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INTRODUCTION: EU LEGISLATION – A SHARED RESPONSIBILITY

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It is self-evident that the adoption of European Union (EU) legislation is a collaborative process. The process is called the “codecision” procedure and formally all EU legislation is adopted by the European Parliament and the Council. According to the EU Treaties it is the European Parliament and the Council that “jointly ... exercise legislative ... functions”.¹

But the role of the European Commission in that process is also vital. Indeed in 1973, when describing the process in the European Community, which was the forerunner of the EU, the first President of the Commission, Walter Hallstein, wrote: “The legislative power in the Community is held by the Council and Commission jointly”.² At that time, of course, what we now know as the European Parliament was the “Assembly”, which was composed of delegates designated by the national parliaments rather than being directly elected, and it exercised only “advisory and supervisory powers”.³

The starting point of any procedure for the adoption of an EU legislative act is a “proposal” from the Commission and the classic rule was that the Commission had the “monopoly on the legislative initiative”, meaning it alone decided whether to submit a legislative proposal and what to put in it.⁴ That monopoly has, however, become less absolute over the years.

Traditionally the actual impetus for new Commission proposals generally came from the European Council. The European Council, while specifically barred from exercising legislative functions, does “define the general political directions and priorities” of the European Union.⁵ The President of the Commission is a member of the European Council and so naturally takes full account of its views when determining the political priorities of the Commission,⁶ which then shape the Commission’s annual work programme.⁷

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¹ See Article 14(1) and Article 16(1) of the Treaty on European Union (TEU); see also Articles 289 and 294 of the Treaty on the Functioning of the European Union (TFEU).

² See W Hallstein, *Die Europaeische Gemeinschaft*, (Econ Verlag, Duesseldorf, 1st edition 1973), Chapter 2(I) (p. 34).

³ See Article 137 of the Treaty establishing the European Economic Community.

⁴ Article 289 TFEU and Article 294 TFEU.

⁵ See Article 15(1) TEU.

⁶ See Article 17(6)(a) TEU.

As far as the Council of the EU is concerned, the Member State holding the rotating Presidency of the Council under Article 16(9) TEU does not have formal power to suggest new legislation but it is charged with leading the Council's work during its six-month Presidency. Each Member State assuming the Presidency adopts a programme setting out its priorities, which it must coordinate with the Member States holding the Presidency immediately before it and immediately after it.⁸

The European Parliament had little influence over the initiation of legislation in the early years but in 1992 the Maastricht Treaty inserted a new provision in Article 138b of the EEC Treaty empowering the European Parliament to "request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing this Treaty". However, no further provision was included on the consequences of such requests and elsewhere in the Treaty the Commission's independence was repeatedly stressed.⁹

A more formal basis for relations between the Commission and the European Parliament was laid down in agreements between the two institutions, such as the Framework Agreements on relations between the European Parliament and the Commission concluded in July 2000 and then in May 2005.¹⁰ They entailed in particular commitments by the Commission to keep the European Parliament informed and to take due account of the views it expressed.

In 2003 the Commission formally undertook to "take account of requests made by the European Parliament or the Council ... for the submission of legislative proposals" and to "reply rapidly and appropriately to the parliamentary committees concerned and to the Council's preparatory bodies".¹¹

The Lisbon Treaty which came into force in 2009 sought "to enhance further the democratic and efficient functioning of the institutions of the EU"¹² and led to a significant strengthening of the European Parliament's role in many respects.

⁷ The 2014 work programme is set out in COM(2013) 739, available together with all the work programmes since 2005 on the Commission website: <http://ec.europa.eu/atwork/key-documents/index_en.htm> accessed 21 August 2014.

⁸ According to the website of the Council: "The presidency is responsible for driving forward the Council's work on EU legislation, ensuring the continuity of the EU agenda, orderly legislative processes and cooperation among member states. To do this, the presidency must act as an **honest and neutral broker**" (emphasis in original): <<http://www.consilium.europa.eu/council/what-is-the-presidency?lang=en>> accessed 21 August 2014.

⁹ Article 157 of the EEC Treaty provided that the Commission was to consist of members "whose independence is beyond doubt", who are to "be completely independent in the performance of their duties", and who are to "neither seek nor take instructions from any government or from any other body".

¹⁰ [2001] OJ C 121/122 and [2006] OJ C 117E/125.

¹¹ See the Interinstitutional agreement on better law-making concluded by the European Parliament, the Council and the Commission on 16 December 2003 [2003] OJ C 321/2, at point 9.

¹² See the Preamble to the TEU.

As regards the initiation of legislation, the existing provision empowering the European Parliament to request the Commission to submit a proposal if it considered that legislation was required to implement the Treaties was complemented by the further provision that:

If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.¹³

In specific cases provided for in the Treaties legislation may also be initiated by a group of Member States or other EU institutions.¹⁴ And, as part of efforts to strengthen the democratic responsiveness of the EU, the Lisbon Treaty also provided for the possibility for legislation to be suggested by Citizens' Initiatives.¹⁵ If at least one million citizens from at least seven Member States sign a petition calling for a new measure to be adopted within the ambit of the EU Treaties they may invite the Commission to submit an appropriate proposal. However, since the necessary rules entered into force in April 2012 it is still too early to say whether a large number of legislative proposals will result.¹⁶

In September 2010 the Commission President, Mr Barroso, presented to the European Parliament his address on the State of the Union 2010,¹⁷ which he undertook to repeat each year. He stated:

I have called for a special relationship between the Commission and Parliament, the two Community institutions par excellence. I am intensifying my political cooperation with you.

Soon after that address a new framework agreement between the EP and the Commission was adopted¹⁸ setting out "measures to strengthen the political responsibility and legitimacy of the Commission" to "better reflect the new 'special partnership' between Parliament and the Commission". A key new measure is the commitment for the President-designate of the Commission, after being nominated by the European Council, to: "submit to Parliament political guidelines for his/her term of office in order to enable an informed exchange of views to take place with Parliament before its election vote" (Point 2).

Other measures to strengthen the cooperation between the European Parliament and the Commission on legislative matters include:

¹³ Article 225 TFEU.

¹⁴ Article 289(4) TFEU.

¹⁵ See Article 11(4) TEU.

¹⁶ See Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L65/1 and the dedicated website: <<http://ec.europa.eu/citizens-initiative/public/welcome>> accessed 21 August 2014.

¹⁷ <http://europa.eu/rapid/press-release_SPEECH-10-411_en.htm?locale=en> accessed 21 August 2014.

¹⁸ [2010] OJ L304/47.

- a commitment by the Commission to present legislative initiatives to the European Parliament before making them public;
- a procedure for the Commission's follow up to requests from the European Parliament for legislative initiatives; and
- provision for closer cooperation between the Commission and the European Parliament on the Work Programme which is to be "the basis for a structured dialogue with Parliament, with a view to seeking a common understanding".¹⁹

Expert analysis in 2012 led by Paolo Ponzano, a long-time Commission insider, has found that only around 5% of Commission proposals are actually autonomous initiatives, others are responses "to more or less explicit demands or mandates received by other institutions ... or in the framework of multi-annual work plans" and that in "the past two decades, in particular, most of the proposals adopted by the Commission have somehow replied to Council conclusions".²⁰

In Ponzano's words, therefore: "the decision to legislate at the European level is a shared responsibility between institutions, while the Commission has discretionary power over the content of its proposal".

The procedure whereby each of the main political groups designated their "*Spitzenkandidaten*" for the post of Commission President before the elections to the European Parliament in May 2014 and those candidates set out their manifestos before the election marks a further step in the strengthening of the European Parliament's role in shaping the EU's political priorities.

The President-designate of the Commission following the 2014 elections, Mr Juncker, presented his political guidelines for the next Commission to the European Parliament in Strasbourg in July 2014.²¹ He stressed the importance of the collaboration between the European Parliament and the Commission:

The proposal and election of the President of the European Commission in the light of the outcome of the European Parliament elections is certainly important, but only a first step in making the European Union as a whole more democratic. A European Commission under my leadership will be committed to filling the special partnership with the European Parliament, as

¹⁹ Points 13, 16, 35 and 53 and Annex IV.

²⁰ P Ponzano, C Hermanin, and D Corona, "The Power of Initiative of the European Commission" – Notre-Europe paper, February 2012; see the introduction, pp 2-3: <http://www.notre-europe.eu/media/commission_power_of_initiative_ne_feb2012.pdf?pdf=ok> accessed 21 August 2014.

²¹ A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change: <http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf> accessed 21 August 2014.

laid down in the Framework Agreement of 2010, with new life. I want to have a political dialogue with you, not a technocratic one. ...

If elected Commission President, my Agenda for Jobs, Growth, Fairness and Democratic Change will serve as the starting point for the Union's annual and multiannual programming. For this, we will also be able to draw on the 'Strategic Agenda for the Union in Times of Change', as adopted by the European Council on 27 June 2014, and on the orientations that will be given by the European Parliament in the months to come. I believe that Europe's policy agenda must be shaped in close partnership between the European Commission and the European Parliament, and in cooperation with the Member States.

Political prioritisation as the basis for a better, more focused Union will only work if it is done in partnership between the Union institutions and the Member States, in line with the Community method.

The Commission's involvement in the legislative procedure does not come to an end once it submits a proposal to the European Parliament and the Council. Far from it! The Commission continues to work to bring the procedure to a satisfactory conclusion and plays a central role for both practical and formal reasons.²²

The practical reason is that the Commission has in-depth knowledge of the problem to be addressed and the general attitude of the authorities of the Member States, what studies have been carried out, the fruits of consultation of interested circles and the general public, the impact assessments, the input of other technical experts within the Commission and so forth. Its work on preparing the proposal has given it a thorough knowledge of the field, it can call on a broad range of expertise, and it knows precisely what the proposal sets out to do.

The formal reasons stem from the Treaties. Article 293(2) TFEU provides that

“[a]s long as the Council has not acted” the Commission has the power to “alter its proposal at any time during the procedures leading to the adoption of a Union act”.

That includes the power to withdraw the proposal altogether, in which case no act can be adopted. While that option is so radical that it is rarely exercised, its mere existence is enough to give the Commission a strong position in the negotiations with the other two institutions.

In addition, under Article 293(1) TFEU the Council must act unanimously if it is to amend the Commission's proposal (except in cases covered by a handful of provisions in the TFEU). The Commission has long experience of negotiating

²² For a more detailed list of arguments for the strong position of the Commission and of the relative positions of the European Parliament and the Council, see: R Thomson and M Hosli, “Who Has Power in the EU? The Commission, Council and Parliament in Legislative Decision-making” (2006) 44(2) *JCMS* 391–417, at p.398.

with the different interests represented in the European Parliament and in the Council and is usually able to strike a deal that it considers in the best interests of the EU. If necessary it may submit an amended proposal to facilitate an agreement, because, having launched a proposal, it does want EU measures to be adopted if at all possible.

The starting point and the focus of all the negotiations between the three institutions must always be the text of the proposal of the Commission. Any suggestion for a change to the Commission proposal must be presented in the form of a textual amendment to a specific part of the draft act in the proposal.²³

This brief overview merely sketches the interaction between the principal EU institutions involved in the EU legislative process. It does not touch on the role of the Member States, of the national parliaments and of the EU's advisory bodies in the formulation of EU legislation, and also the role of the Member States in transposing and implementing EU legislation.

But it is enough to show why the editors of the *Theory and Practice of Legislation* considered it valuable to convene a Symposium on the Quality of EU Legislation at the Academy of Legislation in The Hague in October 2013. It brought together practitioners in the field of legislation from the EU institutions and academic experts in legislative matters to discuss the quality of EU legislation in a broad sense, including preparation (consultation and impact assessment), drafting, negotiation, publication, transposition and implementation, application and enforcement, and the upkeep of the statute book. Representatives from the European Parliament, the Council, the Commission and the Publications Office gave insiders' viewpoints, each from their different perspective, of the EU legislative process. The academic experts were able to broaden the debate with their knowledge of the underlying principles, familiarity with the academic writings, and their comparative perspective.

That symposium led to this special issue of the *Theory and Practice of Legislation*. The idea behind it is the same and most of the contributors spoke at the symposium. The contributions by the practitioners are comparatively short and descriptive, leaving to the academic contributors the task of analysing and drawing some more general lessons.

In the first of the practitioners' articles William Robinson shows just how many hands shape the text of the Commission's legislative proposal, at different times and often remotely – by uploading comments onto a website that another Commission official has to take into account.

²³ See the EP Rules of Procedure, Rules 169(1) and (2) and Rule 170(1):

<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20150101+RULE-169+DOC+XML+V0//EN&language=EN&navigationBar=YES>> accessed 1 January 2015.

See Annex V, points 3 and 15 of the Council's Rules of Procedure (Decision 2009/937/EU [2009] OJ L325/35).

Members of the staff of the General Secretariat of the Council of the EU and of the European Parliament take up the story of when the proposal is the subject of the negotiations between the three institutions.

Manuela Guggeis focuses on the work on the formal quality of the text of EU legislation from the point of view of the lawyer linguists working for the Council. She points out that many of the factors of complexity (such as multiculturalism and multilingualism) are inherent in the EU legislative procedure and are fixed but that others (such as staffing levels and provision of training) are variable. She explains the constraints under which the lawyer linguists carry out their work.

Robert Bray focuses on the political process in the European Parliament and considers what impact the rising trend for EU legislation to be adopted at first reading has on drafting quality and the openness of the legislative process.

Those insiders' views on the complexity and constraints of the EU legislative process recall remarks by John Stuart Mill on the English legislative process over 150 years ago:

It has never been thought desirable that Parliament should itself nominate even the members of a Cabinet. ... But it is equally true, though only of late and slowly beginning to be acknowledged, that a numerous assembly is as little fitted for the direct business of legislation as for that of administration. There is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws. This is a sufficient reason, were there no other, why they can never be well made but by a committee of very few persons. A reason no less conclusive is, that every provision of a law requires to be framed with the most accurate and long-sighted perception of its effect on all the other provisions; and the law when made should be capable of fitting into a consistent whole with the previously existing laws. It is impossible that these conditions should be in any degree fulfilled when laws are voted clause by clause in a miscellaneous assembly. The incongruity of such a mode of legislating would strike all minds, were it not that our laws are already, as to form and construction, such a chaos, that the confusion and contradiction seem incapable of being made greater by any addition to the mass. Yet even now, the utter unfitness of our legislative machinery for its purpose is making itself practically felt every year more and more.²⁴

The academic contributors to this issue question just how fit for purpose the present EU legislative process is, involving as it does not just a “numerous assembly” but a plethora of other interveners.

²⁴ John Start Mill, *Considerations on Representative Government* (1861), Chapter V “Of the Proper Functions of Representative Bodies”.

Roberto Baratta writes of the impact of the complex negotiations leading to the adoption of EU legislation on the tasks of the national administrations in transposing or implementing it, illustrating his article with practical examples drawn from his personal experience. He shows that the delicately crafted compromise wordings characteristic of the EU negotiation process can leave considerable uncertainty for the national administrations charged with the implementation. He suggests that some of that uncertainty could be alleviated by joining up more closely the negotiation and implementation stages, in particular by involving the same national civil servants in both stages.

Maria Mousmouti suggests that when gauging the quality of EU legislation we must look beyond mere formal transposition to its actual effectiveness on the ground. She points out that such enhanced focus on effectiveness would require constant efforts throughout the whole legislative cycle. Taking as illustrations the Equality Directives, she demonstrates the importance of the goals of any legislation being clearly identified in advance. More attention needs to be paid to design and drafting of the legislation, in particular definitions which in EU legislation are often very open ended. It should then be possible to evaluate better whether the goals have actually been achieved.

Helen Xanthaki refers to the challenge of ensuring legislative quality in the EU's "uniquely multi-faceted, almost impossible legislative process". She considers the successive EU programmes to improve legislative quality and suggests that Smart Regulation is overly concerned with pre- and post-legislative scrutiny and that with the Europe 2020 agenda the EU seems to be focusing on growth and competitiveness to the exclusion of quality of legislation, neglecting the interests of EU citizens at large. The national authorities are left with an ever more complex and fraught task in implementing EU legislation.

Wim Voermans also looks at implementation of EU legislation, which he characterises as "the Achilles Heel of European Integration". He points out that while the statistics themselves reveal a serious compliance deficit the full extent of the problem is currently impossible to determine. As a result, the EU's enforcement policies are working in the dark. He calls for more attention to be focused on the how's and why's of non-compliance in order to develop more effective EU enforcement strategies and tools.

Of course the idea of bringing together EU insiders and legal academics is to create a dialogue, a fruitful dialogue with cross-fertilisation of ideas. EU legislation has to be acceptable to 28 Member States with widely differing situations and cultures and to the 751 directly elected MEPs. The political constellations are constantly changing in the course of the legislative procedure. Practitioners in the field of EU legislation are resigned to working in difficult conditions and under severe time constraints. If asked what was the biggest obstacle to clear EU legislation, they might well mutter "Events, dear boy, events!"²⁵

²⁵ Echoing the possibly apocryphal response by Harold Macmillan, British Prime Minister from 1957 – 1963, to a journalist who asked what made his job difficult.

So it must be useful for them to have the opportunity to explain precisely what are the constraints under which they must labour. Their insiders' accounts should inform the work of the academic participants so that the latter's analyses of the EU legislative process are accurate and any recipes for improvement they offer do indeed take full account of the true factual situation. Only in that way can we avoid a *dialogue de sourds*.

DRAFTING EU LEGISLATION IN THE EUROPEAN COMMISSION: A COLLABORATIVE PROCESS

William Robinson*

Abstract

This article examines who does what in the process for drafting EU legislation in the European Commission. It shows that drafting in the Commission involves collaboration between numerous participants and outlines the legal framework for that collaboration. The approach to legislative drafting in most common-law countries aims at a separation between policy formation and drafting, with a specialised drafter working on the basis of policy instructions from the technical departments. In the Commission on the other hand there is no such separation. Rather than the final text being the responsibility of a single drafter, the Commission's proposal is the work of many hands, and minds. This article considers the quality safeguards built into the present process and suggest some possible improvements.

Keywords

EU legislation; drafting process in the European Commission

A. INTRODUCTORY

Almost all EU legislative acts start life as a “proposal” from the Commission, that is a complete, fully worked out draft text of an act.¹ The Treaties provide for just a handful of exceptions to the Commission's “monopoly on the legislative initiative”. Under Article 225 of the Treaty on the Functioning of the European Union (TFEU) the European Parliament may request the Commission to submit a proposal, under Article 289(4) TFEU the legislative process may in certain cases be started by a group of Member States or other EU institutions, and under Article 11(4) of the Treaty establishing the European Union (TEU) a Citizens' initiative supported by at least one million EU citizens may invite the Commission to submit a proposal.

Each proposal from the Commission is accompanied by an explanatory memorandum setting out the context of the proposal, the results of the consultations and the impact assessments, the legal background including details of the choice of type of act and the legal basis and compliance with the principles

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¹ Article 289 TFEU and Article 294 TFEU.

of subsidiarity and proportionality, commentary on the provisions and details of any budgetary implications.²

The proposal is formally adopted by Commission in all the EU languages and published as a “communication” (COM document) and on the EUR-Lex website.³

The text of the Commission’s proposal forms the starting point and the focus of all the negotiations between the European Parliament and the Council. Any suggestion for a change to the Commission proposal must be presented in the form of a textual amendment to a specific part of the draft act in the proposal.⁴ Since the text of the Commission’s proposal plays such an important role in the formation of the final legislative act, it is worth looking at precisely how the Commission draws it up, who does what and what are the rules governing the process.

B. PREPARATION OF EU LEGISLATION IN THE COMMISSION

1. Collegiality

While it is self-evident that the EU legislative process is a collaborative one, the extent to which the preparation of the Commission’s proposal within the departments of the Commission is itself a collaborative process is perhaps less widely known.⁵ From an early stage the text that is ultimately to become the Commission proposal is shaped by many hands, rather than being the product of a single person.⁶

² See the General Guidelines for legislative policy of 18 January 1996 (SEC(95)2255/7), the Interinstitutional agreement on better law-making concluded by the European Parliament, the Council and the Commission on 16 December 2003 ([2003] OJ C321/2), at points 12 to 15, and Commission internal document C(2003)4555.

³ EUR-Lex contains the texts of the Treaties, all legislation and preparatory documents in the legislative procedure, as well as international agreements, the case-law of the European Court of Justice: <<http://eur-lex.europa.eu/homepage.html>> accessed 21 August 2014. A subpage is devoted to legislative procedures: <<http://eur-lex.europa.eu/collection/legislative-procedures.html>> accessed 21 August 2014.

⁴ See the EP Rules of Procedure, Rules 169(1) and (2) and Rule 170(1): <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20140701+TOC+DOC+XML+V0//EN&language=EN>> accessed 21 August 2014. See Annex V, points 3 and 15 of the Council’s Rules of Procedure (Decision 2009/937/EU, [2009] OJ L325/35).

⁵ For a detailed study see M. Hartlapp, J. Metz and C. Rauh, ‘The agenda set by the EU Commission: the result of balanced or biased aggregation of positions?’, *LSE ‘Europe in Question’ Discussion Paper* Series No. 21/2010 (April 2010) (“LEQS Paper 21”): <<http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper21.pdf>> accessed 21 August 2014.

⁶ This article focuses primarily on EU legislation in the narrow sense of legislative acts adopted by the European Parliament and the Council but it should be borne in mind that, apart from the Commission’s work on preparing proposals for such legislation under

According to the Treaties: “The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. ... In carrying out its responsibilities, the Commission shall be completely independent”.⁷ The Commission’s task is, therefore, formally at least, to produce the proposal that technically best promotes the interests of the EU, independently of any national or political considerations.⁸

The Commission consists of 28 Commissioners (referred to in the Treaties and all formal texts as “members of the Commission”) who respectively head some 40 departments.⁹ But it is required by the Treaties to act as a collegiate body.¹⁰ That requirement is reiterated by the Rules of Procedure adopted under Article 249 TFEU to govern the internal workings of the Commission (referred to in this article as “EC RProc”).¹¹ Article 1 EC RProc is entitled “The principle of collective responsibility” and states: “The Commission shall act collectively in accordance with these Rules of Procedure ...”. Indeed in the in-house jargon the body consisting of the actual Commissioners is referred to as the “college”. The Rules giving effect to the Rules of Procedure, adopted by the Commission under Article 28 EC RProc (“Implementing Rules”), repeat the emphasis on a collegiate approach.¹² Implementing Rules 23-1 ff are headed “Cooperation and

Article 17(2) TEU, it also drafts and itself adopts a much larger number of non-legislative acts, whether delegated acts under Article 290 TFEU or implementing acts under Article 291 TFEU. In 2013, for example, the Commission adopted 1526 regulations, directives and decisions compared to the 123 adopted jointly by the European Parliament and the Council.

⁷ Article 17(1) and (3) TEU. The Commissioners are required under Article 243 TFEU to “give a solemn undertaking that ... they will respect the obligations arising” from their office; the same article requires the Member States to “respect their independence and ... not seek to influence them in the performance of their tasks”.

⁸ JHH Weiler has recently written: “The stock phrase found in endless student textbooks and the like, that the supranational Commission vindicates the European interest, whereas the intergovernmental Council is a clearing house for member state interests, is at best naive. Does the ‘European interest’ not necessarily involve political and ideological choices? At times explicit, but even if implicit, always present?” (European Voice, 10.4.2014, p.8).

⁹ The Commission’s own public website lists 33 Directorate-Generals (DGs) and 11 “services”, apart from agencies and decentralised bodies: see: <http://ec.europa.eu/about/ds_en.htm> accessed 21 August 2014.

¹⁰ Under Article 17(6)(b) TEU the President of the Commission is to “decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body”.

¹¹ The current Rules of Procedure were formally adopted in 2000 but all the articles have been replaced more than once and the text currently applying largely dates from 2010. See Decision C(2000) 3614, [2000] OJ L308/26, as amended by Decision 2010/138/EU, Euratom [2010] OJ L55/60, in particular Article 3(2). The most recent amendments were adopted by Decision 2011/737/EU, Euratom [2011] OJ L296/58. The Rules themselves provide: “The Commission shall, as necessary, lay down implementing rules to give effect to these Rules of Procedure” (Article 28).

¹² The Implementing Rules are in an internal Commission Decision C(2005)4416.

coordination between departments”. Under Implementing Rule 20-2, one of the tasks of the Secretary-General is to check that “proposals comply with the Commission’s strategic objectives, are compatible with other policies, are of a high standard and are the result of close collaboration between all the departments concerned”.

2. Decision-making procedures

Under Article 4 EC RProc the Commission has four decision-making procedures:

- (a) the oral procedure at Commission meetings, governed by Article 8 EC RProc;
- (b) the written procedure, governed by Article 12 EC RProc;
- (c) the empowerment procedure, under which one or more Commissioners are authorised to adopt management or administrative acts subject to specified conditions, governed by Article 13 EC RProc; and
- (d) the delegation procedure, under which an official of the Commission can take decisions on technical matters in narrow fields, governed by Article 14 EC RProc.

Decisions on legislation are usually adopted by the written procedure or, in a small proportion of cases, by the oral procedure.¹³

According to the Treaties the Commission is to “act by a majority of its Members”.¹⁴ But it is encouraged by Article 23(7) EC RProc to seek to achieve consensus,¹⁵ and nudged in that direction by the advantages of the written procedure in not requiring any of the limited time available at the meetings of the Commission which are generally held only once a week (Article 12(1) EC RProc). At Commission meetings a vote is taken if a Commissioner asks for one (Article 8(2) EC RProc) but under Implementing Rule 8-1 the President “may

Detailed instructions are issued to Commission departments by the Secretariat-General in the Manual of Operating Procedures, which is described as “an internal working tool for the exclusive use of the Commission’s officials”.

¹³ P Settembri in *Jean Monnet Working Paper* 04/07, ‘The surgery succeeded. Has the patient died? The impact of enlargement on the European Union’ <<http://www.jeanmonnetprogram.org/papers/07/070401.pdf>> accessed 21 August 2014 cites, in footnote 27, R Dehousse, F Deloche-Gaudez and O Duhamel (eds.), *Élargissement: Comment l’Europe s’adapte* 18 (Presses de Sciences Po 2006): “On the basis of data provided by the Commission, G. Ciavarini Azzi (in Dehousse et al. [...] at 41) reports that between May 2004 and August 2006 only 2% of Commission decisions have been adopted by oral procedure”.

¹⁴ Article 250 TFEU.

¹⁵ See Article 23(7) EC RProc: “The department responsible [for preparing an initiative] shall endeavour to frame a proposal that has the agreement of the departments consulted”.

decide that the Commission has reached agreement without the need to proceed to a vote” and it appears that votes are in fact very rare.¹⁶

3. President of the Commission

The Treaties require the President of the Commission to “lay down guidelines within which the Commission is to work”.¹⁷ Accordingly Article 3(1) and (2) EC RProc provide that the President is to:

lay down the political guidelines within which the Commission shall exercise its functions;
steer the work of the Commission in order to ensure it is carried out;
decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body.

Each year, on the basis of the political guidelines thus established by its President, the Commission adopts an Annual Policy Strategy setting out its political and budgetary priorities which are in turn reflected in the Commission’s work programme (Article 2 EC RProc). The detailed procedure is set out in the Implementing Rules:

2-1. Each year the Commission shall hold a policy debate on its Annual Policy Strategy to determine an overall plan for its political and budgetary priorities.

The Commission’s work programme and the preliminary draft budget for the following year shall reflect these priorities.

2-2. To clarify and organise the implementation of its priorities, the Commission shall attach to its work programme a list of the main initiatives it is planning to adopt during the year in question. ...

The President is supported by the staff of his or her “*cabinet*” or private office and by the Commission Secretary-General who has the task to “assist the President so that, in the context of the political guidelines laid down by the President, the Commission achieves the priorities that it has set” (Article 20(1) EC RProc).

The President also sets the agenda for the weekly meetings of the Commission which all Commissioners must attend (Article 5 EC RProc). Much of the work of the Commission’s departments revolves around those meetings. Items are scheduled for inclusion for meetings far in advance in accordance with the work programme. Regular weekly meetings of the “*chefs de cabinet*” (heads of the Commissioners’ private offices) prepare the ground and special meetings

¹⁶ See LEQS Paper 21 cited in note 5, p. 16 and footnote 12.

¹⁷ See Article 17(6)(a) TEU and section B of this article.

of the *chefs de cabinet* may be convened to examine specific questions (Implementing Rule 6-5).

4. Secretary-General

At the hub of the Commission is the Secretary-General who supervises procedures, polices the internal rules and ensures that the Commission functions efficiently and effectively. The Secretary-General:

- assists the President “in preparing the proceedings and in conducting the meetings of the Commission” (Article 6 and Article 20(3) EC RProc);
- attends all meetings of the Commission unless the Commission decides otherwise (Article 10(1) and Article 20(3) EC RProc);
- authenticates the minutes of the meetings of the Commission (Article 11(2) EC RProc).

The Secretary-General heads the Commission Secretariat-General with a staff of some 600 divided into seven directorates. According to its mission statement:

The Secretariat-General is one of the central services of the European Commission, facilitating its smooth and effective functioning and providing strategic direction.

It is the President's department, at the service of the President, the College and the Commission departments. It manages the Collegial decision-making process and ensures the alignment of EU policies with the political priorities of the Commission. In particular, the Secretariat-General defines the Commission's strategic objectives and priorities and shapes cross-cutting policies ...¹⁸

Those policies include Smart Regulation and the Europe 2020 strategy for smart, sustainable and inclusive economic growth.

The Secretariat-General also helps “to ensure political consistency by organising the necessary coordination between departments at the start of the preparatory stages” and it is “responsible for distributing written information that the Members of the Commission wish to circulate within the Commission” (Article 20(2) and (4) respectively EC RProc).

Finally, it also monitors “the formal aspects of draft texts for compliance with procedural rules, drafting rules and rules for presentation (including linguistic concordance)” (Implementing Rules 20-2).

¹⁸ <http://ec.europa.eu/dgs/secretariat_general/mission/index_en.htm> accessed 21 August 2014.

See also the list of tasks in Article 20 EC RProc.

5. Policy formation

The key role in formulating policy within the Commission is played by the Directorate-General (DG) competent for the field in question. Its work is conducted in accordance with policy set at the level of the Commissioner in charge (assisted by the staff of her or his *cabinet*) and the Director-General. DGs are generally divided into a number of directorates which are further subdivided into units. For each policy area there will be a competent unit, the “department responsible” in Commission jargon. But right from the start the department responsible will liaise with other units within the same DG and with the staff of the Commissioner’s *cabinet*.

The first drafts are generally produced by technical experts in the department responsible. They are generally not specialists in legislation and have many other responsibilities, such as: monitoring the sector, liaising with national authorities and interested circles, giving technical advice and circulating information, monitoring and enforcing the rules.

They are not specialists in legislative drafting and generally have had little or no drafting training. They draft many other types of text, such as: consultation papers and technical advice, reports, business plans, meeting texts, press releases and webpages. Only very few DGs have, within their own legal units, lawyers to help their technical experts with legislative drafting. To mitigate the problems confronting the technical experts the Commission Legal Service has developed a Drafters Assistance Package (DAP) enabling those drafting legislation to consult the drafting rules and guidance online as they draft.

Formally all of the Member States’ 24 languages are official languages and working languages of the Commission and the other EU institutions.¹⁹ While that rule is observed in the institutions’ dealings with those outside, it will readily be understood that for the internal procedures one or two common languages are needed to ensure that matters and texts can be understood and discussed at every level. In the early days French was the common language, but later English came to be used alongside French, and after the arrival of 10 new Member States in 2004, English became the most-used language in all the institutions involved in the EU legislative procedure.

