Quo Vadis, Europa?

Loopholes in the EU Law and Difficulties in the Implementation Process*

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Abstract

EU law is a very wide-ranging legal system that comprises thousands of legal acts. It endeavours to regulate many relationships in the Member States of the European Union and effects everyday lives both of individuals and public bodies. EU law is, however, not always positively accepted. Such non-acceptance often follows from the increasing number of cases when EU law cannot be effectively applied on the national level. Significant reason for that lies in the poor quality of EU law.

The article describes features that cause ambiquity of EU legislation, its complexity and incompleteness, that have a very detrimental effect on the application of EU law on the national level. Further it refers to defects of form of certain pieces of EU legislation that give rise to questions concerning legal certainty and due implementation into national legal orders. The article contains many illustrative examples supporting the presented points of view and indicates ways to be taken in the future.

Keywords: EU Law, Quality of Legislation, Loopholes, Implementation, Joint Practical Guide.

EU law, like other systems of laws, is evolving under the influence of many factors. Two of the key factors that have led to gradual change in European legislation from the time it was created are the aspiration of the EU to regulate new areas and the increasing number of Member States, both factors determined by political will. As a result EU law has become a very complex and wide-ranging corpus of rules that all have to be applied in the EU Member States.

For EU legislation to be capable of being effectively applied, observed and enforced it is necessary to ensure that the rules it lays down are precise and clear. This is a crucial point, especially in areas of law that are addressed to a large number of Member States with differing legal cultures, national rules and traditions. But meeting this precondition is far more difficult than it might seem.

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The negotiation process at the EU level is complex. It involves 28 Member States with changing political views and disparate legal backgrounds. The language barriers between the 24 EU languages must also play a role.[1] To achieve agreement on legislation among so many stakeholders compromises and concessions have to be made by all the Member States. The quality of the text must inevitably suffer. After the long negotiations it is therefore not really surprising that some supposedly normative provisions sound more like political proclamations and that the final text is sometimes far from clear.

But this understandable fact should not be used as an excuse. Bad legislation has a very detrimental impact on legal relationships and actually causes new problems that impose a heavy burden on individuals and courts. It should therefore be avoided as much as possible.

Unfortunately the EU is not very successful in shaking off 'bad habits' concerning legislation. Xanthaki has raised critical comments concerning the substance of the legislative text (*i.e.* whether the legislation in question represents an effective means of achieving the aim in question and whether proportionality is achieved); the legislative process (its transparency and fulfilment of the principle of subsidiarity); and the technical side of drafting, such as long titles and sentences, non-normative statements within EU texts, ambiguous phrases and contradictory provisions, or difficult distinctions between the date of entry into force and other dates introduced for implementation.[2] Voermans identifies seven requirements to be met as EU standards for legislative quality: legality, due procedure and consultation, subsidiarity and proportionality, choosing the right instrument, implementation and transposition, enforceability and technical quality. He warns that lack of legislative quality threatens European integration on all levels.[3]

Both legislative drafting experts and those specializing in the application of laws are especially concerned about the technical side of drafting. Defects identified in EU legislation include long acts with many explanatory recitals[4]; complicated definitions, including circular definitions in which the defined term is used as part of the definition itself; unclear scope of application that is being reshaped by recitals; imprecise references to other legal texts; non-normative statements within EU acts; or lack of transitional provisions that raise questions concerning the retrospective character of certain EU rules.[5]

1 W. Robinson, 'Making EU Legislation Clearer', *European Journal of Law Reform*, Vol. 16, No. 3, 2014, pp. 610-632.

2 H. Xanthaki, 'The Problem of Quality in EU Legislation: What on Earth Is Really Wrong?', *Common Market Law Review*, Vol. 38, 2001, pp. 651-676.

3 W. Voermans, 'Concern About 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.

4 W. Robinson, 'Evolution of European Union Legislative Drafting', *The Loophole*, No. 1, 2014, pp. 8-29.

5 Some of these features have been presented by A.-M. Hasselrot, R. Baratta, G. Hogan & K. Gombos at the Quality of Legislation Seminar organized by Legal Service of the European Commission, 3 July 2014, available at: <http://ec.europa.eu/dgs/legal_service/seminars_en.htm>.

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The problem lies not just in a 'lack of order' that could be corrected by ensuring compliance with formal rules like accurate numbering, updated references or unified and consistent terminology. The cause of the poor formal quality of EU legislation is more complex. Certain features even undermine the clarity of EU law to such an extent that they make it impossible for the Member States to implement EU law correctly and in good time into their legal orders and for the individuals and Member States to apply it in practice.[6] Such legislation cannot be effective.[7]

The EU has certainly been trying for many years to respond to the objections to the quality of EU legislation.[8] Concerning the technical side of drafting, it has adopted the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation[9] (hereinafter 'Interinstitutional Agreement' or 'IA'). The Interinstitutional Agreement lays down basic principles for legal drafting and thus establishes a concise but good basis for avoiding many problems. Furthermore, the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation (hereinafter 'Joint Practical Guide' or 'JPG'),[10] which expands on the Interinstitutional Agreement, is a good handbook of drafting practice. But such a codification of the main principles of legal drafting with just a few examples of bad practice is obviously not sufficient. There are still too many serious defects in EU legislation. It is probably difficult, without lengthy experience of drafting at both the EU and national levels, to recognize in the phase of creation of laws what makes the text unclear, inconsistent and difficult to realize in the phase of national implementation. This article therefore provides examples of various features that have a negative impact on the quality of EU legislation.

A Ambiguity

Probably the most difficult feature to overcome is ambiguity (the ambiguous nature of rights and obligations of individuals, public bodies and Member States and ambiguity in definitions in EU acts). Ambiguity is caused by different factors, such as by using soft-law provisions, by inconsistent formulations within one EU act or inconsistent links with other EU acts, or by unclear relationships to the case law of the Court of Justice of the EU. Ambiguous provisions make the consequences of the legislation unpredictable and undermine the positions of both the Member States and the individuals whose rights or obligations are to be regulated

6 This situation is breaching the principle of sincere cooperation under Art. 4 TEU.

7 *See* functional definition of quality of legislation – H. Xanthaki, 'Quality of Legislation: An Achievable Universal Concept or Utopian Pursuit?', *in* M.T. Almeida (Ed.), *Quality of Legislation*, Nomos, Baden-Baden 2011, pp. 75-85.

8 For a detailed discourse on the EU efforts *see* Robinson 2014. Concerning recent attempts – *see* Proposal for an Interinstitutional Agreement on Better Regulation from 21 May 2015, COM(2015) 216 final.

9 OJ C 73, 17 March 1999, p. 1.

10 *See* <http://eur-lex.europa.eu/content/techleg/EN-legislative-drafting-guide.pdf>.

by the EU acts. Since ambiguity can be fatal to clear and effective application of EU law, it must be kept to a minimum.

I Soft-Law Provisions in Legally Binding EU Acts

Soft-law provisions are, unfortunately, often included in legally binding EU acts even though both the Interinstitutional Agreement and the Joint Practical Guide warn against their use.[11] The frequency with which they occur shows that reaching a compromise between 28 Member States is considered to be more important than producing a clear text. A worrying factor is that soft-law provisions are occurring more often in new legislation, suggesting that it is attributable to the increasing number of Member States involved in the negotiations.

For instance, Regulation (EU) No. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency[12] sets out in Article 2 certain definitions that are vital for the transparency of the wholesale energy market. At the same time, in Article 16 it gives the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No. 713/2009[13] a soft-law obligation to "aim to ensure that national regulatory authorities carry out their tasks under this Regulation in a coordinated and consistent way". Moreover, the Regulation on wholesale energy market and transparency gives the Agency an obligation to publish non-binding guidance on the application of the definitions set out in Article 2, as appropriate.

