Making EU Legislation Clearer

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Abstract

This article looks at the clarity of the legislation of the European Union (EU), in particular the clarity of the language used. It sketches out the basic EU rules on transparency and openness, past expressions of concern for clearer EU legislation, and the response of the institutions. Finally, it considers briefly some ways to make EU legislation clearer.

Keywords: European Union, transparency, openness, clarity of legislation.

A. Introduction

Surveys carried out in the United Kingdom by the National Archives since 2012 have shown that the database of UK legislation is viewed by two to three million individual users each month. Since it is clear that most of those users are not lawyers but include a wide range of people who have often reached the legislation database by a simple Internet search, the UK Government has launched the Good Law project which "is an appeal to everyone interested in the making and publishing of law to come together with a shared objective of making legislation work well for the users of today and tomorrow" saying the digital age makes this "an exciting time for re-thinking how legislation can be made easier for users".[1]

If there are each month two to three million individual users of the legislation database of the United Kingdom, which is considered a common law country, how many more users could there be of EUR-Lex,[2] the legislation database of the EU which now embraces 500 million citizens? There are now over 20,000 EU acts in force[3] estimated to occupy some 150,000 A4 pages.

The first president of the European Commission, Walter Hallstein, wrote that the European Community, the precursor of the EU, "is a legal phenomenon in three respects: it is a creation of the law, it is a source of law and it is a legal order".[4] It was created by the basic treaties, which have now been superseded by the Treaty on European Union (TEU) and the Treaty on the Functioning of the

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1 *See* <https://www.gov.uk/good-law>, accessed on 27 January 2014.

2 *See* <http://eur-lex.europa.eu/en/index.htm>, accessed on 27 January 2014.

3 According to the Directory of EU legislation in force: <http://eur-lex.europa.eu/en/legis/latest/index.htm>, accessed on 27 January 2014.

4 W. Hallstein, *Die Europaeische Gemeinschaft*, Econ Verlag 1973, Chapter Two (I).

European Union (TFEU). But those treaties do little more than set out a basic institutional framework and basic principles, together with goals and mechanisms, and much of the actual construction is done by the legal acts adopted by the EU institutions. It is a legal order in the sense that the system of rules it has created is not confined to regulating the operation of the EU's internal market but also guarantees the lawfulness of the actions of the institutions and legal protection of those subject to EU rules.

Since law and legislation are so fundamental to the EU, it too should surely be rethinking how its own legislation 'can be made easier for users'. While much has already been done to make EU legislation accessible in all the EU's languages, more could be done to make it clearer and more easily understandable.

B. EU Rules on Transparency and Openness

I. General

The rejection in 2005 of the EU's Constitutional Treaty in referendums in two of the founder Member States, France and the Netherlands, was a wake-up call for the EU, a sharp reminder of the need to connect or reconnect with citizens and cement the legitimacy of the EU institutions. The wording of the TEU, following the changes made by the Lisbon Treaty signed in 2007, recognises that need with references, for example, to:

- the Member States' resolve to 'enhance further the democratic and efficient functioning of the institutions' (preamble);
- 'a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen' (preamble and Art. 1);
- 'Decisions shall be taken as openly and as closely as possible to the citizen' (Art. 10(3));
- 'The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society' (Art. 11);
- 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights…' (Art. 2).

The rule of law is also mentioned twice in the preamble to the TEU (and again in the Charter of Fundamental Rights).

II. Access to EU Documents

A general right of access to EU documents is given by Article 15 TFEU:

> In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible. …
>
> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to

> documents of the Union institutions, bodies, offices and agencies, whatever their medium ....[5]
>
> Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents .... (paras 1 and 3)

The detailed rules on access to EU documents are still those laid down in a 2001 Regulation.[6]

III. Publication of EU Legislation

Under Article 297 TFEU, all EU legislative acts, all regulations, and all directives which are addressed to all the Member States must be published in the *Official Journal of the European Union*. In the early years, the *Official Journal* was available only in a paper edition, but since 1998 it has also been published online. It can be accessed through the EUR-Lex portal which also makes databases of EU treaties, legislation, and case law available in all EU languages without charge. Since July 2013, the electronic version of the *Official Journal* has been authentic.[7]

IV. Rules on Use of Languages

The treaties provide that the rules governing the languages of the EU institutions are to be determined by the Council.[8] In 1958, the Council adopted Regulation No. 1 which sets out the list of the official languages of the institutions.[9] That list has been amended each time the admission of a new country has made it necessary to add its language and now includes 24 languages. Regulation No. 1 also provides that all EU regulations and other documents of general application must be drafted in the 24 official languages and that the *Official Journal* must be published in all those languages.

C. How EU Legislation Is Drafted

Under Article 289 TFEU: "The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission".

It is accordingly the Commission which produces the first drafts of almost all EU legislative acts. The Commission also drafts a large number of delegated or implementing acts (Articles 290 and 291 TFEU). The Commission does not have a single central department charged with drafting legislation, such as the parlia-

5 An almost identical provision is contained in Art. 42 of the Charter of Fundamental Rights of the EU, which, according to Art. 6 of the TEU, has 'the same legal value as the Treaties'.

6 Regulation (EC) No. 1049/2001 of the European Parliament and of the Council (OJ L 145, 31.5.2001, p. 43). In 2008, the Commission submitted a proposal for a new regulation (COM (2008) 229).

7 *See* Council Regulation (EU) No. 216/2013 (OJ L 69, 13.3.2013, p. 1).

8 Now Art. 342 TFEU.

9 OJ 17, 6.10.1958, pp. 385-458.

mentary counsel in most common law countries. It relies instead on a system similar to that in many civil law countries where the first drafts of acts are produced by the technical department responsible for the policy area, the Directorate-Generals (DGs). The first draft is passed to the other Commission DGs for consultation to ensure the coherence of the Commission's actions. The internal discussions focus on just one language version, and once account has been taken of all the other DGs' comments, the amended draft is translated into all the official languages by the Commission Translation DG and formally adopted by the collegiate body of Commissioners.

The Commission proposal is submitted to the joint legislative authority, the European Parliament (EP), consisting of 766 directly elected Members (MEPs), and the Council, in which all the 28 Member States are represented.

In the Council, technical work is carried out in the working group composed of experts from each Member State, and the final decisions are taken by ministers for the sector concerned from each Member State. In the Parliament, technical work is carried out by the competent committee, which appoints a rapporteur for each proposal, and the political decision is taken by the plenary.

The proposal is submitted in all 24 official languages, but for reasons of efficiency, the subsequent discussions in the Parliament and the Council, in which the Commission still plays a strong role, focus on just one language version. At the end of the procedure, the text incorporating all the amendments agreed by the three institutions is translated into all the official languages by the Translation Service of the Parliament or that of the Council.