Almost all first drafts therefore now have to be produced in English. It is a real challenge for technical experts to have to draft complex texts in a language which is not their mother tongue. To help them meet that challenge an Editing Service was set up by the Translation DG in the early 2000s to improve the linguistic quality of documents drafted within the Commission. In 2005 the Translation DG undertook to expand the Editing Service to cover a substantial proportion of English and French originals drafted by non-native speakers.²⁰ There is no general requirement for all documents produced within the

¹⁹ Article 1 of Council Regulation No 1 of 1958 [1958] OJ 17/385.

²⁰ See Communication on Translation in a Multilingual Community (SEC(2005)984), Executive summary, point 4.

Commission to be submitted for editing. Each department decides for itself which of its documents need to be checked. It is a major cause for concern that, according to a survey carried out in the Commission in 2009, most Commission drafters do not consider it necessary have their documents checked by a native speaker of the language concerned.²¹ Accordingly, one of the Translation DG's current main objectives is to: "Promote more systematic use of editing in the Commission's document production workflow".²²

At an early stage the department responsible will consult the Member States and the interested circles, such as non-governmental organisations, local authorities and representatives of industry and civil society, about the policy options. It may commission studies or organise hearings. To enable the Commission to draw on a broad range of expertise on technical issues it has set up a network of expert groups with members from the public and private sectors to give it non-binding input to inform its decision making.²³

The department responsible is also required to ensure from the beginning of its preparatory work "effective coordination" between all the other Commission departments concerned (Article 23(2) EC RProc). While in the past it was largely left to the department responsible to decide what constituted effective coordination, the Secretariat-General is increasingly encouraging better informal consultations between Commission departments from an early stage, including by means of "inter-service groups".²⁴ The Commission departments may be represented at different levels, with technical experts dealing with technical matters themselves but more fundamental or political matters being raised to the level of the Commissioners' *cabinets*.

The Commission may publish a Green Paper setting out the issues and policy options under consideration and inviting all relevant parties to give their views and contribute to inform the debate. If the Commission concludes that legislation is the appropriate option, it may next publish a White Paper to outline its tentative proposals and to invite comments. Both Green Papers and White Papers

²¹ See the report on the survey in the DGT publication 'Languages and Translation', Issue 1, at p. 4ff:

<http://ec.europa.eu/dgs/translation/publications/magazines/languagestranslation/documents/issue_01_en.pdf> accessed 21 August 2014.

²² DGT Management Plan, Objective T4:

<http://ec.europa.eu/atwork/synthesis/amp/doc/dgt_mp_en.pdf> accessed 21 August 2014.

²³ A framework for the use by the Commission is laid down by the White Paper on European Governance (COM (2001) 428), the Guidelines on the collection and use of expertise by the Commission (COM (2002) 713), the Standards for consulting interested parties (COM (2002) 704), and the Rules for Commission Expert Groups C(2010) 7649 final, SEC(2010) 1360 final). See:

<<http://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faq&aide=2>> accessed 21 August 2014.

A register of expert groups advising the Commission is available at:

<<http://ec.europa.eu/transparency/regexpert/index.cfm>> accessed 21 August 2014.

²⁴ See LEQS Paper 21 (n 5), at section 3.1.

are formally adopted by the Commission and published as COM documents which are accessible on the Commission's website or through EUR-Lex.

Under the Interinstitutional Agreement on Better Lawmaking concluded by the European Parliament, the Council and the Commission in 2003 the Commission undertakes, before submitting legislative proposals to "conduct the widest possible consultations, the results of which will be made public".²⁵ The Commission has accordingly set up a website giving access to all ongoing public consultations.²⁶

The Agreement on Better Lawmaking also called for more frequent use of impact assessments and the Commission undertook to:

continue to implement the integrated advance impact-assessment process for major items of draft legislation, combining in one single evaluation the impact assessments relating inter alia to social, economic and environmental aspects. The results of the assessments will be made fully and freely available to the European Parliament, the Council and the general public. In the explanatory memorandum to its proposals, the Commission will indicate the manner in which the impact assessments have influenced them.²⁷

For all legislative initiatives the Commission publishes a roadmap describing the problem that the initiative aims to address and possible policy options and giving an overview of the planned stages in the development of the initiative, including consultation of stakeholders and impact assessment work.²⁸

The department responsible is required to carry out an impact assessment to help structure and develop policies by identifying and assessing the problem at issue and the objectives pursued. It should identify the main options for achieving the objectives pursued and the advantages and disadvantages of each option and assess the potential impacts of new legislation in the economic, social and environmental fields.

The department responsible must follow Guidelines laid down by the Secretariat-General and the quality of its impact assessment will be checked by an Impact Assessment Board, which is independent of the policy-making departments of the Commission and chaired by a Deputy Secretary-General responsible for Smart Regulation.²⁹

²⁵ [2003] OJ C321/1 (see points 25 and 26).

²⁶ <http://ec.europa.eu/yourvoice/consultations/index_en.htm> accessed 21 August 2014.

²⁷ See points 25 and 27 to 29.

²⁸ A list of all roadmaps is available on the website of the Commission Secretariat-General: <http://ec.europa.eu/smart-regulation/impact/planned_ia/planned_ia_en.htm> accessed 21 August 2014.

²⁹ The Secretariat-General maintains a website on impact assessments containing the text of the Impact Assessment Guidelines (SEC(2009)92) and a list of all impact assessments together with the reports of the Impact Assessment Board: <http://ec.europa.eu/smart-regulation/impact/index_en.htm> accessed 21 August 2014.

6. Coordination of the Commission's policies: Inter-Service Consultation³⁰

(a) General

The department responsible formulates its proposal, including a complete draft text of the legislative provisions, and obtains the approval of its Commissioner.

The DG concerned must, before that proposal may be submitted to the Commission, "consult the departments with a legitimate interest in the draft text" under the Inter-Service Consultation (known by its French acronym "CIS"), the formal procedure for canvassing the views of the other Commission departments (Article 23(3) EC RProc). Since 2001 the CIS has been conducted using an electronic database, CIS-Net, and each DG has one or more CIS coordinators to handle access to CIS-Net. The DG uploads its draft text and indicates which other DGs should be consulted. Those DGs are automatically notified by CIS-Net. Apart from the general requirement to consult the DGs with a legitimate interest, consultation of the departments responsible for the budget, for human resources and security, and for combating fraud is required in appropriate cases (Article 23(6) EC RProc). The other DGs consulted all consider how it impacts their own sector and if necessary sound out their own contacts.

The CIS is managed by the Secretariat-General. Before accepting a draft text it checks that the preliminary steps such as impact assessments and public consultations have all been carried out and that the programming has been respected. It sees that all the appropriate Commission departments are consulted.

To ensure that the Commission functions efficiently, strict time-limits are laid down for the CIS (generally 10 working days according to Implementing Rule 23-4.1.) and the Secretariat-General will monitor the operation of the CIS to verify that those time limits are indeed respected.

(b) Legal Service

In the CIS the Legal Service must "be consulted on all drafts or proposals for legal instruments and on all documents which may have legal implications" (Article 23(4) EC RProc). The Legal Service acts as the Commission's in-house lawyer. It has a staff of almost 400 divided into teams specialising in different fields of EU law and reports direct to the Commission President.

When the Legal Service is consulted on a legislative text the text is examined by two teams, one responsible for the area of law concerned which focuses mainly on the substance of the draft, and the other responsible for the quality of legislation, which focuses mainly on the form.

In the team responsible for the area of law concerned the text is assigned to lawyers who examine the substantive legal aspects. They check in particular whether the legal basis is correct (from a legal point of view) and whether what is being proposed is in accordance with the Treaties, with EU law generally,

³⁰ See LEQS Paper 21 (n 5), section 3.1.

including general principles such as subsidiarity and the case-law of the European Court of Justice, and with the EU's international obligations (in particular under the WTO). They also check that it is consistent with other measures in the sector and elsewhere.

In the team responsible for the quality of legislation lawyers specialising in drafting, known as legal revisers, check whether the text is well drafted, clear and precise and in accordance with the various drafting rules. Some of the drafting rules are in the public domain, such as the Joint Practical Guide for the Drafting of Community legislation (JPG) and the Interinstitutional Style Guide (ISG).³¹ Others are for the institutions' internal use only, such as the Manual of Precedents produced by the Legal Linguistic Experts of the Council and the Commission's Manual of Legislative Drafting.³²

While at this stage the draft exists in just one language, almost always English, the legal revisers also seek to ensure that the draft will be capable of being translated into all the other official languages. The changes suggested by the legal revisers are sometimes substantial.

The two Legal Service teams will often engage in constructive dialogue with the department responsible in order to improve the quality of the proposal. They will, for example, sometimes question whether legislation is the appropriate response, in particular having regard to the principles of proportionality and subsidiarity, or whether the draft provisions are the most appropriate ones. But the Legal Service will focus on legal aspects leaving matters of policy to the department responsible.

The Legal Service is in a strong position to influence the draft text because of its role as the Commission's legal adviser (the Director General of the Legal Service attends all meetings of the Commission and reports direct to the President of the Commission) and because its agreement is necessary for any text to be adopted by the written procedure (Article 12(1) EC RProc).

(c) Role of the Secretariat General³³

In the CIS the Secretariat-General must be consulted on all initiatives of any significance (Article 23(5) EC RProc). It must:

see that documents submitted to the Commission are of good quality in terms of substance and comply with the rules as to form and, in this context, shall help to ensure that they are consistent with the principles of subsidiarity and

³¹ JPG: <<http://eur-lex.europa.eu/techleg/index.html>> accessed 21 August 2014.

ISG: <<http://publications.europa.eu/code/en/en-000100.htm>> accessed 21 August 2014.

³² For more detailed consideration of legislative drafting guidance for the EU institutions, see W Robinson, 'Manuals for drafting European Union legislation' (2010) 4(2) *Legisprudence* 129-155.

³³ See LEQS Paper 21 (n 5), section 3.1.1.

proportionality, external obligations, interinstitutional considerations and the Commission's communication strategy (Article 20(2) EC RProc).

As part of its responsibility for overseeing cross-cutting policies such as Smart Regulation it will see that new rules are kept as simple as possible and that administrative burdens are kept to a minimum.

In the CIS the department responsible may ask the DGT Editing Service to check the text but that is purely optional. However, the Secretariat-General may, as part of its oversight of the formal quality of documents submitted to the Commission, call on the department responsible to consult the Editing Service.

(d) Conclusion of the CIS

In the CIS the Commission departments consulted have three options: to approve the text, to approve it subject to certain comments, or to reject it. While it is common for the departments consulted to make their approval conditional, for example on changes to the text of the draft, they will rarely reject a text outright but will generally work together to find mutually acceptable solutions.

The time limits set for the CIS are strictly applied and if a department that has been consulted fails to reply by the deadline it is deemed to have approved the text. At the end of the CIS:

The department responsible shall endeavour to frame a proposal that has the agreement of the departments consulted. In the event of a disagreement it shall append to its proposal the differing views expressed by these departments (Article 23(7) EC RProc).

It therefore has to act as an honest broker in taking account of all the comments it has received from many different Commission departments which may overlap or conflict. If the changes to its original text are considerable, it may request further checking by the Translation DG's Editing Service but by now time is probably short.

All the DGs have access to the CIS database showing all the replies from other DGs.

The process is overseen by the Secretariat-General which is required to "ensure that decision-making procedures are properly implemented" (Article 20(4) EC RProc). It accordingly has the key power to decide when a written procedure may be launched and, once launched, whether it should be suspended or terminated.

The vast majority of Commission decisions are adopted by written procedure, with only a small proportion requiring the oral procedure which takes up time at the weekly meetings of the Commissioners. As regards those meetings Implementing Rule 6-2 provides:

6-2-1. As a general rule, only politically important or sensitive matters are placed on the agenda.

6-2-2. Without prejudice to Rule 6-2-1, the Commission may also discuss at its meetings any documents on which there is disagreement that could not be resolved at an earlier stage in the decision-making process.

Meetings of the staff of the Commissioners' *cabinets* are used to reduce recourse to the oral procedure, either at the level of members of the *cabinets* ("special chefs") or of the *chefs de cabinets* ("hebdo").

Once the department responsible has taken account of the comments from the other departments and finalised its text in the original language it may launch the decision-making procedure. It uploads its text electronically into an application run by the Secretariat-General, e-Greffé (from the French word for registry). From this time onwards, the text is out of the hands of the department responsible.

7. Translation

The text is automatically sent by e-Greffé to the Translation DGT for translation into the other 23 official languages. The Translation DG is one of the largest translation services in the world with 2,500 staff, 1,474 of them translators.³⁴ It also has a network of free-lance translators who translate almost 30% of its output.³⁵

The Translation DG is fully responsible for the quality of the translations.³⁶ It is only in exceptional cases that the final texts in all the official languages will be checked by the legal revisers in the Commission Legal Service (unlike the position at the European Parliament and the Council, where the final texts in all the languages are checked by the lawyer-linguists).

The Translation DG takes a range of measures to be able to guarantee the quality of its translations.

Its staff translators are all familiar with EU institutions, procedures and terminology and they have good IT systems³⁷ and terminological and documentation backup.³⁸ They are not required to have legal qualifications and only a minority do have them. But since some 60% of their workload is

³⁴ DGT Booklets on *Translation and Multilingualism (2012)* and on *Translation in Figures – 2012*, available from:

<http://ec.europa.eu/dgs/translation/index_en.htm> accessed 21 August 2014.

³⁵ *Translation and Multilingualism*, p. 9.

³⁶ Communication on the simplification and rationalisation of the language process in Commission decision-making procedures (SEC (2001) 2031), section III.

³⁷ In particular Euramis, offering a range of services in the area of language processing, including a central translation memory, a resource for finding earlier translations of any similar texts, see *Translation and Multilingualism*, p. 12.

³⁸ In particular IATE, an interinstitutional database of EU terminology: <<http://iate.europa.eu>> accessed 21 August 2014.

legislation and they are offered various training possibilities they do develop considerable expertise in legislative matters. The other types of documents they translate include: policy documents, reports, internal papers, information brochures, press releases and web texts, and correspondence with national authorities and individual citizens.

Efforts are made to allow translators to specialise in certain fields of Commission activity so that they can become more familiar with the subject, the existing rules and the terminology.

The Translation DG has introduced a system of classifying the types of document submitted for translation so that it can tailor the standard of the translation accordingly. Legislation is obviously put into the highest category. In principle it should not be sent out to free-lance translators but budgetary pressures are leading to departures from that rule.

It has, with the translation services of the European Parliament and the Council, developed a system for sharing knowledge called "ELISE". A documentation note accompanies a text throughout the procedures in the three institutions so that information on resources found, language problems encountered and other comments can be shared with others working on the same text at other stages of the procedure.

The Translation DG guarantees a quick turnaround for documents up to 20 pages. If a text is longer than that the timing is a matter for negotiation. Once the Translation DG has produced the translations it uploads them directly into e-Grefe so that they cannot be tampered with by any other departments (a source of problems in former times).

8. Adoption

The text is adopted by the Commission either by tacit agreement if no objections are raised by any Commissioner in the written procedure (Article 12(4) EC RProc) or by express agreement at a meeting of the Commission in the oral procedure (Article 8 EC RProc).

The texts adopted by Commission are authenticated by the Secretariat-General (Article 17(1) EC RProc). The Secretariat-General also notifies the legislative proposal to the European Parliament and the Council so that the next stage of the legislative procedure can commence (Article 20(4) EC RProc). At the same time it notifies the proposal to the national parliaments³⁹ and to the advisory bodies of the EU, the European Economic and Social Committee and the Committee of the Regions, as appropriate. It also sends the text to the Publications Office for publication on EUR-Lex.

The Secretariat-General's role does not end here, since it is responsible for relations with other institutions (Article 20(5) EC RProc), including keeping the Commission informed of inter-institutional procedures (Article 20(6) EC RProc). It keeps track of the subsequent course of the proposal and ensures that the

³⁹ See Article 12(a) TEU and the Protocol on the Role of national Parliaments in the EU.

Commission department responsible, which attends all the discussions on the proposal in the European Parliament and Council, reports back to the Commission on progress and when necessary obtains appropriate negotiation mandates.

C. ANALYSIS

1. What was the model for the EU's approach to legislative drafting?

As we have seen, the process of drafting EU legislation in the Commission is a decentralised one, very different from the drafting process in most common-law countries, with their specialist drafting offices. In those countries there is generally a clear separation between the policy formation and the drafting process as the policy must be worked out and distilled into "instructions" before the drafting begins. The drafting is done a small team of specialist drafters who often retain responsibility for the draft throughout the whole procedure.

Like so many elements of the European Communities which were the precursors of the EU, the method of legislative drafting, as well as the style and terminology of legislation, largely follow the French model. France played a pre-eminent role because it provided two of the foremost founding fathers of the European Communities in Jean Monnet and Robert Schuman. It was also the only one of the larger founding states to be amongst the victorious allies in the war which had ended just a few years before the signing in 1951 of the Treaty establishing the European Coal and Steel Community, the first of the European Community treaties. Maurice Lagrange, one of the main drafters of that Treaty, has written:

Naturally, the role of the French delegation, as the unquestioned leader, was particularly sensitive: it had both to propose solutions and respond to the, sometimes apposite, objections of our partners and win them over - where necessary by amending the original proposals.⁴⁰

One feature of the French legislative process that was not taken over, however, was the *Conseil d'état*, the supreme administrative court which, before any law can be adopted in France, gives an opinion on its form and lawfulness and on whether the measures proposed are consistent with the aims pursued.⁴¹ The

⁴⁰ M Lagrange, 'The Court of Justice of the European Communities from the Schuman Plan to the European Union' [1 November 1976], at page 4: <http://www.cvce.eu/obj/maurice_lagrange_the_court_of_justice_of_the_european_communities_from_the_schuman_plan_to_the_european_union-en-30dbbb02-97f2-46ad-898c-49b074cb2ab2.html> accessed 6 September 2014.

⁴¹ See the website of the *Conseil d'état*: <<http://www.conseil-etat.fr/fr/la-procedure-devant-les-formationen/>> accessed 6 September 2014.

omission is perhaps all the more surprising since Maurice Lagrange was himself a senior member of the French *Conseil d'état*.

2. Evolution of EU legislative drafting style

The method of drafting and the style of legislation go hand in hand. While other factors such as constitutional traditions and the approaches of the courts to legislation are certainly very important, entrusting legislative drafting to generalist civil servants is conducive to a style of drafting that is closer to the style of writing other formal texts.

From the earliest days EU drafting was in the civil-law style known as “fuzzy law” which “provides general principles in the context of broad legislative purposes” and is contrasted with the common-law style of “fussy law” which “concentrates on detailed distinctions thrown up by a focus on specific circumstances”.⁴² The style of EU legislation could be quite puzzling to common lawyers in the early years.⁴³

Over recent decades the style of EU drafting has evolved considerably. Modern EU acts are no longer so alien to the common lawyer since they are now much more detailed and precise, rather than confining themselves to general principles.⁴⁴ This may be part of a broader development as drafting styles are generally converging.⁴⁵ Reasons for this convergence of styles may include factors such as:

- the internationalisation of law, as rules are often developed at international organisations, such as the WTO, UN bodies or the EU itself;⁴⁶
- technological development, which brings with it incitements for greater uniformity;
- the entry of law into ever more technical fields where national boundaries are increasingly irrelevant and a more scientific approach to lawmaking is needed;

⁴² L Campbell, ‘Legal Drafting Styles: Fuzzy or Fussy?’ (1996) 3(2) Murdoch University Electronic Journal of Law
<<https://www.murdoch.edu.au/elaw/issues/v3n2/campbell.html>> accessed 6 September 2014.

See also T Millett, ‘A Comparison of British and French Legislative Drafting (with Particular Reference to Their Respective Nationality Laws)’ (1986) *Statute Law Review* 130.

⁴³ See the memorable description by Lord Denning in *Bulmer Ltd v Bollinger SA* [1974] 4 Ch 401, at 411.

⁴⁴ See W Robinson, ‘Evolution of European Union legislative drafting’ (January 2014) *The Loophole* 7.

⁴⁵ H Xanthaki, ‘Editorial: Burying the Hatchet Between Common and Civil Law Drafting Styles in Europe’ (2012) 6 *Legisprudence* 133-148.

⁴⁶ Described as “a combination of legal globalisation with regional legal integration” in H Xanthaki, (n 45) 134.

a more critical attitude to legislation on the part of users.

Whatever the reasons for the change, it must surely be more challenging for the non-specialists in the Commission to have to draft this more detailed and precise legislation.⁴⁷

3. Weaknesses in the legislative drafting process in the Commission

The Commission process is complicated by the number of interveners, their very different interests and cultural backgrounds, and the need for most interveners to work in a foreign language, which has a major impact on the quality of the drafts. There are as a result a number of potential weaknesses in the system.

The first draft produced by the lead DG may be of poor quality because the drafter is not a lawyer nor a drafting specialist, she has not had drafting training and she has to work in a foreign language. Whatever its quality, that draft has to serve as the basis for the comments by the other Commission departments in the CIS. Few of those making comments will be experts in statutory interpretation and most will be working in a language that is not their own. They may struggle to discern the true meaning of the draft. There will rarely be time for direct contacts between all the departments concerned to clear up potential misunderstanding. At this early stage, those involved cannot have recourse to two of the mainstays of interpretation of EU legislation, comparison of the different language versions and consultation of background documents such as the explanatory memorandum.

On the basis of their understanding of the draft they formulate their comments. Again since they are not drafting experts and most are obliged to work in a foreign language, their comments may not be expressed in the most limpid way possible.

There is also a danger of a disjointed approach, with a lack of coherence between what the various interveners suggest. The interveners will often focus just on their own area of concern, not the measure as a whole. For example, each DG may focus just on its policy area, the Legal Service substance lawyer just on the lawfulness of the measure, and the editors in the Translation DG's Editing Service just on the language in which the measure is expressed. Even the legal revisers may focus on the formal quality rather than taking a holistic approach.

The Legal Service substance lawyers and legal revisers have an advantage in that they are of course familiar with the approach to interpreting EU legislation but they will in some cases be applying rules and guidance that the department responsible (and other interveners) are not aware of or not familiar with.

⁴⁷ For a different perspective see E Caldwell, "Comments" in AE Kellerman, GC Azzi, SH Jacobs and R Deighton-Smith (eds), *Improving the Quality of Legislation in Europe* (Kluwer Law International, The Hague 1998), p. 79, at p. 82 ("*Improving the Quality of Legislation in Europe*").

Many of those intervening will suggest textual changes, others just substance changes. Some of the textual changes will be intended to change the substance, but others, such as those by the Translation DG's Editing Service and some of the legal revisers' changes, will not. But already there is no separation between the text and the policy.

Because the text is altered by many different hands, no-one has absolute ownership. Even the case-handler in the department responsible who produced the first draft and accompanies the text through the procedures may feel that it is not her text because so many others have intervened in its drafting. She may believe that she must simply rely on the various interveners for all matters within their areas of expertise. In most cases she cannot assess the lawfulness because she is not a lawyer, she cannot judge what is the best drafting approach because she is not a drafting specialist, and she cannot gauge the best wording because she is working in a foreign language. She will know which parts of the text have been changed in response to comments by other departments in the CIS but will not always fully understand the rationale for those changes, because some departments suggest textual changes without oral explanation and there is often little direct contact between the various departments, just an electronic exchange of draft texts and comments.

Another weakness in the CIS is that all the DGs comment just on the first draft (unless a revised draft is recirculated for consultation). They therefore rarely have an opportunity to comment on the changes suggested by the other departments. Those changes, in particular the changes suggested by the Legal Service, may be substantial so the final text may be very different from the one on which the DGs were all consulted.

For major new initiatives special efforts may be made to address those weaknesses but another problem may arise. The department responsible may be reluctant to accept changes to the first draft at all.

One possible reason is that the draft may have been circulated to Member States or interested parties to canvas their views at a preliminary stage, or even published in the form of a White Paper. The department responsible might then fear that those already consulted would be very suspicious if the text finally adopted as the Commission proposal differed substantially from the one on which they had been consulted.

Because the staff in the department responsible are not drafting specialists and generally have to work in a foreign language they may often, in producing their drafts, rely heavily on precedents in the same area of law or in similar measures in neighbouring areas. They may not then understand that changes are required in order to produce rules appropriate to the new context or simply suited to current needs. They may not be able to appreciate the merits of subtly different versions of highly technical texts, which they know are highly sensitive. They may prefer the security of reproducing as closely as possible an existing text to the uncertainty of a new text.

In many respects the problems inherent in the process of drafting legislation in the Commission are replicated in the procedure in the European Parliament

and the Council. There are again large numbers of interveners, all pursuing their own agendas. Those agendas may differ considerably as between the 28 Member States and the 750 Members of the European Parliament, most of whom are attached to one of 7 political groups (but 52 of whom are “non-attached”). Only a minority of those interveners are specialists in legislative matters and yet they have to interpret the legislative text in the proposal and suggest textual amendments to it. Almost all the negotiations are on the basis of the English text and so once again most of the interveners have to work in a foreign language when understanding the proposal and formulating and discussing amendments to it.

4. Some possible solutions

Given the challenges inherent in the Commission’s internal procedures, all steps to improve the quality of its proposals are to be welcomed.

Much attention has been paid to the substantive quality of regulation in successive Commission policies as Better Lawmaking has been succeeded by Better Regulation which has in turn been succeeded by Smart Regulation.⁴⁸ But the linguistic and formal quality of the Commission’s legislative proposals is also vital and should be kept in focus.⁴⁹ Immediate benefits would be yielded by improving the linguistic quality of the drafts from the very start of the procedure and at every stage thereafter. This could be done by boosting the role of the linguists in the Translation DG, both the Editing Service at the drafting stage and the translators and revisers at the translation stage.

A common response to challenges facing the EU institutions is to look at the solutions adopted by individual Member States.⁵⁰ The problem with the quality of legislation is that some of the most effective national solutions cannot readily be transposed to the EU.

A number of Member States have an independent specialist body to examine the text of legislation at the end of the procedure, such as the *Conseil d’état* in France, Belgium and Luxembourg, the *Raad van State* in the Netherlands and the *Lagrådet* in Sweden. High-level reports and commentators have suggested that a similar body should be created for the EU.⁵¹ However, senior staff of the EU

⁴⁸ For a critical appraisal see H Xanthaki, ‘European Union Legislative Quality after the Lisbon Treaty: The Challenges of Smart Regulation’ (2014) 35 *Statute Law Review* 66.

⁴⁹ For more details see W Robinson, ‘Making EU legislation clearer’ (2014) 3 *European Journal of Law Reform* 610.

⁵⁰ For an overview of quality control methods used in different countries see S Ferreri and others, ‘Document quality control in public administrations and international organisations’ (2013/2), DGT Studies: <http://ec.europa.eu/dgs/translation/publications/studies/index_en.htm> accessed 21 August 2014.

⁵¹ French *Conseil d’État*, *Rapport public* 1992, p.31 ; De kwaliteit van EG-regelgeving – Aandachtspunten en voorstellen, the 1995 report by a group chaired by T Koopmans, a former Dutch judge at the Court of Justice, at p. 44 et seq ; CAJM Kortmann, ‘Goede

institutions have pointed out that inserting such a body into the EU's already complex system would be difficult and require treaty change.⁵²

Others have suggested the creation of a central legislative drafting office for EU legislation on the model of Ireland and the United Kingdom.⁵³ Again the objection is raised of the difficulty of fitting such a body in to the EU's structure of three independent institutions involved in the legislative process, each with quite different interests to represent.

5. Lawyer-linguists

Because of the difficulty of borrowing the solutions existing in the Member States, an approach was adopted which was tailored to the specificities of the EU legislative procedure and drafting process. In 1997 the Netherlands government, the Commission and the T.M.C. Asser Institute organised a Conference on the Quality of European and National Legislation bringing together high-level experts from the Member States and the EU institutions.⁵⁴ In 1998 the EU institutions adopted an Interinstitutional Agreement on drafting quality drawing on the work at that Conference.⁵⁵

The 1998 Agreement laid down 22 drafting guidelines and – significantly – listed the practical measures that the EU institutions would take “in order to ensure that these guidelines are properly applied”. In essence those measures were designed to bolster the existing legislative improvement mechanism, the lawyer-linguists who had been an important part of the Council and Commission's legislative work for many years and who were also then being recruited by the European Parliament.

The lawyer-linguists had long had the twofold task of checking the drafting of the final versions of legal texts produced by their respective institutions and

Raad over Gemeenschapsrecht (Nederland”, *Social Economische Wetgeving* (1996) 36, at p. 46; all cited in CWA Timmermans (Deputy Director-General of the Legal Service of the European Commission), “How to improve the Quality of Community Legislation: The Viewpoint of the European Commission” in *Improving the Quality of Legislation in Europe*, (n 47). See also G Sandström, ‘Knocking EU law into shape’ (2003) 40 *Common Market Law Review* 1307.

⁵² See *Improving the Quality of Legislation in Europe*, (n 47), the contribution by CWA Timmermans, at pages 54 -56 and the contribution by J-C Piris, Director-General of the Legal Service of the Council of the EU, 25, at page 37.

⁵³ R Bellis, *Implementation of EU legislation*, a study for the UK Foreign and Commonwealth Office (FCO), November 2003; formerly available on the FCO website. Mr Bellis pointed out that the creation of a central EU body to improve legislative drafting had also been recommended in R Wainwright, ‘Technique of drafting European Community legislation: Problems of interpretation’ (1996) 17(1) *Statute Law Review* 7.

⁵⁴ The proceedings of that Conference were published in *Improving the Quality of Legislation in Europe*, (n 47).

⁵⁵ Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation [1999] OJ C73/1.

ensuring that all the language versions corresponded exactly. Their work was highly technical and had a low profile.⁵⁶

One of the key practical measures listed in the 1998 Agreement was to shift the focus of the lawyer-linguists away from ensuring that the different language versions corresponded exactly towards improving the drafting of the original version at an early stage.

At the Commission the legal revisers duly changed their role from around 2001 when they began revising the early drafts of Commission legal texts, rather than the final versions.⁵⁷ The Commission's Translation DG took over full responsibility for ensuring that all the language versions of the final text of the proposal corresponded exactly.⁵⁸

At the European Parliament and at the Council too the lawyer-linguists have also begun to focus more on the quality of the original version throughout the codecision procedure, rather than just on the concordance of all the language versions at the end of the legislative procedure.⁵⁹

Also in implementation of the 1998 Agreement the Commission legal revisers are liaising more closely with their counterparts in the European Parliament and Council to harmonise their practices and to develop common solutions to new issues that arise. Together they produced the Joint Practical Guide for drafting legislation in 2000 and updated it in 2013.⁶⁰

Some of the other practical measures have also been realised. The information-technology tools called for include a Word application called LegisWrite offering standard templates for all legal acts and the Drafters Assistance Package (DAP) recently launched by the legal revisers. There are systematic contacts with the Member States to consider legislative drafting issues.⁶¹

⁵⁶ Their profile was so low that the Bellis report for the UK FCO (see note 53) does not even mention their existence. Other commentators fail to understand their function at all and assume that the Commission legal revisers act as the central drafting office for the EU institutions; see E Tanner, 'Clear, simple and precise legislative drafting: How does a European Community Directive fare?' (2006) 27(3) *Statute Law Review* 150.

⁵⁷ See internal communication SEC(2001)2031 on Simplification and rationalisation of the language process in Commission decision-making procedures, Chapter IV. The lawyer-linguists of the European Parliament and of the Council began switching their own focus to the early drafts rather than just the final versions in all the languages somewhat later.

⁵⁸ SEC(2001)2031, Chapter III.

⁵⁹ See M Guggeis and W Robinson, "'Corevision': Legal-Linguistic Revision In The European Union 'Codecision' Process" in in CJW Baaij (ed.), *The Role of Legal Translation in Legal Harmonisation* (1st edn., Kluwer Law International, Alphen aan den Rijn 2012) 51-81.