Definitions should be basic 'building blocks' of an EU act that are important for determining its scope of application. Therefore, it is important that these 'building blocks' are stable and are changed only through legal acts of the same nature. Provisions containing definitions like 'wholesale energy market', 'wholesale energy product' or 'market manipulation' should not be left to the discretion of the Agency. But if the discretion of the Agency has already been approved in such a broad way,[14] it does not seem logical for the guidance on the application of the definitions to be only non-binding. What will the consequences be for the Member States and the national regulatory authorities? Do they have to follow the guidance given by the Agency if it is non-binding? Since the Agency is to "aim to ensure that the tasks are carried out in a consistent way" will it seek to oblige the national regulatory authorities to follow the guidance? Will the Member States be liable if the non-binding guidance is not followed?

11 IA, Guideline 12: "The enacting terms of a binding act shall not include provisions of a non-normative nature, such as wishes or political declarations…". JPG, Guideline 12.1.: "Binding acts should lay down rules, including provisions setting out the information (for example: the scope and the definitions) necessary to understand and apply those rules correctly. Anything else is superfluous: desires, intentions and declarations do not belong in the enacting terms of a binding act."

12 OJ L 326, 8 December 2011, p. 1.

13 Reg. (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14 August 2009, p. 1).

14 Concerning the extent of delegation of powers on bodies other than those that the Treaty established *see* Case 10-56 *Meroni* (European Court reports, English special edition Page 157), paras. 172 and 173, and *infra* note 64.

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Similarly, questions concerning legally binding character are raised in the case of various indicative lists[15] or specimens[16] that are present in EU acts and form part of the conditions that the Member States are required to implement. The problem is that these provisions raise questions as to the extent of the obligation of implementation and as to what elements of those provisions really have to be incorporated in national law. For example, Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionizing radiation[17] sets up a system based on a high level of protection that must be ensured by the Member States and on certain regulatory controls such as licensing and authorization. Those procedures should be precise so that legal certainty and legal expectations are not undermined throughout Europe. The Directive provides, however, only that the Member States are to take into account 'the indicative lists' contained in various annexes to the Directive. For instance, "in the case of licensing and when determining what information must be provided under paragraph 1, Member States shall take into account the indicative list in Annex IX." (*See* Article 29(2); *see* the similar provisions in Article 22 and Article 75.) If the list of practices, the list of information or the lists of types of exposure situations are only indicative, to what extent must they be followed and complied with? Which items can a Member State choose to omit or depart from? Is it still possible for a uniform standard to be reached if each Member State chooses different criteria from the indicative lists?

II Inconsistencies between Legally Binding EU Acts or within One Act

Logical interconnections in legal acts are another precondition for laws to be clear. And they are not easy to achieve. In modern legal orders that include voluminous legislation and that have to regulate large numbers of relationships often in highly technical sectors, it is very difficult to achieve a consistent wording that does not leave any loopholes, either within the legal act in question or regarding the interconnection between that act and another. Unfortunately, the negotiation process at the EU level does not often give much opportunity to consider the consequences that a legislative proposal will have on other EU acts since political compromise is more important than the impact it will have in the phase of national implementation.

Lack of clear and logical structures is often linked with long and complicated sentences. Verbosity seems to lead to – and perhaps sometimes attempt to conceal – unclear limits of legal relations that the legal act purports to regulate. Thus, it can be very difficult to interpret some EU acts and to ascertain their precise scope of application. Frequently, inconsistencies appear in definitions and provi-

15 *See* directives in the field of protection of environment, *e.g.* Art. 7a para. 2 of Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions (OJ L 140, 5 June 2009, p. 88).

16 *See* Annexes to Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1 June 2012, p. 1).

17 OJ L 13, 17 January 2014, p. 1.

sions on the scope of application of EU acts, but other parts can be affected as well.

1 Badly Interconnected Definitions and Inconsistent Scope of Application

For example, Regulation (EU) No. 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC[18] includes the following definition in Article 2(1):

> '*accident*' means an occurrence associated with the operation of an aircraft which, in the case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, or in the case of an unmanned aircraft, takes place between the time the aircraft is ready to move with the purpose of flight until such time it comes to rest at the end of the flight and the primary propulsion system is shut down, in which:
>
> (a) a person is fatally or seriously injured as a result of:
> – being in the aircraft, or,
> – direct contact with any part of the aircraft, including parts which have become detached from the aircraft, or,
> – direct exposure to jet blast,
>
> except when the injuries are from natural causes, self-inflicted or inflicted by other persons, or when the injuries are to stowaways hiding outside the areas normally available to the passengers and crew; or
>
> (b) the aircraft sustains damage or structural failure which adversely affects the structural strength, performance or flight characteristics of the aircraft, and would normally require major repair or replacement of the affected component, except for engine failure or damage, when the damage is limited to a single engine, (including its cowlings or accessories), to propellers, wing tips, antennas, probes, vanes, tires, brakes, wheels, fairings, panels, landing gear doors, windscreens, the aircraft skin (such as small dents or puncture holes) or minor damages to main rotor blades, tail rotor blades, landing gear, and those resulting from hail or bird strike, (including holes in the radome); or
>
> (c) the aircraft is missing or is completely inaccessible;

That definition is so long and complicated that most readers will be lost already in the first part. But especially point (b), which lists in chaotic fashion parts of the aircraft (which should either be covered by or exempted from the definition), topples into absurdity. Moreover, it seems strange that an engine failure limited to a single engine is not deemed to be an accident. Is it possible that that is something that does not normally require a major repair of the affected component?

18 OJ L 295, 12 November 2010, p. 35.

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Clearly, such a definition is far from acceptable. It is not in line with the Interinstitutional Agreement as it is contrary especially to the second sentence of Guideline 4, which recommends avoiding overly long articles and sentences,[19] and it does not fulfil recommendations of the Joint Practical Guide either.[20] Further, point (b) of the definition does not comply with Guideline 22 of the Interinstitutional Agreement, which recommends that technical aspects should be set out in annexes.[21]

But this definition is not the only one: the same Regulation also defines an '*incident*' and a '*serious incident*' as follows:

> *'incident'* means an occurrence, other than an accident, associated with the operation of an aircraft which affects or could affect the safety of operation,[22]
> *'serious incident'* means an incident involving circumstances indicating that there was a high probability of an accident and is associated with the operation of an aircraft, which in the case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, or in the case of an unmanned aircraft, takes place between the time the aircraft is ready to move with the purpose of flight until such time it comes to rest at the end of the flight and the primary propulsion system is shut down.[23]

A 'list of examples of serious incidents is set out in the Annex' to the Regulation, but it does not help much, as it is not exhaustive.

The difference between these definitions, especially between the definition of 'accident' and 'serious incident', is therefore very vague. The borders of the situations to be covered by the respective definitions are unclear, making the task of achieving a uniform application and construction of the obligations stemming from the Regulation impossible.

To make the situation even more complicated, Directive 2003/42/EC on occurrence reporting in civil aviation,[24] which has recently been repealed by Regulation No. 376/2014,[25] defined (in Article 2(1)) '*occurrence*' as:

19 "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."

20 Guideline 4.6: "It is sometimes easier to draft complicated sentences than to make the effort to summarise content which results in clear wording. However, this effort is essential in order to achieve a text which can be easily understood and translated."

21 "Technical aspects of the act shall be contained in the annexes, to which individual reference shall be made in the enacting terms of the act and which shall not embody any new right or obligation not set forth in the enacting terms."

22 Art. 2(7).

23 Art. 2(16).

24 Directive 2003/42/EC of the European Parliament and of the Council of 13 June 2003 on occurrence reporting in civil aviation (OJ L 167, 4 July 2003, p. 23).

25 Reg. (EU) No. 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation (OJ L 122, 24 April 2014, p. 18).

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> an operational interruption, defect, fault or other irregular circumstance that has or may have influenced flight safety and that has not resulted in an accident or serious incident, hereinafter referred to as 'accident or serious incident', as defined in Article 3(a) and (k) of Directive 94/56/EC.