Since EU legislation is authentic in all the official languages, the 24 language versions must be harmonised, a task known as 'legal-linguistic concordance'. Legal-linguistic concordance serves to ensure that all the language versions are tidied up, for example, by checking that all the amendments have been incorporated, that the numbering of all the provisions and the cross-references are coherent, and that the texts all produce the same legal effect. The task is carried out by lawyers with language skills known as lawyer linguists or legal revisers. Originally, it was carried out at the very end of the procedure within each institution, once the text in the drafting language was fixed. At that stage, the original could generally not be changed, except so far as was essential to permit the text to have a uniform meaning in all the languages. Now the lawyer linguists are becoming involved at an earlier stage when they can suggest drafting improvements while the policy is still being worked out.

D. Historical Overview of Concern for Clearer EU Legislation

I. Early Years

Reference to the early drafting manuals produced by the EU institutions for their internal use shows that the main focus was on creating a harmonised format for EU legal acts and consistency across the different language versions rather than on actual clarity of the texts.

For example, the Council Manual of Precedents of 1983 (2nd edition) is in a bilingual format with the French text on one side of the page and the text in one of the other languages (Danish, Dutch, English, German, Greek, or Italian) on the facing page.[10] It consists largely of models of different types of act or specific provisions. The short section on 'Guidelines for Drafting' chiefly covers such things as the use of precedents and abbreviations, the use of capital letters, and how to write dates and numbers.

The early drafting guidance notes in the Commission were brought together into a Manual on Legislative Drafting in 1985 but were also chiefly concerned with the consistent use of formulas in the different languages and specific technical guidance (although the 3rd edition of the Manual in 1997 included a short section on clarity covering consistency, the use of precedents, choice of terms, and definitions).[11] From the 1990s onwards, concerns were voiced about the clarity of European legislation. In 1992, the French Conseil d'état drew up a report which looked at the growing influence of Community legislation on French law and expressed disquiet at the volume of Community rules and how difficult they were to understand.[12]

During the UK Presidency at the end of that year, the European Council adopted the Birmingham Declaration with the pithy demand: "We want Community legislation to be clearer and simpler".[13] In Edinburgh later that year, it called for the quality of Community legislation to be improved by better drafting and for it to "be made more readily accessible in a concise and intelligible form"[14] with the joint focus on writing understandable language and producing simpler texts by replacing acts which had been amended by new updated acts.

In 1993, responding to those calls from the European Council, the Council adopted a Resolution setting out ten non-binding drafting guidelines with the aim of making "legislation as clear, simple, concise and understandable as possible".[15]

The first guideline set out as the general principle that "the wording of the act should be clear, simple, concise and unambiguous; unnecessary abbreviations, 'Community jargon' and excessively long sentences should be avoided".

Further guidelines call for precise references, consistency, and clear definition of rights and obligations or relate to the standard structure of an act, the function of the preamble, material to be omitted, consistency with existing acts, amendment, and clear indication of entry into force.

It is not certain that the Council Resolution had much impact. It appears to have been raised before the European Court of Justice (ECJ) on just one occasion when Portugal challenged a decision approving rules that it said were obscure, badly structured, and retroactive. The Court of Justice held "that resolution has

10 Not publicly available.

11 Available at: <http://ec.europa.eu/smart-regulation/better_regulation/documents/legis_draft_comm_en.pdf>, accessed on 27 January 2014.

12 Rapport public 1992, Le droit communautaire (Etudes et documents n. 44).

13 Presidency Conclusions, 16.10.1992, DN: DOC/92/6, at point A.3.

14 Presidency Conclusions, 13.12.1992, DN: DOC/92/8.

15 OJ C 166, 17.6.1993, p. 1.

no binding effect and places no obligation on the institutions to follow any particular rules in drafting legislative measures".[16]

What is certain is that some Member States (notably the Netherlands and the United Kingdom) were not satisfied that enough was being done and pursued efforts to improve the quality of EU legislation.

II. Intergovernmental Conference 1997 and Follow-Up

To prepare the ground for the Intergovernmental Conference to be held in Amsterdam in 1997, the Netherlands government in 1995 commissioned a report on the quality of Community legislation[17] and in 1997 organised an experts conference on the quality of European and national legislation.[18]

At the Intergovernmental Conference of 1997, the heads of state or government of the Member States adopted Declaration No. 39 on the quality of the drafting of Community legislation.[19] The Conference noted that "the quality of the drafting of Community legislation is crucial if it is to be properly implemented by the competent national authorities and better understood by the public and in business circles" and called on the institutions to "establish by common accord guidelines for improving the quality of the drafting of Community legislation".

Two things were to distinguish the new guidelines from those in the 1993 Council Resolution. First, the new guidelines were to be drawn up by all three EU institutions involved in the legislative process. Second, to make sure that the new guidelines were effective, the Conference called on the three institutions to take "the internal organisational measures they deem necessary to ensure that these guidelines are properly applied".

In 1998, the Parliament, the Council, and the Commission accordingly adopted an agreement laying down 22 guidelines for the quality of drafting of Community legislation.[20] Those guidelines are not binding although, according to an Advocate General of the Court of Justice, "it should be presumed that the institutions which adopted them by common accord (the Parliament, the Council and the Commission) follow them when drafting legislation".[21] They certainly form the common basis for the work on drafting by the staff of the three institutions.

The first six guidelines set out general principles and begin as follows: "legislative acts shall be drafted clearly, simply and precisely" (Guideline 1).

Other general principles include taking account of the reader (Guideline 3), concision and avoidance of "[o]verly long articles and sentences, unnecessarily

16 Case C-149/96 *Portugal v. Council* [1999] ECR I-8395.

17 Koopmans Report, *The Quality of EC Legislation. Points for Consideration and Proposals*, The Hague 1995.

18 For a report on the conference, *see* A. Kellerman, *Improving the Quality of Legislation in Europe*, T.M.C. Asser Instituut 1998.

19 OJ C 340, 10.11.1997, p. 139.

20 OJ C 73, 17.3.1999, p. 1.

21 Opinion of Advocate General E. Sharpston of 24 January 2013 in Joined Cases C-457/11 to C-460/11 *VG Wort v. Kyocera and Others* [2013] ECR I- 0000, at point 32.

convoluted wording and excessive use of abbreviations" (Guideline 4), and consistent use of terminology (Guideline 6).

The other 16 guidelines relate to specific parts of acts or to other drafting matters such as amendment, references, and repeals.

The institutions undertook to apply in particular the following implementing measures:

- draw up a joint practical guide for drafting;
- organise their procedures to involve their lawyer linguists early;
- foster the creation of drafting units;
- provide drafting training for their staff;
- cooperate with the Member States on drafting matters;
- develop information technology tools;
- ensure collaboration between the departments responsible for ensuring drafting quality;
- report on the measures taken.