⁶⁰ <<http://eur-lex.europa.eu/techleg/index.html>> accessed 6 September 2014.

⁶¹ See, for example, the programme of seminars organised by the Commission legal revisers:

<http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm#3> accessed 6 September 2014.

Some of the measures promised in the 1998 Agreement have not materialised however. That is most unfortunate since they are key parts of a coherent package that was accepted by the EU institutions as the price for not adopting some of the more far-reaching measures proposed, such as a Treaty provision on the quality of EU legislation, a body to vet EU legislation, or indeed the creation of an EU drafting office.⁶²

It is perhaps because not all the promised measures have been taken that the obligation in point (h) of the 1998 Agreement to draw up periodical reports on the measures taken to comply with the Agreement has not been honoured either. The Council issued a report on the steps it had taken to comply with the Agreement just once, in 2001.⁶³ The Commission has never produced a report specifically on the implementation of the Agreement. It does produce annual reports on “Better Lawmaking”⁶⁴ but only one or two of those reports have included any reference to legislative drafting.

One promised measure that has not materialised is the creation of drafting units within the departments involved in the legislative process.⁶⁵ Clearly if each Commission DG had a drafting unit the task of the technical staff would be made much easier and the quality of the first drafts much improved. That would make the rest of the Commission’s internal procedures more efficient, raise the level of the consultation process, and lead to better proposals. Such drafting units could engage in a dialogue with the Commission’s legal revisers on drafting matters and contribute to building drafting expertise within the Commission.

Another commitment which has led to few practical results is the institutions’ promise to ensure that their staff be given training in legal drafting. Since numerous non-lawyers are involved in the drafting and the translation of legislation in the three EU institutions it is clear that basic training in legislative

⁶² See W Sorgdrager, ‘Address by the Minister of Justice of the Netherlands’ in *Improving the Quality of Legislation in Europe*, (n 47), p. 3, at p. 6; and Section C(4) of this article.

⁶³ Report 5882/01 JUR 37 of 12 March 2001.

⁶⁴ Available on: < http://ec.europa.eu/smart-regulation/better_regulation/reports_en.htm> accessed 3 January 2015.

⁶⁵ This was suggested by CWATimmermans, in *Improving the Quality of Legislation in Europe*, (n 47) 55. It was expressly incorporated in the 1998 Agreement as implementing measure (c).

The suggestion has been endorsed by the UK Parliament. See in particular the Twenty-Second Report of the UK Parliament House of Lords Select Committee on EU law, 2007-2008: ‘**The Commission should give serious consideration to the creation of a cadre of specialist legislative drafters**’ (point 157, in bold in the original):

<<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/150/15002.htm>> accessed 6 September 2014; and the statement by Lord Mance on that report as regards drafting in the Commission:

<<http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/81212-0001.htm#08121251000325>> accessed 6 September 2014.

An exchange of letters between the Minister for Europe (30.9.2008) and the Chairman of the Select Committee (6.11.2008) confirmed that the UK government was following up the proposal.

matters would facilitate their work, making the whole process more effective and efficient, and improve the quality of their input, leading to an improvement in the quality of the original and all the translations.

This is an approach that has been taken in some of the Member States. For example, in France the *Ecole nationale d'administration* includes legislative drafting in the topics it teaches in its courses for civil servants⁶⁶ and in the Netherlands an Academy for Legislation and an Academy for Government Lawyers have been established to train legislative lawyers for work in the various government ministries by means of a combination of theoretical teaching and practical work.⁶⁷

While some short courses have been offered to EU staff on a sporadic basis, in particular in the Commission, there is still no systematic programme of training in legislative drafting or legislative matters generally for all staff involved in the EU legislative process. That is a fundamental weakness in the process, and one that could be addressed comparatively easily without Treaty change or major upheavals in the working methods of the institutions.

D. FINAL WORDS

For those familiar with the common-law approach to preparing legislation of maintaining a strict separation between the formation of the policy and the drafting of the text of the legislation the lack of any such separation in the system in the Commission is a fatal flaw. A former head of the UK Parliamentary Counsel has written:

the longer the two activities – formulation of policy and the production of a legislative text designed to achieve the desired policy – can be kept separate the more likely it is that the legislation will achieve the desired effect. Indeed, as a general rule I would say that the moment you have a draft legislative text you are doomed. From then on more attention will be paid to the text than to the formulation of the policy to which it is designed to give effect.⁶⁸

“Eppur si muove”⁶⁹ as Galileo is alleged to have muttered after being forced by the Inquisition to recant that the earth moves around the sun. The method of drafting legislation in the Commission has been in use for over 60 years and is also used in many other national legal systems. It is certainly not perfect but if all the participants in the EU legislative procedure, including the representatives of

⁶⁶ See the curriculum on its website: <<http://www.ena.fr/index.php?fr/formation/initiale/modules-stages>> accessed 6 September 2014.

⁶⁷ See the websites: <<http://academievooroverheidsjuristen.nl/landingpage/english>> and <<http://academievoorwetgeving.nl/landingpage/english>> accessed 6 September 2014.

⁶⁸ E Caldwell, “Comments” in *Improving the Quality of Legislation in Europe*, (n 47), page 79, at page 82.

⁶⁹ And yet it moves.

the Member States, gave improving the quality of EU legislation the priority it deserves, and in particular implemented all the measures listed in the 1998 Agreement, the results might actually be good enough.

THE ROLE OF THE COUNCIL LAWYER-LINGUISTS IN IMPROVING THE FORMAL QUALITY OF EU LEGISLATION

Manuela Guggeis

Abstract

The quality of EU legislation is often criticised. This article considers the factors influencing the formal quality of EU legislation, some of which are common to most legislation while others are particular to the EU.

Many of the factors contributing to the good or bad formal quality of EU legislation are inherent in the EU's complex structure and decision-making process and are fixed. Other factors are variable and EU staff, in particular the Council's lawyer-linguists, are making a sustained effort to tackle them. In general substantial progress has been made.

However, there are times when the political process demands the adoption of a lot of legislation in a short time and then the quality of that legislation inevitably suffers.

Keywords

Quality of legislation; European Union; legal-linguistic revision.

A. INTRODUCTION

The quality of the legislation of the European Union (EU), like the quality of any national legislation, is constantly under criticism from politicians and citizens, judges and academics¹: it is said to be complex, ambiguous, inconsistent, and difficult to implement.

Some of these flaws are unavoidable: they are the price to be paid for the functioning of a modern democratic system which allows all social and

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The content of this contribution does not reflect the official opinion of the European Union. Responsibility for the information and views expressed therein lies entirely with the author.

¹ For academic criticism see in particular: H Xanthaki, 'The problem of quality in EU legislation: What on earth is really wrong?' (2001) 38 *Common Market Law Review* 651-676; E Tanner, 'Clear, simple and precise legislative drafting: How does a European Community Directive fare?' (2006) 27(3) *Statute Law Review* 150-175; W Voermans, 'The quality of EU legislation: what kind of problem, by what kind of standards?' (2009) 2(1) *Erasmus Law Review* 59 – 95.

economic stakeholders to have a say and to influence the rules of society, based on negotiation and search for compromise.

The seriousness of other flaws can be mitigated through a constant effort to improve the technical elements of law-making.

In other words, quality, at least in the EU, is the final product of several factors, some of which are external or imposed upon the EU institutions, such as political and constitutional elements, others are internal, more related to the efficiency of the working organisation of the institution. Examples of internal factors are human resources (how many staff are assigned to the task of supporting the law-making and translating the texts), timing (how much time are staff allowed for working on a text), instructions (how clear and comprehensive are the drafting rules), information technology tools or the training provided to those involved in the drafting process, to name but the most important ones.

This article considers the factors influencing the formal quality of EU legislative acts in particular and how they are addressed by the EU institutions.

B. EXTERNAL FACTORS

1. The constitutional framework of the EU is established by the basic EU Treaties.² Over the years the competences of the EU, its decision-making procedures, and its voting rules have constantly evolved due to successive modifications of the Treaties and to the entry of new Member States (in EU jargon “enlargements”).

What has not changed is the particular nature of the construction: a mix of national and international elements. The EU’s legislative authority comprises, on the one hand, the European Parliament, composed of directly elected representatives of EU citizens divided into transnational political groups, and on the other the Council, composed of the national ministers, representatives of sovereign states each with its own legal order, economic strengths, and historical and geographical characteristics. Some of the legal acts adopted according to the different procedures have the same effects as national laws: they are of general and direct application³ (but are negotiated, particularly at the Council, in the diplomatic manner used for international agreements).

2. The procedure by which the European Parliament and the Council interact and adopt legislative acts is the “ordinary legislative procedure” (in EU jargon “co-decision”).⁴

The Commission produces a legislative proposal, comprising a complete draft act, after carrying out all the necessary preparatory work such as consultations of interested circles and the public and impact assessments. The

² Since the entry into force of the Treaty of Lisbon in 2009, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

³ See Article 288 TFEU: “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”.

⁴ See Article 294 TFEU.

Commission's proposal is submitted at the same time to the European Parliament and the Council for examination and discussion. It is also submitted to the EU's advisory bodies (Economic and Social Committee and Committee of the Regions), as appropriate,⁵ and to the national parliaments for a check on compliance with the principle of subsidiarity.⁶

On the basis of the subject matter, the proposal is allocated in the European Parliament to the competent standing committee and, in the Council, to a working party composed of national delegates who are experts in the field.⁷

Each institution decides, after extensive and thorough internal discussion and negotiation, the position to be taken during the interinstitutional discussions and negotiations.

Representatives of European Parliament, the Council and the Commission (which defends its proposal and has the right to withdraw it at any time before an act is adopted⁸) meet several times to examine their respective positions, trying to find common ground. After each tripartite meeting (in EU jargon, the "trilogues"⁹), the negotiators inform their respective Institutions of progress made and seek a mandate for the next round of talks. Once a compromise is found that is acceptable to all three Institutions, the European Parliament and the Council finally adopt the text.

3. This seemingly simple procedure hides complex dynamics: each text has its own story. This story depends on the political urgency of the problem dealt with in the proposal and is influenced by the domestic political situation of each Member State (which obviously changes with each election or change of government), the importance of the national economic interests at stake, the persuasive powers of the Member State holding the rotating presidency of the Council. The text is forged by the alliances and interest groupings which the Member States can build in the Council and the MEPs in the European Parliament. The success is often linked not only to the personal skills and experience of the negotiators and those assisting them, but also to the personal chemistry between them. Even linguistic competencies contribute to the progress of the dossiers, as ever more often meetings are held without interpretation and the number of texts translated into all the languages at the various stages has fallen sharply for budgetary reasons. Even if in theory all the official languages are also working languages at the European Parliament and the Council, the reality is that recourse to English has become generalised.¹⁰

⁵ See Article 300 TFEU ff.

⁶ See Protocols No 1 and No 2 to the EU Treaties.

⁷ There are over 150 working parties. The full list is at:

<<http://www.consilium.europa.eu/council/committees-and-working-parties?lang=en>>
accessed 5 January 2015.

⁸ See Article 293(2) TFEU.

⁹ See the Joint Declaration on practical arrangements for the codecision procedure [2008] OJ C 102E/111).

¹⁰ For a statement of the European Parliament's policy on multilingualism see:

4. At the time of writing this contribution in early 2014, all the legislative activity is heavily influenced by two factors: the upcoming European Parliament elections in May 2014 and the end of the Multiannual Financial Framework for 2007 to 2013 (the long-term budget of the EU, known as the “MFF”). The result is an exceptional rise in legislative activity, as the legislator tries to conclude all ongoing negotiations and adopt the respective acts before the end of the parliamentary term, both for practical and political reasons: the newly elected European Parliament might not validate the agreements reached by its predecessor and the MEPs campaigning for re-election need to be able to show their electorate the results they have achieved.

In addition, the end of the current MFF has a huge financial impact on all Member States. The Commission submitted 70 sector-specific proposals in fields of activity such as research, cohesion policy, agriculture and fisheries, environment, justice and home affairs, and foreign affairs. Since the proposals defined the conditions of eligibility and the criteria for the allocation of funds, and since they needed to enter into force by the end of 2013, the pressure on the Lithuanian Presidency of the Council in the second half of 2013 and on all the technical services was enormous.

The result was a flurry of political agreements and adoption of legislative acts in the final months of 2013. All in all, 137 legislative acts were adopted in the second half of 2013 alone (compared to 17 during the preceding Irish Presidency in the first half of 2013). Between October and December 2013, no fewer than 61 legislative acts were adopted and entered into force, which constitutes some 85 % of the legislative activity of the whole of the previous year (in 2012, a total of just 70 legislative acts were adopted).

It goes without saying that such political success does not come without a cost for the quality of drafting, as the resources dedicated to this herculean task had not changed. Furthermore, it is worth underlining that the staff of the European Parliament and of the Council responsible for maintaining the quality of legislation (the lawyer-linguists and revisers) are not allowed to interfere with the political content of the texts they revise and must refrain from touching the substance of a political agreement (see section C below).

C. INTERNAL FACTORS

The second series of factors which influence the quality of EU legislation is internal to the Institutions and is, to a certain extent, open to possible improvements. We will examine briefly each of these factors.

<<http://www.europarl.europa.eu/aboutparliament/en/007e69770f/Multilingualism.html>> accessed 5 January 2015. For an outline of how the language rules are applied at the Council see:

<<http://www.consilium.europa.eu/uedocs/cmsUpload/sn01087.en07.pdf>> accessed 5 January 2015.

1. Human resources

The European Parliament, the Council and the Commission each have its own translation department and its own team of lawyer-linguists.

The function of the lawyer-linguists is specific to the EU institutions and constitutes the organisational corollary of the fact that the texts of all EU acts in all the official languages of the EU are equally authentic.¹¹

The initial task of the lawyer-linguists was to guarantee the exact parallelism, both textual and legal, between the various linguistic versions of EU legal texts. Experience showed that the negotiated texts had to be drafted not only according to standard rules of presentation (which are collected in a Manual of Precedents for acts adopted by the Council of the European Union¹²) but also in accordance with general principles of clarity. This was essential not just to ensure that EU texts were understood by those to whom they were to apply outside the institutions but also in order to avoid translation mistakes by the institutions' own translators. Due to public pressure for clear and understandable European legislation, in 1997 the Heads of State and Government adopted Declaration No 39 on the quality of the drafting of Community legislation annexed to the Final Act of the Amsterdam Treaty.¹³ The following year the European Parliament, Council and Commission adopted common guidelines on the quality of drafting.¹⁴ A further step was taken in the year 2000 when the heads of the Legal Services of the three institutions adopted the Joint Practical Guide for the drafting of Community legislation.¹⁵

The lawyer-linguists' second task (in order of chronology, not importance) is therefore, according to the Council's Rules of Procedure, "ensuring the drafting quality of the legislative acts".¹⁶

¹¹ As regards the role of the lawyer-linguists of the European Parliament and of the Council, see M Guggeis and W Robinson, "Corevision": Legal-Linguistic Revision In The European Union "Codecision" Process' in in CJW Baaij (ed.), *The Role of Legal Translation in Legal Harmonisation* (Kluwer Law International, Alphen aan den Rijn, 1st edn. 2012) 51-81. As regards the role of the legal revisers in the Commission, see W Robinson, 'Polishing what others have written: the role of the European Commission's legal revisers in drafting European Community legislation' (March 2007) *The Loophole* 71-81. See <http://www.opc.gov.au/calc/docs/Loophole/Loophole_Mar07.pdf> accessed 5 January 2015.

¹² Not publicly available.

¹³ [1997] OJ C 340/139.

¹⁴ Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation [1999] OJ C 73/1.

¹⁵ Obtainable from the EU Bookshop: <<http://bookshop.europa.eu/en/joint-practical-guide-of-the-european-parliament-the-council-and-the-commission-for-persons-involved-in-the-drafting-of-legislation-within-the-community-institutions-pbKA4502094/>> accessed 5 January 2015 or from EUR-Lex: <<http://eur-lex.europa.eu/techleg/index.html>> accessed 5 January 2015.

¹⁶ Council Decision 2009/937/EU [2009] OJ L 325/35. See Article 22:

In order to achieve this objective, in 2007 a new project was launched at the Council. Every time the General Secretariat of the Council receives a proposal or draft legislative act, a "quality team", consisting of two "quality advisers", namely a lawyer-linguist and a legal adviser, is appointed to carry out an assessment of the drafting quality of the text.

This team monitors the quality of the text throughout the legislative process, right up until the formal adoption of the act by the Council. If necessary, the team will draft a note with drafting suggestions. In 2013, 156 files underwent this procedure and the results were very encouraging, particularly in terms of the trust built up between the administrators in the General Secretariat of the Council, the national experts from the Member States and the quality advisers. Trust is the most important component in this phase, as the modifications suggested by the quality team are not compulsory and may be rejected by the legislative authority. The lawyer-linguist needs to have not just a good command of drafting technique, but also negotiating skills, in order to "sell" a product, namely quality, which is not objectively quantifiable and may not even appear attractive to the "client", especially when a text has been discussed for a long period of time and is politically sensitive.

Notwithstanding the constant increase in EU competences, the human resources dedicated to translation have been reduced and the number of lawyer-linguists has remained constant (at the Council there are 4 lawyer-linguists for each official language, except for the English team which has 6 and the Irish team which has 3).

Given the variability of the workload (with peaks as explained above), the rigidity of the system has a direct impact on the quality of the work.

2. Timing

The lawyer-linguists of the European Parliament and the Council are constantly working under time pressure. The task of verifying the parallelism between the translations of the legal acts of the EU has to be carried out between the time when political agreement is reached on those acts and the time when they are formally adopted. It is essential that that interval should not be too long. There is a real risk that, if the formal adoption is delayed too much, the political "momentum" may vanish and the necessary voting majority will be lost.

"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."

In the EU codecision procedure, the time allocated for the translation of the agreed texts is two weeks and for the legal-linguistic revision six weeks. The latter period is very short, considering that the revision has to be carried out not only by the lawyer-linguists of the Council but also by those of the European Parliament. Each linguistic version of the act has to be "negotiated" by one lawyer-linguist from the Council and one from the European Parliament. The former takes into account the observations made by the national expert, while the latter consults, whenever necessary, the parliamentary committee.¹⁷ The final version is then discussed at lawyer-linguist working-party level¹⁸ and finally brought to the Plenary.

As usually more than one legal act is tabled for discussion at the same Plenary session of the European Parliament, the timetable for the revision of each of them is more or less the same, obliging the lawyer-linguists to deal with a correspondingly higher amount of pages within the same time frame.

Unfortunately, the two factors, human resources and timing, cannot be influenced (the first for economic, the second for political reasons). They can only be "better managed" by constantly reviewing the working methods, organising training, giving clear drafting instructions and improved IT tools.

3. Organisation of work

The conduct of reviews of the organisation of work and of rationalisation is a constant feature in the EU institutions. In 2009, following the changes introduced by the Lisbon Treaty, all the procedures for legal-linguistic revision of codecision texts were changed, concentrating the work, in case of first reading agreements, on the period before the vote in the Plenary.

The reduction in the time taken (from 12 weeks to 6) was made possible partly by cutting unnecessary technical stages (like intermediate formatting of the texts), but above all by closer cooperation between the lawyer-linguists of the European Parliament and of the Council.

4. Training

The qualifications required for applying for a lawyer-linguist position are "perfect command of one European language and a thorough command of at least 2 others and a law degree. Previous experience of translating legal texts and

¹⁷ See M Guggeis and W Robinson, "Corevision": Legal-Linguistic Revision In The European Union "Codecision" Process' in CJW Baaij (ed.), *The Role of Legal Translation in Legal Harmonisation* (Kluwer Law International, Alphen aan den Rijn, 1st edn., 2012) 51-81.

¹⁸ At this meeting, the national experts from the Member States, assisted by one lawyer-linguist per language, discuss the final English version of the text. The lawyer-linguist responsible for the file, the EP English lawyer-linguist, the Commission representative and the Council administrator attend the meeting.

additional languages are an asset".¹⁹ The actual job of revising legal texts and drafting them correctly is, however, learnt by doing it.

For that reason, the EU Institutions decided, in 2009, to introduce a new training method for lawyer-linguists: instead of relying on external teachers, the most experienced colleagues were invited to share their knowledge and to coordinate interinstitutional drafting and revision sessions. Small groups of officials from the three institutions work together on a drafting exercise discussing the different issues and sharing best practices. This training has proven very successful, especially in creating a common drafting culture between the staff of the different institutions.

At the same time, a group of senior lawyer-linguists, who have been trained in training techniques, give regular drafting courses for desk officers (the staff in the other departments who actually take part in the drafting process) in order to improve their understanding of the importance of legal drafting.

5. Drafting instructions

The instructions and rules on EU legislative drafting were previously different for each institution and sometimes even conflicting.²⁰ They have now been reviewed and harmonised by an interinstitutional working group on questions of legislative drafting (known by its French acronym "GRITL")²¹, composed of experienced lawyer-linguists from the European Parliament, the Council and the Commission. The Manual of Precedents of the Council is regularly updated following consultation with the other institutions. It has now been split into two parts: one on EU legal acts in general, and the other on international agreements. The Joint Practical Guide has been updated in order to take into account the changes introduced by the Lisbon Treaty.

The interinstitutional working group meets regularly in order to solve all drafting issues; its decisions are brought to the attention of all the lawyer-linguists in the institutions in the form of internal instructions or recommendations.

6. Information Technology Tools

The potential for improvement in this field is vast.

The most important project is to complete the harmonisation of the different formatting systems of the institutions, in order to avoid duplicated work each time a text is sent from one institution to another.

¹⁹ See the website of the European Personnel Selection Office: <http://europa.eu/epso/apply/jobs/perm/2013/lawyer-linguists/index_en.htm> accessed 5 January 2015.

²⁰ See W Robinson, 'Manuals for drafting European Union legislation' (2010) 4(2) *Legisprudence* 129-155.

²¹ Groupe de réflexion pour la technique législative.

At the European Parliament very interesting and positive experiences have been made with "XML" (Extensible Markup Language), a meta-language which enables the exchange of information. It has been particularly useful for dealing with multilingual versions since it facilitates the reproduction of textual changes in all language versions.

The Commission and the European Parliament have developed information technology tools of their own to assist drafters.

At the Commission, the Drafters' Assistance Package ("DAP"), linked to the Legiswrite tool for basic word-processing and formatting of legislative texts, allows the desk officers to open and consult the appropriate drafting rule for each part of the legal act they are working on.

At the European Parliament, the Drafting Support Tool ("DST") is a drafting service provided to all MEPs. Access is extremely easy and the system allows each MEP to submit an amendment and to have it revised shortly afterwards by a lawyer-linguist specialising in the language of the text.

D. CONCLUSIONS

Improving the quality of a legal text is a never ending story and a constant struggle. As in all battles, the final result largely depends on the strategy and the resources put into it.

At an EU level, the quality of each text depends on the right mixture of the different factors described above. A politically uncontroversial text, translated and revised by well-trained professionals who have been given sufficient time, clear instructions and good IT tools will be of a substantially better quality than a text which is the result of endless political discussions and full of ambiguous compromises and which has had to be translated and revised under extreme time pressure.

BETTER LEGISLATION AND THE ORDINARY LEGISLATIVE PROCEDURE, WITH PARTICULAR REGARD TO FIRST-READING AGREEMENTS

Robert Bray*

Abstract

This article examines how the first-reading (and second-reading) agreement, which is tending to become the predominant mode for the adoption of most EU legislation, works and the impact it has on drafting quality and the openness of the legislative process. It will also consider the European Parliament's administration's plans for a more scientific, fact-based approach to the legislative process.

Keywords

European Union legislation; Parliamentary procedure; drafting quality and transparency.

The ordinary legislative procedure applies to the vast majority of legislation adopted by the EU¹. But if you read the Treaties², there is no hint of the idea that what since the Lisbon Treaty is called the “ordinary legislative procedure”, formerly known as the “codecision procedure”, can be, and in fact usually is, concluded by a first-reading or early second-reading agreement. Indeed, a typical legal basis³ provides as follows: “The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.” If we look further at the Treaties, we find article 289(1) TFEU⁴, which states that “The ordinary legislative procedure shall

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¹ See the List of legal bases providing for the ordinary legislative procedure in the Treaty of Lisbon (Reproduced from A6-0013/2008 Report on the Treaty of Lisbon 2007/2286 (INI)) available at <http://www.europarl.europa.eu/code/information/legal_bases_en.pdf> accessed 29 January 2014.

² See Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

³ Article 114 of the Treaty on the Functioning of the European Union (TFEU).

⁴ Article 289 further provides as follows: “2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the

consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in article 294.”

For its part, article 294 TFEU provides as follows:

1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.
2. The Commission shall submit a proposal to the European Parliament and the Council.

First reading

3. The European Parliament shall adopt its position at first reading and communicate it to the Council.
4. 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.
5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.
6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.

Second reading

7. If, within three months of such communication, the European Parliament:
 - (a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
 - (b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;
 - (c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.
8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:

European Parliament, shall constitute a special legislative procedure. 3. Legal acts adopted by legislative procedure shall constitute legislative acts. 4. 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.”

(a) approves all those amendments, the act in question shall be deemed to have been adopted;

(b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

Conciliation

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.

11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

Third reading

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.

14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

Special provisions

15. Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.

In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11.

It is only if you dig deeper that the real picture begins to emerge.

Statistics on concluded codecision procedures (by signature date)⁵

7th Legislature - 14 July 2009 - 30 June 2014

1st reading	early 2nd reading	2nd reading	3rd reading (conciliation)	Total COD files
422	40	25	8	495
85 %	8 %	5 %	2 %	100 %
17	32	33	30	Average length of procedure time (in months)

6th Legislature - 1 May 2004 - 13 July 2009

1st reading	early 2nd reading	2nd reading	3rd reading (conciliation)	Total COD files
321	45	58	23	447
72 %	10 %	13 %	5 %	100 %
17	27	34	45	Average length of procedure time (in months)

In the current legislature 85% of procedures were closed by a first-reading agreement. There are several reasons why this should be so. Although it is not

⁵ Source: Conciliations and Codecision webpage of the European Parliament <http://www.europarl.europa.eu/code/about/statistics_en.htm> accessed 29 December 2014.

the aim of this article to analyse them, it may be observed that the Treaty does not specify a time limit for first reading, whereas the second reading is limited to three months (extendable to four without any particular difficulty). The Presidency for the time being is invariably keen to conclude first-reading agreements in order to have something concrete to show that it has been a success and it is easy to identify files where sufficient progress seems to have been made in both the competent parliamentary committee and the Council working group. It only remains to convince Parliament's rapporteur and shadow rapporteurs⁶ to begin negotiations.

A guide to first- and second-reading agreements emerges from Parliament's Rules of Procedure⁷, rules 73-76. They first provide that negotiations with the other institutions aimed at reaching an agreement in the course of the legislative procedure are to be conducted having regard to the Code of Conduct laid down by the Conference of Presidents⁸. The Code sets out general principles on how to conduct negotiations during all stages of the ordinary legislative procedure with the aim of increasing their transparency and accountability, especially at an early stage of the procedure. It is complementary to the "Joint Declaration on practical arrangements for the codecision procedure" agreed between Parliament, the Council and the Commission which focuses more on the relationship between these institutions⁹. The most interesting section of this code for present purposes is section 7 on assistance, which provides that "The negotiating team shall be provided with all the resources necessary for it to conduct its work properly. This should include an 'administrative support team' made up of the committee secretariat, political advisor of the rapporteur, the codecision secretariat and the legal service. Depending on the individual file and on the stage of the negotiations, this team could be enlarged."

The Rules go on to provide that negotiations are not to be entered into until the committee has adopted a decision on the opening of negotiations by a majority of its members. The decision has to determine the mandate and the composition of the negotiating team.

The mandate consists of a report adopted in committee and tabled for later consideration by Parliament or, exceptionally, of a set of amendments or a set of clearly defined objectives, priorities or orientations.

⁶ Once the competent committee has chosen a rapporteur for a particular file, the other political groups each choose a member to follow it, known as the "shadow rapporteur".

⁷ <<http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>> accessed 29 December 2014.

⁸ See Annex XX to the Parliament's Rules of Procedure: Code of conduct for negotiating in the context of the ordinary legislative procedures:

<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20140701+ANN-20+DOC+XML+V0//EN&language=EN&navigationBar=YES>> accessed 29 December 2014.

⁹ [2007] OJ C145/5.

The negotiating team is led by the rapporteur and presided over by the chair of the committee responsible or by a vice-chair designated by the chair. It is to comprise at least the shadow rapporteurs from each political group.

Any document intended to be discussed in a meeting with the Council and the Commission (“trilogue”) is to take the form of a document indicating the respective positions of the institutions involved and possible compromise solutions and has to be circulated to the negotiating team at least 48 hours, or in cases of urgency at least 24 hours, in advance of the trilogue in question.

The negotiating team has to report back to the committee after each trilogue and documents reflecting the outcome of the last trilogue have to be made available to the committee.

If the negotiations lead to a compromise, the committee has to be informed without delay and the agreed text has to be submitted to the committee responsible for consideration. If that text is approved by a vote in committee, it has to be tabled for consideration by Parliament in the appropriate form, including compromise amendments. It may be presented as a consolidated text provided that it clearly displays the modifications to the proposal for a legislative act under consideration.

Not only, however, is no time limit imposed for the first reading by the Treaties, the first reading may be extremely lengthy. Furthermore, it may be preceded by a legislative initiative pursuant to article 225 TFEU. The following time line for the legislation adopted as Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession¹⁰ will, I argue, be more typical in the future, except that in the recent period Parliament has equipped itself with a whole range of instruments to assist its Members that were not available at the time when the Successions Regulation was going through Parliament. However, already then, Parliament was more than capable of engaging in a legislative dialogue with the Council (and the Commission) on highly technical legislation while taking account of the requirements of better legislative drafting.

On 16 November 2006, Parliament adopted a legislative initiative pursuant to article 192, second paragraph¹¹, of the EC Treaty on succession and wills in response to a Green Paper presented by the Commission on 1 March 2005¹². The rapporteur was Giuseppe Gargani, the then Chair of the Legal Affairs Committee.

¹⁰ [1012] OJ L201/107.

¹¹ This provision, the counterpart of article 225 TFEU, allowed the European Parliament to request the Commission to present a proposal for legislation.

¹² COM(2005)65 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0065&rid=1>> accessed 29 December 2014; European Parliament resolution with recommendations to the Commission on succession and wills [2006] OJ C314E/342.

Following extensive consultations and the preparation of an impact assessment, the Commission presented a proposal for a regulation in October 2009¹³. After the proposal had been referred to the Committee on Legal Affairs and Kurt Lechner appointed as rapporteur, the first exchange of views took place in December 2009. A second discussion was held on 28 January 2010 in the light of the contributions and reasoned opinions received from national parliaments.

On 29 April 2010 the rapporteur presented a working document and this was followed on 22 March 2010 by a workshop on the proposed regulation and national law.

Although no negotiating mandate had yet been adopted, informal talks began between the rapporteur and the shadow rapporteurs, the Council Presidency and the Commission. They soon agreed to have the text of the Commission proposal verified by the lawyer-linguists of the Council and the Parliament to eliminate a number of discrepancies that had been found. It is interesting to note in passing that Commission legislative proposals are not vetted by the Commission's team of lawyer-linguists. This is the case even with texts of this kind, which are extraordinarily complex and delicate, both legally and linguistically.

In November 2010, Professor Etienne Pataut of the Ecole de droit de la Sorbonne (Paris 1) presented a study commissioned by the committee's policy department on the public policy clause to the representatives of the three institutions.