Since Council Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents[26] was repealed by the aforementioned Regulation on the investigation and prevention of accidents and incidents in civil aviation, the definitions of 'accident' or 'serious incident' had to be interpreted according to that Regulation. And if the limits of the definitions of 'accident' and 'serious incident' were not clear in the Regulation on the investigation and prevention of accidents and incidents in civil aviation, the definition of 'occurrence' could not be clear either, and the interpretation of these terms must have been extremely confusing. That must have been contrary to Guideline 6 of the Interinstitutional Agreement concerning consistency in the use of terminology[27] and to the Joint Practical Guide as well.[28] Accordingly, national measures transposing the Directive on occurrence reporting in civil aviation probably could not be logically interconnected with the Regulation on the investigation and prevention of accidents and incidents in civil aviation and could not unequivocally establish their scope of application in line with both the Directive and the Regulation. It is therefore fortunate that the Directive on occurrence reporting in civil aviation was repealed by Regulation No. 376/2014. However, the problems concerning the interpretation of terms contained in the Regulation on the investigation and prevention of accidents and incidents in civil aviation have not yet been resolved, and it seems that new EU legislation is not avoiding trends concerning inconsistent definitions either (see a definition of 'serious accident' in Article 3 (l) of Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways[29] and a definition of the term 'significant accident' in Appendix, point 1.1 of Commission Directive 2014/88/EU of 9 July 2014 amending Directive 2004/49/EC of the European Parliament and of the Council as regards common safety indicators and common methods of calculating accident costs).[30]

26 OJ L 319, 12 December 1994, p. 14.

27 "The terminology used in a given act shall be consistent both internally and with acts already in force, especially in the same field."

28 Guideline 6.2: "Consistency of terminology means that the same terms are to be used to express the same concepts and that identical terms must not be used to express different concepts. The aim is to leave no ambiguities, contradictions or doubts as to the meaning of a term. Any given term is therefore to be used in a uniform manner to refer to the same thing, and another term must be chosen to express a different concept."

29 OJ L 164, 30 April 2004, p. 44.

30 OJ L 201, 10 July 2014, p. 9. Some language versions, such as the Czech, use in an Appendix the term 'serious accident' whose definition differs from the term used in Directive 2004/49/EC.

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2 Other Unclear Provisions Having an Effect on the Scope of Application

Unclear limits of application and ambiguous links to other EU acts can also be found in EU provisions other than those on definitions and on the general scope of application. Apart from cases in which recitals purport to set out normative provisions[31] or in which there is inconsistency between recitals and normative provisions,[32] problems are also caused by provisions that could be called 'indirect amendments' of EU acts. These represent situations when a provision of one EU act supplements a provision of another EU act without a precise specification of this other EU act or its provisions. In such cases it is not clear what legal relationships and situations should be covered by the amending provision.

The Interinstitutional Agreement states in Guideline 18 that amendments should take the form of text to be inserted in the act to be amended.[33] And according to Guideline 16 of the Interinstitutional Agreement, references to other acts should indicate precisely the act or provision to which they refer.[34] Neither indirect amendments nor unclear references are therefore recommended by the EU drafting rules.

Regrettably, in reality those drafting rules are not always followed. For example, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive')[35] refers in Article 7 to so-called '*Misleading omissions*' as a part of '*Misleading commercial practices*' that are to be prohibited. Under Article 7(1) a commercial practice is to be regarded as misleading if:

> it omits material information that the average consumer needs to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

Article 7(5) further states that:

31 R. Baratta, *Complexity of EU law in the Domestic Implementing Process*. Presented at the Quality of Legislation Seminar organized by Legal Service of the European Commission, 3 July 2014, available at: <http://ec.europa.eu/dgs/legal_service/seminars_en.htm>.

32 *See* for example Opinion of AG Geelhoed in Joined Cases C-154/04, *The Queen Alliance for Natural Health Nutri-Link Ltd* and C-155/04 *The Queen National Association of Health Stores Health Food Manufacturers Ltd*, paras. 69, 75 and 81 (Reports of Cases: 2005 I-06451).

33 "Every amendment of an act shall be clearly expressed. Amendments shall take the form of a text to be inserted in the act to be amended. Preference shall be given to replacing whole provisions (articles or subdivisions of articles) rather than inserting or deleting individual sentences, phrases or words. An amending act shall not contain autonomous substantive provisions which are not inserted in the act to be amended."

34 "References to other acts should be kept to a minimum. References shall indicate precisely the act or provision to which they refer. Circular references (references to an act or an article which itself refers back to the initial provision) and serial references (references to a provision which itself refers to another provision) shall also be avoided."

35 OJ L 149, 11 June 2005, p. 22.

> Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.

Annex II to Directive 2005/29/EC refers to specific provisions of 14 directives, but does not by any means ensure clarity and legal certainty. First, the list is not up to date, since, for example, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts that is mentioned in the list[36] has been repealed by Directive 2011/83/EC,[37] and Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit,[38] which is amended by the Directive 98/7/EC[39] mentioned in the list, has been repealed by Directive 2008/48/EC.[40] Second, as the list is non-exhaustive, it is necessary to take account also of other situations not mentioned in the list that are not sufficiently specified. Third, the list also aspires to cover situations that could be contained in new EU acts approved in the future. Without a clear link to Directive 2005/29/EC (Unfair Commercial Practices Directive), it is in practice very unclear which provisions are liable to fall within the provisions containing '*material information*' for the consumer. It goes without saying that clarity is of the essence in the field of consumer protection, where it is crucial to strike a balance between the rights of consumers and the commercial interests of traders.

III Provisions of EU Law That Are Not Up to Date

Ambiguous situations are also caused by provisions of EU law that do not sufficiently reflect new legislation in other fields of EU law, or the case law of the Court of Justice. This situation should not happen in practice as Guideline 21 of the Interinstitutional Agreement provides that obsolete acts and provisions should be expressly repealed. The Joint Practical Guide specifies that an act may be obsolete not only because it is directly incompatible with the new rules, but also, for example, as a result of an extension of the scope of the rules.[41] But the

36 OJ L 144, 4 June 1997, p. 19.

37 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (OJ L 304, 22 November 2011, p. 64).

38 OJ L 42, 12 February 1987, p. 48.

39 Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 101, 1 April 1998, p. 17).

40 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22 May 2008, p. 66).

41 *See* JPG, Guideline 21.1.

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reality is different, and so we can commonly find provisions that fail to take account of progress in certain branches of laws.[42]

A relatively uncomplicated situation happens when the EU act mentioned in a reference is replaced by another EU act and it is easy to track this new EU act and its corresponding provision. In such cases it can be accepted that – despite the fact that it should not be a standard practice, especially in the case of directly applicable regulations having direct impacts on individuals – it is possible to find out what rules should be applied. What is much worse is when the reference is not clear at all, for example, because the EU act or provision referred to has been repealed without being replaced, or has been replaced by provisions of a fundamentally different character, so that it is impossible to track the new relevant provisions. A good example of this defect is Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).[43] The scope of Directive 92/57/EEC is defined in Article 1(2), which provides:

> This Directive shall not apply to drilling and extraction in the extractive industries within the meaning of Article 1 (2) of Council Decision 74/326/EEC of 27 June 1974 on the extension of the responsibilities of the Mines Safety and Health Commission to all mineral-extracting industries.[44]

The reference in Directive 92/57/EEC to Decision 74/326/EEC would present no problem if Decision 74/326/EEC had not been repealed at the end of 2003 by Council Decision 2003/913 of 22 July 2003 setting up an Advisory Committee on Safety and Health at Work.[45] Unfortunately, Decision 2003/913 does not carry over provisions of the Decision 74/326/EEC, so the scope of Directive 92/57/EEC (the scope of the exemption in Article 1(2) for drilling and extraction in the extractive industries) remains unclear.