The Joint Practical Guide was indeed drawn up within the one-year deadline set by the Agreement.[22] The preface signed by the heads of the Legal Services of the three institutions summarises the aim as follows:

> In order for Community legislation to be better understood and correctly implemented, it is essential to ensure that it is well drafted. Acts adopted by the Community institutions must be drawn up in an intelligible and consistent manner, in accordance with uniform principles of presentation and legislative drafting, so that citizens and economic operators can identify their rights and obligations and the courts can enforce them, and so that, where necessary, the Member States can correctly transpose those acts in due time.

Some steps have been taken to give effect to most of the other implementing measures, at least in part. The institutions' lawyer linguists have indeed been brought into the drafting process earlier. At the Commission, this began to happen in 1997, but in the Parliament and the Council, it happened many years later. Some rather limited drafting training has been provided. Seminars have been organised to enable the Member States to express their views on drafting matters.[23] Work is continuing on improving the information technology tools offered to Commission drafters, with a wiki-type drafting assistance package being launched in 2013. The lawyer linguists of the three institutions have improved their collaboration by means of joint training, formal meetings and consultation, and informal contacts. In 2001, the Council issued a report on the steps it had taken to comply with the Agreement.[24] The Commission has never produced a report specifically on the implementation of the Agreement. It does produce

22 Available at: <http://eur-lex.europa.eu/en/techleg/index.htm>, accessed on 27 January 2014.

23 *See* <http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm#3>, accessed on 27 January 2014.

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

annual reports on 'better lawmaking',[25] but they rarely include more than a fleeting reference to drafting and more often omit it altogether.

As part of the internal organisational measures called for by Declaration 39, the Council in 1999 inserted in its Rules of Procedure a provision confirming its Legal Service's role in improving drafting pursuant to the 1998 Agreement and stating: "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".[26]

The Parliament has now included in its own Rules of Procedure a provision on the final checking of the acts it adopts.[27]

In 1998, some staff in the Commission's Translation Directorate-General launched a campaign to improve the linguistic quality of Commission texts. It was run by a small group of English translators and focused on drafting in English and never achieved a sufficiently broad impact throughout the Commission, where most drafting was still done in French.[2829]

III. Governance Initiative and Better Regulation

In 2000, the European Council in Lisbon "set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world".[30] In the same year, the Ministers of Public Administration of all the EU Member States established a high-level advisory group, the Mandelkern Group, to examine regulatory quality in Europe. In its Final Report presented to the European Council in 2001, it called for an action plan of over 30 measures to improve regulatory quality and stated: "The lack of simplicity, clarity and accessibility of European provisions – such as unclear, confusing terminology, incomplete or inconsistent regulations or use of vague terms – constitute significant problems".[31]

The Commission launched its governance initiative in July 2001, stating that the EU "must pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts".[32] In a paper later that year, it called for a new strategy and a new culture of simplification of regulation.[33] In June 2002, it adopted a package of measures as part of the governance initiative designed to lead to bet-

25 Available at: <http:// ec. europa. eu/ smart -regulation/ better_ regulation/ reports_ en. htm>, accessed on 27 January 2014.

26 Council Decision 1999/385/EC, ECSC, Euratom (OJ L 147, 12.6.1999, 13), as amended by Council Decision 2009/937/EU (OJ L 325, 11.12.2009, 35); *see* Art. 22.

27 OJ L 116, 5.5.2011, p. 1. *See* Rule 180(2).

28 Some details of the campaign are given in Languages and Translation published by the European Commission Translation Directorate-General in September 2010, pp. 4 *et seq.*:

29 <http://ec.europa.eu/dgs/translation/publications/magazines/languagestranslation/documents/issue_01_en.pdf>, accessed on 27 January 2014.

30 Point 5 of the Council Conclusions: <www. consilium. europa. eu/ uedocs/ cms_ data/ docs/ pressdata/en/ec/00100-r1.en0.htm>, accessed on 27 January 2014.

31 Available at: <http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm#_br>, accessed on 27 January 2014. *See* Point 8.3.2.1.

32 White Paper on Governance (COM (2001) 428), at point 3.2.

33 *See* COM (2001) 130, p. 3, and COM (2001) 726), p. 2.

ter lawmaking, including an Action Plan on simplifying and improving the regulatory environment.[34]

Responding to an invitation from the European Council in Seville in June 2002, the Parliament, the Council, and the Commission adopted another Interinstitutional Agreement in December 2003 affirming their common commitment to improving the quality of lawmaking in all its aspects.[35]

As regards drafting quality, they "agree to promote simplicity, clarity and consistency in the drafting of laws and the utmost transparency of the legislative process" (point 1). They undertake to "ensure that legislation is of good quality, namely that it is clear, simple and effective.... They are committed to the full application of the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation" (point 25).

But now drafting is just one among many aspects of quality of legislation: better preparation of legislation, greater transparency, improved accessibility of EU legislation, keeping the regulatory burden as light as possible, and improved follow-up to legislation adopted. To some extent, the EU institutions seemed to take the view that drafting quality had been addressed, and they could move on to other matters.

The 2003 Agreement became a cornerstone of the Commission's Better Regulation programme in which a leading role is played by the Commission Secretariat-General.[36]

The Member States continued to call for further steps to be taken to improve the quality of EU regulatory policy. In 2004, the six countries holding the rotating presidency of the European Council in 2004, 2005, and 2006 launched a Joint Initiative on Regulatory Reform.[37] In 2006, the Davidson Review commissioned by the United Kingdom to examine the impact of EU regulation on the United Kingdom stated:

> it is widely acknowledged that the EU legislative process and practice (e.g. last-minute amendments by the Council or Parliament, without risk-assessment) still leads to poorly worded or ambiguous legislation. Management of such legislation is a challenging task for national governments and regulators.[38]

In 2010, the Commission launched the Smart Regulation project embracing the whole cycle of regulation including implementation and post-adoption scrutiny and stated:

34 COM (2002) 275, 276, 277, and 278.

35 OJ C 321, 31.12.2003, p. 1.

36 The documentation is now on the Secretariat-General's Smart Regulation website: <http://ec.europa.eu/smart-regulation/index_en.htm>, accessed on 27 January 2014.

37 A Joint Statement on 'Advancing Regulatory Reform in Europe' was signed on 7 December 2004 by the six Member States successively holding the presidency of the Council from 2004 to 2006 (Ireland, the Netherlands, Luxembourg, the UK, Finland, and Austria).

38 Davidson Review on implementation of EU legislation, HMSO 2006 (*see* point 5.2.6): <www.berr.gov.uk/files/file44583.pdf>, accessed on 27 January 2014.