It was not until March 2011 that the rapporteur presented his draft report to the Legal Affairs Committee and only after a further hearing in June that the amendments were considered on 11 July 2011 and a negotiating mandate adopted. The mandate, which was couched in very general terms, contained the words "Parliament will advocate achieving ... a genuinely European solution for the benefit of Union citizens which ensures the highest possible level of legal certainty and legal clarity".

Negotiations now started in earnest between the institutions. With a view to dealing with potential drafting/translation problems, it should be noted that two of Parliament's lawyer-linguists attended every meeting of the negotiating team and had even taken part in the earlier informal meetings.

The text that was adopted in committee and then in plenary on 13 March 2012 was the subject of scrupulous revision by the lawyer-linguists of Parliament and the Council. Even so, there was some suggestion in certain quarters that a second reading might have been useful in giving interested parties, in particular probate lawyers, notaries and judges, the chance to comment on the final text proposed. Since the Regulation will apply to the "succession of persons who die

¹³ COM(2009)154: Proposal for a regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009PC0154&rid=2> accessed 29 December 2014.

on or after 17 August 2015”, it will not be long before we see from references for preliminary rulings from the European Court of Justice how successful Parliament was in ensuring “the highest possible level of legal certainty and legal clarity”. The chief aim of the Regulation is to simplify the highly complex legal predicament of testators (and successors) finding themselves in a trans-frontier situation. In any event, no particular drafting problems were raised in connection with the Regulation at the hearing held in the Legal Affairs Committee on 11 February 2013.

It must also be said that the legislative process in this case was particularly geared to providing the rapporteur – who was himself an expert in the field, being a notary by profession – with expert advice in the shape of studies and expert opinion, including an outstanding study by the Ruprecht-Karls-Universität Heidelberg, whose experts also produced a briefing note for the rapporteur¹⁴.

The fact that eight weeks are allowed for the legal/linguistic revision of legislative texts also shows how seriously the co-legislators under the ordinary legislative procedure take the quality of drafting into account. The presence of lawyer-linguists and the systematic provision of interpreting during trilogues is further evidence of this. In future, too, Parliament’s Editing Unit plans to extend its activities in the near future to cover editing on request, a helpline on points of English for authors and training courses for authors, where light will be shed on typical errors made in English and advice given on drafting.

But the biggest changes are being introduced as a result of the establishment of the European Parliament’s new Directorate-General for Parliamentary Research Services (EPRS, the acronym standing for “European Parliamentary Research Service”) on 1 November 2013. The Directorate General consists of the Directorate for the Library, the Directorate for Impact Assessment and European Added Value and the new Members’ Research Service - which provides briefing and research services for individual MEPs and publishes a range of synoptic publications. The Directorate for Impact Assessment and European Added Value consists of four units, for (i) ex-ante impact assessment, (ii) ex-post impact assessment, (iii) European added value and (iv) science and technology options assessment (STOA)¹⁵.

¹⁴ Opinion on the proposal for a European regulation on succession law – Version 2009/157(COD) of 16 January, Prof. Dr Burkhard Hess, Prof. Dr Dr h.c. mult. Erik Jayme, Prof. Dr Thomas Pfeiffer, assisted by Dr Stefan Huber, Dr Björn Laukemann, D. Robert Magnus and Stefanie Spancken, Ruprecht-Karls-Universität Heidelberg, Institut für ausländisches und internationales Privat- und Wirtschaftsrecht, doc. 2012 PE 462.430 <http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462430/IPOL-JURI_NT%282012%29462430%28SUM01%29_EN.pdf> accessed 29 December 2014.

¹⁵ See ‘Preparing for Complexity – European Parliament in 2025 – Final report by the Secretary-General’, <<http://www.europarl.europa.eu/the-secretary-general/en/activities/documents/docs-2013/docs-2013-april/documents-2013-april-2.html>> accessed 29 December 2014 and the EPRS webpage <<http://www.europarl.europa.eu/aboutparliament/en/000f81b2e3/European-Parliamentary-Research-Service.html>> accessed 29 December 2014.

This will certainly improve Parliament's involvement in the legislative process.

To turn to the question of the transparency and openness of the legislative process, which cannot but assist in ensuring that the resultant legislation is at least exposed to public scrutiny before it is adopted, I would point out that the European Parliament is by far and away the most open of the EU institutions. Except for (the very few) meetings held *in camera*, meetings are webcast. This compares with the meetings of the Council's working parties, which are not open to MEPs, let alone to the public. Documents, including voting lists, are readily available on Parliament's Internet site and votes on legislative documents are now by roll call.

As far as negotiations for first- and second-reading agreements are concerned, it is considered that sufficient provision is made for feed-back to the competent committee and to all interested members, also through the system of shadow rapporteurs, which ensures the involvement of the political groups.

COMPLEXITY OF EU LAW IN THE DOMESTIC IMPLEMENTING PROCESS

Roberto Baratta*

Abstract

This article highlights how the complexity of EU secondary law (other than self-executing acts) can cause real difficulties at the stage of its transposition at national level. Two practical examples, involving the intervention of the Commission, illustrate the problem. It is assumed, on the one hand, that the general principles of law (legal certainty, legitimate expectations and transparency) require the EU legislator to ensure intelligibility and drafting quality, and on the other hand that these features are of the essence not only for citizens and for business, but also to enable the national authorities to adopt domestic implementing measures in an effective and timely manner. In that perspective, the article outlines some tentative methodological suggestions, while addressing, in the light of the ECJ case-law, the methods of interpreting EU law, the role of recitals, the Commission's use of soft-law instruments to guide national implementing measures, as well as the proactive attitude from Member States within and outside the Council. A practical suggestion is made to establish a close connection at national level between the personnel taking part in the drafting of an EU legal act (upstream phase, i.e. those people contributing to the draft of legislation at the Council level) and the personnel engaged in the process of implementing that act at the domestic level (downstream phase). Linking the two phases so as to rely on the same national staff for advising on both appears to be a quite simple scheme to ensure better understanding of the EU legal texts and to sound a warning wherever there is a risk of an infringement due to inadequate implementation.

Keywords

EU legislation; implementation in Member States; complexity of EU secondary law; methodological suggestions.

A. INTRODUCTION

Before public officials in a Member State can implement European Union (EU) legislation, they must first comprehend it. Within the internal dynamics of norm-creation, that experience may be rather challenging due to the complexity of the

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EU legal act which can be a sign that it is not of good quality. The obvious body to turn to for assistance is the European Commission. First, for a utilitarian reason: should the Member State adopt an interpretation different from the one which the Commission favours, it runs the risk of infringement proceedings. Second, absent the authority of the European Court of Justice (ECJ), the Commission is considered as the institution enjoying a power of interpretation. Third, if there are diverging views among national officials – who may indeed be exposed to conflicting sub-national actors and interest groups, for instance – there is a need for an EU official body to consult with. Be it a calculated instrumental approach due to the Commission's function as the guardian of the treaties or one related to a real trust in its independence and overarching role to promote the general interest of the Union (Article 17 TEU), public officials in the Member States do in fact rely on the Commission. It is after all what might be called a daily interpretative factory of EU law.

This article will highlight how the complexity of EU law can be a real difficulty at the stage of its transposition at national level. Two practical examples, involving the intervention of the Commission, will hopefully help to illustrate the problem (section B). Some tentative methodological suggestions will be made in the final part of the article (section C).

B. TWO PRACTICAL EXAMPLES

The fundamental issue at stake is the correct comprehension of EU law¹. Although in theory a piece of EU legislation should be relatively coherent and easy to assess, in practice that is not necessarily the case. Indeed a legislative text is often the result of compromises between competing interests and objectives being pursued by the EU institutions, the national Governments and others taking part in the process. Unsurprisingly, as the practice in the law-making process proves, legitimate concerns for the quality of legislation may be outweighed by the need to find a compromise acceptable to all the parties. In such situations national authorities, sometimes already under strain due to ongoing infringement proceedings, face interpretative issues of the relevant *acquis*.

¹ The problem raised by the multilingual nature of EU law will be left aside on purpose, since it deserves a specific analysis to be mainly addressed through the means of accurate linguistic revision, enhanced use of 'lawyers-linguists' and, where necessary, of 'definitions' in secondary law.

1. Bus passengers' rights

The first example concerns Regulation (EU) No 181/2011 on the rights of bus passengers ("the Regulation")². Italian authorities raised some interpretative matters with the Commission when the domestic legislator was about to finalize a measure to comply with the Regulation and, most importantly, to close infringement proceedings at the pre-litigation stage.

In response to a question regarding Article 12 (on a Member State's obligation to designate terminals where assistance for disabled persons and persons with reduced mobility has to be provided), the Commission's reply points to the need for a systematic reading of the Regulation, taking into account Articles 2 and 13. In brief, in the Commission's view, the rights of persons with a disability and reduced mobility pursuant to Article 12 do not apply to regular services where the scheduled distance of the service is less than 250 km. Consequently, the obligation for the Member States to designate bus terminals in accordance with Article 12 applies only to regular services with a scheduled distance of more than 250 km. By taking that view the Commission rejects the argument endorsed by some of the Italian authorities, according to which the doctrine of *effet utile* (effectiveness) and a teleological approach requires that Member States ensure the rights of the persons concerned even for services of less than 250 km. That approach would secure – it was argued – the most effective protection of the persons with disability and reduced mobility.

In its reply, the Commission does touch upon the objective of the Regulation, as pointed out in its Recital (2) – to grant a minimum level of protection for passengers – and clarifies that Member States are without doubt allowed to adopt measures which provide passengers with a higher level of protection. Thus, it is possible for Member States to appoint bus terminals in order to provide assistance for persons with disabilities and reduced mobility also for shorter distance services. However, according to the Commission's interpretation, that is not, strictly speaking, an obligation under the Regulation.

Arguably, as often occurs in the context of harmonization, Member States may go beyond the minimal level required by EU law. In such a case, EU law allows some latitude to Member States, setting only the lowest limit above which a margin is left for optional action. In this field the application of the legal framework becomes voluntary and thus optional. Over-implementation is obviously possible in principle, but it is a policy choice of both national Government and Parliament possibly justified by a cost-benefit analysis and, sometimes, even desired by stakeholders. Yet legal advisers in the Member States should be crystal clear in that respect.

Finally, the Commission addresses the question whether it is possible to designate bus terminals which, because of their architectural barriers and the lack

² Regulation (EU) 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport [2011] OJ L 55/1.

of specific equipment, are accessible only to persons with certain types of disabilities, but not to others. It replies first of all, that the minimum level of assistance is defined by a systematic interpretation of the relevant provisions of the Regulation and the Annex to it; secondly, that the Regulation provides for some limits when providing assistance to disabled persons (referring to Article 10(1)(b)); thirdly, that recital (11) calls upon the Member States to endeavour to improve existing infrastructure where this is necessary to enable carriers to ensure access for disabled persons and persons with reduced mobility as well as to provide appropriate assistance. Finally, in the Commission's view, information about bus terminals where people with certain disabilities can be assisted and which can provide certain forms of assistance listed in part (a) of Annex I to the Regulation is of key importance. Thus, the Commission encourages the Italian authorities to adopt implementing measures aimed at informing the passengers concerned about those bus terminals.

It seems worth noting in particular that the Commission rightly refers to recitals as interpretative tools. In that respect, the preamble of a legal act is a useful means for interpreting it, as is briefly discussed below.

2. Freedom of movement

My second example gets us back again on recitals but focuses mainly on the use of the preamble as a normative means in secondary law acts and on its impact on the interpretative outcomes. We know from our practical experience of secondary law (in particular, Regulations and Directive which require implementing acts at national level) that sometimes recitals perform a supplementary normative role. However, that point is quite problematic, given the limits set by the ECJ in its case-law (see again *below*).

One of the most telling illustrations concerns the vexed question whether national bodies may expel EU citizens who have recourse to the social assistance system of the host Member State. As is well-known there are many controversial aspects here and several among them have been referred for preliminary rulings to the ECJ. My purpose is to address only a point of legislative technique regarding two of the binding provisions of Directive 2004/38 (“the Directive”).³

In short, joint application of Article 8(4) and Article 14(3) implies on the one hand that, having recourse to social assistance benefits does not entail *per se* that national authorities can adopt an expulsion measure⁴ (negative obligation); and on the other hand, that they must take into account the situation of the person

³ Directive (EC) 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

⁴ ‘An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State’ (Article 14(3) of the Directive).

concerned⁵ (positive obligation). Therefore, the normative text entails both a negative and a positive obligation. The first is relatively plain, whereas the second appears to be quite vague. However, the latter becomes clearer if one reads it in the light of recital (16) which ultimately requires national bodies to apply a proportionality test in all decisions concerning expulsion of the relevant persons. More precisely, that recital clarifies that only when the beneficiary has become an unreasonable burden for the local social system, can national authorities actually proceed to his or her expulsion, after having considered the personal situation, which implies that:

The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted⁶.

In other words, a four-step approach is suggested, almost imposed by a recital.

In such a situation, when advising on implementation of the Directive within the domestic legal order so as to avoid the risk of infringement proceedings, one is tempted to suggest that the implementing measure had better contain a copy-out of that recital as well. For it actually has a supplementary normative nature, as the Commission itself seems to confirm since it builds on that recital⁷. When

⁵ As regards Union citizens who apply for a right of residence on the territory of another Member State for a period longer than three months, and have *inter alia* comprehensive sickness insurance cover in the host Member State and assure the relevant national authority that they have sufficient resources not to become a burden on the social assistance system of the host Member State during their period of residence, Article 8(4) of the Directive sets out that 'Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned' (emphasis added).

⁶ See Directive (EC) 2004/38, (n 3), recital (16).

⁷ The genuine supplementing operative nature of the recital seems emphasized in the Commission's Communication on guidance for better transposition and application of Directive 2004/38/EC (COM/2009/0313). Tellingly, in that Communication the Commission points out that:

'Recital 16 of Directive 2004/38 provides three sets of criteria for this purpose: **(1) duration**

- For how long is the benefit being granted?
- Outlook: is it likely that the EU citizen will get out of the safety net soon?
- How long has the residence lasted in the host Member State?

(2) personal situation

- What is the level of connection of the EU citizen and his/her family members with the society of the host Member State?
- Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?

(3) amount

- Total amount of aid granted?
- Does the EU citizen have a history of relying heavily on social assistance?

applying the provision, as well as the related recital, much is left to the administrative authorities and ultimately to the national judiciary. The Directive only provides an outline scheme. To comply with that normative framework, including the corresponding recital, detailed steps of the procedure have to be followed in practice on a case-by-case basis. It is plain that the recital in this case supplements the operative part of the Directive.

C. TACKLING THE COMPLEXITY OF EU SECONDARY LAW

The highlighted complexity of secondary legislation matters. Intelligibility and drafting quality are of the essence (for citizens and for business) not only in order to comply with the principles of legal certainty and legitimate expectations⁸, but also to enable the national authorities to adopt implementing domestic measures in an effective and timely manner. Secondary law has to be acceptably clear in its terms and reasonably consistent with the *acquis* – this holds true in particular when secondary law codifies the interpretation of primary law as ruled by the ECJ – in order to serve its objectives. Besides, the clearer a law instrument is, the better the principle of transparency is respected.

At least since the Amsterdam Treaty⁹ a number of disparate sources of rules and guidelines apply to the drafting process¹⁰. However, in the course of the cumbersome ordinary and special legislative procedures these rules and guidelines may be overlooked and sacrificed to compromise between the

• Does the EU citizen have a history of contributing to the financing of social assistance in the host Member State?.

⁸ EU legislation must enable those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them (see cases C-161/06 *Skoma-Lux* [2007] ECR I-10841, paras 36 and 38, and C-361/06, *Feinchemie Schwebda GmbH*, [2008] ECR I-3865, para. 50).

⁹ In 1997 the Intergovernmental Conference attached to the Amsterdam Treaty Declaration No 39 on the quality of the drafting of Community legislation [1997] OJ C 340/139. 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 organizational measures they deem necessary to ensure that these guidelines are properly applied’.

¹⁰ See generally W Robinson, *Drafting Union Legislation*, European Parliament, Directorate General for Internal Policies, Policy Department, Citizen’s Rights and Constitutional Affairs, Brussels (2012), 17; W Robinson, ‘Manuals for Drafting European Union Legislation’ (2010) 4(2) *Legisprudence* 129, 137 who rightly argues that manuals (‘too many’) ‘can only be part of the solution to the problem of drafting quality. They must stop relying so heavily on manuals and develop a broader approach to improving the drafting of EU legislation’ (at 152).

institutions, and within the Council itself¹¹. As lawyers know, within the Committee of Permanent Representatives of the Member States (Coreper), and within the Council, according to a settled practice decision-making tends to be consensual, even where the voting rule is qualified majority¹². To reach a consensus or unanimity within the Council is a source of complexity in itself and it has an impact on the quality of legislation¹³. In fact, the need to approve a measure without explicit dissent or with the consent of the twenty-eight governments may give rise to strained compromise wording, leading quite often to ambiguous texts which to say the least risk having no practical effect. Likewise, the same holds true when it comes to reaching an agreement between the Parliament and the Council. From the viewpoint of the rotating Council Presidencies, progress is often measured in quantitative terms rather than focusing on the technical quality of the legal acts adopted¹⁴.

Moreover, if a normative text fails to fulfil the principle according to which *leges ab omnibus intelligi debent*,¹⁵ it is destined, in due course, to become a source of virtually endless references for preliminary rulings. That amounts to being a tangible phenomenon of deferring to the judiciary the role of complementary legislator, revealing in fact a failure to legislate properly. One may wonder whether the EU judiciary is supposed to act as an arbiter of the legislative inconsistencies – is the ECJ really entitled to surreptitiously assume the role of the EU legislature, particularly bearing in mind the principle of separation of powers and the rule of law (Article 2 TEU)? Be that as it may, until the authoritative decision by the ECJ, would that uncertainty not give rise to a

¹¹ ‘... the Byzantine complexity of the Union’s legislative procedures’, according to S O’Leary, ‘Free Movement of Persons and Services’, in P Craig and G De Búrca (eds), *The Evolution of EU Law*, (2nd ed. OUP, 2011) 499, 513.

¹² As is known, that Council practice is based on Article 11(1), first subpa., of the Council’s Rules of Procedure [2009] OJ L 325/35, according to which the Council ‘shall vote on the initiative of its President’, whereas the second subparagraph – which requires the Presidency to open a voting procedure on the initiative of a member of the Council or of the Commission, provided that a majority of the Council’s members so decides – is not frequently applied. As a result, Coreper prefers to extend the discussion and search for a consensual solution (see, eg Y Devuyt, ‘The European Union’s Institutional Balance after the Treaty of Lisbon: “Community Method” and “Democratic Deficit” Reassessed’, in [2008] *Georgetown Journ. Int. Law* 302-303). But see for praise of the ‘compromis unanime’ to avoid ‘les frustrations de la minorité’, J-P Jacqué, ‘L’*autorité discrète du Comité des Représentants Permanents*’, in *Mélanges en l’honneur de P. Manin. L’Union européenne: Union de droit, Unions des droits* (Pedone, 2010), 263.

¹³ W Robinson, ‘Making EU Legislation More Accessible’, in L Mader and M Tavares de Almeida (eds) *Quality of Legislation: Principles and Instruments* (Nomos, 2010).

¹⁴ G Sandström, ‘Knocking EU Law Into Shape’, [2003] 40 *CML Rev*, 1307, 1308-1309; M Guggeis, W Robinson, ‘“Corevision”: Legal-Linguistic Revision in the European Union Co-decision Process’, in CJW Baaij (ed) *The Role of Legal Translation in Legal Harmonisation* (Kluwer Law International 2012) 1, 8-9.

¹⁵ Laws should be understood by everyone.

risk of fragmented application of the same act throughout the Union, as well as a source of uncertainty for citizens?

1. The inherent difficulty of interpreting EU law

Firstly, one could be inclined to have recourse to the classic methods of interpreting EU law. But that is not an easy task either. Unlike domestic legal orders which sometimes tend to prefer literal approaches, EU legislation is to be interpreted purposively, while taking into account its peculiar common nature; it cannot be just based on textualism – *i.e.* interpretation closest to the text and taking the words in their narrowest meaning – though this method enjoys a natural appeal for its simplicity and for serving to insulate the interpreter, as far as possible, from charges of political activism¹⁶. It suffices to recall two leading statements by the ECJ in the *CILFIT* case:

Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.¹⁷

Strict textualism can therefore be misleading and raises a problem at the implementation stage, particularly if national interpreters are unfamiliar with the particularities of EU law. In any case, faced with a problem of understanding an EU act, national public officials are expected to apply the ECJ's approach to interpretation. They must look to the words and then to the purpose or intent¹⁸ when the wording is uncertain, as well as to the overall evolution of the EU law¹⁹. In *CILFIT* the ECJ ruled that:

every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.²⁰

¹⁶ It is a matter of course, however, that the interpretation of law cannot entail its subjective application nor its exploitation to justify a desired end. Only in this perspective, Voltaire's view, according to which to interpret the law is to corrupt it, can be retained. Interpretation may be to a certain extent a creative, albeit not arbitrary, activity in the EU legal system.

¹⁷ Case 283/81, *CILFIT* [1982] ECR 3415, para. 19.

¹⁸ To quote the words of the ECJ in the *Da Costa* case "When it gives an interpretation of the Treaty in a specific action pending before a national court, the Court limits itself to deducing the meaning of the Community rules from the wording and spirit of the Treaty ..." (Joined cases 28 to 30/62, *Da Costa* [1962] ECR 31, 37).

¹⁹ Case C-128/94 *Hönig* [1995] ECR I-3389, para. 9.

²⁰ Case 283/81 *CILFIT*, above fn. 17 para. 20. Likewise case C-292/00 *Davidoff* [2003] ECR I-389, para. 25: "The Court observes that Article 5(2) of the Directive must not be interpreted solely on the basis of its wording, but also in the light of the overall scheme

In the example of the Regulation on the rights of bus passengers, the Commission correctly stressed the need for a systematic interpretation of the text. Purposive interpretation is essential too²¹. Structuralism – i.e. finding the meaning of a particular provision only by reading it in the light of the legal text as a whole and its context – and teleological interpretation²² are often the key concepts as regards the interpretative methods to be used in the EU legal order²³. To say the least, national judges and, more generally, public officials should be well aware of these criteria.

2. The Commission could adopt more soft law instruments to guide national implementing measures

Secondly, if it is not easy to solve the matter through the means of common and relatively simple interpretative methods, the Commission might more often have recourse to soft-law instruments, such as recommendations, communications, practical guidelines or explanatory papers, though they admittedly represent a failure to legislate properly. Naturally, they would not bind Member States. But they would help them to implement a certain piece of legislation properly, when they are sometimes already fearsome of the risk of infringement proceedings.

and objectives of the system of which it is a part'; and case C-63/00 *Schilling* [2002] ECR I-4483, para. 29. The philosophical idea that individual norms are to be envisaged as fragments drawn from a larger order (N MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, (OUP, 1999) 7), seems particularly apposite to the EU legal order.

²¹ Case C-336/03 *EasyCar (UK) Ltd* [2005] ECR I-1947, para. 21. For another example of purposive interpretation, Case C-173/07 *Emirates Airlines* [2008] ECR I-5237, para. 35: 'to regard a 'flight' within the meaning of Article 3(1)(a) of Regulation No 261/2004 as an outward and return journey would in fact have the effect of reducing the protection to be given to passengers under the regulation, which would be contrary to its objective of ensuring a high level of protection for passengers'.

²² As regards the regular use by EU courts of judicial review 'as the medium through which to construe Community policy in a teleological manner so as to best attain its objectives', see P Craig, 'Institutions, Power and Institutional Balance', in *The Evolution of EU Law*, (n11) 41, 73.

²³ As a matter of principle, however, if no other interpretative method leads to a different conclusion from the one suggested by the textual analysis, the ECJ is 'not entitled to assume the role of the Community legislature and interpret a provision in a manner contrary to its express wording. It is for the Commission to submit proposals for appropriate legislative amendments to that end', regardless of the objective reasons put forward by the Commission and intervening Governments advocating an interpretation which was not consistent with the text (cases C-310/98 and C-406/98, *Met-Trans and Sagpol* [2000] ECR I-1797, para. 32). See in that regard the Opinions of Advocate General Léger in case C-350/03, *Schulte* [2005] ECR I-92, paras. 84-94 and Advocate General Colomer in case C-396/07 *Juuri* [2008] ECR I-8883, paras. 44-48, who suggested that it is necessary to take both words and goals seriously.

Most of all, it would promote uniform application throughout the Union – a corollary goal which should not be underestimated, particularly when the EU act concerns internal market law. Many problems potentially affecting the correct application of EU legislation could then actually be resolved without the need to resort to infringement proceedings. That would be in line with the principle of loyal cooperation to assist Member States ‘in carrying out tasks which flow from the Treaties’ (Article 4(3) TEU).

3. The limited role of recitals

Thirdly, in order to address the problem *ex ante* – *i.e.* in the law-making process – it is appropriate to make use of the preamble. But the EU legislator is expected to draft it accurately. Going back to the second example (in section B.2), recital (16) of Directive 2004/38 is probably the utmost the legislator can do. As noted above, the very obligation set out in the operative part of the Directive to take into account the specific situation of the person concerned, has been supplemented twice: once by means of a recital that substantiates the application of a proportionality test; and then the relevant details were subsequently clarified by the four-step approach suggested by a soft-law instrument.

As lawyers know, recitals are interpretative tools in the EU legal order (as in legal orders in general for that matter) that the ECJ refers to in a restrictive manner²⁴. In principle the ECJ does not give effect to recitals that are drafted in normative terms. Recitals can help to explain the purpose and intent behind a normative instrument. They can also be taken into account to resolve ambiguities in the legislative provisions to which they relate²⁵, but they do not have any autonomous legal effect:

²⁴ One interesting precedent is about the meaning of Directive (EC) 2000/78 that includes a number of ‘normative’ recitals with no corresponding substantive provisions in the operative part of the Directive itself. In that respect, the ECJ apparently sticks to the recital wording, but ultimately it does not expressly rely on the preamble (case C-267/06 *Tadao Maruko* [2008] ECR I- 1757, paras. 49 to 60).

²⁵ Case C-244/95 *Moskof* [1997] ECR I-6441, paras. 44-45. Recitals can help to establish the purpose of a provision (case C-173/99 *BECTU* [2001] ECR I-4881, paras 37-39) or its scope (case C-435/06 *C* [2007] ECR I-10141, paras. 51-52) But they cannot take precedence over those substantive provisions. ‘Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.’ (case 215/88 *Casa Fleischhandels* [1989] ECR 2789, para. 31). Moreover, ‘the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording...’ (case C-162/97 *Nilsson* [1998] ECR I-7477, para. 54. See also case C-412/93 *Edouard Leclerc-Siplec* [1995] ECR I-179, para. 47; case C-308/97 *Manfredi* [1998] ECR I-7685, para. 30; case C-136/04 *Deutsches Milch-Kontor* [2005] ECR I-10095, para. 32; case C- 110/05 *Commission v Italy* [2009] ECR I-519, Advocate General Léger Opinion, para. 64-65 (‘It is clear from settled case-law that ‘the preamble to a Community act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions

the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question.²⁶

Therefore, a recital cannot displace the operative provisions of a legal instrument. The rationale of the case-law appears to be based on the principles of legal certainty and legitimate expectations.

In a case concerning the interpretation of a consolidated legislative act, the ECJ, after having analyzed the content and purpose of the new text, stressed that a recital in the preamble to that text did not correspond to any of the provisions which it contained. Following the opinion of the Advocate General, the ECJ stressed that it was a mistake which was made when consolidating the earlier legislation, and held that a

recital cannot be relied upon to interpret Article 6(1) of Regulation No 822/87, as amended by Regulation No 1325/90, in a manner clearly contrary to its wording.²⁷

It is noteworthy that the Interinstitutional Agreement of 16 December 2003 on Better Law Making,²⁸ underlined the need to improve the quality of legislation and reiterated the EU institutions' commitment to the full application of the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation²⁹, stating *inter alia* that

The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations.³⁰

of the act in question or for interpreting those provisions in a manner clearly contrary to their wording³. In this case, neither of the recitals referred to by the Italian Republic is repeated in the actual body of the directives. And, as I have already emphasised in point 70 of my Opinion in the *Meta Fackler* case, although the preamble to a directive in principle may give the Court information as to the legislature's intention and the meaning to be given to the measure's provisions, the fact remains that, where a concept set out in a recital is not given concrete expression in the actual body of the directive, it is the terms of the latter that must predominate³.

²⁶ Case C-162/97 *Nilsson*, [1998] ECR I-7477, para. 54.

²⁷ Case C-308/97 *Manfredi*, [1998] ECR, I-7685, para. 30. Note that what is referred to in that case as "consolidation" of an act is now called "codification" in EU terminology. See also case C-136/04 *Deutsche Milch-Kontor* [2005] ECR I-10095, para. 32; case C-134/08 *Tyson Parketthandel* [2009] ECR I-2875, para. 16; case C-7/11 *Caronna* [2012] ECR I-0000, judgment of 28 June 2012, nyr, para. 40.

²⁸ [2003] OJ C 321/1.

²⁹ [1999] OJ C 73/1.

³⁰ Above fn. 29, 2, point 10 (emphasis added).

4. A proactive attitude from Member States

Fourthly, in order to tackle the problem of the complexity of EU legal texts – a difficult task as among others the recent ECJ ruling on the Directive on Data Retention proves³¹ – several suggestions could be made. One is the stricter application of the 1998 Interinstitutional Agreement which already provides that EU acts are to be drafted ‘clearly, simply and precisely’³² and that:

provisions of acts shall be concise and their content should be as homogeneous as possible. Overly long articles and sentences, unnecessarily convoluted wording and excessive use of abbreviations should be avoided.³³

It would also be worth exploring the possibility of improving the current interinstitutional legal framework on better law making, or of encouraging the Commission to pay more attention as to the clarity of provisions in the legislative process; the Council could be more sensitive to such an issue in its current practice³⁴ even in terms of enhancing the involvement of lawyers in the Working Groups³⁵.

But the purpose of this section of the article is not to dwell on institutional steps but to focus is on national experiences instead. The following suggestion is of a practical nature.

³¹ Although specific provisions of that Directive did not permit the retention of the content of the communication or of information consulted using an electronic communications network, on the basis of a systematic interpretative approach, including reference to recitals, the ECJ held that ‘it is not inconceivable that the retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication covered by that directive and, consequently, on their exercise of the freedom of expression guaranteed by Article 11 of the Charter’ (Joined cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* [2014] ECR I-0000, Judgment of 8 April 2014 nyr, para. 28).

³² Interinstitutional Agreement of 22 December 1998, point 1.

³³ *Ibid.*, point 4.

³⁴ Search for a compromise, namely among Member States, should not be done at any cost and the rotating Presidencies should pay close attention to the matter, with the help of the institutions’ legal services, as well as of the Member States’ lawyers. In other words, it does not seem unreasonable to argue that Article 11 of the Council Rules of procedure could be applied more strictly, possibly with the Commission’s help. This is not to say that the search for a consensual solution within the Council is inconsistent with the Treaties. After all, the qualified majority voting rule does not preclude the approval of a text with a larger consent. However, if the search for consensus is at the cost of adversely affecting the normative part of the text and ultimately raising an issue of legal certainty, that in itself creates a legal problem.

³⁵ G Sandström, (n 14), 1309. See also C Timmermans, ‘How Can One Improve the Quality of EU Legislation’ [1997] 34 CML Rev 1229-1257; ELH de Wilde, ‘Deficient European Legislation is in Nobody’s Interest’ [2000] EJLR 293-319; H Xanthaki, ‘The Problem of Quality in EU Legislation: What on Earth is Really Wrong’ [2001] 38 CML Rev 651-676.