Similar problems arise when an EU act provides for certain obligations that are unclear in the context of the related fields undergoing certain 'updating' processes, especially because of case law. For example, the aforementioned Regulation No. 1227/2011 on wholesale energy market integrity and transparency pro-

42 Dynamic references, *i.e.*, references that also cover future amendments of the act in question, are permitted by the JPG. It is, however, pointed out that it may lead to difficulties. *See* JPG, Guideline 16.13: "It is, however, important to be aware that dynamic references may lead to difficulties when construing the legal act concerned, in that the content of the provision making the reference is not predetermined, but varies depending on subsequent amendments to the provision referred to."

43 OJ L 245, 26. August 1992, p. 6.

44 OJ L 185, 9 July 1974, p. 18. This provision of the Decision provides for the following: "Mineral-extracting industries shall be taken to mean the activities of prospecting and of extraction in the strict sense of the word as well as of preparation of extracted materials for sale (crushing, screening, washing), but not the processing of such extracted materials." That is to say that the exception from the scope of the directive 92/57/EEC has to be interpreted narrowly, within the meaning of this provision.

45 OJ C 218, 13 September 2003, p. 1.

vides in Article 13 for an obligation to ensure that national regulatory authorities have the necessary investigatory and enforcement powers, which are to include the right to require existing telephone and existing data traffic records (Article 13(2)(d)). National regulators are therefore to be given extensive competence to interfere in the 'private sphere', which raises questions concerning fundamental rights. The retention of certain data in electronic communication services or public communication networks was allowed by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks[46] for the purpose of the investigation, detection and prosecution of serious crimes. But that Directive was annulled by the judgment of the Court of Justice of the EU in the Digital Rights Ireland case[47] on the grounds that the EU legislature had exceeded the limits imposed by compliance with the principle of proportionality in the light of the Charter of Fundamental Rights of the European Union. Since Directive 2006/24/EC was held to be invalid in the case of serious crimes, it is probably not possible to justify a similar attitude concerning requirements of telephone and data traffic records in the case of the investigation and enforcement in the wholesale energy market. Then questions arise as to how to ensure the full applicability of Article 13 of Regulation No. 1227/2011 and as to whether certain parts of the competence of the regulatory authority can be exercised at all. The full application of Article 13 of the Regulation therefore remains unclear.

The same ambiguity will probably arise with the implementation of Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.[48] This Directive's aim is to provide specific rules for effective enforcement and to facilitate a better and more uniform application of the substantive rules governing the freedom of movement of workers under Article 45 TFEU and under Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.[49] The defect consists in the fact that the personal scope of Directive 2014/54/EU does not extend to self-employed persons in a similar position whose rights concerning non-discrimination follow from Article 49 TFEU. The analogy between the position of self-employed persons and the position of workers has been confirmed in older rulings of the Court of Justice, for example in the *Meeusen* case.[50] Unfortunately, more recent rulings of the Court of Justice have not altogether maintained this approach: The judgment in the *Czop* case[51] strictly distinguished between the rights of workers, which derive from Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of move-

46 OJ L 105, 13 April 2006, p. 54.
47 Joined Cases C-293 and 594/12, *Digital Rights Ireland Ltd* (Reports of Cases: not yet published).
48 OJ L 128, 30 April 2014, p. 8.
49 OJ L 141, 27 May 2011, p. 1.
50 Case C-337/97, *C.P.M. Meeusen* (Reports of Cases: 1999 I-03289).
51 Joined Cases C-147 and 148/11, *Czop and Punakova* (Reports of Cases: not yet published).

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ment for workers within the Community[52] (now replaced by Regulation No. 492/2011), and the rights of self-employed persons, which derive from Directive 2004/38/EC 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.[53] It seems illogical and contrary to the principle of non-discrimination not to bring self-employed persons within the scope of Directive 2014/54/EC, which applies only to the matters specified in the Regulation No. 492/2011, especially if in both cases 'economically active' persons are covered. There can be no justification for failing to give self-employed persons equal treatment in areas like access to social and tax advantages or housing (*see* Article 2 of Directive 2014/54/EU). On the other hand, the recent case law of the Court of Justice does not support analogy in this area and thus leaves the situation of self-employed persons unresolved.

B Incompleteness of Laws

Incompleteness of laws is a specific horizontal feature having a very detrimental impact on the national implementation process. Unfortunately, this problem has been aggravated by the Lisbon Treaty with the new concept of so-called non-legislative delegated acts (Article 290 of the Treaty of Functioning of the European Union, hereinafter 'TFEU') that are intended to supplement or amend legislative acts, and implementing acts (Article 291 TFEU) that are intended to implement legally binding Union acts.[54] To make the following explanations easier to understand, legislative acts and legally binding Union acts are hereinafter called 'basic legal acts', while delegated and implementing acts are hereinafter called 'derivative legislation' or 'implementing measures'.

Nowadays, the role of derivative legislation is expanding; as a consequence, Member States are often obliged to implement basic legal acts adopted by the European Parliament and the Council without knowing what future measures having an important impact on these legal acts will arise.

Naturally, any legal order must, in order to function well and effectively, be structured and organized by different legal acts having their given position in a hierarchy of the order. Therefore it is acceptable to confer a certain regulatory competence on administrative bodies, in the case of the EU, especially on the European Commission. The European Commission has also been empowered to issue certain implementing measures to the basic legal acts under the so-called

52 OJ L 257, 19 October 1968, p. 2.

53 OJ L 158, 30 April 2004, p. 77.

54 The terminology in the Treaty is very confusing since it gives the impression that delegated acts are not normative and are not a part of the legislation, both of which are false. Depending on the form of the delegated act, they are binding for Member States or individuals. Furthermore, there is no clear borderline in using delegated acts and implementing acts – *see* Opinion of AG Villalón in case C-427/12, *European Commission v. European Parliament and Council of the European Union* (Reports of Cases: not yet published). Concerning criticism on a new typology of EU acts after the Lisbon Treaty *see* D. Ritleng, *La nouvelle typologie des actes de l'Union. Un premier bilan critique de son application*, Revue Trimestrielle de Droit Europeen 2015, p. 7.

Comitology procedure since the 1960s. In the late 1990s that procedure was enshrined in the Comitology Decision,[55] but it has now been superseded by the Lisbon Treaty and Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.[56]

However, the development of that derivative legislation (implementing acts and especially delegated acts) in recent years and particularly after the Lisbon Treaty raises questions concerning the transparency of the European legislative process. The number of measures concerned is increasing, and their character may affect the scope of the basic legal acts since the measures often touch on important matters provided for in the basic legal acts as well. It seems that derivative legislation is a good tool to avoid ordinary and extraordinary legislative procedures of the European Parliament and Council. The task is thus not about the existence or non-existence of implementing measures of the administrative bodies but about how far such competence can extend if it is not to 'overshadow' the primary competence of the legislative authority under the EU Treaties, that is to say the European Parliament and the Council.[57]

The growing powers of the European Commission and of other bodies intended to regulate specific fields have been particularly criticized in the case of the so-called Lamfalussy process created in 2001 to regulate the financial services sector.[58] This 4-level system nowadays consists of basic legal acts approved by the European Parliament and Council, then implementing measures of the European Commission, further technical acts, guidelines and recommendations of European Supervisory Authorities (ESAs) in the financial sector[59] and the oversight of the European Commission over the implementation of these rules in national legal orders. Directives of the European Parliament and Council based on this process, such as MiFID (Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments)[60] or the Solvency II (Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance

55 1999/468/EC: Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17 July 1999, p. 23).

56 OJ L 55, 28 February 2011, p. 13.

57 W. Voermans, 'Delegation Is a Matter of Confidence: The New EU Delegation System Under the Treaty of Lisbon)', *European Public Law*, Vol. 17, No. 2, 2011, pp. 313-330.

58 *See* the Commission's website: <http://ec.europa.eu/finance/securities/lamfalussy/index_en.htm>, or <http://en.wikipedia.org/wiki/Lamfalussy_process>.