> Managing the quality of the legislation also means making sure that it is as clear and accessible as possible. The Commission scrutinizes all new legislative proposals to ensure that the rights and obligations they create are set out in simple language to facilitate implementation and enforcement.[39]

Smart Regulation represents a further widening of the focus to include, according to the Commission website, impact assessment, consultation, expertise, administrative costs, choice of regulatory instruments, transposition and application of EU law, subsidiarity and proportionality, simplification and sectoral simplification, codification and recasting, accessibility and presentation of EU law, and inter-institutional coordination.[40]

The Smart Regulation agenda itself forms part of the Europe 2020 strategy which seeks a way out of economic crisis by setting goals in the areas of employment, innovation, education, poverty reduction, and climate/energy which are to be achieved by initiatives to deliver smart, sustainable, and inclusive growth.[41] It is clear that the Smart Regulation is to be broadened further from the reference in the Commission Communication to:

> Pressing ahead with the Smart Regulation agenda, including considering the wider use of regulations rather than directives, launching ex-post evaluation of existing legislation, pursuing market monitoring, reducing administrative burdens, removing tax obstacles, improving the business environment, particularly for SMEs, and supporting entrepreneurship. (Point 2.1)

So the focus on drafting quality was still further diluted.

IV. Clear Writing

In March 2010, the Commission launched a Clear Writing Campaign applying to all forms of written communication in the Commission. It covers all the official languages and is backed by a number of key Commission departments. They include the Secretariat-General, which is concerned with the sound running of the Commission administration; the Legal Service, which is concerned with the lawfulness and drafting quality and consistency of all legal texts in the Commission; the Directorate-General for Communication; and the Translation Directorate-General, which in addition to catering for all the Commission's translation needs offers an editing service to improve the drafting quality of any Commission text. At the heart of the campaign is a set of ten 'hints' covering the preparatory stages of writing a text, practical suggestions for clear writing, and revising and

39 COM (2010) 543, at point 2.4.

40 *See* <http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm>, accessed on 27 January 2014.

41 COM (2010) 2020.

checking the finished product. The hints are presented and expounded in a booklet.[42]

This is a welcome refocusing on drafting, but at present the initiative is confined to the Commission.

E. Views on Clarity of EU Legislation

The lack of clarity of EU legislation has drawn criticism in numerous articles since 1998 by judicial figures,[43] linguists,[44] and academic commentators.[45] Many of them have pointed out that rules on clarity are there and mechanisms to apply those rules seem to be in place but that significant problems persist.

In a speech in 2000,[46] the Swiss Chancellor Ms Huber-Hotz spoke of the "all too grotesque inaccessibility, laboriousness and incomprehensibility of EU legal acts" which she illustrated by two titles of EU regulation: the first was 92 words

42 *How to write clearly:* <http:// bookshop. europa. eu/ is -bin/ INTERSHOP. enfinity/ WFS/ EU -Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=HC3010536>, accessed on 27 January 2014.

43 G. Sandström, 'Knocking EU Law into Shape', *Common Market Law Review*, Vol. 40, 2003, p. 1307. In support of his case for an external body to review the quality of EU legislation, he cited G. Lambertz, who was later Swedish Chancellor of Justice: "Sweden should work energetically and single-mindedly to ensure that endeavours to improve the quality of EU legislation are not merely confined to paper" (*Svensk Juristtidning* 2000, p. 247) and the contribution by S. von Bahr, Swedish judge at the ECJ, *in Une communauté de droit, Festschrift für Gil Carlos Rodriguez Iglesias*, Colneric and others, Berliner Wissenschafts-Verlag 2003; E. Sharpston, Advocate General at the ECJ, 'Drafting Comprehensible Legislation in a Multi-Lingual, Multi-Legal-System Environment: Some Reflections on the EU Drafting Process and Its Consequences', *The Sir William Dale Memorial Lecture* 2011: <www. sas. ac. uk/ videos -and -podcasts/ law/ drafting -comprehensible -legislation -multi -lingual -multi -legal -system -environ>, accessed on 27 January 2014.

44 M. Cutts, *Clarifying Eurolaw*, Plain Language Commission, 2001; M. Cutts & E. Wagner, *Clarifying EC Regulations*, Plain Language Commission, 2002. Both are available from the website of the 'Plain Language Commission': <www.clearest.co.uk/pages/home>, accessed on 27 January 2014.

45 In particular, H. Xanthaki, 'The Problem of Quality in EU Legislation: What on Earth Is Really Wrong?', *Common Market Law Review*, Vol. 38, 2001, p. 651; E. Tanner, 'Clear, Simple and Precise Legislative Drafting: How Does a European Community Directive Fare?', *Statute Law Review*, Vol. 27, No. 3, 2006, p. 150; W. Voermans, 'The Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?', *Erasmus Law Review*, Vol. 2, No. 1, 2009, pp. 59-95; M. Bobek, 'Corrigenda in the Official Journal of the European Union: Community Law as Quicksand', *European Law Review*, 2009, p. 950; W. Robinson, 'Making EU Legislation More Accessible', *in* L. Mader & M. Tavares de Almeida (Eds.), *Quality of Legislation: Principles and Instruments*, Nomos 2010; W. Robinson, 'Accessibility of European Union Legislation', *Loophole*, February 2011 (also published in *Legislação* (Portugal), No. 53, 2010).

46 Recht haben – gerecht sein, 6.11.2000: <http://web.archive.org/web/20030701101153/http://www.admin.ch/ch/d/bk/hu20001106.html>, accessed on 27 January 2014.

long, and she described it as "quite simply incomprehensible";[47] of the second, which referred to coefficients for "cereals exported in the form of Irish whiskey", she said: "If whiskey is a form of cereal, that is almost touching the fundament of our language. Such legislative pomp does not promote trust in the legal order. Belief in the law cannot flourish".[48]

The Court of Justice has apparently never annulled an act on grounds of lack of clarity, probably because that would have serious repercussions at EU and national level and fresh legislation to address those repercussions would take a long time to pass through the EU legislative process. Since at least the 1970s, however, it has interpreted the principle of legal certainty as requiring the application of EU legislation to be foreseeable (or predictable). A recent formulation of the principle was given in the *Plantanol* case:

> the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them'.[49]
>
> It has also held in the *PRO Sieben* case that if an EU provision imposes restrictions on a fundamental freedom and the 'legislature has not drafted that provision in clear and unequivocal terms, it must be given a restrictive interpretation.[50]

The Court of Justice does sometimes comment on the quality of drafting and has cited the Interinstitutional Agreement of 1998 in at least two judgments.[51]

47 Commission Regulation (EC) No. 2592/1999 of 8 December 1999 amending Regulation (EC) No. 1826/1999; amending Regulation (EC) No. 929/1999 imposing provisional anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway with regard to certain exporters, imposing provisional anti-dumping and countervailing duties on imports of such salmon with regard to certain exporters; amending Decision 97/634/EC accepting undertakings offered in connection with the anti-dumping and antisubsidy proceedings concerning imports of such salmon; and amending Council Regulation (EC) No. 772/1999 imposing definitive anti-dumping and countervailing duties on imports of such salmon (OJ L 315, 9.12.1999, p. 17).