At the transposition stage, a Member State might involve national staff who actively took part in the EU law-making process. For those staff – it can reasonably be assumed – have developed in the course of the negotiations a solid expertise both on the legal implications of the EU legal text and, above all, on its impact on domestic law. Those staff should in principle advise on the minimum required to effectively implement a Directive for instance, so as to avoid over-implementation and to advise when implementation goes beyond the minimum necessary to comply with it and the legislator starts approaching a *domaine libre*. As a matter of principle, national civil servants should be able not only to manage the interpretative issues flowing from the legal text being implemented, but also to pinpoint which part of the domestic legal order should be revised. Risks of infringements would in principle be reduced accordingly.

Being part of the national transposition team as advisers does not mean that those staff will be doing the actual drafting. However, to put it more generally it would appear to be a pragmatic solution to establish a close connection at national level between the personnel taking part in the drafting of an EU legal act (in the Italian jargon ‘fase ascendente’ or upstream phase) and the personnel engaged in the process of implementing that act (‘fase discendente’ or downstream phase). Linking the two phases so as to rely on the same national staff for advising on both appears to be a quite simple scheme to ensure better understanding of the EU legal texts and, where appropriate, to sound a warning wherever there is a risk of an infringement due to inadequate implementation. In addition, such a close link between negotiation and transposition would permit national authorities to draft transposition measures at an earlier stage – even immediately after the law-making process in Brussels is over³⁶.

A recent Italian reform is appreciated step in the right direction. In 2012, Italy approved Bill No 234 repealing previous statutes³⁷, and setting out comprehensive provisions on the participation of national authorities in the legislative and political activity of the EU’s institutions, as well as in the related implementing stage at national level³⁸. Article 20 has set up for the first time the

³⁶ That has been my personal experience when I was the legal advisor of the Italian Permanent Representation. In fact in 2007 I made that suggestion to the former Chief of Legislative Unit of EU Department for EU Affairs.

³⁷ See generally A Esposito, ‘La legge 24 dicembre 2012, n. 234, sulla partecipazione dell’Italia alla formazione e all’attuazione della normativa e delle politiche dell’Unione Europea. Parte I - Prime riflessioni sul ruolo delle Camere’, *Federalismi.it*, 2013, 2, 1; C. Favilli, ‘Ancora una riforma delle norme sulla partecipazione dell’Italia alla partecipazione e all’attuazione delle politiche dell’Unione europea’, *Rivista di diritto internazionale*, 2013, 701.

³⁸ According to its long title, Bill No 234/2012 provides for the fully fledged involvement of the parliamentary authorities which has been designed in full coherence, on the one hand, with the Italian Constitution, and on the other hand with EU principles of conferral, subsidiarity, proportionality, sincere cooperation, efficiency, transparency and participatory democracy. One of the most innovative parts of Bill 24 December 2012 No 234 is indeed Part II which provides a thorough involvement of the Italian Parliament in

‘Evaluation Unit of the EU legal acts’ to ensure ‘a more effective Italian participation in the law-making process of the EU and’ – what is important to stress here – ‘its careful implementation in the internal legal order’. It may be pointed out that the Evaluation Unit is composed of civil servants from the relevant departments who have the tasks of monitoring EU activities, contributing to the information to be given to the Italian Parliament and, significantly, assisting the members of the Committee of senior officials of the public administrations responsible for determining the Italian position in the making of EU law (Article 19). It is to be noted that pursuant to Bill No 234/2012, the national staff that follow negotiation in Brussels are involved in the drafting of a Report to be addressed to the Italian Parliament as to the content of the Commission’s legislative proposals. That report contains *inter alia* an impact assessment on the national legal order, as well as an initial transposition table (Article 6(4) and 6(5)), which is to be progressively updated³⁹.

Although in a quite indirect way and perhaps in a slightly bureaucratic manner, this legal framework appears to demonstrate that the suggestion to have one single Unit in charge for both ‘upstream’ and ‘downstream’ phases has been endorsed by Bill No 234/2012. It goes without saying that it is not *per se* a panacea, since its workability will depend on the national legislator and, most of all, on the timely adoption of the national legislative instruments to implement at domestic level EU secondary acts – *i.e.* ‘*legge europea*’ (‘*European Law*’) and ‘*legge delegata europea*’ (‘*Delegated European Law*’). In principle, however, it is worth noting that these two internal law instruments are theoretically designed to achieve transposition in an effective manner. The former sets out provisions for directly modifying, supplementing and repealing domestic legislation to

the legislative process of the EU. The new Bill establishes obligations to consult with and inform the Parliament (Article 4), including the international agreements concluded among Member States in financial, economic and monetary areas (Article 5). The objective is to effectively involve the Italian Parliament in the decision making process of secondary law before the Government adopts a position within the EU institutions (Article 6). In the same vein, the Italian Chambers may adopt formal instructions addressed to the Government, as well as parliamentary scrutiny reservations (Article 10). In short, any political or legislative activity of the EU, namely in the economic governance area, is currently subject to serious scrutiny control by the Italian Parliament. Implicitly the new Bill is also meant to inject into the EU system more democratic legitimacy through the Italian national system, much on the lines set out by the *Bunerverfassungsgericht* (BvR 987/10, 2 BvR 1099/10 e 2 BvR 1485/10) concerning the compliance of the German laws authorizing financial aid to Greece with Articles 38, 110, 115 and 14 of the *Grundgesetz*; see also the ruling of 28 January 2012 (on application 2 BvR 8/11). However, this will be realised only if the Italian Parliament has the strength to effectively scrutinize the Government. The Bill is indeed a step in that direction by providing all the necessary legislative tools.

³⁹ As noted by C Favilli, (n 37), 725, if it is taken seriously, the ‘revolutionary’ obligation to submit a Report to the Italian Parliament will have a positive effect on the so-called ‘fase discendente’, since it commits the competent administrations to deal with the EU law-making process in a systematic manner, and not only after it is over.

comply with EU binding instruments, including the ECJ rulings on infringements and international agreements concluded by the Union (Article 30(3)); the latter is deemed to confer a delegated power to the Government with a view to the transposition of directives and of decisions taken by the Union under the Common Foreign and Security Policy (CFSP) only (Article 30(2)) – that is to say EU legal instruments which require more systematic and coordinated transposition measures. In that respect, the Italian Government is committed to adopting the delegated acts at the latest two months before the deadline set out in the directives or the decisions (Article 31(1)). It is also worth noting that the Government has been given the power to modify, where necessary, the delegated act within 24 months of its adoption (Article 30(5)), even as regards the transposition of EU delegated acts aimed at supplementing or amending non-essential elements of the relevant directive (Article 31(6)).

As a result, Bill No 234/2012 decouples the former ‘Community Law’ (or ‘*Legge comunitaria*’) which was conceived as one omnibus tool. Overall, the domestic legislative process concerning transposition becomes much more flexible. Instead of having a single instrument, Italian authorities have several means at their disposal. That holds true particularly if one also considers the possibilities: (a) for the Parliament to approve where necessary *ad hoc* delegated powers to the Government (Article 34); (b) for the Government to transpose directives by means of regulatory and administrative provisions (Article 35), including for the purpose of implementing EU acts adopted by the Commission or the Council (Article 36); and finally (c) for the Parliament to approve urgent transposition instruments, specifically to bring to an end infringement procedures (Article 37).

D. CONCLUSION

In conclusion, there is no single, magic bullet to deal with the complexity of EU secondary law. Several suggestions could be adopted both at EU and national level to help remedy the problem. As suggested above:

- National judges and public officials should be well aware of the complex interpretative methods to be used concerning EU legal texts;
- EU institutions should be reminded that recitals are interpretative tools, but – as the ECJ clearly stated in its case-law – must not be drafted in normative terms;
- Stricter application of the 1998 Interinstitutional Agreement which already provides that EU acts are to be drafted ‘clearly, simply and precisely’, is highly advisable, though it could also be worth exploring the possibility of improving the current interinstitutional legal framework on better law making;
- Having in mind quite a recent Italian experience, a pragmatic solution is to establish a close connection at national level between the personnel taking part in the drafting of an EU legal act (upstream phase) and the personnel engaged in the process of implementing that act (downstream

phase). Linking the two phases so as to rely on the same national staff for advising on both appears to be a quite simple scheme to ensure better understanding of the EU legal texts and, where appropriate, to sound a warning wherever there is a risk of an infringement due to inadequate implementation. In addition, such a close link between negotiation and transposition would permit national authorities to draft transposition measures at an earlier stage.

National experiences may indeed be a valuable source of inspiration. To paraphrase a famous statement⁴⁰, do not ask what the EU institutions could do to guide national authorities when implementing a complex legal act, but each Member State should ask itself what it can do to achieve an effective result at home. In other words, Member States could be instrumental in mitigating the complexity of secondary law, to which sometimes they unfortunately contribute.

⁴⁰ In his inaugural speech in 1961, President John F. Kennedy urged American citizens to “ask not what your country can do for you - ask what you can do for your country”.

EFFECTIVENESS AS AN ASPECT OF QUALITY OF EU LEGISLATION: IS IT FEASIBLE?

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Abstract

The present article examines the concept of effectiveness in relation to European legislation. Effectiveness is a concern associated with European legislation since the early days of the internal market and one that is assuming increasingly disconcerting dimensions. However, in its existing understanding, effectiveness is almost exclusively linked to transposition, implementation and enforcement of European legislation by the member states and is not seen as an indicator of legislative quality that permeates the entire process of legislative design and drafting. This article maintains that the dynamic concept of legislative effectiveness is linked not only to the transposition and the implementation of legislation but primarily to choices of legislative design and drafting. The design and drafting of European legislation pose specific challenges to the capacity of legislation to achieve common minimum standards and results. These challenges are explored in detail by looking into the European Equality Directives (Directives 2000/78/EC and 2000/43/EC). This article concludes that effectiveness as a law making principle is not adequately reflected in the existing European law-making toolkit and a new approach is required that sets effectiveness at the 'heart' of the law-making culture and process.

Keywords

Quality of legislation; effectiveness; transposition; compliance; enforcement; Equality Directives.

A. INTRODUCTION: EFFECTIVENESS AS A CONCERN IN EUROPEAN POLICY AND LAW-MAKING

Law is a powerful symbol and tool of European integration. The effectiveness of European legislation initially became a concern in the process of building the internal market. The existence of common rules, enforced and applied in the same way in all member states was the cornerstone of a common market that would enable the free circulation of capital, goods and services: the effectiveness of European law was a necessary prerequisite for its completion¹. The effective application of legislation was the main factor that would enable individuals and

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¹ COM (85) 310 final, point 152.

enterprises to benefit from the possibilities offered by the internal market². In this context, effectiveness of legislation was associated with the transposition of (what was then) community law, its application and enforcement, notification procedures, the auditing of national enforcement measures and redress measures in cases of infringement. More than 20 years later, with the internal market being a reality, the ‘Europe 2020’ Strategy continues to connect the bottlenecks in the single market with the implementation and enforcement gaps of European legislation and places ‘Smart Regulation’ at the heart of its policy objectives. Effectiveness of European legislation remains a concern to the present day³, and an increasingly problematic one.

Effectiveness is a concept with multiple meanings in the European legal system. At a theoretical level, it is a general principle of the European legal order that derives from the primacy and direct effect of European law and requires the effective protection of community rights and their effective enforcement in national courts⁴. This overarching principle ‘patrols’ the borders and the relation between EU law and other norms and sets standards for national courts in meeting their obligations arising from European legislation⁵. This means that, in the multi-level European system, a fundamental understanding of effectiveness refers to *giving effect* to European legislation in member states’ legal systems. On another front, effectiveness is a pillar of good European governance⁶ that, together with openness, participation, coherence and accountability, must govern all EU actions. In this understanding, effectiveness is related to results. In this broad context, effectiveness is also at the epicentre of the discussions around the quality of European legislation. Good European legislation must be simple, *effective*, clear⁷ and, according to the Smart Regulation Agenda, ‘fit-for – purpose’⁸.

Ineffective legislation undermines the credibility of EU law, poses obstacles to the internal market and any other ‘European’ endeavour and introduces uneven standards and differing levels of protection across the EU. The increasing incidence of ineffectiveness has triggered a considerable strengthening in the ‘watchdog’ role of the European Commission and recourse to infringement procedures (Article 258 TFEU)⁹, references to the Court for non compliance with judgments (Article 260 TFEU), for late transposition of Directives (Article 260

² COM (93) 700 p. 69.

³ COM(2007) 502 final, p.1.

⁴ T Tridimas, *The General Principles of EU Law* (Oxford University Press, Oxford, 2nd Edn. 2009) 418.

⁵ M Ross, ‘Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?’ (2006) 31 *European Law Review* 476-498.

⁶ COM (2001) 428, p. 7.

⁷ COM(2002) 275 final; Interinstitutional Agreement on better law-making *OJ C321*, 31.12.2003, p. 1, point 25.

⁸ COM (2010) 543 final, point II; COM(2013) 686 final.

⁹ S Andersen, *The Enforcement of EU Law. The Role of the European Commission* (Oxford Series in European Law, Oxford University Press, Oxford 2012) 44-93.

para 3 TFEU)¹⁰, sanctions and fines. Yet, this approach does not appear to eliminate the problem¹¹. This makes one wonder whether the limited effectiveness of legislation has in fact different roots and is not, as currently believed, only an issue of transposition, enforcement and implementation of European legislation.

B. UNDERSTANDING EFFECTIVENESS OF LEGISLATION

Effectiveness is a primary expression of legislative quality that reflects the relationship between the purpose and the effects of legislation and expresses the extent to which legislation is capable of guiding the attitudes and behaviours of target populations to those prescribed by the legislator¹². Put in simple terms, legislative effectiveness expresses the extent to which a law can do the job it is intended to do.

Effectiveness is not an abstract concept. On the contrary, it is a feature of every legislative text. Effectiveness is the unique capacity of every law to achieve its purpose and this capacity is determined by its content, form and structure. More specifically it is dependent on four main elements¹³: the purpose of a legislative text, its substantive content and legislative expression, its overarching structure and its real-life results. Each of these elements has a distinct importance for effectiveness: purpose sets the benchmark for *what* legislation aims to achieve; the substantive content and legislative expression determine *how* the law will achieve the desired results and how this will be communicated to its subjects; the overarching structure determines how the new provisions interact with the legal system; and real-life results of legislation indicate *what has been achieved*. Looking at all these elements in conjunction, the coherence and consistency offers an overall picture of the effectiveness of a legislative text and of the main problems to it. Although reality might often have an impact on legislation, it is the content, the structure and the clarity of a legislative text that set the foundation of its effectiveness. If legislation has a clear purpose, rules and enforcement mechanisms appropriate to achieve this

¹⁰ Ibid, 96-121.

¹¹ M Smith, 'Enforcement, Monitoring, Verification, Outsourcing: the Decline and Decline of the Infringement process (2008) 33 European Law Review 777-802; W Voermans, 'Implementation of EU Enforcement Provisions: Between European Control and National Practice' (2008) 1 Review of European Administrative Law 83-97.

¹² H Xanthaki, 'Quality of Legislation: an achievable universal concept or an utopia pursuit?' in L Mader, M Tavares de Almeida (eds), *Quality of Legislation. Principles and Instruments* (Nomos, Baden – Baden, 2011) 80-81; H Xanthaki, 'On Transferability of Legal Solutions' in C Stefanou and H Xanthaki (eds) *Drafting Legislation: A Modern Approach* (Ashgate 2008) 17.

¹³ M Mousmouti, 'Operationalising Quality of Legislation through the Effectiveness Test' (2012) 6 *Legisprudence* 201; M Mousmouti, 'The 'effectiveness test' as a measure of legislative quality: equality in law, inequality in practice and quality in legislation' (DPhil thesis, University of London 2013) 235-242.

purpose, clearly, precisely and unambiguously expressed and defines a clear way to capture and evaluate its results, it is likely to succeed. Legislation that is unclear, too vague, unfocused is more likely to fail, partially or entirely.

Effectiveness of legislation is a concept that permeates the entire life cycle of legislation. It does not materialise magically but only if some complex ‘mechanics’ in the conceptualisation, the design, the drafting and the actual enforcement and implementation of the law have taken place. Therefore, despite the tendency to link effectiveness primarily to application and implementation of legislation, the concept has two –equally important- dimensions: a *prospective dimension* when the law is formulated and drafted and a *real-life dimension* when a law is implemented¹⁴. The former expresses the extent to which legislation is conducive to the desired regulatory effects (*can a law achieve the desired results?*) while the latter expresses the extent to which the attitudes and behaviours of target populations correspond to those prescribed by the legislator (*has a law achieved the desired results?*). The effort to appraise the effectiveness of any legislative text cannot look only at the way in which the text is implemented but needs to examine at the same time the design and the drafting of the text together with its application and results. How does this understanding of effectiveness apply to European legislation?

European legislation is different from national legislation in several ways. For one matter, legislative decisions are made at multiple levels and through the involvement of multiple actors (European institutions, member states, stakeholders, policy networks, individuals etc). Secondly, European law is mostly the result of diplomacy, negotiations conducted on political terms and compromise¹⁵ rather than ‘pure’ policy-making. This often results in legislation couched in political rather than legal language, deliberately vague to leave room for different approaches and different in form and style compared to national legislation. The distinctive features of European legal instruments are evident in the *sui generis* nature of Directives whose primary function is to determine the *result* to be achieved while leaving the form and method to the discretion of member states and national authorities¹⁶. In the European legal order, legislative action is required both by the European and the national legislator: the two are bound in a relationship of mutual dependence. In this ‘unique’ relationship, the former determines the results to be achieved and introduces the minimum standards to be adhered to, while the latter chooses the most appropriate ways and means to transpose European Directives and ensure their correct application and implementation.

¹⁴ Mousmouti, ‘The “effectiveness test”’ (n 13).

¹⁵ CWA Timmermans, ‘How to Improve the Quality of Community Legislation: the Viewpoint of the European Commission’ in A Kellermann, G Ciavarini-Azzi, S Jakobs and R Dayton-Smith (eds), *Improving the Quality of Legislation in Europe* (Kluwer Law International, The Hague, 1998) 41.

¹⁶ Article 288 of the Treaty on the Functioning of the European Union; J Dickson, ‘Directives in EU Legal Systems: Whose Norms Are They Anyway?’ (2011) 17 *European Law Journal* 194.

If legislative effectiveness is the result of legislative design and implementation, then both legislators (European and national) play an important –and distinct– role in the effort to make European legislation effective. The European legislator determines the end results and the standards to be achieved through a concrete set of rules and mechanisms set out in Directives. In turn, the national legislator legislates to transpose the European provisions correctly and do so in a way to achieve the required end results and make them effective in the legal culture and circumstances of a given member state. The study of the practice of transposing legislation shows that national legislators have devised over the years several ways, more or less creative, to transpose Directives in their legal systems¹⁷. Following a recent trend towards ‘clear’ transposition options, several legislators prefer to ‘copy-out’ rather than ‘re-write’ Directives¹⁸ and this makes the bond between the legislative choices of the European and the national legislator even more visible: many provisions drafted to function in the context of a European legal instrument may be transplanted, almost intact, in national legislation. Legislative effectiveness is therefore an issue that concerns equally the European and the national legislator and one where the legislative choices of the European legislator are increasingly important.

This dynamic relationship between the European and the national legislator, and the close link between European and national legislation, is not reflected in the existing understanding of legislative effectiveness in Europe. In the limited research conducted on this topic, the effectiveness of European legislation is understood as related exclusively to the compliance, enforcement and implementation of legislation¹⁹ and not to the quality of EU law-making as a whole. Non-compliance refers to the lack of implementation, application or enforcement, to pre- and post-litigation non-compliance, to legislative, executive and judicial non-compliance, and to defiance, evasion and benign non-compliance²⁰ and has multiple facets and reasons behind it²¹. It also refers to implementation, enforcement and impact and is understood to have at least seven distinct meanings: the enactment of EU policy into legislation; the implementation of Regulations; the transposition of Directives; the implementation of EU secondary legislation, or of national transposing or implementing legislation; the use of EU law by economic undertakings, other organisations and individuals; recourse to litigation in a national court based on

¹⁷ B Steunberg, W Voermans, *The Transposition of EC Directives: A Comparative Study of Instruments, Techniques and Processes in Six Member States* (University of Leiden 2006).

¹⁸ D Greenberg, ‘The ‘Copy-Out’ Debate in the Implementation of European Union Law in the United Kingdom’ (2012) 6 *Legisprudence* 243.

¹⁹ F Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 *Modern Law Review* 23

²⁰ *Ibid.*, 23

²¹ L Conant, ‘Compliance and what EU Member States Make of it’ in M Cremona (ed), *Compliance and the Enforcement of EU Law* (The Collected Courses of the Academy of European Law, Oxford University Press, Oxford, 2012) 1-30.

EU law; and the enforcement of EU law by national courts²². In all the above, and insofar as effectiveness is seen as a matter of transposition and implementation of European law, it is an issue for which member states are responsible and, usually, the culprits. Effectiveness as an aspect of quality in EU law-making and EU legislation does not appear to be a concern. Consequently, the role and the influence of the legislative choices of the European legislator are rarely examined or questioned.

Although there is no doubt that the implementation and enforcement of European law is often political and evokes sensitive institutional and political questions, this is not the only critical aspect of effectiveness. The prospective dimensions of effectiveness are equally important. This article examines effectiveness as an aspect of legislating and focuses in particular on the potential impact of legislative choices of the European legislator on legislative effectiveness. Rather than engaging in a theoretical analysis of this question, the article looks into the Equality Directives (the Racial Equality Directive -RED²³ and the Framework Equality Directive -FED²⁴), examines the four elements of effectiveness (purpose, means, overarching structure and results) and attempts to identify challenges they might pose to effectiveness.

C. THE EUROPEAN EQUALITY DIRECTIVES AND EFFECTIVENESS

Equality is a fundamental value of the European Union. Nowadays, equality and non-discrimination is a ‘value, a principle, an objective, a fundamental right, positive duty and a legal competence’²⁵ of the European legal system. A voluminous body of secondary legislation has developed in the course of three decades concerning ‘traditional’ grounds of equality legislation like equal pay, gender and nationality, but also, more recently, to cover grounds like race or ethnic origin in employment and occupation, social security, social advantages and education (RED) and religion or belief, disability, age or sexual orientation in employment and occupation (FED).

Equality legislation is an interesting case study for legislative effectiveness because it exemplifies the tension between the need for legislation to regulate complex social relationships and behaviours and the need to ensure effectiveness in a tangible and measurable way. Equality legislation presents a number of challenges for the European and national legislators: to translate abstract notions into law, to achieve coherent and comprehensive legal formulations, to choose appropriate implementation and enforcement mechanisms, to set clear rules, to make sure that vulnerable individuals can easily understand and enjoy their

²² Snyder (n 19) 19-56.

²³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin– [2000] OJ L180/22.

²⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

²⁵ M Bell, ‘Equality and the European Union Constitution’ (2004) 33 *Industrial Law Journal* 242, 244.

rights and at the same time to establish a framework simple, clear and sophisticated enough to address complex issues. The analysis that follows will focus on the choices of legislative content, design and style related to the elements of effectiveness: the purpose, content, overarching structure and results of legislation.

1. Purpose: the Objectives of the Directives

Conceptually, equality is not a straightforward matter. On the contrary, it can be understood in several different ways: as ‘formal’ equality that reflects the Aristotelean premise of treating likes alike and differences differently; as substantive equality concerned with achieving specific outcomes rather than ensuring a fair process or as equality of opportunity that attempts to equalize the starting point for individuals rather than remedy unfairness²⁶. Equality has been characterized as an ‘empty idea’ whose content is contextual²⁷ and is thus highly dependent on surrounding values of the legal system. The question on the meaning of equality is not theoretical: instead, it is crucial for defining the ultimate objectives of equality legislation. European primary law does not clearly state whether it aims to achieve formal equality, equality of opportunity, substantive equality or combinations of the above in different areas of life. Rather, an answer to this question has come from the European Court of Justice over the years²⁸.

As already mentioned, the ultimate goal of Directives is to determine a common *result* to be achieved by the member states. Within the context set by the Treaties, how is this expressed in the Equality Directives? What is their specific purpose? What is the common result that they aspire to achieve? As is now common practice in European legislation (although not reflected in current drafting rules)²⁹, both Directives include specific purpose provisions: Article 1 of the FED states that ‘the purpose of this Directive is *to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment*’. Along the same line, Article 1 of the RED states that ‘the purpose of this Directive is *to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment*’.

²⁶ S Fredman, *Discrimination Law* (Clarendon Law Series, Oxford University Press, Oxford, 2002) 7-11.

²⁷ P Westen, ‘The Empty Idea of Equality’ (1982) 95 Harvard Law Review 537, 548

²⁸ Tridimas, *General Principles of EU Law* (n 4) 418.

²⁹ Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions, Guideline 13.

These almost identical purpose statements include two parts: the first part expresses the aspiration to ‘lay down a framework for combating discrimination’ which corresponds to the role of Directives to introduce common minimum standards of protection in member states. However, the Directives go a step further to refer to the objective of *putting into effect* the principle of equal treatment. What does that mean? According to a substantive interpretation, the reference to *effective* equal treatment points towards substantive understandings of equality³⁰. From a different viewpoint however, could this reference point towards the intention of the legislator to go beyond minimum standards to an expectation of minimum common results? Could this be an indication that the Equality Directives aim to ensure that European citizens should have a *real and effective*, as opposed to a formal, opportunity to be treated equally? Is this the result to be achieved by them?

There is no obvious answer to these questions. The Preamble to the Directives does not provide information to illuminate the result to be achieved. The Commission’s initial proposals on the other hand³¹ were very realistic with regard to their purpose: the RED aspired towards a ‘community wide definition’ of discrimination on the grounds of racial and ethnic origin, the delineation of the scope, the minimum level of protection and rights to redress; and arrangements for monitoring discrimination³². The proposal on the FED aspired to establish a community framework of general rules of protection against discrimination. These statements seem to assume that the existence of common definitions of discrimination and the delimitation of their scope of protection coincide with the end purpose of the Directives. Is that true? Is the purpose of the Directives fully achieved by the formal transposition of their provisions in national legal orders? Or is the end result a broader, policy-oriented, goal?

The vagueness detected in the overall purpose of the Equality Directives is confirmed also with regard to specific provisions, one example being age discrimination. Age is one of the prohibited grounds in the FED and, unlike other discrimination grounds, differences of treatment are allowed if they are objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary (Article 6 FED). The criteria for determining legitimate aims are not specified in the respective provisions. Accepted differences in treatment are a thorny issue for equality law, especially with regard to direct discrimination and need to be very restrictively applied. Recital 23 of the FED makes clear that differences in treatment can be considered justified ‘in very limited circumstances’. However, most cases on age discrimination decided by the Court of Justice revolve around the permissible justifications for the legitimate use of age as a differentiation criterion and demonstrate a tendency to bring subject matter under permissible exceptions

³⁰ D Schiek, ‘A New Framework on Equal Treatment of Persons in EC Law’ (2002) 8 European Law Journal 295.

³¹ COM (1999) 566 final.

³² COM (1999) 565 final.

rather than re-examine the use of age-related criteria in legislation³³. For example, in *Mangold*³⁴, the Court of Justice ruled that a legitimate policy aim (to promote the employability of older people) cannot be considered appropriate and necessary to attain the objective expressed in the legislation if it relies on age as the *only* criterion³⁵. In *Palacios* however, the use of age-related criteria in pension age limits in collective agreements was considered justified as it did not rely solely on age³⁶, while a strict objectivity test for the use of age-related criteria and a direct link between the use of age-related criteria and the objectives pursued by legislation were required in *Age Concern England*³⁷ and in *Huetter*³⁸. In *Petersen*³⁹ the Court acknowledged that maximum age limits, although not considered appropriate and necessary in that specific case, could have been justifiable if the purpose of the legislation had been different. In *Wolf*⁴⁰, the Court accepted a proportionate use of age-related criteria in order to promote rational policy goals at national level while in *Kucukdeveci*⁴¹ a rigid age criterion was not justified because it affected young employees unequally. If the interpretation of legislation is an effort to illuminate the purpose of legislation, this increasing body of case law suggests that the age discrimination provisions of the FED are more oriented to provide protection from ‘unjustified age discrimination’ rather than age discrimination in general⁴². Is this, however, the purpose of the age discrimination provisions in the FED? Does the provision serve a different purpose from the one stated in the Directive? Or is the stated purpose, which allows exceptions only in very limited circumstances, too restrictive compared to what the legislator had in mind? Either way, this ambiguity affects the way in which the specific provisions are transposed and applied at national level.

Defining a clear purpose of legislation is of primary importance for making it effective. Implicit purposes require deductive reasoning in trying to determine ex-post what a law is there to achieve. Purposes that are too broad or too narrow cannot direct interpretation and implementation to the desired results and the law might be manipulated in different directions. Explicit purposes have a number of

³³ M Sergeant, ‘The European Court of Justice and Age Discrimination’ (2011) 2 Journal of Business Law 144.

³⁴ Case C-144/04 *Mangold v Helm* [2005] ECR I-9981; L Waddington, ‘Recent Developments and the Non-Discrimination Directives: Mangold and more’ (2006) 13 Maastricht Journal of European and Comparative Law 365.

³⁵ *Mangold*, para 65.

³⁶ C-411/05 *Palacios de la Villa* [2007] ECR I-8531 paras 44, and 73-75, cf Recital 14 FED.

³⁷ C-388/07 *Age Concern England* [2009] ECR I- 1569.

³⁸ C-88/08 *Huetter* [2009] ECR I-5325 para 48

³⁹ C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I- 47 para 78

⁴⁰ C-229/08 *Colin Wolf v Stadt Frankfurt am Main* [2010] ECR I-1.

⁴¹ C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG*. [2010] ECR I 365 , para 42

⁴² cf Sergeant, ‘The European Court of Justice and Age Discrimination’ (n 33) 147-8.

advantages for the implementer, the judge and the subjects of the legislation. Especially European legislation serves as a set of ‘drafting instructions’ for member states. A purpose statement that does not make the common ‘European’ result to be achieved clear makes it harder for the 28 national legislators to legislate in the correct direction and for the European and national courts to interpret legislation. In the example of the Equality Directives, the stated purpose of *putting into effect the principle of equal treatment* raises more questions than it answers and does not provide a clear and unambiguous benchmark for what the legislation sets out to achieve.

2. Content: Legislative and Drafting Choices of the Equality Directives

The ‘heart’ of legislation lies in its content. Selecting rules based on their potential to bring about the desired results, determining appropriate enforcement mechanisms and setting rules that are clear, precise and easily understood are fundamental tasks in legislating. They determine *how* the law will achieve its results and communicate rights and obligations to the subjects of legislation.

European equality legislation puts in place a multi layered regulatory and enforcement strategy. The Equality Directives include prohibitions of distinct forms of discrimination, positive measures, obligations to impose sanctions, duties to disseminate information, to promote social dialogue, dialogue with civil society, self-regulation and preventive measures. Further, they include proactive measures like mainstreaming that make equality a guiding value in decision and law-making. In terms of ‘rationale’, equality legislation is built around two complementary pillars: the prohibition of different forms of discrimination (direct and indirect discrimination, harassment, instructions to discriminate, Art. 2 FED, Art. 2 RED) and the obligation for positive duties or affirmative action (Art. 157(4) TFEU, Art. 7 FED, Art. 5 RED) that require a broader redefinition of concepts and institutions in an inclusive way. The combination of negative and positive duties expresses an approach to the phenomena that goes beyond reactive to proactive stances and efforts to tackle discrimination through combined means.

Further, equality legislation incorporates a multi-layered enforcement and implementation strategy. Enforcement is based on an individual complaints-led model that relies on individual litigation combined with traces of a group-justice model (reversal of the burden of proof, possibility for organizations to intervene in litigation)⁴³ and proactive measures (mainstreaming) that introduce change in an ex-ante, rather than ad hoc, manner. The Directives include specific provisions on enforcement (Arts. 9-12 and 17 FED, Arts. 7-9 and 12 and 15 RED) and provide for the establishment of specialized equality bodies to promote equal treatment (Art. 12 RED). This multi-layered enforcement strategy represents a consistent effort to respond to the complex issues involved.