59 For example, in the banking sector – European Banking Authority (EBA), in the securities sector – European Securities and Markets Authority (ESMA) and in the insurance and occupational pensions sector – European Insurance and Occupational Pensions Authority (EIOPA). This system was supplemented by the European Systemic Risk Board (ESRB) supported by the European Central Bank in order to oversee the macro prudential rules and systemic risks in the financial sector.

60 OJ L 145, 30 April 2004, p. 1. *See* also a new MIFID II – Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJ L 173, 12 June 2014, p. 349.

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and Reinsurance),[61] are therefore not only very complicated but also leave a lot of leeway for derivative legislation whose character, scope and form is not always clear.

But it is not just the specific financial sector that trends to a new and strong role of derivative legislation of the Commission and other specialized regulatory bodies. Nowadays, powers to adopt derivative legislation extend to almost all branches of EU law.[62] And specialized regulatory bodies play an important role: for example, Regulation No. 1227/2011 on wholesale energy market integrity and transparency previously referred to sets out definitions in Article 2, but those definitions can be aligned or updated by Commission delegated acts (Article 6) or 'interpreted' by the Agency for the Cooperation of Energy Regulators (Article 16(1)). That is to say, the scope of the Regulation can be 'adjusted' by means of further derivative legislation and even by interpretations given by non-Treaty bodies.[63]

I So Where Is the Problem?

According to the Treaty, delegated acts must not supplement or amend essential elements of basic legal acts (*see* Article 290 TFEU). As regards implementing acts, Article 291 TFEU is not so specific, but the same principle should apply to these acts as well, as stated in the case law of the Court of Justice.[64] Conversely, the essential elements of the acts fall within the exclusive competence of the legislative authority, formerly just the Council but now the European Parliament and the Council.

But what are '*essential elements*'? According to the case law of the Court of Justice, only those provisions that are intended to give concrete shape to the fun-

61 OJ L 335, 17 December 2009, p. 1.

62 Some examples among many: Art. 7 of Directive 2014/40/EU of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (OJ L 127, 29 April 2014, p. 1), Reg. (EU) No. 38/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the granting of delegated and implementing powers for the adoption of certain measures (OJ L 18, 21 January 2014, p. 52), Art. 9 of Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences (OJ L 68, 13 March 2015, p. 9), Art. 5 of Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJ L 174, 1 June 2011, pp. 88-110) or Reg. (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market (OJ L 257, 28 August 2014, p. 73).

63 *See* case in note 15. Delegation of powers to non-Treaty bodies can relate only to clearly defined executive powers, the use of which must be entirely subject to supervision by the delegating authority. But the recent case C-270/12 *United Kingdom v. European Parliament and Council of the European Union* (Reports of Cases: not yet published) concerning ESMA measures of general application does not sound that strict at all.

64 Case 25-70 *Köster* ([1970] ECR 01161), para. 6, and judgments mentioned in notes 66 and 67.

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damental guidelines of Community policy are classed as essential.[65] This general definition has been interpreted in the recent case of the *European Parliament v. Council*,[66] where the Court of Justice stated that the conferral of enforcement powers on border guards entails political choices falling within the responsibilities of the European Union legislature (paragraph 76). It, however, did not respond to the objection of the European Parliament concerning a broader construction of the term '*essential elements*', covering definitions and a delimitation of material scope (paragraph 44).

The fact that it has so far not been clearly stated where the dividing line is to be drawn between essential elements and non-essential elements is obviously a major problem of the 'basic' EU legislation and its relationship to the derivative legislation of the Commission and other specialized regulatory bodies. In my opinion, the margin left for the derivative legislation (implementing measures of the Commission or other specialized bodies) should be much narrower, so that definitions, provisions on material scope, new obligations not mentioned in the basic legal acts and a new competency of regulatory bodies cannot be adopted by derivative legislation. Insofar as delegated acts under Article 290 TFEU amend and supplement basic legal acts, they do not in principle comply with those limits and are damaging the transparency of the European legislative process since they undermine the division of competence between the European Parliament and the Council, on the one side, and the Commission and other specialized bodies, on the other. Therefore their application should be reduced to a minimum, and they should be resorted to only in fully justified situations. As this is not happening, the scope of implementing and delegated acts and other following legislation of specialized bodies is very broad and allows for intervention affecting the basic legal acts approved by the European Parliament and the Council. All too often the content of the basic legal acts is very vague since those acts merely establish a framework that will be further filled in by implementing measures of a different character.[67]

As a result, in the implementation process Member States are often obliged to implement a mere 'shell', a framework that is outlined in the basic legal act but whose actual content is not yet known. And it is not just the content that is not clear: often even the form of the further content (whether the implementing measure will be a directive, a regulation, a decision or some other atypical act) is not known. That 'known unknown' (to quote Donald Rumsfeld) has a fundamental impact on the Member States' legislative activity in view of the fact that directives and decisions addressed to the Member States that provide for obligations for individuals have to be transposed into national legal orders. Therefore if EU derivative legislation is approved in the form of a directive or a decision providing

65 *See* Case C-240/90, *Germany v. Commission* (Reports of Cases: 1992 I-05383), para. 37, Case C-14/01, *Molkerei Wagenfeld Karl Niemann GmbH & Co. KG* (Reports of Cases: 2003 I-02279), para. 33).

66 Case C-355/10, *European Parliament v. Council of the European Union* (Reports of Cases: not yet published).

67 It is frankly surprising that Member States represented in the Council agree to leave so much leeway to the derivative legislation.

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for obligations for individuals and at the same time it supplements or amends a basic legal act of the EU, it is normally necessary to amend the national legal act that transposed the basic legal act of the EU. The national legal act concerned is often of an important character (a statute), and such a change cannot be done quickly since it needs the consent of the national parliament. On the other hand, derivative legislation of the EU often specifies short implementation periods that can be complied with only with difficulty when transposition or some other substantial adjustment of the national legal order is necessary.[68] Therefore ill-considered or excessive use of EU derivative legislation often does not speed up the national implementation process and does not contribute to clarity on the issue in question.

Unclear situations also appear in cases in which individual decisions are mixed with derivative legislation, especially delegated acts. For instance, Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment[69] has been amended by many Commission delegated directives adapting Annex IV to Directive 2011/65/EU to technical progress.[70] What is confusing is that these delegated directives are of a general character and have to be transposed, while Article 5 of the 'basic' Directive 2011/65/EU does not sound that strict at all: it has created a system based on individual applications for granting, renewing or revoking an exemption from the requirements of the directive (*see* Article 5(3) and Annex V), so it looks as if the intention was to set up a system of individual decisions granted to manufacturers. Without knowing what future steps the Commission plans to apply, it is very hard to adjust national measures suitable for these intentions in a short time.

C Complexity

Overall complexity is another feature undermining the clarity of EU legislation that makes it difficult to produce user-friendly texts. It is not just that sentences used in EU acts are very long and complicated, as already mentioned (*see* A.II.1.), but they are often very technical. Naturally, modern society is technical, and a certain level of complexity is therefore inevitable. But many rules laid down in EU legislation are structured in such a way that the text is hardly understandable. In particular, the use of abbreviations and shortcuts in conjunction with long sentences makes the text very hard to follow. The abbreviations may present few

68 The situation is then contrary to IA, Guideline 20: "…Provisions on deadlines for the transposition and application of acts shall specify a date expressed as day/month/year. In the case of Directives, those deadlines shall be expressed in such a way as to guarantee an adequate period for transposition." Naturally, some Member States have instituted certain fast-track procedures or procedures making it possible to amend statutes approved by the Parliament by secondary national (governmental or ministerial) legislation. These procedures, however, raise constitutional objections and represent a permanent risk to the validity of this implementation process.

69 OJ L 174, 1 July 2011, p. 88.

70 *E.g.* Commission Delegated Directive 2014/1/EU (OJ L 4, 9 January 2014, p. 45).

problems for specialists in specific fields, but they can be incomprehensible for others, including lawyers.