48 Commission Regulation (EC) No. 1632/1999 (OJ L 194, 27.7.1999, p. 9). Rules on the export of cereals in the form of whiskey are still being adopted today: *See* Commission Implementing Regulation (EU) No. 736/2012 (OJ L 218, 15.8.2012, p. 6).

49 Case C-201/08 *Plantanol* [2009] ECR I-8343, para. 46. In para. 43, the ECJ observes that the principle of legal certainty applies not just to the EU institutions but also to the Member States when they implement EU directives.

50 Case C-6/98 *PRO Sieben Media* [1999] ECR I-7599, para. 30.

51 Case C-439/01 *Libor Cipra* (2003) ECR I-745, at para. 46; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* (2005) ECR I-6451, § 92. The Interinstitutional Agreement of 1998 has frequently been cited in opinions of the Advocates General. *See* the list in W. Robinson, 'Manuals for Drafting European Union Legislation', *Legisprudence*, Vol. 4, No. 2, 2010, at point C.4(a).

F. Impact of the Drafting Process on the Clarity of EU Legislation

The EU legislative process involves the European Parliament, the Council, and the Commission. The three institutions are quite independent of each other and defend quite different interests, and each jealously guards its own prerogatives. The legislative process is a lengthy one, leaving much scope for distortion of the draft as it passes through.

Agreement has to be reached between 751 MEPs and 28 Member States whose circumstances and views may be very different. To achieve such agreement, texts may, at one extreme, be made subject to numerous conditions, riders, qualifications, and exceptions or else, at the other extreme, be left sufficiently vague or ambiguous to cover many eventualities, in the manner of international agreements.[52]

As long ago as 1992, Jacques Delors, the President of the Commission, stressed the need for the Commission's drafts to be as simple as possible because of the layers of complexity that would be added in the course of the subsequent legislative procedure:

> we must be inventors of simplicity which must lead to a collective examination of conscience, firstly within the Commission, for whom the pen must be lighter and the texts plainer....; the quest for compromise at Council level results in texts which are too complicated, even incomprehensible.[53]

At that time, the legislative authority was the Council alone. Now that the Parliament is joint legislative authority, the compromises have become still harder to achieve.

The first drafts are prepared by the Commission's technical specialists in the sector concerned. In most cases, they are not lawyers and have had little training in drafting. For this reason and also because most of them will have to draft in a language that is not their mother tongue, they rely heavily on standard templates and on precedents, often simply earlier texts from their own sector.

Those technical specialists may believe that it is not so necessary to make the actual legislation particularly easy to understand because simpler explanations are provided in the interpretive notes or guidance published by the Commission or the citizens' summaries that accompany new legislation. Because they are specialists accustomed to communicating with other specialists, they do not realise that some of the language they use is jargon impenetrable to those outside the sector. They may not appreciate that drafting legislation requires more skill, more care, and more time than writing a guidance note or a press release. Or they may simply not have enough time to produce the best possible draft.

52 Indeed the Advocate General in the *PRO Sieben* case (Case C-6/98 *PRO Sieben Media* [1999] ECR I-7599), F. Jacobs concluded after a detailed analysis that "the provision in question appears to be, in the light of the arguments advanced on both sides, not only equally open to two conflicting interpretations, but perhaps deliberately ambiguous" (Opinion, at point 53).

53 Quoted in the Opinion of the Economic and Social Committee on Plain Language (OJ C 256, 2.10.1995, p. 8) at point 2.3.1.

Their draft passes to the legislative authority, the Parliament, and the Council. At each stage, those who wish to have the policy changed will do so by suggesting changes to the text of the draft act. The only trace of the policy is the draft act itself. Very rarely does there exist separately a clear, comprehensive, and up-to-date statement of the policy.

In such a system, there is nobody who has 'ownership' of the text and is concerned to make the text perfect. Those who produce the first drafts will know that those drafts are destined to be amended or rewritten in the subsequent stages of the process. Most of those involved in the later stages focus on the policy and assume that someone else will sort out the linguistic quality of the text.

There is less likelihood that drafters will learn from experience. Those who produce the first drafts do not learn from their experience because they are doing so many other things and there will be long gaps between their drafting duties. Also, because they are not drafting experts, they often do not understand the reasons for subsequent changes to their drafts.

G. Impact of Multilingualism on the Clarity of EU Legislation

I. Language and Drafting

In the early days, the lingua franca of all the European institutions was French. Over the years, English has progressively taken over. A survey carried out in the Commission in 2001 found for the first time that more documents had been drafted in English than French (55% and 42%, respectively). Just a few years later in 2009, a survey of Commission staff found that over 90% regarded English as their main drafting language.[54] The 2009 survey found, however, that only a small minority of those writing in English are native speakers, just 13%. Rather alarmingly 54 % of drafters "rarely or never have their documents checked by a native speaker".

Only a small minority of those involved in the subsequent negotiations on the Commission's proposal in the Parliament and Council will be native English speakers, but they have to make all their suggestions in the form of amendments to the text of the proposal. Large numbers of amendments may be put forward, some of which may well duplicate or overlap with others or else contradict them. Clearly, there is great scope for communication breakdown. An amendment may be suggested on the basis of a misunderstanding of the original text. Or a suggested amendment may be misunderstood by the other negotiators. Inconsistent terminology or sentence structures may be introduced into the draft.

Another aspect of multilingualism is that some drafting solutions which would the neatest and clearest in English may have to be rejected because they are not capable of being rendered accurately in all the 23 other languages.[55]

54 *See* the report on the survey in the DGT publication Languages and Translation, No. 1, pp. 4 *et seq.*: <http:// ec. europa. eu/ dgs/ translation/ publications/ magazines/ languagestranslation/ documents/issue_01_en.pdf>, accessed on 27 January 2014.

55 *See* Guideline 5.

The English used in EU texts is often specific to the EU and based on institutions, principles, and concepts that have developed, originally in French, over 50 years. The English terminology used, as originally chosen by the early translators for use in the treaties and legislation, has become hallowed by usage and harder than ever to depart from as the years go by.

Because some of those institutions, principles, and concepts are unique to the EU, special technical terms have been coined to describe some of them, such as 'acquis' to describe the body of existing EU law that any country wishing to join the EU has to accept (see Art. 20 TEU). But it is difficult for those working in the EU institutions to draw the line between such technical terms, whose use in legislation is necessary and legitimate, and mere jargon, that is, terms useful to make communication between insiders easier but confusing to outsiders. Examples of jargon are 'comitology' to describe the system of committees of national experts supervising the technical aspects of the Commission's implementation of EU law, the numerous abbreviations or acronyms used in the EU institutions such as COREPER to refer to the Member States' ambassadors to the EU, or the identification of treaties or policy areas by the name of the place where they were agreed, such as the Lisbon Treaty or the Schengen area.