⁴³ M Bell and L Waddington, ‘Reflecting on Inequalities in European Equality law’ (2003) 28 *European Law Review* 349.

A central issue in the complex conceptual design of the Equality Directives is the legal formulation of equality and the prohibited grounds of discrimination which are fundamental for understanding the nature and scope of protection that equality legislation offers.

The legal concepts of the Equality Directives did not always reflect clear legislative choices. In fact, several concepts developed ex-post rather than ex-ante and were integrated in legislation after being ‘fertilised’ in case law. Some of them were the result of influences from the Court of Justice (direct and indirect discrimination), soft law (harassment) or of obscure origin (instruction to discriminate) as they never featured in the policy agenda⁴⁴. Further, the legal formulations of equality legislation have not always been clear and unambiguous. Direct and indirect discrimination suffered from multiple inconsistencies that have been gradually ‘aligned’ and ‘corrected’ through the interpretative intervention of the Court of Justice and ‘recast’ efforts. Conceptual confusions are now fewer, but they still exist, for example, in the definition of indirect discrimination⁴⁵; concepts like harassment (Art. 2(3) FED, Art. 2(3) RED) and instruction to discriminate (Art. 2(4) FED, Art. 2(4) RED) are not defined while uncertainty prevails when it comes to positive duties (Art. 157(4) TFEU, Art. 7 FED, Art. 5 RED). Besides the theoretical controversy on the compatibility of positive action with discrimination law, the concept and the nature of positive action is not defined, leaving considerable vagueness with regard to its function and nature as an obligation, as a right or as an exception to the principle of equal treatment⁴⁶ and leaving the question to the Court of Justice. Overall, the legal formulations of equality, despite the fact that they have gained in clarity, certainty and coherence over recent years, present a mix of some concepts with a determined content and others with an ‘open’ or flexible one. Whether this flexibility was deliberate, whether it shows lack of clarity in addressing the issues in question or whether it responds to the need to ensure adaptability, it is an issue that directly affects not only the way that these provisions will be transposed, the common understanding of the minimum standards introduced, the role of member states in giving concrete content to

⁴⁴ K Ahtela, ‘The Revised provisions on Sex Discrimination in European Law: A Critical Assessment’ (2005) 11 *European Law Journal* 74, 59.

⁴⁵ C Barnard and B Hepple, ‘Substantive Equality’ (2000) 59 *Cambridge Law Journal* 583; S Fredman, ‘Combating Racism with Human Rights: the Right to Equality in S Fredman (ed), *Discrimination and Human Rights. The Case of Racism* (Oxford University Press, Oxford, 2001) 24-25.

⁴⁶ S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, Oxford, 2008) 9-31; C. O’ Cinneide, ‘Positive Action and the Limits of Existing Law’ (2006) 13 *Maastricht Journal of European & Comparative Law* 351; D Schiek, ‘More Positive Action in Community Law Case C-409/95, *Marschall v Land Nordrhein-Westfalen* (1998) IRLR 39 (ECJ)’ (1998) 27 *Industrial Law Journal* 155; D. Schiek, ‘Positive Action in Community Law. Case C-450/93, *Kalanke v Freie Hansestadt Bremen* [1995] IRLR 660; [1995] ECR1-3051; [1996] ICR 314 (ECJ)’ [1996] 25 *Industrial Law Journal* 239.

these formulations but also their overall effectiveness in the sense of their capacity to offer adequate protection and achieve a set of desired results.

Another important issue relates to the scope of equality legislation. The Equality Directives cover very diverse subject matter that touches upon broad issues like race, disability etc and reflects an effort to transfer material from the social sphere to the domain of law. Highly controversial grounds, such as race and ethnic origin, religion or belief and sexual orientation are left open by the Directives. Further, conceptual and drafting choices pose a number of questions. For example, reference to both religion and belief in the FED suggests a difference between the two concepts. On the other hand, it is not clear whether related concepts, like philosophical or political beliefs, are covered, whether the Directive protects recognised religions or all religions, or whether the freedom not to have a religion falls within its scope⁴⁷. In the same vein, the Directive does not define the broad concept of sexual orientation beyond a vague reference to any discrimination ‘whatsoever’ (Art. 2(1) FED). Similarly, neither disability nor reasonable accommodation (Art. 5 FED) nor disproportionate burdens are defined, although some indications are provided in the Preamble of the FED (Recitals 20 and 21).

The lack of definitions, especially in the case of disability, was addressed in the case *Chacon Navas*⁴⁸, where the Court acknowledged that an ‘autonomous and uniform’ European definition of disability would guarantee uniform treatment across Europe⁴⁹. Despite the inherent problems of defining disability, the Court formulated a definition that received severe criticism for being incompatible with the disability policy of the EU⁵⁰ and for introducing standards difficult to deviate from⁵¹. In fact, the Court did no more than pose a fundamental question related to the function of the Directive: how can it ensure minimum standards of protection across the EU if the content of basic notions is not clear? Apart from the substantive question of whether a definition of disability is necessary, desirable or possible, from the viewpoint of legislative design, the meaning and scope of any other prohibited discrimination ground in equality legislation is critically linked to the scope of the law.

⁴⁷ D Schiek, L Waddington and M Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Ius Commune Casebooks for the Common Law of Europe, Hart Publishing, Oxford and Portland, 2007) 103-121; L Vickers, ‘Religious Discrimination in the Workplace: an emerging hierarchy?’ (2010) 12 *Ecclesiastical Law Journal* 280.

⁴⁸ C-13/05 *Chacon Navas v. Eures Colectividades SA* [2006] ECR I- 6467.

⁴⁹ Opinion of the Advocate General in *Chacon Navas*, paras 57, 64, 65: ‘The persons to be protected and the delineation of the functional limitations to be considered must not vary. Otherwise, the protection afforded by that prohibition of discrimination would vary within the Community’.

⁵⁰ COM (2010) 636 final.

⁵¹ L Waddington, ‘Case Comment on C-13/05 *Chacon Navas v Eures Colectividades SA*, judgement of the Grand Chamber of 11 July 2006’ (2007) 44 *Common Market Law Review* 487-499.

There is no doubt that the conceptual design of the Equality Directives is a well intentioned and well articulated effort to respond to the complex phenomena of discrimination. However, the sophisticated structures of equality legislation are ‘weakened’ by the fluid and abstract content of central legal formulations of the Directives. Although this can be seen as a ‘realistic’ approach that reflects the intricacies of European legislation by abstaining from difficult definitions, leaving margin for accommodating diverse approaches and transferring the issue to the national courts and ultimately the Court of Justice, it raises several questions with regard to the minimum protection offered by European legislation, the circumstances under which the law will be interpreted, and the degree to which these choices allow equality legislation to be effective.

3. Overarching structure and consistency of the protection offered by the Equality Directives

European equality legislation is complex, both in structure and content. It consists of a multiplicity of provisions in primary and secondary law, not to mention soft law, programming documents, financing mechanisms etc. Complex ‘patchworks’ may often raise issues of consistency in the protection offered but also in the direction in which behaviours are directed. It is not rare, and this might not always happen in an obvious way, that legislative measures may try to direct behaviour in opposing directions. For example, when one set of legislative provisions offers incentives to a specific vulnerable group to stay in the labour market while another set of provisions offers motives to apply for early retirement, these contradictions often result in legislation failing to meet its goals. Coherence is an important feature of effective legislation. The Equality Directives were drafted in parallel and are relatively well aligned in terms of definitions and basic concepts. They do introduce, however, hierarchies in the normative density of the provisions as well as substantive hierarchies in the protection among the different grounds. Some grounds receive more attention than others (sex discrimination rating ‘first among equals’⁵²), some have broader scope (race and gender), while others allow exceptions (religion and age) or imperatively require positive measures (disability). This diverse framework involves horizontal and vertical hierarchies of protected grounds and protected individuals. Although these differences are not necessarily unjustified and hierarchies of protection are not necessarily a wrong approach⁵³, they do raise issues of consistency with the underlying concept of equal treatment and the protection offered. Neither the concept of equal treatment nor the overall policy

⁵² L Waddington, ‘Article 13EC: Setting Priorities in the Proposal for a Horizontal Employment Directive’ (2000) 29 *Industrial Law Journal* 176; L Waddington and M Bell, ‘More Equal than Others: Distinguishing European Union Equality Directives’ (2001) 38 *Common Market Law Review* 587.

⁵³ E Howard, ‘The Case for a Considered Hierarchy of Discrimination Grounds in EU Law’ (2006) 13 *Maastricht Journal of European & Comparative Law* 445.

or objectives of legislation, or the underlying policy, indicate that such an approach is desirable and deliberate.

Beyond issues of consistency, this complex framework leaves several sensitive or complex matters unregulated. For example, there is no indication of the relation between the different prohibited grounds and interrelated grounds, for example race or ethnic origin and religion or nationality, closely related prohibited grounds, such as race and religion, or the relation between consolidated grounds and other non-consolidated ones, for example colour or language that could be considered to be covered by already consolidated prohibited grounds⁵⁴. On the other hand, non-discrimination legislation in its current state provides limited solutions for complex issues, such as added or multiple discrimination or intersectional discrimination.

Overall, although the consistency of the Equality Directives does not seem to be a problematic issue, there are several points of tension between the provisions of the Treaty and of the Charter of Fundamental Rights as well as in coherence of the provisions of the Directives and their alignment with the case-law of the Court. Improvements have certainly been achieved, but the ambiguities have not been altogether eliminated.

4. Results: what have the Equality Directives achieved?

Evaluating the results of legislation, especially European legislation, is neither simple nor straightforward. The results of legislation have been relatively overlooked in comparison to other stages of the legislative process. However, awareness is growing of the fact that legislation is a ‘shot in the dark’⁵⁵ unless there is information on its implementation, its results and effects and the ways in which it operates in real life. Legislative evaluation is the only way to ensure a consistent appraisal of the responsiveness of the law to the regulated problems and phenomena.⁵⁶

The Equality Directives review the implementation of legislation through specific reporting obligations and specifically the obligation of the Commission to report every five years on their application (Art. 19 FED, Art. 17 RED). These provisions do not make clear however whether they refer to the transposition of the Directives, their application in practice or to the broader results. The reports published so far give a confusing picture as they refer indiscriminately to transposition, enforcement, application and, in some cases, also to broader effects.

⁵⁴ E Howard, ‘Anti-Race Discrimination Measures in Europe: An Attack on Two Fronts’ (2005) 11 *European Law Journal* 468.

⁵⁵ H Schäffer, ‘Evaluation and Assessment of Legal Effects Procedures: Towards a More Rational and Responsible Lawmaking Process’ (2001) 22 *Statute Law Review* 132.

⁵⁶ COM(2013) 686 final.

The first Commission report on the application of the RED in 2006⁵⁷ noted the variety of practices in the member states. It affirmed the importance of information and dissemination for the effective protection from discrimination and highlighted the limited information available on how this obligation is fulfilled. Despite the limited time since the transposition date, the report identified as a key challenge for effective transposition the setting up of mechanisms for observing and reporting on the impact of measures including statistics. The first Commission report on the application of the FED in 2008 highlighted aspects that were ‘particularly problematic or important’⁵⁸. It noted: the limited number of cases brought before courts; the lack of definitions; the interrelation between prohibited grounds; and the trends of the case law. The conclusions of the report were often contradictory: for example, it concluded that legislation on age discrimination is ‘effectively brought into line with Directive’ although ‘most of the previous rules on age distinctions remain in place’. (If existing distinctions remain, what has then been the impact of the age discrimination provisions?) Further, it noted that the Directive did not lead to litigation and that additional obstacles hinder access to justice, including low awareness of rights. Despite these findings, the overall conclusion was that transposition ‘can be considered a success overall’ and that challenges existed only in enforcement. The last joint report by the Commission on both Directives was published in 2014⁵⁹. It acknowledges that the transposition of non-discrimination rules has been achieved and all necessary procedures and bodies are in place. However, there is limited information on how legislation is applied in practice. Some of the challenges identified suggest that real-life results are relatively poor: low awareness of existing protection, significant variations in the role and effectiveness of equality bodies and need for better implementation and application of the Directives in order to ‘realise the full potential ... in terms of protection of the fundamental right to equal treatment in the EU’. Overall, the implementation reports offer more a picture of the transposition options rather than the overall achievements of Equality legislation.

The reports on the implementation of the Equality Directives confirm the indeterminate nature of this reporting. In all cases, they refer to the transposition and implementation problems or achievements but do not investigate broader impacts or results. In fact, they do not even attempt to connect the information collected to the purpose of the Directives. They focus just on procedural aspects and although the information on how legislation is transposed is invaluable for monitoring the application of legislation, they provide no answer to the question whether the Directives have indeed succeeded in putting into effect the principle

⁵⁷ COM (2006) 643 final; S Burri and S Prechal, ‘The Transposition of Recast Directive 2006/54/EC’ (2009) Report for the European Network of Legal Experts in the Field of Gender Equality (*Europa Website*, February 2009) <http://ec.europa.eu/justice/gender-equality/files/2009reportrecastdirectivefinal_en.pdf> last accessed 6 January 2015.

⁵⁸ COM (2008) 225 final/2.

⁵⁹ COM(2014) 2 final.

of equal treatment. In some way, the reports appear to assume that the purpose of the Directives is fulfilled by the mere fact of correct transposition of the provisions of the Directives. These reports, at least in their current form, are useful as an account of transposition options but not as a tool for appraising the effectiveness of legislation.

In October 2013 the European Union Agency on Fundamental Rights issued an opinion on the situation of equality in the EU 10 years on from the implementation of the Directives⁶⁰. That opinion sought to ‘assess the effectiveness of the EU equality Directives’ making use of data from surveys and other studies. One of the main conclusions was that the Equality Directives have not automatically led to positive results on the ground and that discrimination remains a reality for many Europeans. Effective implementation is hindered, among other issues, by the limited awareness of rights by people at risk, obstacles in accessing justice, the lack of statistical data, its limited use in policy analysis and the actual function of the *acquis* as a minimum standard. Among other issues, the opinion highlighted the need for a ‘dedicated follow-up’ of legal obligations and the need for structural indicators (legislative and institutional), process indicators (policies and actions plans) and outcome indicators (survey and complaints data) to measure the ‘fundamental rights temperature’ on the ground.

This brief account shows that little is in fact known about the results and effects of the Equality Directives beyond transposition. Ten years after their transposition date, there is no attempt to examine whether the Equality Directives managed to ‘put into effect’ the principle of equal treatment. In fact, only a partial answer can be provided: while there is no doubt that results have been achieved at the level of legal remedies, it is obscure whether or what results have been achieved in real life. This lack of information does not allow an appraisal of the effectiveness of the Directives.

D. EUROPEAN LEGISLATION AND EFFECTIVENESS: THE MAIN CHALLENGES

The foregoing analysis highlights a number of issues that emanate from the way in which European legislation is conceptualized, designed and drafted (and the compromises behind each of those choices) and affect its effectiveness, as an aspect of legislative quality. It is now clear that looking only at the ‘real’ dimensions of effectiveness, in other words the way legislation is transposed, offers a limited picture of the problems that need to be remedied. Legislative effectiveness is primarily the result of choices made in the design and drafting of

⁶⁰ European Union Agency for Fundamental Rights, ‘Opinion of the European Union Agency for Fundamental Rights on the Situation of Equality in the European Union 10 Years on from Initial Implementation of the Equality Directives’ (FRA Opinion – 1/2013) <http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf> last accessed 6 January 2015.

legislation and this is an essential point on which the effort to improve the effectiveness of legislation needs to focus. This case study, despite its limited scope, highlights a number of issues relevant to legislating that have an impact on the effectiveness of European legislation.

The first set of challenges pertains to the clarity of the overall purpose of European legislation. Directives aim to introduce common results and guide the member states towards their achievement through minimum common standards. In other words, they serve as common ‘drafting instructions’ for all member states. However, these results are rarely explicit. Although most Directives include purpose clauses, these do not make the common result sought explicit in a way that can clearly guide their transposition, interpretation and implementation. Purpose clauses appear to play a secondary rather than substantive role and, at least in this case, prove to have a limited contribution to the correct transposition, interpretation and application of European law. On a more abstract level, it is rarely clear whether the common result of the Directives is achieved through the transposition of the provisions in all member states or whether it extends beyond the level of legal remedies. The 30 years of sex equality legislation have not led to the elimination of violence, the equalisation of pay or the creation of a gender-balanced workforce or gender-neutral workplaces. The Directives have however led to the potential for equal pay, the possibility to address structural inequalities, the development of national law, opportunities to challenge policy and interpretative choices of institutions⁶¹. Achievements can be approached at the level of possibilities and legal remedies but also at the level of real life results. What is the measure of achievement of European legislation? Making this result clear and explicit, and using the purpose clauses of the Directives to this end, could contribute to the effectiveness of European legislation and would facilitate both its transposition, enforcement, implementation and interpretation at all levels, whether European or national.

The second set of challenges pertains to choices of design and drafting of European Directives. Many new concepts of European law are introduced through definitions or other legal formulations. Definitions are a common, and often indispensable, part of Directives that set out the ‘European’ semantic content of new concepts. Often definitions are too broad or are left open-ended, reflecting either a lack of consensus on their content, the wish to leave room for different approaches or capitalising on the advantages of obscurity⁶². In other words, definitions might have a determined content or an indefinite one. Although this is a relatively common (and realistic) legislative practice, especially in the European context, the need to ensure *minimum* and *equal*

⁶¹ T Hervey, ‘Thirty Years of Sex Equality Law: Looking Backwards, Looking Forwards’ (2005) 12 Maastricht Journal of European and Comparative Law 323; S Prechal, ‘Equality of Treatment, Non Discrimination and Social Policy. Achievements in Three Themes’ (2004) 41 Common Market Law Review 533-551.

⁶² K Schiemann, ‘The advantages of obscurity: the drafting of EU legislation and judgments’, presentation at IALS on June 13th 2013.

standards of protection across the EU raises a valid question with regard to this choice, especially when it concerns concepts essential for the fulfillment of the purpose of legislation. In the opposite case, member states can adopt very different standards. This has the further implication that, through the trend towards ‘copy-out’ transposition options, many of these vague definitions may end up almost intact in national legislation. And although this might make ‘formal’ transposition evident, it does not necessarily promote legislative effectiveness. Although it is clear that Directives do not always aim to harmonise national legislation in the member states, it is important from the perspective of legislative effectiveness to ensure that the minimum standards, the rules and the basic concepts introduced by European legislation are sufficiently clear.

A third set of challenges pertains to the limited effort invested not only in collecting information on the results of Directives but also in identifying the progress achieved in practice and the degree of achievement of the purpose of legislation. Existing reporting obligations on the Commission are primarily oriented to monitoring the transposition and application of legislation rather than to identifying broader outcomes and results. In other words, the focus lies on whether and how European legislation became effective in member states rather than whether it has been effective in the sense of producing the desired results. If the purpose of legislation is considered fulfilled the moment it has been correctly transposed, then this might make sense. If not, and if there is a need to look into possible discrepancies between legislative provisions and the actual protection offered on the ground or if there is an interest in understanding what European legislation has actually achieved, then this is clearly insufficient and more analytical effort is required. At the moment, there is no mechanism or process that collects information on the broader impacts of legislation and attempts to connect it to its purpose.

E. THE WAY FORWARD: HOW CAN THE EFFECTIVENESS OF EUROPEAN LEGISLATION BE IMPROVED?

As already discussed, to this moment, the understanding of effectiveness of European legislation is oriented towards transposition, enforcement, compliance and implementation and ignores effectiveness as an aspect of legislative quality. Results (beyond transposition) are not an evident concern in European law-making. Legislative effectiveness, as the capacity of the law to achieve its results, is not an express concern in the law-making process and toolkit. Although effective legislation is positioned at the centre of the European understanding of quality of legislation, this is evident neither in the Smart Regulation agenda nor in Impact Assessments as the main tool used to assist policy and law-making. The new emphasis on evaluation⁶³ indicates some increased awareness of the weak link between the design and the implementation

⁶³ COM(2013) 686 final p. 5.

of the law but does not link this to national legislation and the need to consider effectiveness as early as possible in the drafting process.

Effectiveness does not happen by magic. It requires a consistent effort throughout the life cycle of legislation. Effectiveness is a principle that can meaningfully connect the different phases of the life-cycle of legislation (design, implementation, evaluation) and the different levels of legislating (EU and national) but it should be the subject of special attention when legislation is designed and drafted. The Smart Regulation agenda, with its justified focus on results, views effectiveness as an issue linked to the implementation and the evaluation of legislation and ignores its 'proactive' dimensions. Existing tools, and especially Impact Assessments, are expected to deliver effective legislation, even if this is not adequately reflected in the options set out. However, effectiveness cannot materialise, unless it is a clear concern in the entire life cycle of the law. The challenges identified previously cannot be solved by ad hoc practices, but only by making effectiveness a guiding principle in the law-making process and culture to which the Smart Regulation agenda and tools contribute.

A new focus on effectiveness as a principle guiding law-making would consequently shed a different light on the specific features of European legislation examined in this article. Firstly, on clear statements of what is sought through European law. Whether through clear and well formulated statements of purpose or substantive indicators of achievement and results, effective legislation needs to be associated with clear benchmarks that that can meaningfully guide transposition, interpretation and implementation and can later be revisited, verified and refined through evaluation. Explicit purposes can allow flexibility to member states to achieve the desired results rather than engage in formalistic transposition that ignores the reality on the ground. Secondly, substantive choices, usually examined in Impact Assessments, as well as choices of legislative expression must be made bearing in mind their potential to bring about results. Impact assessments are not useful only for identifying the cost and benefits of available options but also their prospects to be effective. Thirdly, reporting and evaluation requirements should be planned in a way to provide adequate knowledge on the results and effects of legislation, and should be complemented by analytical data on the real life results of legislation. Ex-post impact assessments and evaluations should be used to assess the degree of achievement of the objectives of legislation in the member states.

QUALITY OF LEGISLATION: FOCUS ON SMART EU AND POST-SMART TRANSPOSITION

Helen Xanthaki*

Abstract

This article explores legislative quality under the Smart Regulation framework, and critically assesses the further challenges of transposition after Smart. The prism through which the topic is viewed is solely legislative drafting, also expressed in civil law jurisdictions as law-making techniques. The standard by which EU legislation and national transposition measures are to be quality assessed is effectiveness of EU and national legislation defined as their ability to produce the desired regulatory results.

Keywords

Effectiveness; transposition; Smart Regulation.

A. INTRODUCTION

The EU's long engagement with legislative quality is characterized by a struggle to accommodate a multitude of national legal systems, legal and spoken languages, and legislative styles; and to bring them all under a harmonised umbrella of ever-changing aspirations of integration. It does not help the cause that these aspirations do not always find sympathy in all of the Member States. This uniquely multi-faceted, almost impossible, legislative process is nurtured through principles and rules of legislative quality set mostly as abstract and uncodified general principles of law some of which are scattered in self-regulatory, non-binding instruments: from Sutherland's criteria for legislative quality in 1992 to Simpler Legislation for the Internal Market of 1996, then to the 1998 Inter-institutional Agreement on common guidelines for the quality of drafting of Community legislation,¹ Inter-institutional Agreement on Better Lawmaking,² then to Better legislation, and then finally to Smart Regulation.³

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¹ OJ EU 1999 C73/1.

² OJ EU 2003 C321/1.

³ COM(2010)543.

Better Regulation in the EU focuses on administrative burdens, legislative scrutiny, reducing the number of legislative instruments, and emphasizing the shared responsibility of the EU and Member States. Smart Regulation, introduced as the successor of Better Regulation, looks at the whole life cycle of legislative texts: design, implementation, enforcement, evaluation, and revision. It follows Stefanou's identification of the drafting process as a part of the legislative process, which is a part of the policy process.⁴ It confirms that EU regulation is a shared responsibility of the institutions and Member States. And it affirms the need for in-depth consultation. Focus is placed on the simplification of EU law via the reduction of administrative burdens beyond the expected 25 per cent cut in red tape by 2012; evaluation of law effectiveness and efficiency *ex ante* via fitness checks on key areas (environment etc.), and via strategic general policy evaluations; selection of the 'the best possible' legislation through Impact Assessment, improvement of implementation record via post-legislative scrutiny, SOLVIT, and EU Pilot; and achieving clearer and accessible legislation via simple language, codification, recasting, and e-access.

B. A SMART EU?⁵

So, can Smart Regulation finally succeed where all its predecessors have failed? Can it actually nurture good, effective EU legislation that can offer successful production of the desired regulatory results pursued by EU policies?

There is little doubt that Smart sets smart goals that, in principle, can service effectiveness and thus quality of EU legislation. But, as is often the case with the EU, it is only when one delves deeper into the details of the initiative and the methods to be employed for the achievement of these smart principles in practice that doubt is cast on the extent to which they do actually serve legislative quality.⁶

Simplification of EU law is indeed a wonderful goal. But, when viewed through the prism of effectiveness, simplification cannot be limited to the reduction of administrative burdens. If the goal is to produce legislation that is simple, and therefore readily legible for the users, it must extend to simple, clearly spelt out policies, so that the user can understand what regulatory reform is pursued, assess whether the reform can be served by the proposed EU text, discuss whether the legislative text can produce the desired regulatory results,

⁴ C Stefanou, 'Drafters, Drafting and the Policy Process' in C Stefanou and H Xanthaki, *Drafting Legislation: A Modern Approach* (Ashgate Aldershot 2008) pp. 321–333.

⁵ For a fuller analysis of this issue, see H Xanthaki, 'The Problem of Quality in EU legislation: What on Earth is Really Wrong?' [2001] *CML Rev* 38, 651–76; H Xanthaki, 'EU Legislative quality post-Lisbon: the challenges of Smart Regulation' [2014] 35 *Statute Law Review* 66–80.

⁶ For a full presentation of my critique to Smart Regulation, see H Xanthaki, 'Implementation of EU legislation' Oral Evidence, Public Hearing at the Legal Affairs Committee of the European Parliament 'Better Regulation' Hearing, Brussels, 21 June 2011.

and ultimately evaluate *ex post facto* whether the legislative text has actually succeeded. Simplification is a multi-level concept that applies to policy choices, to the selection of the appropriate regulatory means, to the legislative expression, to the choice of enforcement methods, to the national implementing measures, and of course to the tools for pre- and post-legislative scrutiny. Without simplifying all of the above, simplification is an empty promise. And, in fact, without all of the above, so is the reduction of administrative burdens: citizens will always require specialist advice on the interpretation of complex policies, laws, enforcement mechanisms, and national implementing measures.

Similarly, evaluation of law effectiveness and efficiency *ex ante* is a fantastic initiative in theory. But can it be achieved simply via fitness checks and general policy evaluations? But before even getting there, what is effectiveness and efficiency anyway? There is no definition of effectiveness and efficiency of legislation in any of the EU documents produced under Better and Smart Regulation. There isn't even an agreed set of goals that can apply when assessing which law is effective and which is efficient. In actual fact the terms are used widely, often interchangeably, without any attempt to identify their semantic elements even at an abstract level. And so there are no concrete standards against which EU legislation is to be assessed, *ante* or even *ex post facto*. This is especially crucial since effectiveness and efficiency carry different semantic concepts within each of the Member States. Thus, there is a dire need to ensure that the criteria for effectiveness of any piece of legislation are agreed upon by policymakers, law experts, and legislative drafters and that they are clearly expressed in the legislation itself via perhaps their inclusion in a purpose clause or an objectives article. These can then be carried through to post- legislative scrutiny and then utilized to confirm effectiveness, thus allowing the text to continue its legislative life. It is worth noting that effectiveness and efficiency cannot be applied as generic terms, they acquire concrete meaning by reference to the regulatory results pursued by means of each specific legislative text: and so setting out the specific parameters of these notions is necessary for, and actually greatly enhancing of, any real pursuit for legislative quality in the whole life cycle of the legislative text as a regulatory tool.

Moreover, Smart does not deal with the fate of ineffective or inefficient legislative texts. If such a deficiency is discovered at the pre-legislative scrutiny stage, will the Commission go back to the drawing board and redesign the text, assuming that legislation is indeed proven to be the appropriate regulatory tool in this case? If the deficiency is discovered at the post-legislative scrutiny stage, can the legislation continue to live by means of appropriate amendments or will it suffer a short death by use of a repeal or sunset clause? And in these decisions, does legislative quality really prevail or does parliamentary realism kick in, thus pushing to keep ineffective legislation alive simply because defective law is allegedly better than no law? And of course effectiveness and efficiency are not the goals of EU texts alone: national

transposing measures play a huge part in effectiveness and efficiency of the regulatory and legislative package. Smart fails to address this altogether.

With specific reference to efficiency, it is unclear whether that refers to a mathematical exercise involving financial cost or whether social and other impacts must be calculated towards the reduction of burdens, or indeed how these can be calculated. And how the evaluation of efficiency of the whole legislative package, including transposition measures, can be compiled and assessed.

The improvement of the implementation record is a third worthy point of reference for Smart Regulation. But once again, one has to distinguish between the aim itself and the proposed methods for its achievement. Can implementation be improved solely via the proposed post-legislative scrutiny, availability of SOLVIT, and the EU Pilot on clarification and assistance with the application of EU legislation? Improving implementation is again a multi-faceted issue that includes guidance on the definition of complete transposition for new and aspiring Member States, as well as older ones; clear guidance on the definition of legislative quality in EU drafting and transposition; and specialised professionals, including as behavioural analysts, policy analysts, and of course trained specialist drafters working side by side with the EU's lawyer linguists.

The fourth Smart principle is the choice of 'the best possible' legislation. But this extends far beyond the suggested Smart Impact Assessments, clearer and accessible legislation, simple language, codification, recasting, and e-access. In a legislative environment where there is no definition and no criteria for what is good legislation, there is no precise basis upon which the best possible legislation is to be selected. And so selecting the best possible legislation requires a holistic approach to effectiveness, the setting of a hierarchy of drafting principles, the specialist drafting training of specialist drafters working with policy officers and lawyer linguists from the Commission at the EU level and specialist drafters working at the national level.

And so, much like in many EU policies, the regulatory framework for EU legislative quality is a puzzle of fragmented principles introduced rather cryptically in texts of political compromise. And, consequently, what is still missing from this lengthy grapple with EU legislative quality is a comprehensive set of concrete standards by which EU legislative texts are classified as good or bad laws. This state of affairs is not out of line with the legislative quality debate at the national level. There is still disagreement both amongst practitioner drafters and in academe as to what constitutes a good law. Effectiveness is the prevalent theory.⁷ In the joint effort of all actors in the legislative process for efficacy of regulation in the sense of the achievement of the desired regulatory results, legislative texts achieve quality when they are able to lead to these

⁷ H Xanthaki, 'Quality of Legislation: An Achievable Universal Concept or a Utopian Pursuit?' in MT Almeida (ed) *Quality of Legislation* (Nomos Baden-Baden 2011), pp. 75–85.

regulatory results. A good law is one that is capable of leading to efficacy of regulation. There is nothing technical at this level of qualitative functionality: what counts is the ability of the law to achieve the reforms requested by the policy officers. And, in view of the myriad of parameters that are unique in each dossier, there are no precise elements of quality at this level. If anything, this qualitative definition of quality in legislation as synonymous to effectiveness respects and embraces the subjectivity and flexibility of both drafting rules and conventions and, ultimately, of phronetic legislative drafting. Is this qualitative functional approach to legislative quality synonymous with legislative anarchy? Of course not; principles are well accommodated in the fight for effectiveness. Cost-efficiency, clarity, precision, and unambiguity are principles that when applied, at least in the majority of cases, make good laws. But each dossier carries subjective choices, and it is the qualitative nature of effectiveness as a definition for quality that can accommodate and nurture these choices under the flag of regulatory efficacy.