For example, Commission Regulation (EU) No. 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No. 280/2004/EC and No. 406/2009/EC of the European Parliament and of the Council[71] contains many abbreviations and shortcuts that lead to sentences like:

> Decision 13/CMP.1 of the Conference of the Parties to the UNFCCC serving as the Meeting of the Parties to the Kyoto Protocol (Decision 13/CMP.1) requires that ERUs only be issued by converting AAUs or removal units (RMUs), which have a serial number comprising the commitment period for which they are issued. ERUs cannot be issued if the commitment period marked in the relevant serial number does not match the period during which the emissions reductions took place. Emission trading scheme (ETS) accounts in the Union Registry should not hold ERUs inconsistent with these rules. (*see* recital 17).

As far as legal drafting is concerned, it is plain that such a text is contrary to Guideline 4 of the Interinstitutional Agreement concerning excessive use of abbreviations.[72] As to its effect, one has to bear in mind that this EU act is a regulation that is of general application and is directly applicable. It should therefore reach a certain level of comprehensibility for it to be generally applied and to achieve the intended result. Paradoxically, the recital quoted above, which is supposed to explain the enacting terms of the Regulation, does not fulfil its function as it does not clearly set out the aim of the act. Provisions of EU acts, especially those that are legally binding, should therefore not be drafted in the form of a technical methodology or instructions in which some 'lower standard' of comprehensibility can be acceptable.

The same objection applies where acts wholly fail to meet formal requirements on composition of legal acts. One example is Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation[73] which provides for a single global standard for automatic exchange of information based on the steps carried out by the Organisation for Economic Cooperation and Development (OECD). Since it was necessary to harmonize the EU and the OECD approach, Directive 2011/16/EU was amended. The amendment, however, does not comply with the technical drafting rules: Crucial definitions ('reporting financial institution' and 'non-reporting financial institution', 'financial account', etc.) and provisions determining scope (reporting and especially diligence requirements) were

71 OJ L 122, 3 May 2013, p. 1.

72 "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."

73 OJ L 359, 16 December 2014, p. 1.

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put in long annexes; Annex I partly replicates provisions on rights and obligations of the amended Article 8; the new Article 25(3)[74] amends indirectly Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[75] and thus leaves it unclear whether the individuals whose financial institutions operate in the non-EU area (and do not fall within the scope of Directive 2011/16/EU) also have to obtain information on collection and transfer of data relating to them; the definition of '*automatic exchange*' in a new Article 3, point 9[76] refers only to '*capitalized terms*' set out in Annex I, which means that it refers to bold print in the text of the Annex I, and so forth. The last-mentioned feature is particularly disturbing and far from clear because certain electronic versions do not display the bold print referred to in the Directive. This approach seems to breach many requirements of the Interinstitutional Agreement such as Guidelines 13-15[77] and Guideline 22[78] and creates a confusing regulation that first has to be carefully disentangled before work on implementing it can start.

Similar 'detective work' has to be done in the case of a new Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.[79] Painstaking work is needed just to find out what fields fall within or outside its scope (*see* Article 1 and *a contrario* Article 7 and following of the Directive concerning exclusions) and definitely complicate the task of Member States in implementing the directive.

74 "Notwithstanding paragraph 1, each Member State shall ensure that each Reporting Financial Institution under its jurisdiction informs each individual Reportable Person concerned that the information relating to him […] will be collected and transferred in accordance with this Directive and shall ensure that the Reporting Financial Institution provides to that individual all information that he is entitled to under its domestic legislation implementing Directive 95/46/EC in sufficient time for the individual to exercise his data protection rights …"

75 OJ L 281, 23 November 1995, p. 31.

76 "'automatic exchange' means the systematic communication of predefined information on residents in other Member States to the relevant Member State of residence, without prior request, at pre-established regular intervals. […] In the context of Article 8(3a), Article 8(7a), Article 21(2) and Article 25(2) and (3) any capitalised term shall have the meaning that it has under the corresponding definitions set out in Annex I."

77 "13. Where appropriate, an article shall be included at the beginning of the enacting terms to define the subject matter and scope of the act.

14. Where the terms used in the act are not unambiguous, they should be defined together in a single article at the beginning of the act. The definitions shall not contain autonomous normative provisions.

15. As far as possible, the enacting terms shall have a standard structure (subject matter and scope – definitions – rights and obligations – provisions conferring implementing powers – procedural provisions – implementing measures – transitional and final provisions)."

78 *See supra* note 21.

79 OJ L 94, 28 March 2014, p. 65.

D Defects of Form

Effective regulation depends not only on material requirements but also on the formal requirements. The choice of form at the EU level has fundamental consequences on the process of implementation at the national level. Regulations, directives, decisions and recommendations each have their own characteristics following from the stipulations in the Treaty.[80] These characteristics distinguish legal acts according to whether they are legally binding, for whom they are binding and whether they can be applicable directly. Accordingly, the Interinstitutional Agreement provides that drafting is to be appropriate to the type of act concerned including its binding or non-binding character, and that it is to take account of the personal scope of legislation, in particular the proper identification of the rights and obligations of persons concerned.[81] The choice of the right instrument thus influences legislation with respect to obligatory character, time needed to bring about changes, and the effect on individuals.

I No Legally Binding Form

Despite the fact that EU law lays down its own rules concerning legislative processes that should be complied with, it is possible to find cases in which procedural requirements are undermined. For example, there are some EU acts that have not been published in the Official Journal of the EU, even though they have quite considerable effects in the Member States.

This approach is used especially in the field of security and justice, for example in the field of biometric identifiers or biometric data. Council Regulation (EC) No. 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States[82] provides in Article 2 and Article 5(2) that certain technical specifications for passports and travel documents are to be established by implementing measures. According to Article 3, it can be decided that certain specifications are kept secret and not published. But there is nothing concerning establishing technical specifications that will not be kept secret but not be published in the Official Journal. However, such technical specifications can be found, for example, in Commission Decision C (2011) 5499.[83] A similar approach can be seen in other branches of the security and justice field, for example in Council Regulation (EC) No. 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-coun-

80 *See* Art. 288 TFEU.

81 IA, Guidelines 2 and 3.

82 OJ L 385, 29 December 2004, p. 1.

83 Commission Decision C (2011) 5499 of 4 August 2011 amending Commission Decision C (2006) 2909 laying down the technical specifications on the standards for security features and biometrics in passports and travel documents issued by Member States.

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try nationals,[84] further implemented by Commission Decision C (2011) 5478,[85] which was not officially published.

Unfortunately, a similar attitude to procedural rules can also be seen in fields of EU law outside the sphere of justice and security. It happens that Member States are asked to make certain changes quickly because a particular working group of the Commission has decided that amendment of a given rule is necessary. This is problematic in cases where the change touches the scope of an EU act that is then effectively 'amended' only by means of the proceedings of a working group. This was the case, for example, of certain uniform notice forms to the Regulation (EC) No. 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community[86] which – without a sufficient legal background – allow homogeneous gathering of pieces of information necessary for the monetary controls.

EU law is a system that declares itself to be governed by the principle of the rule of law.[87] It is important for legal certainty to be achieved, that is to say that individuals should be bound only by rules that have been laid down by a given procedure established by laws and that they will be able to find all the rules in force in officially published journals (whether on paper or in electronic form). The fact that this does not always happen is a grave defect undermining the whole system of EU law. Rules that do not comply with procedural requirements, including that of being published, cannot produce consequences on individuals.[88] Obliging Member States to lay down new rules in their national legal orders based on mere administrative measures is contrary to fundamental European principles and therefore should not be applied in practice.

Furthermore, a mix of legally binding rules and non-legally binding rules 'interpreting' or 'implementing' the rules in force often just creates chaos since it fails to state clearly what is the law in force. This can be illustrated by Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).[89] As regards air borders, Annex VI to that Regulation provides in Section 2.1.1. that:

> The competent authorities of the Member States shall ensure that the airport operator takes the requisite measures to physically separate the flows of passengers on internal flights from the flows of passengers on other flights. Appropriate infrastructures shall be set in place at all international airports to that end.