Another problem resulting from the number of languages in use in the EU institutions is the misuse of technical terms because of interference effects. It is a problem that faces not just those having to work in a foreign language but also native speakers of a language who have worked abroad in a multilingual environment for a long period.

In some cases, the result is merely the use of the wrong technical term with no risk of confusion. For example, instead of the correct English term 'amendment' to refer to the adoption of a new act to change the wording of an existing one, drafters often use 'modification', influenced by the French term. Similarly, instead of 'correction' to describe the process of putting right mistakes in the text of an existing act, they use 'rectification', again because of the French term.

In other cases, though, the result can be misleading, as when 'derogate' is used for 'repeal' (influence of Spanish), 'motives' for 'statement of reasons on which an act is based' and 'visas' instead of 'citations' (both influenced by various Romance languages), or 'guideline' for 'directive' (influence of German and Dutch).

One of the ways in which the EU's linguists try to tackle the problem is by publishing lists of false friends,[56] jargon,[57] or words which are misused.[58] There are, however, too many separate lists, none of which is comprehensive or authoritative.

56 *See* hint 9 in the Commission booklet How to Write Clearly: <http://bookshop.europa.eu/is-bin/INTERSHOP. enfinity/ WFS/ EU -Bookshop -Site/ en_ GB/ -/ EUR/ ViewPublication -Start ? PublicationKey=HC3010536>, accessed on 27 January 2014.

57 *See* <http://ec.europa.eu/ipg/content/tips/words-style/jargon-alternatives_en.htm>, accessed on 27 January 2014.

58 *See* the list published by linguists at the Court of Auditors: <http:// ec. europa. eu/ translation/ english/ guidelines/ documents/ misused_ english_ terminology_ eu_ publications_ en. pdf>, accessed on 27 January 2014.

Sometimes multilingualism leads not to actual mistakes but to a 'floating' terminology where similar terms may come to be used interchangeably, as where the Court of Justice's requirement for legislation is variously that it should be 'predictable' or 'foreseeable'.

The EU institutions are not just multilingual but also multicultural, and this also has implications for drafting. It is widely recognised that overlong sentences make legislation hard to understand and the EU duly adopted Guideline 4 recommending the use of short sentences. But cultural and linguistic sensitivities come into play. From the Nordic countries, criticism is voiced that the sentences in EU legislation are much longer than in domestic legislation,[59] but countries further south counter that a succession of staccato sentences is ugly in their languages.

Cultural differences also come into play in other ways; for example, while the clear-writing principles in most English-speaking countries advise writers to avoid Latin, writers from many other EU Member States, particularly lawyers, but also others such as scientific experts, still tend to use Latin, including Latin expressions unfamiliar to most English speakers. For that reason, the Joint Practical Guide calls for such expressions to be avoided.[60]

II. Language and Interpretation

To understand EU legislation, it is never enough simply to look at one language version.

On the basis of the provision in Regulation No. 1[61] that all regulations must be 'drafted' in all the official languages, the Court of Justice has developed the doctrine that all the language versions are authentic, from which it follows that no one single version is authentic. In the *CILFIT* case, it held: "it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions".[62]

It went on to explain further why it was not possible simply to rely on the text of any single language version of EU legislation:

> It must also be borne in mind, even where the different language versions are entirely in accord with one another, that 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.

59 In a lecture in Brussels on 26 October 2006, A. Piehl of the Institute for the Languages of Finland reported that the average number of words per sentence in Finnish legislation had fallen from 23.1 in the 1990s to 14.9 in the 2000s. However, according to a study she carried out in 2006, the average number of words in a sentence in EU legislation in the years 1992 to 2002 was still 23 (<http://ec.europa.eu/dgs/legal_service/seminars/fi_piehl20061026.pdf>, accessed on 27 January 2014).

60 Point 5.2.4.

61 *See* n. 9, Art. 4.

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

> Finally, 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.[63]

The Court of Justice's observation that legal concepts do not necessarily have the same meaning in EU law as they have in the national law of the Member States is an important reminder of the need for caution when reading EU legislation.

For example, 'codification' in EU parlance refers to the operation of combining an original act and all the amendments to it in a single new act adopted by the legislative authority under an accelerated procedure. That is closer to what is called 'consolidation' in English law, but 'consolidation' in EU law refers to the publication by the EU's Publications Office of the text of the enacting terms only of an original act incorporating all amendments, the resulting text being for information only.

In a number of cases, users of EU legislation have fallen into the trap of relying on the meaning in their national law of a term used in the text in their language of an EU act. The Court of Justice has ruled, however, that the EU "legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect".[64]

Another problem is that nuances in EU usage are too often not known to the general user. For example, many writers refer to 'transposition' and 'implementation' of EU directives as though the two words are interchangeable. In fact though, to 'transpose' a directive is to adopt the national provisions needed to give effect to it, while to 'implement' a directive is the next stage of actually applying and enforcing those national provisions.

H. Ways to Improve the Clarity of EU Legislation

I. Publish All Rules and Guidance on Drafting and Interpretation

Despite the commitment to openness and transparency in the TEU, it is far from easy for users of EU legislation to find all the rules and guidance on the drafting and interpretation of EU legislation.

The rules on drafting and the form of legislation are at present scattered in Treaty provisions, the institutions' rules of procedure, and agreements between the institutions and elsewhere.[65] The drafting guidance that is published on the EUR-Lex website is short in comparison with the guidance reserved to the institutions' internal use. The approach to interpretation of EU legislation must be deduced from the case law of the Court of Justice.

There are now 28 EU Member States with very different legal systems and drafting traditions. To promote better understanding of EU legislation, the EU should bring together all the rules and guidance on drafting and make it public in

63 *Ibid.*, paras. 19 and 20.
64 Case C-103/01 *Commission v. Germany* [2003] ECR I-5369, para. 32
65 *See* W. Robinson, n. 50.

one place. Ideally, much of it should be in the form of a binding instrument,[66] but even a comprehensive website would be a big step forward.

At least basic guidance on interpretation of EU legislation should be published in the same place.

To improve access to EU terminology, the EU institutions have established a joint terminology database.[67] It should be made more widely known and should be enhanced with the inclusion of all the terms that have been defined in EU legislation and also with a glossary of EU legislative drafting terms that appear alien to most EU citizens.

II. Drafting Units

When the EU institutions adopted the 1998 Agreement on drafting guidelines, the prescribed implementing measures including the following: "the institutions … shall foster the creation of drafting units within those bodies or departments within the institutions which are involved in the legislative process".[68]

Both the United Kingdom and Ireland have their own specialist drafters or parliamentary counsel, and it is likely that it was from there that the idea of specialist EU drafters originated.