The great advance of the EU's current strategy is that legislation is finally viewed within the umbrella of regulation. This sets it in its right place in the process but also introduces the idea of measurable and reviewable legislative quality. But by turning the focus of attention from legislation to regulation, the EU seems to have forgotten about legislation altogether, somehow trying to simply wish away the continuing problems of legislative quality.

What is even more disappointing is the 2020 Agenda for Europe, where not only Better Regulation but also Smart Regulation is ignored: the EU seems to be moving away from Better Regulation and Smart Regulation on to a strategy for growth and competitiveness. It is very difficult to understand what this means. One is tempted to look at the purpose clause of Better and Smart Regulation. Removing barriers to businesses and rendering them competitive against non-EU enterprises, rather than pursuing legislative quality, are the expressly stated purpose of these agendas. It is precisely this aim that is repeated, and even more clearly expressed, in the 2020 Agenda for Europe. And so it seems that the EU has clumsily missed a unique opportunity to finally balance its focus of attention to both businesses and citizens. While the former enjoy the fruits of Better Regulation, Smart Regulation, and the 2020 Agenda for Europe, citizens are still facing the same issues of confusion stemming from the multitude of bad EU laws (not tackled by SLIM, as they did not relate to small and medium enterprises) and bad regulation (not tackled by Smart Regulation because administrative burdens were not applicable). This imbalance may well have been intentional. After all, growth and competitiveness is a policy focused on businesses only. But how can this be justified within the focus on citizen and citizenship expressed clearly in the Treaty of Lisbon? How can it be accommodated within the emphasis on social equity for EU citizens so eloquently professed in the Treaty of Lisbon, which declares the passage from the Internal Market to a forum of citizenship, international justice, and peace? It is precisely this new legal basis under Lisbon that one can use to promote legislative quality further. The challenge is to go back to Better Regulation and

Smart Regulation and assess their success from the point of view of the citizens using the Treaty's citizenship concept as a focus. Transferring the focus from businesses to citizens would tint the picture of effectiveness of these three regulatory initiatives with much darker colours because the amount of work that remains in order to make EU legislation and EU regulation palatable is daunting. But it is absolutely necessary.

C. SMART TRANSPOSITION?⁸

It would be naïve to profess that this dark picture of superficial legislative quality at the EU level has no consequences on the transposition of EU legislation by national authorities. In fact, the relationship between EU legislative quality and national legislative quality is rather amphidromous. On the one hand, bad EU legislation makes the pursuit of legislative quality at the national level an almost impossible task: national drafters are faced with the additional challenge of a bad basis upon which they are called to draw for the purposes of legislating internally on the issue at hand. But on the other hand, the bad quality of national implementation measures feeds back into the already bad EU measure that it attempts to implement, thus burdening it even further with additional drafting problems. And the circle of deficiency in the legislative framework continues and, in the form of non-implementation or partial implementation, feeds into regulatory and ultimately policy deficiencies.

The link between bad EU laws, bad national laws, and bad regulation is not difficult to establish. If the EU is viewed as a 'goal regulator'⁹, full compliance includes 'appropriate policies by national agencies, and even appropriate behaviour by street-level bureaucrats delivering services to citizens'.¹⁰ Implementation is a middle concept that includes enforcement. And transposition is the technical task of regulating for the purposes of implementation that invites compliance. And so non-compliance means non-implementation or implementation outside the scope of the implementing EU measure or partial implementation of the EU measure. This points to bad national laws that fail to invite implementation. And bad national implementing laws damage the legislative package of EU legislation as a whole. To quote Jordan, whilst analysis of transposition is important, implementation is more important, as the success of a policy is ultimately judged by its impacts 'on the ground'.¹¹

⁸ For the complete analysis on this topic, see Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation*, (forthcoming 2014, Hart Publishers, Oxford).

⁹ See P Westerman 'Breaking the circle: goal-legislation and the need for empirical research' [2013] 1 *The Theory and Practice of Legislation* 385, 397-398.

¹⁰ See R Thomson, R Torenvlied and J Arregui, 'The Paradox of Compliance: Infringements and Delays in Transposing European Union Directives' (2007) 37 *British Journal of Political Science* 685, 686; also see E Versluis, 'Even Rules, Uneven Practices: Opening the "Black Box" of EU Law in Action' (2007) 30 *West European Politics* 50.

¹¹ See A Jordan, 'The Implementation of EU Environmental Policy: A Policy Problem without a Political Solution?' in A Jordan (ed.) *Environmental Policy in the European*

Having dealt with this argument from the perspective of EU legislation let us now turn to the quality of transposition measures, especially post Smart. To fully appreciate the problem, it must be stated that the task of transposition is rather complex from a quantitative point of view: the sheer number of binding instruments that require transposition suffices to demonstrate the volume of the task.¹² In addition to the quantitative difficulty of accession and membership, from a quantitative perspective transposition is a multifaceted issue. When transposing, the drafter's autonomy is restricted in terms of choosing the subject and the scope of the national legislation.¹³ Even evaluation of transposition is a complex task, as it requires a detailed understanding of the relevant domestic legal systems and laws. Assessment of practical implementation is an even more difficult task, as it involves broader questions of policy, many and varied administrative acts, and other issues.¹⁴

First, the dynamism of the *acquis*, especially when soft law is taken into account, signifies that the goalpost for transposition is inevitably being moved further away as time passes.¹⁵ Every new EU legal instrument, every new judgement of the European Courts, and every international agreement signed by the EU is added to the body of rights and obligations that form part of the *acquis* and that Member States must receive in their national legal order. Thus, national drafters and legislators require constant updates in the definition and delimitation of their concept of the *acquis*.¹⁶ Second, EU instruments differ from the form of national, and international, legal measures. This renders the understanding of their legal value, their degree of bindingness, and the depth of their enforcement requirements a rather complex task.¹⁷ Third, the terminology used in EU

Union: actors, institutions and processes (London, Earthscan, 2002), 301; also see A Jordan, 'The Implementation of EU Environmental Policy: a Policy Problem without a Political Solution?' (1999) *Environment & Planning C: Government and Policy* 69.

¹² See J O'Reilly, 'Coping with Community Legislation – A Practitioner's Reaction' (1996) 17 *Statute Law Review* 15, 16.

¹³ See G Maneva, 'Drafting for Accession: Bulgaria's Way to Success' (2005) 7 *European Journal of Law Reform* 111, 120.

¹⁴ See R Macrory, 'The Enforcement of Community Environmental Laws: Some Critical Issues' (1992) 29 *Common Market Law Review* 347, 355.

¹⁵ See R Wainwright, 'Techniques of Drafting European Community Legislation: Problems of Interpretation' (1996) *Statute Law Review* 7, 9.

¹⁶ The problem is becoming more pronounced as increasingly emphasis is placed on the use of alternative regulatory instruments, including self-regulation, co-regulation, open co-ordination, benchmarking, peer pressure, networks, standardization and soft law: see L A J Senden, 'Soft Law and Its Implications For Institutional Balance in the EC' (2005) 1 *Utrecht Law Review* 77.

¹⁷ Even lists in annexes of EU Directives must be transposed either expressly or in preparatory work in national implementing measures; see Case C-478/99, *Commission of the European Communities v Kingdom of Sweden*, [2002] ECR I-4147.

instruments tends to have an idiosyncratic meaning¹⁸ with connotations that differ from those awarded to the same term in the national laws of Member States.¹⁹ The identification of the elements of the concept utilised in the *acquis* and the nuances of variation with the national concept adds a layer of extra difficulty to the task of adequate and full transposition. Fourth, as legislative texts are intertwined, the *acquis* may enter into aspects of national law that are outside the fields of regulation covered by the EU. In order to achieve the desired task of full reception and compliance without undue distortion to the national legal system, transposition must take into account the legal system as a whole, thus requiring amendments to all of its fields.²⁰

In view of these complexities, how can transposition be achieved in practice? In responding to the task, from an exclusively legal point of view²¹, national authorities are faced with dilemmas concerning the choice of the type of national implementing legislative measure and dilemmas related to the means that can achieve quality of the national implementing legislation. The final decision concerning the means to be used for the achievement of transposition rests with the national authorities under the principle of autonomy. But this is balanced by the equally important principles of subsidiarity, proportionality, adequacy, synergy and adaptability that bind both EU institutions and Member States.²²

And so subsidiarity²³ calls for an economy of approaches and an economy of measures: national authorities may proceed with legislation only where other

¹⁸ See S Chalton, 'The Transposition Into UK Law of EU Directive 95/46/EC (The Data Protection Directive)' (1997) 11 *International Review of Law Computers and Technology* 25, 27.

¹⁹ See TA Finlay, 'Community Legislation: How Big a Change for the National Judge?' (1996) 17 *Statute Law Review* 79, 80.

²⁰ See Wulf-Henning Roth, 'Transposing "Pointillist" EC Guidelines Into Systematic National Codes— Problems And Consequences (2002) 10 *European Review of Private Law* 761.

²¹ At the domestic level, the *choice of national legislative instrument* is also a political one and individual ministerial styles affect this choice: see D G Dimitrakopoulos, 'The Transposition of EU Law: "Post-Decisional Politics" and Institutional Autonomy (2001) 7 *European Law Journal* 442, 450.

²² See J A Usher, 'The Reception of General Principles of Community Law in the United Kingdom' (2005) 16 *European Business Law Review* 489, 495. The requirements flowing from the protection of general principles recognised in the Community legal order are also binding on Member States when they implement Community rules: see Case C-107/97, *Criminal Proceedings against Max Rombi and Arkopharma SA, the party liable at civil law, and Union federale des consommateurs "Que Choisir ?" and Organisation generale des consommateurs (Orgeco), Union departementale O6*, [2000] ECR I- 3367, para. 65; see also Case 145/88, *Torfaen Borough Council v. B & Q plc.*, [1989] ECR 3851; 24 *Shrewsbury and Atcham BC v. B & Q*, [1990] 3 CMLR 535; C-20/00 and C-64/00, *Booker Aquaculture v. The Scottish Ministers*, [2003] ECR I-7411.

²³ See European Commission, Report from the Commission 'Better Lawmaking 2004' Pursuant To Article 9 Of The Protocol On The Application Of The Principles Of Subsidiarity And Proportionality (12th report), COM (2005) 98 final and SEC (2005) 364,

levels and forms of regulation are not efficient²⁴; and, if legislation is indeed the most efficient means of regulation within the parameters of the specific Member State, national authorities must take the lightest legal forms in the hierarchy of normative measures. The principle of proportionality²⁵ ensures correspondence between the national authorities' choice to legislate and the aim that the proposed legal instrument seeks to achieve,²⁶ and, in the event of legislation, between the choice of form of the national implementing measure and its purpose.²⁷ Adequacy balances subsidiarity and accentuates proportionality, albeit expressed in the negative form: it calls for means of regulation and legislation that can achieve the effect pursued; and as a result it can only be secured post hoc through a prospective evaluation of the proposed law.²⁸ Synergy promotes a holistic approach of the law on a concrete social phenomenon, thus ensuring that the new instruments falls smoothly into place upon its entry into force and that it combines its forces for the achievement of the aim of legislation on the social phenomenon in question. And adaptability requires flexibility in the choice of the appropriate instrument; it enhances subsidiarity and proportionality, but is thankfully balanced by adequacy and synergy, thus nurturing the concepts of experimental legislation or legislation in stages.

Brussels, 21.03.2005, at 2; also see G Davies, 'Subsidiarity: The Wrong Idea, In The Wrong Place, At The Wrong Time' (2006) 43 *Common Market Law Review* 63, 67; B Rodger and S Wylie, 'Taking The Community Interest Line: Decentralisation And Subsidiarity In Competition Law Enforcement' (1997) 18 *ECLR* 485; K Lenaerts, 'The Principle Of Subsidiarity And The Environment In The European Union: Keeping The Balance Of Federalism' (1994) 17 *Fordham International Law Journal* 846; N Farnsworth, 'Subsidiarity – A Conventional Industry Defence: Is The Directive On Environmental Liability With Regard To Prevention And Remedying Of Environmental Damage Justified Under The Subsidiarity Principle?' (2004) 13 *European Environmental Law Review* 176.

²⁴ Nevertheless, the UK tends to over-implement EU law: see J O'Keeffe, 'Making a Silk Purse Out of a Sow's Ear' (2006) 103 *Law Society's Gazette* 14.

²⁵ See Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, 1148; see also The Law Society, 'EU Better Law-Making Charter', Better Law-Making Programme 5 (2005).

²⁶ When there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued: see Case T- 54/99, *max.mobil Telekommunikation Service GmbH v. Commission of the European Communities*, [2002] ECR II-313, para. 81; see also Joined Cases C-133/93, C-300/93 and C-362/93, *Crispoltoni and Others*, [1994] ECR I-4863, para. 41.

²⁷ See G De Burca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105; also see J Jans, 'Proportionality Revisited' (2000) 27 *Legal Issues of European Integration* 239.

²⁸ Where the legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question. See Case C-150/94, *United Kingdom v. Council*, [1998] ECR I-7235, para. 49; Case T- 54/99, *max.mobil Telekommunikation Service GmbH v. Commission of the European Communities* [2002] ECR II-313, para.84.

It would be fair to state that, despite the vagueness of the task involved in the transposition of the *acquis* and the EU's avoidance of offering guidance, there are identifiable principles for complete transposition. Transposition in practice is a complex task both from a quantitative and a qualitative point of view. But in their autonomous drafting choices national authorities must utilise the five tests of regulatory and legislative subsidiarity, proportionality, adequacy, synergy, and adaptability. These dictate the choice made on the basis of the extent of legislative intervention required for full transposition; the type of the main EU instrument for reception; and the object of the national implementing measure. In fact, the application of the five tests demolishes the simplistic correlation between particular forms of EU legislation with national forms: Regulations often do require transposition via national law, and Directives may not always require transposition. Each EU legal instrument must be considered *ad hoc* in the light of prior national legislation. This treatment requires accurate knowledge of the *acquis*, extensive experience in the workings of the national legal system and skills for the adaptation of the latter to the former.

However, complete implementation of the *acquis* from a substantive law point of view does not suffice for successful transposition. The quality of national implementing measures, pronounced since 1997, is equally important for the achievement of national implementing laws that are efficient, effective and enforceable, in other words that comply with both the Copenhagen and the Madrid criteria for accession. Drafting rules concern the substance of the legislative text, the legislative process leading to their adoption and technical drafting issues. As for the substance of the legislative text, legislation must be: an essential and effective means of achieving the aim of the EU instrument under transposition; proportionate to the aim to be achieved; and consistent with the national statute book. For the legislative process, national implementing measures must respect the principles of subsidiarity, openness, transparency and cost efficiency. And on the technical side of drafting, national implementing measures must be clear, unambiguous, and precise. And capable of leading to effectiveness of national regulation and, as a member of the implementing collective²⁹, to effectiveness of EU regulation. This excludes the use of the 'copy out' technique³⁰ that is now used as standard even in the UK³¹. Drafters must

²⁹ See L J O'Toole Jr, 'Multi-organizational Policy Implementation: Some Limitations and Possibilities for Rational Choice Contributions' in F W Scharpf (ed.), *Games in Hierarchy and Networks: Analytical and Empirical Approaches to the Study of Governance Institutions* (Frankfurt am Main/Boulder, Colo., Campus Verlag/Westview Press 2003) 27.

³⁰ See L Ramsey, 'The Copy Out Technique: More of a "Cop Out" than a Solution?' (1996) 17 *Statute Law Review* 218; also see National Audit Office, 'Lost in Translation? Responding to the challenges of European law', HC 26 Session 2005-2006, 26 May 2005; Cabinet Office Regulatory Impact Unit, 'Transposition guide: how to implement European directives effectively, 2005'; L Etherington, 'Digging Beneath the Surface: Transposition, Implementation and Evaluation of European Environmental Law' (2006) *Journal of Environmental Policy and Planning* 107.

recognise that elaboration, as opposed to copy out, is necessary for the effective transposition of an EU legislative instrument that introduces rights or obligations in an unclear or imprecise manner; that demands the creation of a criminal offence; or that involves sub-delegation via its application by administrative authorities. Finally, from the perspective of the UK post devolution, it is necessary to pitch the text to the right legislative authority.³²

Where does Smart fit in with all this? Smart fails to address the issue of alternative regulation altogether. In the pursuit of effective and efficient laws leading to better implementation, the focus remains on an expectation for national legislative measures that will copy the EU measure verbatim. Their advantage seems to be that they carry a numbered title that can be neatly placed next to the EU measure in the ever popular implementation tables, and can then comfortably be ticked as a good example of transposition in implementation reports and scoring. This invites and nurtures a technical and superficial approach to transposition that damages the cause of legislative quality at the national and ultimately at the EU level. Indeed, Member States have extreme difficulty³³ in making a legitimate and objectively plausible case for a refusal to proceed with legislative regulation on the basis of national intricacies.³⁴ Even in the choice of national implementing regulatory measures, selection is limited exclusively to legally binding national forms of legislative texts. Similarly, the choice of type of national implementing legislative instrument is limited in executive versus primary legislation, with executive or delegated legislation having the advantage of a quick and practicable transposition fix. But delegated legislation cannot commonly respond to the need for legal regulation in the cases of lack of former regulation at the national level, as – by definition – lack of prior regulation signifies lack of a primary instrument that would introduce the necessary authorising or enabling clause. As a result, primary legislation would be required for proportionate and adequate regulation. And this need cannot be filled by means of legal sophistry that pronounces the Accession Treaty as an adequate enabling clause for the purposes of all delegation for transposition. The same principles apply in the case of prior national regulation that is archaic or in radical and direct conflict with EU law. In these cases the options available for

³¹ See HM Government, ‘Guiding Principles for EU Legislation’, BIS/13/774, 2013, point 5.

³² For a detailed discussion see A Ross, H Nash and C T Reid, ‘The implementation of EU environmental law in Scotland’ (2009) 13 *Edinburgh Law Review* 224.

³³ In Case C-327/98, *Commission of the European Communities v. French Republic*, [2000] ECR I- 1851, paras. 22-23, the ECJ held that national difficulties in transposition was not a plausible excuse for not passing implementing measures.

³⁴ National legislation is needed even when the activity regulated by the EU instrument does not take place in the member state: see Case C-441/00, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, [2002] ECR I-4699; see also Case C- 214/98, *Commission v. Greece*, [2000] ECR I-9601, at para. 22. However, national legislation may not be needed when the EU instrument is pointless for reasons of geography; see Case 420/85, *Commission v. Italy*, [1987] ECR 2983, para.5.

national implementing measures are limited to the passing of a core law supplemented by delegated legislation dealing with technical and administrative details. It is of course true that in cases where there is prior national legislation in the field under transposition, national authorities tend to have a wider selection of options: but even these have to be justified by means of a technical and superficial approach to transposition nurtured by Smart as an initiative that fails to focus on the effectiveness of legislation as a product. And the result of these issues is that, in turn, this fallacy of national legislative quality contributes to the fallacy of regulatory success both at the national and ultimately the EU level thus regurgitating the pre-Smart state of affairs. In this respect Smart seems to stand opposite subsidiarity and proportionality both in their legislative and legal forms. Similarly, Smart seems to be fighting against adaptability as the principle would require a more flexible approach to transposition both in the choice of non-legislative national regulatory choices but also in the choice of non-traditional legislative choices.

Of course there is an argument in the conviction that from a regulatory point of view, at least in theory, the five tests of subsidiarity, proportionality, adequacy, synergy and adaptability have already been met, and a decision to proceed with legislative regulation has been made at the EU level. Similarly, the level of legislative form selected by the EU has already taken into account the legal basis of the instrument but also the order of the selected form in the hierarchy of sources of EU law. And so, the argument continues, the EU instrument under transposition has already passed, at least in theory, the five tests. Under this thinking it is inevitable that the choices of EU institutions in the EU legislative process direct, even delimit, the choices of national authorities in the national legislative process for the introduction of implementing measures.³⁵ But this line of argument does not apply from the quality perspective. The argument fails to take into account that all the application of the five tests at the EU level is made with reference to the EU regulatory, legal, and legislative environments, not those of each of the Member States. And so the tests actually do need to be replicated at the national level in order to apply the Member States' regulatory, legal, and legislative parameters. Their intricacies may well justify a completely different conclusion and consequent course of action to that of the EU.

Nevertheless, it must be accepted that Smart does enhance, in principle, adequacy and synergy by demanding more post hoc evaluation of legislation and further strategic approaches to legislation at the EU level. These Smart goals strive for a focus to the whole life cycle of the legislation, and promote ex ante and post hoc evaluations, which are the main means of achieving adequacy of regulation and adequacy of legislation. The problem though is that holistic strategic approaches to legislation cannot be blindfolded exclusively into ex ante and post hoc impact assessments: simply put, the measures on their own cannot

³⁵ See J-L Sauron *L'Application du Droit de L'Union Européenne en France* (Paris, La documentation française, 2000) 40.

lead to the goal. The inadequacy of Smart means to reach these plausible Smart goals reflects also in the case of transposition, and limits the quality of the national legislative product too. Which, in turn, feeds back into the bad quality of the EU measure. It must be noted that *ex ante* and *post hoc* impact assessments are excellent tools in identifying errors in the transposition of EU legislation. However, on their own and as undertaken at the moment, they only address limited regulatory issues not legislative issues and only at the EU level rather than at the transposition level.

And so transposition is not in any better shape after Smart. Smart misguides transposing Member States into a legislation-oriented regulatory package that creates all good practices for its evaluation without actually setting real quality standards against which the assessment is to be made and without looking at the quality of legislation as a product at all. This is not a novel conclusion: it is simply a replication of the conclusions from the evaluation of Smart in the first part of this article. The aggravating factor with transposition, however, is that Smart lies at loggerheads with three of the five accepted principles of legislative quality in transposition, whilst still failing to guarantee the other two in practice.

D. HELP ME OUT!

EU legislative texts are growing in number and volume. There is little doubt that legislative quality for EU citizens as well as companies must be brought back into the focus of the EU as a regulator. Smart has failed to offer focus on EU citizens. Of course, rebalancing the legislative focus towards citizens rather than companies is easier said than done. It is a task that requires strategic political will on behalf of more than the Commission as a policy actor. Holistic policy goals setting rational and non-clashing strategic policy goals must be set, all leading to a distinct policy and ideology agenda. And responsibility for the effort to achieve this lies with the European Parliament, the European Commission, and the European Council, in that order. Fragmentation and opportunism of regulation may be inevitable in an expanded Europe: but history has proven that the short-term victory of a new legislative text, such as for example the unfortunate European Evidence Warrant, is a recipe for ineffectiveness, non-implementation, and - often but unfortunately not always - repeal and re-regulation by another legislative text. Delimiting the phenomenon of fragmented and opportunistic regulation is a task of the Commission. As is the task of redirecting the agenda to legislative quality, not instead of, but alongside Smart.

EU laws are special. And they require special treatment. As they tend to be the result of negotiations and compromises that render them acceptable within the wide family of laws and traditions hosted within the EU, they cannot be viewed as complete regulatory documents: they invite and require supplementation by national implementing measures that complete the legislative and regulatory package as a means of creating an effective legislative set that can produce the desired regulatory results within the regulated country at the time when they are passed. They need to be used as drafting instructions, rather than

model laws. Although this idea is currently submerged in the sea of practicalities that have led to the increasing use of delegated legislation for their implementation, it is questionable whether practicalities, at the EU and national levels, must lead the debate. Focusing on true legislative quality, namely on effectiveness of legislation as a tool for regulation at the EU level, can enhance and nurture true legislative quality at the national level. In other words, transposition cannot be viewed as a technical task of simply dropping the bombshell of a foreign-looking and foreign-sounding legislative text in the legal system of Member States. It must be viewed as a unique opportunity for national legislative drafters to serve their legal system by adapting the EU legislative text to the national regulatory, legislative, and drafting ethos and style. This requires creativity by national drafters, and trust in them by their Commission counterparts.

Ultimately, Smart has simply managed to ring an alarm bell in the field of legislative quality. Smart is a good step, a good initiative, which in the field of regulation may prove extremely helpful. But Smart fails legislation and legislative quality miserably. Legislative quality cannot be viewed as a purely technical transplant of EU texts into national laws. It requires a strategic analysis of the whole life cycle of the EU and national legislative texts through the prisms of effectiveness, efficiency, and best possible solution; evaluation *ex ante* and *ex post facto* at the EU and national level; and the promotion of good legislation. But hang on! Is this not what Smart is professing to do, on paper, anyway?

IMPLEMENTATION: THE ACHILLES HEEL OF EUROPEAN INTEGRATION

Wim Voermans

Abstract

Implementation of EU law is vital for European integration. The EU implementation record however up until now shows that there are serious implementation deficits. Although the EU in response to these deficits has piled up strategies and instruments to improve the overall implementation, we still do not know how big the compliance problem of the EU is. The nature and seriousness of compliance deficits are until now the 'known unknowns'. This paper looks into two issues that are important if we want to improve implementation and compliance rates of EU law. First of all it addresses the question of how to gather information on implementation and compliance as a basis for enforcement policies and secondly it appraises the EU's enforcement policies, set up to improve the implementation of EU Law currently in place. The paper concludes that present EU strategies and tools to promote compliance broadly follow the enforcement-school approach with some management-school elements. It also concludes that the information basis for these strategies is quite weak and that they are not based on a deep understanding of what motives underlie noncompliant behaviour. The strategies and instruments rely strongly on repression by sanctions as well. A better understanding of the how and the why of non-compliance could improve the effectiveness of the present policies in place – more positive and communicative approaches to non-compliance could well complement present strategies and instruments.

Keywords

European Union; European integration; implementation; compliance; application of EU law; transposition; non-compliance; compliance deficits; implementation deficits.

There are known knowns. There are things we know that we know. There are known unknowns. That is to say, there are things that we now know we don't know. But there are also unknown unknowns. There are things we do not know we don't know.

Donald Rumsfeld, US Secretary of State for Defence, February 2002

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A. IMPLEMENTATION IS VITAL

Law which is not implemented is mere paper and will, therefore, most likely not achieve what it aims for: a change in (institutional) behavior. Especially European integration and the EU are vulnerable to deficiencies in implementation. The EU is built on law, and governed by law: law is the instrument of choice to achieve the goals of the Union. It founds and cements that very Union. Non-implementation of law can therefore endanger the EU project itself. Even though implementation – which includes transposition, application and enforcement – is vital, the record shows that in the areas that are actually monitored as regards implementation EU law there is a persistent lack of proper implementation. The EU for instance has a serious and almost perennial transposition problem of EU Directives, which – after some success due to the 1% deficit target set by the European Council in 2007 – shows – according to the European Commission – a ‘worrisome’ increase over recent years.¹ And although the figures for 2013 show some improvement,² it remains to be seen whether this small decrease will turn into a permanent downward trend. In their recent study in 2013 on ways to ensure proper implementation and application of EU law Ballesteros, Mehdi, Eliantonio and Petrovic come to the conclusion that Member State’s compliance with their EU legal obligations remains an unresolved issue.³ From the recent number of infringement procedures brought by the European Commission that were open,⁴ the rulings of the Court of Justice of the European Union (CJEU) and the complaints lodged by citizens and businesses on the issue of delayed or incorrect application one can already deduce that the EU faces a serious compliance deficit, but these statistics on the enforcement instruments do not give an accurate reflection of the actual problem, according to the 2013 Implementation Study.

They only represent the most serious breaches or the most vocal individuals or entities (those who complain). The Commission has neither the policy nor

¹ European Commission, *29th Annual report on monitoring the application of EU law* (COM 714 final, 2012) p. 13. Things do however seem to have improved somewhat. In November 2013 the Commission Internal Market Scoreboard shows that following a slow and steady decline, the average transposition deficit has climbed to 0.7 %. Sixteen Member States have a higher transposition deficit than six months prior to that date.

² European Commission, *30th Annual report on monitoring the application of EU law* (COM 726 final, 2013).

³ Marta Ballesteros, Rostane Mehdi, Marionlina Eliantonio and Damir Petrovic, *Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness* (Directorate-General Internal Policies of the Union of the European Parliament, PE 493.014, 2013, p. 16 (hereinafter referred to as “the 2013 Implementation Study”).

⁴ 2900 Infringement procedures were open in 2009, 2100 in 2010, 1775 in 2011 and 1343 at the end of 2012. European Commission, *29th and 30th Annual reports on monitoring the application of EU law*.

the resources to systematically identify and to enforce all cases of non-implementation. Thus, statistics on infringement procedures do not reflect the full extent and cost of breaches for businesses or the economy as a whole.⁵

A substantial part of the compliance deficit therefore consists of ‘silent losses’, i.e. undetected or at least unreported non-compliance with EU law.⁶ These are the result of a combination of firstly a ‘paper implementation culture’ in which implementation and application of EU law is mainly monitored on the basis of quite abstract Member State progress reports and notifications and secondly non-compliant behaviour for strategic, political or other reasons on the part of the Member States. These ‘known unknowns’ of non-compliance are a serious issue. Compliance – including full and correct implementation – is, as the Commission already duly noted back in 2001, essential ‘not only for the sake of efficiency of the internal market but also to strengthen the credibility of the Union.’⁷ This proved to hold true during the debt, financial and Euro crisis between 2010-2013 when the financial markets of the world seemed to express doubts as to the credibility of the commitments under EU law made by the EU Member States.⁸ The economic trustworthiness of the EU is – more than countries that can rely on a political union backed by a fiscal union – to a large extent dependent on the commitments under law rather more than the credible commitment to raise and actually collect taxes.

For this very reason the EU has beefed up its enforcement policies over the last decade. The basis for these new EU policies on better implementation and enforcement of EU law was laid in the Commission Communication “Better monitoring of the application of Community Law” of 2002,⁹ taken further in 2007 in the Communication “A Europe of results – Applying Community Law”,¹⁰ and integrated into the 2010 Communication on Smart Regulation.¹¹ The

⁵ The 2013 Implementation Study, p. 16.

⁶ W Voermans, ‘Concern about the quality of EU legislation: what kind of problem, by what kind of standards?’ (2009) 2(1) *Erasmus Law Review* 59-95.

⁷ European Commission, White Paper on European Governance (COM 428 final, 2001).

⁸ That does however not mean that the Euro crisis was solely caused by the non-observance of the Eurozone’s fiscal rules as a lot of commentators like to believe. Non-compliance was not the direct cause although it did not help to solve the crisis either. Pisani-Ferry has argued that it is undoubtedly true that the euro area in its first ten years suffered from a lack of fiscal discipline, that from the standpoint of sustainability of public finances good times were wasted, and that the credibility of fiscal rules was compromised. But he adds to that that the EU policies to remedy the euro crisis were wrong footed and less effective than they could have been because they were based on a partial diagnosis that overemphasises the lack of enforcement of existing fiscal rules. Jean Pisani-Ferry, ‘The Euro Crisis and the New Impossible Trinity’ (2012) *Bruegel Policy Contribution*, Issue 1, p. 3.

⁹ Commission Communication, Better monitoring the application of Community Law (COM 725 final, 2002).

¹⁰ Commission Communication, A Europe of Results – Applying Community Law (COM 502 final, 2007).

implementation and enforcement strategy tries to achieve three basic goals: first to resolve implementation and enforcement problems at an early stage, second to strengthen implementation tools and third to reduce the recourse to infringement procedures. This hands-on approach is backed up by annual reports on the monitoring of the application of EU law. However laudable these efforts are, one can have serious doubts whether they will be effective if we have to admit we simply do not know and cannot identify the extent (and the nature) of the compliance deficit. You cannot correct something that you do not know, before you know it. This contribution will look into two issues that are important if we want to improve implementation and compliance rates of EU law. First of all we shall address the question of how to gather information on implementation and compliance as a basis for enforcement policies and secondly we shall appraise the EU's enforcement policies currently in place.

