acts to be clear and understandable, as has been suggested at highest levels.⁹⁶

If such a requirement is not inserted in the Treaties it could be embodied in an act on the drafting and interpretation of Union legislation or in a binding interinstitutional agreement under Article 295 TFEU.

In the Union legislative process attention is focused at every stage on the draft text of the new act (usually in just one language). Once the act is adopted, on the other hand, it must be interpreted not on the basis of just one text but having regard to all 23 language versions and to the context and objectives of the act and its place in the scheme of Union law.⁹⁷ Particularly now that there are 27 Member States with very different legal cultures, it would be helpful to all users of Union legislation for the legislative authority to lay down

94 Such as, amongst others, the Institute of Advanced Legal Studies, London (<http://ials.sas.ac.uk/>) and the European Academy for Law and Legislation, The Hague (<http://www.eal.eu/index.php/en/eall-about>).

95 Such as, amongst others, the International Association for Legislation (<http://www.ial-online.org/>) and the Statute Law Society (<http://www.statutelawsociety.org/>).

96 In 1997, the Netherlands had, with the European Union institutions, organised a Conference of experts from Member States and those institutions on the quality of European and national legislation. At that conference the Netherlands Minister of Justice, Ms W. Sorgdrager, said:

'There is one topic I should like to examine in more detail myself: this concerns the proposal by the Dutch Government in the IGC concerning the quality of European legislation. In the first place, our aim with this proposal is to embed care for the quality of European legislation in the new EU Treaty itself. Care for the quality of legislation will become less optional. The institutions will be bound by guidelines on the quality of legislation when they take decisions on draft legislation' (See the report on the conference in *Improving the quality of legislation in Europe*, A.E. Kellerman and others, T.M.C.Asser Instituut, 1998).

Again at the European Convention in 2002 two delegates suggested the insertion of a requirement in the Treaty that 'legal acts should be drafted clearly, simply and precisely with the aim of making them easy to understand for the citizens' (Paper submitted to Working Group IX on Simplification (WG IX – WD 14 of 6.11.2002) by Mrs Lena Hjelm-Wallén and Mr Kenneth Kvist).

97 See Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 18.

basic rules on the drafting and interpretation of legislation. At present the approach to drafting Union legislation is governed by a patchwork of rules, manuals and practices of the Parliament, the Council and the Commission (as shown in section 2 above). Interpretation is governed solely by principles developed piecemeal in the case-law of the Court of Justice, apart from one short Regulation on how time-limits are to be calculated, Council Regulation No 1182/71.⁹⁸

A comprehensive set of rules on the drafting and interpretation of Union legislation might cover some or all of the following:

- the requirement that Union legislation be clear, understandable and accessible;
- language, structure, and drafting;
- amendment, consolidation, codification, recasting, repeal and correction;
- status of Internet and paper versions;
- interpretation, including use of definitions, use of singular and plural and use of masculine and feminine forms;⁹⁹
- status of titles, preambles, articles and their headings, and annexes,
- status of declarations, statements, interpretative notes, and citizens' summaries;
- entry into force, taking effect and application;
- time-limits (replacing Council Regulation No 1182/71).

98 Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L124, 8.6.1971, p. 1).

99 Interpretation acts are found in most common-law countries. See for example:

Ireland: <http://www.irishstatutebook.ie/2005/en/act/pub/0023/index.html> ;

United Kingdom: http://www.opsi.gov.uk/revisedstatutes/acts/ukpga/1978/cukpga_19780030_en_1

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