The United Kingdom has returned to the suggestion more than once. In 2003, a report commissioned by the UK government listed technical problems

66 *See* W. Robinson, n. 44.

67 *See* <http://iate.europa.eu/iatediff/SearchByQueryLoad.do;jsessionid=9ea7991c30d897d86bed22cb40fe97448d495864614a.e3iLbNeKc3mSe3aNbxuQa3qLbi0?method=load>, accessed on 27 January 2014.

68 Implementing measure (*c*).

repeatedly found in EU legislation and proposed the creation of a central drafting office to prevent them.[69] The UK parliament has also endorsed the suggestion.[70]

The advantages of drafting units are obvious to most of those familiar to the common law tradition. A smaller group of drafting specialists working in their mother tongue is able to develop a high level of drafting expertise. Those specialists are of course aware of all the rules and guidance available and are able to learn from their own drafting experience and that of their colleagues. They can produce drafts that are of high quality and are consistent.

It seems though that the EU institutions still prefer to retain the system of decentralised drafting by staff who specialise in the technical subject matter concerned that is familiar to most of the civil law countries of continental Europe. Despite the commitment given in 1998, they have so far not created any drafting units.

III. Involve Linguists More

In the absence of specialised drafting units, one obvious way of making legislation clearer is to involve linguists in the drafting process, as is already done in a number of continental European countries.

This has been the practice in Sweden since 1976, when a team of linguists and lawyers was set up in the Ministry of Justice to check the language and form

69 R. Bellis, *Implementation of EU Legislation*, A Study for the 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 by R. Wainwright, in 'Technique of Drafting European Community Legislation: Problems of Interpretation', *Statute Law Review*, Vol. 17, No. 1, 1996, p. 7.

70 *See* in particular the Twenty-Second Report of the UK Parliament House of Lords Select Committee on EU law, 2007-2008: "The Commission acknowledges that there can be problems with the quality of drafting of legislation. It is taking steps to address this issue and the associated difficulties of operating in many languages. The issue of drafting quality should not be exaggerated: lack of clarity often arises not in the original proposal but from the changes introduced as a proposal goes through the legislative process. The Commission should give serious consideration to the creation of a cadre of specialist legislative drafters" (point 157, in bold in the original). <www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/150/15002.htm>, accessed on 27 January 2014. The statement by Lord Mance on that report as regards drafting in the Commission: "The committee considers that consideration should be given to introducing a cadre of specialist legislative drafters along the lines of the United Kingdom's domestic parliamentary draftsmen. On 30 September, the Government wrote welcoming the committee's report and analysis and indicating broad agreement with many points we made. They regarded our proposal for a specialist cadre of drafters as interesting, and we await their response to our question about whether they will actively promote it" <www.publications.parliament.uk/pa/ld200809/ldhansrd/text/81212-0001.htm#08121251000325>, accessed on 27 January 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.

of all draft legislation. No legislation may be sent to the printers without their approval.[71]

In Finland too, all proposals for legislation are checked by the Unit of Legislative Inspection at the Ministry of Justice, in the course of which "Special attention is also paid to the linguistic accuracy, comprehensibility, preciseness and consistency of the proposal".[72]

In Switzerland, the language service of the Federal Chancellery examines the linguistic quality of all draft legislation.[73] It checks the structure, understandability, linguistic correctness, and substantive and terminological consistency to ensure that all legislation is "citizen-friendly, transparent and understandable".[74]

In Germany, a team of linguists at the Ministry of Justice checks the linguistic correctness and understandability of all draft legislation at the stage of the ministerial consultation.[75] And the linguistic correctness and understandability of all draft legislation must be checked again in parliament by the Gesellschaft für deutsche Sprache (German Language Commission).[76]

In the EU, the creation by the Council and Commission as long ago as the 1970s of the function of lawyer linguists to check draft legislation was a step in the same direction, and indeed some of the first lawyer linguists came from the institutions' own translation departments. Since the Interinstitutional Agreement of 1998, the role of the lawyer linguists of all three institutions has been enhanced by involving them earlier in the drafting process. One factor to note, however, is that the lawyer linguists' responsibilities include checking the legal presentation and form of the original and ensuring that all the 28 language versions correspond exactly. As a result, their resources are thinly spread, and they are not able to do all they might to improve the linguistic quality of the original.

In the Commission, the need was recognised in the early 2000s, and the Directorate-General for Translation set up an editing service to improve the linguistic quality of documents drafted within the Commission. In 2005, DGT

71 *See The Swedish Government Promotes Clear Drafting*, published by the Swedish Ministry of Justice, May 2005. The main source of initiative for the plain language movement has ever since been the Cabinet Office. The Director-General for Legal Affairs of the Cabinet Office is responsible for 'high quality in the legislation and the administration' and for seeing to it that 'the language in Acts and other decisions is as clear and simple as possible' (Ordinance concerning the Duties of the Government Office, 26 §).

72 *See* <www. oikeusministerio. fi/ en/ index/ basicprovisions/ legislation/ parempisaantely/ lawdraftingprocess_0.html>, accessed on 27 January 2014.

73 *See* <www. bk. admin. ch/ themen/ lang/ 00938/ index. html ?lang= de>, accessed on 27 January 2014.

74 *See* <www. bk. admin. ch/ themen/ lang/ 04921/ index. html ?lang= de>, accessed on 27 January 2014.

75 *See* <www. bmj. de/ DE/ Ministerium/ OeffentlichesRecht/ RechtspruefungSprachberatung AllgemeinesVerwaltungsrecht/_node.html>, accessed on 27 January 2014.

76 *See* Para. 42(5) of the Joint Rules of Procedure of the Federal Ministries (GGO): <www.bmj.de/ SharedDocs/Downloads/DE/pdfs/§44GGO.pdf?__blob=publicationFile>, accessed on 27 January 2014.

undertook to expand its editing service to cover a substantial proportion of English and French originals drafted by non-native speakers.[77]

But it is not compulsory for all documents produced within the Commission to be submitted for editing. Each department decides for itself which of its documents need to be checked. Worryingly, as we have seen, the survey carried out in the Commission in 2009 revealed that most Commission drafters do not even have their documents checked by a native speaker of the language concerned.[78]

Accordingly, one of DGT's current main objectives to "Promote more systematic use of editing in the Commission's document production workflow" must be welcomed wholeheartedly.[79]

IV. Binding Rule

An academic commentator has suggested that requirements set out in EU food law and labelling provisions to use language which is 'easily understood'[80] and the approach taken by the Court of Justice "ought to be extrapolated to create a duty of EU officials to use language in a clear and comprehensible manner in their dealings with EU citizens".[81]

Since that article was written, more EU acts have imposed similar duties in other areas.[82]

But rather than relying on such extrapolation, some eminent figures have suggested that the EU should have a binding rule that its legislation be clear and understandable.