B. KNOWING WHAT YOU ARE UP AGAINST

It is really quite simple. If full and correct implementation and (consequently) compliance with EU law is the aim, then all efforts need to be targeted at remedying implementation that is falling behind and, likewise, acting on all forms of non-compliance. Targeted efforts to settle implementation and compliance problems require accurate information regarding implementation and compliance defects. If, however, we look back over the last fifteen years, most of the efforts to improve implementation and compliance in the EU have not been invested in trying to get better information (by way of systematic evaluation of implementation and compliance) but rather more in an accumulation of policies and instruments to improve implementation. Although these policies like 'Better monitoring of the application of Community Law' of 2002, the Communication "A Europe of results – Applying Community Law" and the 2010 Commission Communication¹² underline the importance of more and better information on implementation (predominantly by monitoring) and although some action was indeed taken to improve the information base for targeted improvement, the outcome is still rather modest. This may sound somewhat harsh in view of all the efforts put into the improvement of implementation and application of EU law, but if we bear in mind that effort does not automatically equal information, it is a fair comment.

1. Systemic flaws in the setup of implementation responsibilities

The problem at the root of it all is the way the responsibility for implementation is set up. Under the duty of loyal cooperation (Art. 4(3) of the Treaty of European Union (TEU)) and the general obligation to implement and apply EU

¹¹ Commission Communication, Smart Regulation in the European Union (COM 543 final, 2010).

¹² See footnotes 9, 10 and 11 for references.

legal acts (Art. 291 of the Treaty on the Functioning of European Union (TFEU)), it is the Member States themselves that are primarily responsible for implementation of EU law and – hence – for the first-line monitoring of the observance of EU law. The Commission has a supervisory task to ensure the application of EU law (Art. 17 TEU) but this mainly involves indirect, second-line supervision and monitoring, i.e. checking whether the Member States live up to their commitments under EU law – including the commitment to transpose, implement and apply and thus enforce EU law. To ensure respect for EU law the Commission reviews the implementation by Member States of EU legislation indirectly, using reports resulting from information obligations (e.g. reporting or notification obligations), contacts, correspondence and meetings with Member States. The Commission can open infringement proceedings, asking Member States to correct an absent or wrong transposition or incorrect application of the law, and if need be bring the case before the Court of Justice for it to decide on the alleged infringement.¹³ If Member States have failed to fulfil their obligation under the Treaties the Commission can, on the basis of an infringement ruling of the Court of Justice (seek to) impose financial sanctions.¹⁴ The Commission may also impose preliminary sanctions if a Member State has failed to fulfil its obligation to notify measures transposing a directive.¹⁵ The Commission has few first-line monitoring responsibilities.¹⁶ The EU's supervisory or monitoring system therefore strongly relies on the (political) will and capacity of the Member States in to monitor the implementation of EU law.

There are some inherent vulnerabilities to this form of 'home country control'¹⁷ by the Member States. First of all not all Member States have the same administrative capacity.¹⁸ Secondly the domestic legal frameworks, methods, practices and attitudes as regards inspection and enforcement differ widely between the Member States. Thirdly, the EU legal framework harbours next to no positive incentives for Member States to implement timely and correctly and to comply to the full with EU law. Accurate reporting on and monitoring of

¹³ Consolidated Version of the Treaty on the Functioning of the European Union [2012], art 258.

¹⁴ As a lump sum or penalty payment.

¹⁵ Consolidated Version of the Treaty on the Functioning of the European Union [2012], art 260 (3).

¹⁶ Some are to be found in the field of competition law. See P C Adriaanse, T Barkhuysen, P Boswijk, K Habib, C de Kruijff, M J J P Luchtman, W den Ouden, S Prechal, B Steunenberg, J A E Vervaele, S de Vries, W J M Voermans & R J G M Widdershoven, 'Implementation of EU Enforcement Provisions: Between European Control and National Practice' (2008)1(2) Review Of European Administrative Law 83-97.

¹⁷ See for instance H van Meerten and A T Ottow, 'The proposals for the European Supervisory Authorities (ESAs): the right (legal) way forward?' (2010) Tijdschrift voor Financieel Recht, nr. 1/2, p. 6.

¹⁸ Administrative capacity is important for compliance of Member States. See Tanja A. Börzel, Tobias Hofmann, Diana Panke and Carina Sprungk, 'Obstinate and Inefficient: Why Member States Do Not Comply With European Law' (2010) 43(11)Comparative Political Studies 1363-1390.

implementation and compliance is costly, has a possible self-incriminatory effect (i.e. may be the basis for proceedings before the Court of Justice), does not yield any tangible political capital (neither domestically nor at the EU level) and therefore is unlikely to be prioritized. Furthermore the EU's legal framework for correct and timely implementation and full implementation rests predominantly on legal responsibility and hardly at all on political responsibility. If EU law is not properly implemented or not fully complied with due to lack of effort on the part of national authorities, it is difficult to hold them to account politically. The reliance on legal responsibility has side-effects as well: it promotes an attitude of 'let's-take-it-to-Court-and-see-what-happens.' In most cases the politicians that take a case to court (or those who are taken to court), will not be the same ones as those that receive the ruling on the case. Moreover it does not always pay off to be over-zealous in transposing EU Directives or fully implementing and complying; it may lead to a temporary competitive disadvantage in relation to Member States that are not that quick of the mark.¹⁹

The Commission is trying very hard to overcome these vulnerabilities by improving its second-line checks on supervision and monitoring by the Member States, e.g. by setting up EU wide agencies²⁰ and making use of – what we have called the - I-strategy, which is an overall strategy trying to get better information on compliance ranging from setting up and using informal networks of inspectors in Member States to detailing inspection and information obligations in Directives and Regulations.²¹ Much effort has also been put into overcoming hurdles for timely transposition, in setting up compliance-promoting tools and coming up with pre-infringement arrangements, which will be discussed in the next paragraph. But it will be clear that the Commission lacks the power and capacity to effectively monitor, and accordingly influence, implementation and compliance, with the exception, of course, of the monitoring of transposition of EU Directives. Here the Commission can keep track of what is happening due to the notification obligations. Much of the claims of improved implementation over the last years are successes and improvements in the field of timely transposition. But transposition is, evidently, only a small phase in the cycle of implementation and compliance of EU law. Effective implementation of policies depends greatly on a proper connection between all the different stages

¹⁹ B Steunenberg and W Voermans et al., *The transposition of EC directives: A Comparative Study of Instruments, Techniques and Processes in Six Member States* (Leiden University & Ministry of Justice, 2005), p. 147-148, and p. 168.

²⁰ Involving agencies in supervision of EU law seems to one of the new strategies to overcome the vulnerabilities of the present supervisory arrangements in the Treaties. See for example the three new EU financial agencies (European Banking Authority (EBA), and European Insurance and Occupational Pensions Authority European Securities (EIOPA) and European Markets Authority (ESMA)) that have been created in response to the financial crisis in 2010. They have all been given (exclusive) supervisory tasks.

²¹ See Adriaanse, et al., 'Implementation of EU Enforcement Provisions: Between European Control and National Practice' (2008) 1(2) *Review Of European Administrative Law* 83-97.

of the policy cycle, beginning with the policy formulation, the enactment of a political decision, and in case of a Directive or Regulation, the ensuing transposition or implementation of the act, the monitoring of compliance and enforcement, and evaluation. It is especially periodical evaluations that can highlight problems in implementation (and unwarranted consequences) and can lay a basis for future amendments of the existing Directives and Regulations. The better the chains in the policy cycle are aligned and interlinked, the better the chances that the desired goals are met.

2. Consequences of the flaws

Systemic flaws in the scheme of implementation responsibilities within the EU come with a price. They have - as we already found in 2009 and by and large quote here²² - three main consequences:

First, - as already indicated - the lack of the right information on the overall effectiveness of enacted EU legislation in terms of application, implementation and enforcement. For the reasons mentioned Member States are not always equipped or inclined to monitor and inspect the implementation and compliance to the full and hence do not know exactly what is happening. For their part, the EU-institutions do not always seem to be very keen to know either: the overall sentiment seems to be that after enactment, implementation is the Member States' business.

Information on what is actually happening after enactment, though, is vital for the EU legislative institutions' ability to reconsider and adjust their course. The problem is not that there isn't any information on the application of EU legislation, but rather that in a lot of cases it is not the right information to assess the effectiveness of directives or regulations, and that they are reported by a more or less partisan organizations, i.e. the Member States themselves. Transposition-notifications, scoreboards, reports on litigation under EU legislation, and the odd infringement procedure, will - as we have noted above tell you only so much about what is really happening in the post-enactment stages of legislation. The EU by and large has a 'paper implementation culture' meaning that implementation and application are mainly monitored on the basis of quite abstract Member State progress reports and notifications. Information on the law-in-action is quite rare. And if the right information is missing it is nearly impossible to tailor effective remedies or to change course.

The lack of (the right) information shows whenever a policy area is systematically evaluated. A 2004 evaluation of the Public Procurement Directives 1992-2003, for instance, revealed that less than an estimated one-third of the public procurements complied with the administrative procedures laid

²² W Voermans, 'Concern about the quality of EU legislation: what kind of problem, by what kind of standards?' (2009) 2(1) *Erasmus Law Review* 59-95.

down in the procurement directives.²³ This compliance deficit does not show from the monitoring data the Commission keeps, nor from its annual reports on application. Sometimes even the central authorities of Member States are not aware of the ‘silent losses’ as regards interpretation and application of EU law.²⁴ We simply do not know whether or not and to what extent EU legislation is being complied with, and judging from what seeps through the outlook is not altogether promising.

Secondly: from the little we do know, we can deduce that the compliance rate of EU legislation is probably rather low. In 1998 Radaelli concluded that poor performance in the implementation stage is the Achilles heel of many European rules.²⁵ His conclusion still stands to this day. The Commission²⁶ has admitted as much, but at the same time points out that it is, in fact, the Member States which have the primary responsibility for the correct and timely application of EU Treaties and legislation. The Commission cannot go it alone when it comes to overseeing and checking implementation. This division of responsibilities only seems to add to the problems of implementation. Chinese walls seem to be cemented between the initial legislative stages and the phase of implementation. The Commission cannot be held accountable for the implementation performance of the Member States and lacks the resources to effectively monitor and check the actual implementation performance of the Member States.

²³ Europe Economics, *Evaluation of Public Procurement Directives*, (Markt10/D Final Report, 2004). The researchers admit that this percentage of non-compliance can even be worse because they simply did not have all the necessary information.

²⁴ In our year 2000 study it turned out that ‘silent losses’ occur quite frequently because national enforcement authorities, inspectors or administrative authorities simply cannot resolve residual legislative problems of their own, nor can they report back. One example is the provision on ‘serious offence’ in Directive 96/26/EC on the admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations, amended by Directive 98/76/EC (OJ 1998 L 277/17). The directive provides that repeated – even minor – offences of drivers against the transport rules lead to the revocation of the licence to practise as a road transport operator. This has the unforeseen and quite dramatic consequence that big operators, with a large staff, run a much bigger risk of losing their licence than small operators. Obviously this was not the objective of the directive, but what are the administrative authorities to do? They do what they normally do: not apply the provision at all. This was but one example. We stumbled upon many problems like these in the five, randomly picked, dossiers we studied in our research. W Voermans and others, *Quality, Implementation and Enforcement; a Study into the Quality of EU Legislation and its impact on the implementation and enforcement within the Netherlands* (Tilburg University & Ministry of Justice, 2000) 28-29.

²⁵ C Radaelli, ‘Governing European Regulation: The Challenges Ahead’ (1998), European University Institute, RSC Policy Paper No 98/3, < http://www.eui.eu/RSCAS/WP-Texts/RSCPP98_03.html> , p. 6.

²⁶ Commission Communication, *A Europe of Results – Applying Community Law* (COM 502 final, 2007).

Underachievement in the actual implementation of EU legislation is very hard to tackle because of the flaw in the system of responsibility for implementation. The price is an unknown amount of non-compliance that threatens the trustworthiness of the EU – which is based on law – and may in turn nurture a culture of non-compliance, making the situation still worse. The establishment of European agencies²⁷ and European networks that act as ‘ears and eyes’ as regards implementation are an effective remedy, notwithstanding the need for a broader discussion on the institutional position of European agencies.²⁸

Third: EU policy processes still lack an overall and effective feedback culture, although much progress has been made in this field as we will discuss in the next paragraph. However after EU legislation is adopted it sometimes still proves difficult for authorities in Member States to report back on interpretation, application and implementation problems without the risk of incriminating themselves and triggering an infringement procedure. The need for feedback shows in the emergence of different networks of implementation authorities over the years. A well-known network in this respect is the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), an informal network of the environmental authorities of the Member States.²⁹ That is one area in which progress has been made.

On the basis of this analysis, one would expect that the way forward would be, as a matter of urgency, to bring about change in the system of implementation responsibilities with a focus on better linking the different stages in the EU’s policy chain, trying to link legal responsibility with political responsibility for implementation and application of EU law, invest in administrative capacity for monitoring and inspection as well as systemic evaluation in order to get better information and a better balance in responsibilities. That is however a non-starter since it would require amongst other things a change of the Treaties and considerable investment. That does not mean that there was and is no sense of urgency to tackle the problems of implementation. But it does explain why the EU has predominantly looked for solutions within the confines of the present system.

²⁷ EU agencies are distinct bodies from the EU institutions – separate legal entities set up to perform specific tasks under EU law. There are over 40 agencies, divided into 4 groups: decentralised agencies, executive agencies, EURATOM agencies and the European Institute of Innovation and Technology (EIT). See <http://europa.eu/about-eu/agencies/index_en.htm> last visited on 5 October 2014.

²⁸ Commission Communication, European agencies – The way forward (COM 135 final, 2008).

²⁹ The IMPEL network is both active and influential, especially since the Commission accepted the invitation to preside it. Since 1992 IMPEL has generated almost 50 reports ranging from the Better Legislation initiative to the Reference Book on Environmental Inspections. Informal and semi-informal networks like IMPEL are mushrooming the five years. See P.C. Adriaanse et al., *Implementation of EU control and sanction provisions* (Leiden University & Ministry of Justice, 2008).

C. RECENT ATTEMPTS AT ENSURING IMPLEMENTATION AND APPLICATION OF EU LAW AND THEIR EFFECTIVENESS

Especially in the last decade the EU has adopted numerous policies and strategies to improve the implementation and application of EU law. In the 2013 Implementation Study Ballesteros, Mehdi, Eliantonio and Petrovic try to assess key aspects of implementation and the effectiveness of certain tools developed to promote compliance with EU law. For that purpose they group their analysis of policies and instruments to improve the overall implementation and application of EU law into three main categories: a. transposition trends and hurdles to timely transposition, b. compliance promoting tools, and c. pre-infringement tools and its relation to (the practice of) the infringement proceedings. Because this structure gives a good insight in the different elements of recent implementation policies and tools we will follow suit in this paragraph.

1. Improving timely transposition

Although the 2013 Annual report on monitoring the application of EU law³⁰ seems to show some improvement in the transposition deficit the timeliness of transposition of EU Directives is a persistent problem. The 2013 Implementation Study shows that – looking at the period 1999-2012 –there is a continuous trend of delayed transposition.³¹ The data show that in nearly three-quarters of the cases³² under study transposition was delayed (74%), that national legislation transposing EU law is rarely adopted on time (only in 16% of the cases) and that in 10% of the cases the information on a delay is not communicated to the Commission. This ties in well with the findings from earlier studies.³³ Although the Member States agreed at the Stockholm European Council of 2001 to reduce their transposition backlogs to less than 1.5% of the total number of directives from 2002 on, and reduced this target to 1% by 2009 at the Brussels European Council in March 2007, and it appeared that those targets were more or less met by 2011, appearances are deceptive here. The 1% target does reflect the score of more than 50 years and secondly does not account for being ‘a bit’ late, and, of course, unreported delays or incorrect transpositions are not accounted for. The large body of transposition literature shows a host of reasons and factors that to some extent explain the reasons for late transposition, most of them having to do

³⁰ European Commission, 30th Annual report on monitoring the application of EU law (COM 726 final, 2013).

³¹ The 2013 Implementation Study, p. 25.

³² They looked into 16 cases.

³³ E Mastenbroek, ‘Surviving the Deadline; The Transposition of EU Directives in the Netherlands’ (2003) 4(4) *European Union Politics* 371-395 & Markus Haverland, Bernard Steunenberg and Frans van Waarden, ‘Sectors at Different Speeds: Analysing Transposition Deficits in the European Union’ (2011) 49(2) *Journal of Common Market Studies* 265–291.

with a combination of problems in the connect between EU and domestic policies and domestic legal frameworks (including procedures), the complexity of the subject-matter in the Directive, the level of discretion and issues of political prioritization.³⁴ In the wake of the ‘Better Law Making’ agreement,³⁵ EU institutions have come up with different instruments in order to improve, or at least facilitate timely transposition. The first instrument is that of the ‘correlation tables’ which in a systematic way present in a table how each provision of a Directive is transposed into national law. Member States over the last ten years were encouraged to draw up these tables to help communication on the transposition, both vis-à-vis the Union and the domestic political actors. Their overall contribution in speeding up the transposition process is not rated very highly by the Member States according to the 2013 Implementation Study.³⁶ The use of Committees composed of Member States representatives chaired by a representative of the Commission to assist the implementation of a Directive was rated even lower; the existence of a Committee does not seem to prevent delay at all. The introduction of that keep the comparative score in transposition of Member States does seem to have had a more marked effect on the timeliness of transposition according to the 2013 Implementation Study.³⁷ By a modest form of naming and shaming those barometers and scoreboards cause peer pressure and public pressure on the transposition process and thereby have an effect on the speed of transposition.

2. Tools to improve overall compliance

To promote implementation and compliance, the EU system has direct Treaty-based compliance tools – e.g. the infringement procedure, complaint procedure and possible sanctions based on Articles 258 to 260 of the TFEU – and other compliance-promoting tools developed under different legal bases, such as provisions under secondary EU legal instruments (e.g. the correlation tables and committees already referred to in the former paragraph) or under the Commission’s responsibilities under Article 17 TEU. We will not deal with all of them, but highlight the most important ones that were assessed in the 2013 Implementation Study. Of the compliance-promoting tools the so-called

³⁴ See Bernard Steunenberg and Dimiter Toshkov, ‘Comparing transposition in the 27 member states of the EU: the impact of discretion and legal fit’ (2009) 16(7) *Journal of European Public Policy* 951-970 and see as regards parallel problems with implementation Antoaneta Dimitrova and Bernard Steunenberg, ‘Too difficult to handle: Compliance with EU-policy in a multi-level context’, Paper delivered at the 2014 Annual APSA conference in Washington D.C. to be retrieved at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2454678> last visited at 2 October 2014. See also the 2013 Implementation Study, p. 32-35.

³⁵ European Parliament, EU Commission and EU Council, ‘Interinstitutional Agreement on Better Law-making’ (2003) OJ C 321.

³⁶ The 2013 Implementation Study, p. 40-42.

³⁷ The 2013 Implementation Study, p. 42-43.

‘Package Meetings’ – in which the Commission meets with individual Member States to discuss and identify ways to solve compliance problems subject to infringement procedures and to obtain information about specific potential breaches – are deemed to be the most effective over all. Implementation plans issued by the Commission to assist Member States in their planning of the appropriate measures that need to be put in place to ensure achievement of the goals of a Directive are also valued highly. It is especially the Member States that consider the existence of networks of informal bodies composed of representatives of Member States in charge of the implementation (agencies, inspections, etc.) and committees with the task of assisting the Commission with the implementation of a certain Directive (so-called comitology) very effective because they provide platforms for the exchange of experiences and best practices. Reporting obligations for the Commission on certain aspects of the implementation of Directives to the European Parliament of the Council are considered quite effective as well. Mandatory (periodical) inspections, on the other hand, required under EU law to monitor the implementation of EU legislation, be it by (as in most cases) the Member States’ authorities or (in rare cases) by the Commission itself, are perceived as very effective by the interviewed EU officials but seen as more or less ineffective by Member States’ officials in the 2013 Implementation Study. EU officials and Member States officials do agree on the relative ineffectiveness of conformity checks (checking the compliance of Member States’ transposition measures in a comparative way) and ‘fitness checks’ i.e. evaluation tools set up to assess whether the regulatory framework for a policy sector is fit for purpose. The aim of these latter checks is to identify excessive administrative burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time, and to help identify the cumulative impact of legislation. This low estimate of effectiveness (the lowest score of all the compliance tools in the 2013 Implementation study) does not bode well for the Commission's new Regulatory Fitness and Performance programme of which fitness checks are an important element.³⁸

³⁸ Commission Communication, Regulatory Fitness and Performance (REFIT): Results and Next Steps (COM 685 final, 2013). The Regulatory Fitness and Performance Programme (REFIT) commits itself to a simple, clear and predictable regulatory framework for business workers and citizens. This programme aims to cut red tape, remove regulatory burdens, simplify and improve the design and quality of legislation so that the policy objectives are achieved and the benefits of EU legislation are enjoyed at lowest cost and with a minimum of administrative burden, in full respect of the Treaties, particularly subsidiarity and proportionality. Under REFIT, the Commission is screening the entire stock of EU legislation on an ongoing and systematic basis to identify burdens, inconsistencies and ineffective measures and identified corrective actions.

3. Enforcing correct implementation and application: pre-infringement tools c.a.

The formal Treaty-based compliance tool of the infringement procedure is of course a powerful tool but it comes with its downsides. First of all the procedure is formal and adversary in nature as well as time consuming and it does not directly promote the hoped for partnership in the application of EU law between the Commission and the Member States. Furthermore it strains the resources of the EU Commission. To overcome these defects the Commission in its 2007 Communication 'A Europe of results' launched an initiative on a partnership approach between the Commission and the Member States to ensure the correct application of EU law, to provide more rapid answers to citizens and businesses and solutions to problems, and to tighten up the handling and management of existing procedures. In April 2008, the EU Pilot project was designed for this purpose and started operating with 15 volunteer Member States. The second evaluation report succinctly sums up the results:

During the period April 2008 – September 2011 a total of 2,121 files were submitted to EU Pilot. Of these, 1,410 files completed the process in EU Pilot. However, the volume is not spread equally among the Member States. Apart from the fact that the more populated Member States receive more files in EU Pilot as a result of the larger number of citizens, businesses and civil society interests, there is another element that comes into play. There is a difference in the number of files between those Member States which have used the system since the beginning in 2008, and the others which joined the system during 2010 or 2011. Out of 2,121 files: 15.5% of files were submitted to Italy and Spain, 8% to United Kingdom, 7.7% for Germany and 6.5% for Portugal (...) As regards the "success rate" concerning the 1,410 files having completed their process in the system, nearly 80% (1,107 files) of the responses provided by the Member States were assessed as acceptable, enabling the file to be closed without the need to launch an infringement procedure under Article 258 TFEU. The remaining 20% of the files (303) in which no acceptable solution in line with EU law could be found went on to the infringement phase, which has already been launched or is being prepared by the Commission following the processing of the file in EU Pilot. The success rate for the first evaluation report on EU Pilot was 85%.³⁹

The 2013 Implementation Study shows that the EU Pilot does indeed offer an effective tool to address implementation, to find solutions, to reduce infringements and to communicate more efficiently and thus promotes a

³⁹ European Commission, Second Evaluation Report on EU Pilot (COM 930 final, 2011). 49% Of the 2,121 files held in the evaluation originated from complaints, while 7% were enquiries by citizens or businesses, and around a further 44% were files created by the Commission on its own initiative.

partnership between the Commission and individual Member States based on trust. But it also has its downsides. The dialogue within the EU pilot lacks transparency for the non-involved parties and stakeholders, the procedure does not align all that well with the present EU law on access to information and clear-cut procedural rules are lacking. Still the EU pilot met with approval from both the EU officials as well as the officials of the Member States.

4. In sum

The authors of the 2013 Implementation Study are to be applauded because the study is – as far as we can see – the first comprehensive study which covers almost all aspects of implementation of EU law. On the face of it the outcome of the study is a very heartening one: the assessment of the effectiveness of the compliance-promoting tools and policies seems to be very positive. But if we take a closer look than we see that, as the researchers note, it is in fact the EU officials themselves who are very positive about the effectiveness and that most of the assessments of effectiveness are based on perceptions (interviews) rather than on hard facts and data of (non)compliance. The known unknowns were not researched.

D. OBSERVATIONS AND OUTLOOK

If we want to counter noncompliance in the EU we need to have an understanding of the nature and volume of noncompliance, as well as the causes of it, in order to better target our efforts to prevent it from happening. Most of the effort until now has been put into developing policies and tools to improve implementation and thereby compliance. Of course these strategies and policies are important, but their effect lies predominantly in the relationship between the EU and the Member States. The reality of the law in action beyond this relationship is much harder to assess. Furthermore, for any strategy on compliance to be effective, an understanding of why people or institutions comply with the law is of key importance. The why of (non)compliance is – as such – understudied. Börzel, Hofmann, Panke and Sprungk⁴⁰ in 2010 have tried to answer the question why some Member States violate EU law more frequently than others. Their study – based on an analysis of comprehensive data set of more than 6,300 violations of EU law – shows that powerful Member States are most likely to violate EU law, whereas small countries with efficient bureaucracies are the best compliers (administrative capacity also matters for powerful Member States). The vicissitudes of noncompliance with the Stability and Growth Pact (SGP)⁴¹ give a vivid example of that. The Pact has proved to be

⁴⁰ Börzel (n 18).

⁴¹ The SGP is a 1997 agreement, among the 28 Member states of the European Union, to facilitate and maintain the stability of the Economic and Monetary Union (EMU). The fiscal discipline is ensured by the SGP by requiring each Member State, to implement a

unenforceable against big countries such as France and Germany, which were at the outset its strongest promoters. These countries have for some years run "excessive" deficits under the Pact definition that went unpunished, partly due to the political power they could wield in the Council. The Pact was further weakened in 2005 when France's and Germany's violations were waived. The problem with this behaviour is that noncompliance may foster noncompliance:⁴² other Member States may consider themselves free to transgress as well.⁴³ If we want to promote compliance we need to understand the why of (non)compliance.

1. The 'why' of compliance

Why do institutions or people comply with the law? Different theories and approaches exist. The first approach is the administration-oriented approach. It starts from the notion that the principal actor in compliance is the administration itself. Compliance with enacted regulation is inspired by a combination of due process when enacting and proper communication of the rules (publication and promulgation) and making administrative efforts to ensure the acceptance of rules (by giving additional information, dialogue, monitoring, etc.) or other methods that could contribute to voluntary or 'spontaneous' compliance with these rules. Administration-oriented enforcement approaches assume that states choose to violate norms and rules because they are not willing to bear the cost of compliance. Non-compliance therefore can only be prevented by raising the costs of noncompliance.⁴⁴ For this institutionalized monitoring and sanction systems need to be set up to act on noncompliance. In modern compliance theory this administration-oriented line of thinking branches out into two different perspectives. The first one is the rational perspective (believing – as we have seen - that regulatory addressees are rational actors that weigh cost and benefits

fiscal policy aiming for the country to stay within the limits on government deficit (3% of GDP) and debt (60% of GDP); and in case of having a debt level above 60% it should each year decline with a satisfactory pace towards a level below. Resolution of the European Council on the Stability and Growth Pact Amsterdam, 17 June 1997 (OJ C 236, p. 1-2). The resolution was backed by two regulations. The first Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 209, p. 1). The second one was Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 209, p. 6).

⁴² See K Keizer, *The Spreading of Disorder*, (PhD-thesis University of Groningen, Groningen 2010). Keizer's research shows that compliant behavior of norm addressees is greatly influenced by the fact whether or not they observe care and respect of others (fellow citizens) for these and indeed more generally other norms. Keizer 2010, p. 90.

⁴³ See W Voermans, 'Motive-based Enforcement', in: Luzius Mader, Sergey Kabyshev (eds.) *Regulatory Reforms; Implementation and Compliance*, Proceedings of the Tenth Congress of the International Association of Legislation (IAL) in Veliky Novgorod, June 28th-29th 2012 nr. 17. (Baden-Baden: Nomos 2014) p. 60-61.

⁴⁴ Börzel (n 18). 1367-1368.

and believing therefore that only a coercive strategy of monitoring and sanctioning will induce compliance, hence also known as the enforcement school).⁴⁵ The second perspective is the management perspective which also perceives regulatory addressees as rational beings, but recognizing that non-compliance is not always per se the result of deliberate defiance of the regulation. It also occurs as a result of capacity limitations on the part of the addressee, as a result of ambiguity of rules, or involuntary and inadvertently for a number of other reasons.⁴⁶ Non-compliant behaviour therefore does not always need to be 'cured', remedied or followed by administrative enforcement or sanctions, but may be secured by remedial forms of administrative action (information, administrative assistance, legislative simplification, etc.).⁴⁷ According to both perspectives, though, compliance is largely dependent on administrative action. In the constructivist perspective – on the other hand – compliance is dependent on the way regulatory norms tie in with or align with the beliefs of the addressee. According to constructivist theory the main driver for the change of behaviour (or preferences) is not external (e.g. administrative action), but rather more the socialization or internalization of rules by the addressees.⁴⁸ Internalization, as it were. Socialization and internalization of rules, in turn, are predominantly brought about by persuasion and/or persuasive appeals to inner morality.

2. Outlook

Compliance theory is not mere theory but tested and often proven right.⁴⁹ This does not mean that these notions are easy to translate into practice. It does teach us, however, that the present EU strategies and tools to promote compliance broadly follow the enforcement-school approach with some management-school elements. What is characteristic of the present EU approach, however, is that the information basis of noncompliance is quite weak, that it is not based on a deep understanding of what motives underlie noncompliant behaviour and that it relies on repression by sanctions. On the basis of this analysis it might be worthwhile

⁴⁵ J T Checkel, 'Why Comply? Social Learning and European Identity Change' (2001) *International Organization* (55) 3, p. 555–557. See also E Versluis, 'Compliance Problems in the EU; What potential role for agencies in securing compliance' (2005). To be retrieved at: <<http://regulation.upf.edu/ecpr-05-papers/eversluis.pdf>> last visited on 4 February 2013.

⁴⁶ E Versluis, *ibid* p. 8-9.

⁴⁷ J Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union' (2002) 56 *International Organization* 609-643, notably p. 613.

⁴⁸ Or as Raustalia and Slaughter put it: 'From a constructivist perspective, compliance is less a matter of rational calculation or imposed constraints than of internalized identities and norms of appropriate behaviour.' K Raustiala & A Slaughter, 'International Law, International Relations and Compliance' (2002), in W Carlsnaes, T Risse & BA Simmons, *Handbook of International Relations* (Sage; London, p. 540).

⁴⁹ See Voermans (n 43).

to improve the information base (by systematic evaluations for instance) to better understand the full size of the problem. Secondly it may be instructive to better understand why Member States and actors within Member States comply or do not comply. We know why it sometimes proves hard for Member States to transpose Directives on time and correctly. Do these reasons apply for (non)compliant behaviour as well? We have also seen that the political answerability and responsibility for EU law is asymmetrical and that power balance and setup of the domestic bureaucracies are important. Elements and problems that are difficult to tackle given the present system of the Treaties. On a last note: it might be worthwhile to study whether the present 'stick-approach' of sanctions and deterrents can be complemented with positive actions. Why not reward compliant behaviour with more than scoreboard ratings? Why not – as the idea was floated during the workshop leading up to this special issue – reward Member States with more transposition time if they have a clean transposition slate. 'Carrot-approaches' are in a lot of cases very welcome and effective additions to sanctions systems and can contribute to compliance.