84 OJ L 157, 15 June 2002, p. 1.

85 Commission Decision C (2011) 5478 of 4 August 2011 amending Commission Decision C (2002) 3069 laying down the technical specifications for the uniform format for residence permits for third country nationals.

86 OJ L 309, 25 November 2005, p. 9.

87 The rule of law is mentioned twice in the preamble to the TEU and again in Art. 2 thereof and also in the preamble of the Charter of Fundamental Rights of the European Union.

88 Case C-161/06 *Skoma-Lux sro* (Reports of Cases 2007 I-10841), para. 45 and following.

89 OJ L 105, 13 April 2006, p. 1.

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But the 'interpreting' Updated Schengen catalogue on External borders control of 2 December 2008 (15250/2/08) providing for recommendations and best practices seems to narrow the aforementioned obligation. It provides in Recommendation 98 that "*[a]erodromes, minor airports and terminals where the volume of traffic allows should separate flows by systematically monitoring and accompanying the flow of passengers*." This approach does not fulfil legal certainty.

II Insufficient Interconnection of Forms or Incorrect Choice of a Form

There are aspects of failure to comply with formal requirements other than those already mentioned. Serious consequences for implementation at the national level also result from cases where the choice of a certain form of EU act is not appropriate or consequences following from a choice of an EU act have not been well considered. Many problems arise when a given field of law is regulated by EU acts of different forms, especially if one act amends the other. There are numerous cases in which directives are amended by regulations (which will be illustrated below), or in which regulations and directives are amended by decisions.[90] But one can find other combinations as well: it is less common for regulations to be amended by directives[91] and it is not unknown, but fortunately rare, for directives to be amended by communications.[92] Other difficulties concerning a form of a legal act, which will be explained below, appear when regulations are basically 'concealed' directives, and cases when decisions contain obligations for Member States similar to directives but aspire to have consequences like regulations.

90 For example, Decision No. 1359/2013/EU of the European Parliament and of the Council of 17 December 2013 amending Directive 2003/87/EC clarifying provisions on the timing of auctions of greenhouse gas allowances (OJ L 343, 19 December 2013, p. 1); Commission Decision 2010/115/EC of 23 February 2010 amending Annex II to Directive 2000/53/EC of the European Parliament and of the Council on end-of-life vehicles (OJ L 48, 25 February 2010, p. 12); Commission Decision 2010/685/EU of 10 November 2010 amending Chapter 3 of Annex I to Reg. (EC) No. 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks (OJ L 293, 11 November 2010, p. 67); or Commission Decision 1999/816/EC of 24 November 1999 adapting, pursuant to Arts. 16(1) and 42(3), Annexes II, III, IV and V to Council Reg. (EEC) No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community (OJ L 316, 10 December 1999, p. 45).

91 For example, Commission Directive 2006/141/EC of 22 December 2006 on infant formulae and follow-on formulae and amending Directive 1999/21/EC (OJ L 401, 30 December 2006, p. 1) whose Annexes have been amended first by a reg. (No. 1243/2008) and then by directives (2013/26/EU, 2013/46/EU); or Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Reg. (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ L 354, 28 December 2013, p. 132).

The JPG warns against amending a Regulation by a Directive (*see* Guideline 18.6).

92 For example, Communication from the Commission in pursuance of Article 4 of Directive 2000/84/EC of the European Parliament and of the Council on summer-time arrangements (OJ C 83, 17 March 2011, p. 6).

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1 Amendment of Directives by Regulations

The Treaty establishes a clear distinction between regulations and directives. Regulations are directly applicable (that is to say, they produce consequences without any national transposition, and indeed transposition of a regulation, in the sense of incorporating its provisions into national law, is forbidden).[93] Directives are binding, as to the result to be achieved, upon the Member States to which they are addressed but must be transposed in the national legal orders (*see* Article 288 TFEU). These different characteristics of regulations and directives often lead to complications for national implementation if an EU act of one type is amended by an act of another type. For example, Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys[94] was, in the case of limit values for barium, amended by Commission Regulation (EU) No. 681/2013 of 17 July 2013 amending Part III of Annex II to Directive 2009/48/EC.[95] Recital 11 to the amending Regulation states:

> In order to ensure the best possible protection of health and life of humans, in particular children, it is necessary to apply those lower migration limits for barium within the shortest possible delay. Therefore, the Directive should be amended by a Regulation which enters into force on 20 July 2013, thus avoiding a longer period of transposition of a Directive during which different migration limits would apply.

In fact, though, that idea of a 'fast track' amendment cannot work at all. The Member States had been under an obligation to transpose Directive 2009/48/EC, and so they should have already incorporated the 'old' limit values for barium in their legal orders. To implement the new Regulation No. 681/2013 correctly, it is necessary to remove the 'old' limit values from national legal orders first. Such a change cannot be made overnight and takes a certain time, definitely more than Regulation No. 681/2013 allows.[96] The contrivance to which the Commission resorted therefore creates problems concerning temporal application, but in particular creates situations that are not acceptable for the individuals since they are denied legal certainty.[97] While the new Regulation No. 681/2013 sets out 'new' limit values for barium, those limit values are in conflict with the 'old' limit values that – until removed – form part of the national transposition provisions. Individuals are bound by both. Despite the fact that Regulation No. 681/2013 is a directly applicable instrument that should prevail, the interpretation of the mutual relationships between national and European laws cannot remedy the lack of due implementation.

93 *See* Case 34-73, *Fratelli Variola* (Reports of Cases 1973 0098), paras. 9-11 or Case 39-72 *Commission v. Italy* (Reports of Cases 1973 00101), para. 17.

94 OJ L 170, 30 June 2009, p. 1.

95 OJ L 195, 18 July 2013, p. 16.

96 Reg. No. 681/2013 was published in the Official Journal on 18 July 2013, and according to its Art. 2, it entered into force just two days later, on 20 July 2013.

97 *See*, for example, Case C-361/88, *Commission of the European Communities v. Federal Republic of Germany* (European Court Reports 1991 I-02567), paras. 21, 30.

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Another example is afforded by Article 69(5) of Regulation (EC) No. 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency[98] that provides that Directive 2004/36/EC of the European Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports[99] will be repealed from the entry into force of the implementing measures according to Article 10(5) of the Regulation.[100] A reference to another act that is only of an implementing nature, which may be either a directive, a regulation or a decision, and that is not in force leaves considerable uncertainty as to the end of the application of Directive 2004/36/EC and the end of national provisions transposing the Directive.

The aforementioned examples are also contrary to the Interinstitutional Agreement: mixing different types of acts does not comply with Guideline 2[101] in conjunction with Guideline 18,[102] as expounded by the Joint Practical Guide. The Joint Practical Guide is even more specific when it states as a general rule that the amending act should be of the same type as the act to be amended and that, in particular, it is not recommended to amend a regulation by a directive.[103] Those recommendations were not followed in the cases set out above, leading to confusion with a detrimental effect on individuals.

Furthermore – in the first example of this section the amending Regulation No. 681/2013 entered into force only two days after publication. Therefore Guideline 20.4.1 of the Joint Practical Guide, which requires that there be grounds of urgency for entry into force on the third day following that of publication, was not observed either.

And – concerning the second example of this section – the mention of Directive 2004/36/EC in Regulation No. 216/2008 with a further reference to the (uncertain and unknown) implementing measures is not in line especially with Guideline 16.4 of the Joint Practical Guide, which provides that a reference should be used only if:

- it makes it possible to simplify the text, by not repeating the content of the provision referred to;
- it does not affect the comprehensibility of the provision; and
- the act referred to has been published or is sufficiently accessible to the public.

98 OJ L 79, 19 March 2008, p. 1.

99 OJ L 143, 30 April 2004, p. 76.

100 "Directive 2004/36/EC is hereby repealed as from the entry into force of the measures referred to in Article 10(5) of this Regulation, and without prejudice to the implementing rules referred to in Article 8(2) of that Directive."