In 1997, at the conference on quality of legislation organised by the Netherlands to prepare the ground for the Amsterdam Intergovernmental Conference, the Netherlands Minister of Justice, Ms W. Sorgdrager, said:

> There is one topic I should like to examine in more detail myself: this concerns the proposal by the Dutch Government in the IGC concerning the quality of European legislation. In the first place, our aim with this proposal is to embed care for the quality of European legislation in the new EU Treaty itself.

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

78 *See supra* n. 44.

79 DGT Management Plan, Objective T4: <http://ec.europa.eu/atwork/synthesis/amp/doc/dgt_mp_en.pdf>, accessed on 27 January 2014.

80 *See* Directive 2000/13/EC of the European Parliament and of the Council (OJ L 109, 6.5.2000, p. 29), Art. 16(1): "Member States shall ensure that the sale is prohibited within their own territories of foodstuffs for which the particulars provided for in Art. 3 and Art. 4(2) do not appear in a language easily understood by the consumer".

81 *See* M. Aziz, 'Mainstreaming the Duty of Clarity and Transparency as Part of Good Administrative Practice in the EU', *European Law Journal*, Vol. 10, No. 3, May 2004, pp. 282-295.

82 *See* Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (OJ L 376, 27.12.2006, p. 36); Art. 7 refers to ensuring that "information is easily accessible", states that the "information shall be provided in plain and intelligible language" and refers to information being "provided in a clear and unambiguous manner". Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1); Art. 3(2), Art. 4(4), and Art. 5(2) each refer to information being provided "in simple and accessible language".

> Care for the quality of legislation will become less optional. The institutions will be bound by guidelines on the quality of legislation when they take decisions on draft legislation.[83]

Again at the Convention on the EU Constitution in 2002, two delegates suggested the insertion of a requirement in the Treaty that "legal acts should be drafted clearly, simply and precisely with the aim of making them easy to understand for the citizens".[84]

Such a provision already exists in the national laws of some EU Member States such as Sweden[85] and Germany.[86] Similar provisions exist in the USA[87] and Australia.[88]

The OECD has recently adopted a recommendation that its member countries should make clear legislation part of their formal policies.[89] Point 2 states: "Governments should ensure that regulations are comprehensible and clear and that parties can easily understand their rights and obligations".

Point 2.5 expands on that recommendation: "Governments should have a policy that requires regulatory texts to be drafted using plain language".

Such a rule is perhaps less useful in common law countries where legislation is drafted by parliamentary counsel who are all very conscious of the need for clear legislation.

But it is valuable in a decentralised drafting system to remind all the numerous participants in the drafting process of what they should be aiming at and to strengthen the hand of those in the system who are trying to improve the drafting quality but coming up against resistance on grounds of expedience or inertia.

I. Conclusion

In 1995, the European Economic and Social Committee emphasised the urgent need for the EU to improve its communication as follows:[90]

83 *See* Kellerman 1998, p. 6.

84 Paper submitted to Working Group IX on Simplification (WG IX – WD 14 of 6.11.2002) by L. Hjelm-Wallén & K. Kvist.

85 The Director-General for Legal Affairs of the Cabinet Office is responsible for 'high quality in the legislation and the administration' and for seeing to it that 'the language in Acts and other decisions is as clear and simple as possible' (Ordinance concerning the Duties of the Government Office, 26 §).

86 The Joint Rules of Procedure of the Federal Ministries provides: "Draft laws must be drafted in a manner that is linguistically correct and as far as possible understandable to everyone", para. 42(5). Gemeinsame Geschäftsordnung der Bundesministerien <www.bmj.de/SharedDocs/Downloads/DE/pdfs/§44GGO.pdf?__blob=publicationFile>, accessed on 27 January 2014.

87 Executive Order 13563 of 18 January 2011 on Improving Regulation and Regulatory Review provides: "Our regulatory system … must ensure that regulations are accessible, consistent, written in plain language, and easy to understand".

88 *See* section 3 of the Legislation Act 2001.

89 Recommendation on Regulatory Policy and Governance, 22.3.2012: <www.oecd.org/governance/regulatorypolicy/2012recommendation.htm>, accessed on 27 January 2014.

90 Opinion on Plain Language (OJ C 256, 2.10.1995, p. 8).

> Plain language is essential to a more open Community. ... People would understand official documents more easily. Translation would be easier, quicker and cheaper. Above all, hostility to European ideals and principles would be reduced because the people of Europe would feel more at ease with European institutions, rules and the people in charge of European matters. European documents would become an influence towards harmony and cohesion in Europe. (points 1 and 2)

The Committee concluded:

> The Commission should take positive steps to do what the 1993 Council Resolution has said ought to be done. The Committee has shown that it is official policy to use plain language. It has shown that it is possible to use plain language in official documents and in legislation. All that is now required is that it should actually happen. The people of Europe are yearning for clear and simple language in European documents. Let us give it to them. (point 3)

Almost 20 years later, the EU still does not have a formal commitment to using clear and simple language nor the mechanisms to deliver it. In the United Kingdom, a parliamentary committee has said:

> The language of government, politics and administration matters. The public sphere demands a public language that conveys meaning. Any language that obscures, confuses or evades does not fulfil its public purpose.... Good government requires good language; while bad language is a sign of poor government.[91]

In the EU too, the Parliament, as the body that is directly elected by and accountable to EU citizens, could combat bad language and insist that EU legislation, as well as all other written communication, be clear and simple. Its members have noted the Commission's Clear Writing Campaign.[92] Now they should make their own commitment to clear and simple language and embody it in a binding rule, perhaps as part of the General Administrative Law that the Parliament is currently considering for the EU.[93]

91 House of Commons Public Administration Committee, Report on Bad Language: The Use and Abuse of Official Language, 2009, at point 45: <www.publications.parliament.uk/pa/cm200910/cmselect/cmpubadm/17/1702.htm>, accessed on 27 January 2014.

92 *See* written question E-007198/2011 by David Martin MEP: <www. europarl. europa. eu/ sides/ getDoc.do?type=WQ&reference=E-2011-007198&language=EN>, accessed on 27 January 2014, and the answer given by Commissioner Vassiliou, <www. europarl. europa. eu/ sides/ getAllAnswers.do?reference=E-2011-007198&language=EN>, accessed on 27 January 2014.

93 *See* Working document on the state of play and future prospects for EU administrative law submitted to the Committee on Legal Affairs on 19 November 2011, in particular Recommendation 20: <www. europarl. europa. eu/ document/ activities/ cont/ 201210/ 20121025ATT54550/ 20121025ATT54550EN.pdf>, accessed on 27 January 2014.