101 "The drafting of Community acts shall be appropriate to the type of act concerned and, in particular, to whether or not it is binding (Regulation, Directive, Decision, Recommendation or other act)".

102 *See supra* note 34.

103 JPG, Guideline 18.6.

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Temporal provisions illustrated by the second example are also not in conformity with Guideline 20 of the Interinstitutional Agreement as expounded by the Joint Practical Guide.[104]

2 Regulations as Concealed Directives

However, it is not just amendments of different types of acts that cause problems of form. European legislation, unfortunately, has reached a state in which the differences between the various types of legal acts are not clear. Thus, directives often look like regulations and some regulations look like directives, contrary to both the Interinstitutional Agreement[105] and the Joint Practical Guide.[106]

Directives are nowadays often very detailed and do not allow the Member States to regulate many aspects on their own.[107] This is an unwelcome trend but is not as detrimental as the converse case – when a regulation looks like a directive.

Regulations are more and more constructed in such a way that they provide for given results to be achieved. Consequently, they create obligations for Member States to regulate certain aspects through national law. For example, Article 6(1) of Regulation (EC) No. 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator[108] provides that:

> Subject to paragraph 2 of this Article, Member States shall determine the conditions to be met by undertakings and transport managers in order to satisfy the requirement of good repute laid down in Article 3(1)(b).

Article 62 of Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories[109] contains a formulation typical of directives when it states:

104 As the initial act is a directive, the situation seems to be contrary especially to IA, Guideline 20. *See supra* note 69.

105 IA, Guideline 2. *See supra* note 34.

106 JPG, Guideline 2:

> "2.2. The drafting style should take account of the type of act.
>
> 2.2.1. Since Regulations have direct application and are binding in their entirety, their provisions should be drafted in such a way that the addressees have no doubts as to the rights and obligations resulting from them: references to intermediary national authorities should therefore be avoided, except where the act provides for complementary action by the Member States.
>
> 2.2.2. Directives are addressed to the Member States … Furthermore, they are drafted in a less detailed manner in order to leave Member States sufficient discretion when transposing them. If the enacting terms are too detailed and do not leave such discretion, the appropriate instrument is a regulation, rather than a directive."

107 *See*, for example, Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation.

108 OJ L 300, 14 November 2009, p. 51.

109 OJ L 257, 28 August 2014, p. 1.

> Member States shall ensure that competent authorities publish/do….

Many 'directive-style' provisions that, to be fully applied, need to be implemented by national laws can also be found in Regulation (EU) No. 598/2014 of the European Parliament and of the Council of 16 April 2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach.[110] For example, Article 5(2) of this Regulation provides that:

> Member States shall ensure that the Balanced Approach is adopted in respect of aircraft noise management at those airports where a noise problem has been identified. To that end, they shall ensure that:
> a the noise abatement objective for that airport, taking into account, as appropriate, Article 8 of, and Annex V to, Directive 2002/49/EC, is defined;
> b measures available to reduce the noise impact are identified;
> c the likely cost-effectiveness of the noise mitigation measures is thoroughly evaluated;
> d the measures, taking into account public interest in the field of air transport as regards the development prospects of their airports, are selected without detriment to safety;…

These general aims cannot be applied directly. For them to have real effects they have to be supplemented with a clear statement of who must fulfil them, in what manner, in what time frame, according to what criteria, and so forth. Such rules have to be laid down by national laws.

This conclusion can be supported by the text of Regulation (EU) No. 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities,[111] which even introduces in Article 42 a formulation typical of the final provisions of directives:

> The Member States shall adopt appropriate provisions to ensure the effective application of this Regulation.

Regulations also contain many non-obligatory provisions (options) so that a Member State that decides to use an option usually has to initiate its national legal procedures because it is necessary, from the point of legal certainty, to state clearly in the national law that an option has been used. For example, a number of provisions in Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms[112] (the CRR Regulation) contain derogations from the

110 OJ L 173, 12 June 2014, p. 65.
111 OJ L 158, 27 May 2014, p. 77.
112 OJ L 176, 27 June 2013, p. 1.

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application of certain articles. In particular, Articles 8, 9, 10, 15 use formulations like:

> Competent authorities may, in accordance with national law, partially or fully waive the application of the requirements set out in…

Such practices are not in conformity with the Joint Practical Guide since they do not state clearly the rights and obligations of the addressees of these directly applicable acts.[113] They also often cause time problems in the implementation at the national level. Regulations do not have transposition periods and the interval between the date on which they are published and that on which they come into force (and apply) is often very short. In cases where a regulation contains provisions requiring further national legal action for the regulation to be fully applied in practice or where it contains optional provisions that a Member State wishes to avail of, it is very unlikely that the Member States would be able to provide for all adjustments correctly and, in particular, in good time. In such cases, if it is not possible to choose instead of the form of a regulation the form of a directive, at the very least the date on which the regulation must be applied in Member States should be deferred[114] for Member States to be able to fulfil the principle of sincere cooperation under Article 4 TEU.

3 Hybrid Character of Decisions

Similar situations appear in the cases of EU acts whose character is not absolutely clear from the legislative point of view, in particular decisions. According to Article 288 TFEU:

> A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them

In practice it is possible to find decisions of two different types: some have the form of an individual act, but others – if they are addressed to (all) the Member States – have the form of a legally binding act of general application.[115] It is especially the second type of decisions that can cause problems.

The Treaty does not give a clear answer to the question regarding the extent to which these decisions have to be transposed into national legal orders or the extent to which they can be directly applicable. If we look at the decisions of gen-

113 JPG, Guideline 2.2.1. *See supra* note 107.

114 *See* JPG, Guideline 20.11: "A distinction is sometimes made between the entry into force of a regulation and the application of the arrangements introduced by it, which may be deferred. The purpose of the distinction may be to enable the new bodies provided for in the regulation to be set up immediately and to enable the Commission to adopt implementing measures in respect of which those new bodies have to be consulted."

115 *See* JPG, Guideline 2.2.3: "Decisions should be drafted to take account of their addressees, but they should still, for the most part, comply with the formal rules of presentation for acts of general application:…"

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eral application closely we can see that some resemble regulations[116] but others look more like directives. For a directive-like decision it is typical that the decision is addressed to Member States and at the same time that it provides for rights and obligations of individuals. For example, Commission Decision 2007/777/EC of 29 November 2007 laying down the animal and public health conditions and model certificates for imports of certain meat products and treated stomachs, bladders and intestines for human consumption from third countries[117] provides for conditions and requirements of imports into the Union of meat products and other similar products. Since the rules concern imports and restriction on imports they produce consequences on individuals doing business in this field. But Decision 2007/777/EC is addressed only to the Member States (*see* Article 10). Therefore in this case the Decision cannot be applied directly to individuals and cannot be directly binding on them. For it to be binding on them, it has to be transposed into national legal orders, at least as regards the provisions relating to individuals.

Some decisions even provide a specific period for implementation in national legal orders like directives.[118] But others do not. And then one has to take into account that the necessary transposition at the national level cannot be done quickly. Decisions generally do not allow much time for national adjustments. In the case of Decision 2007/777/EC, the day on which it applied was set on the day after the day of adoption, 1 December 2007 (*see* Article 9). The consequences that Decision 2007/777/EC was envisaging from the end of 2007, though, could not have been achieved immediately because of the need for transposition of provisions concerning individuals.

It seems that decisions are considered to be like regulations. But if they are not addressed to individuals they cannot have any direct effects on individuals. In such cases individuals can be bound only by national laws implementing the decisions. Since decisions do not incorporate sufficient transposition periods, the desired goal of decisions cannot be attained in a short time. Recent developments suggest, however, that there is a reduction in the number of decisions having the

116 For example, Decision No. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism (OJ L 347, 20 December 2013, p. 924). This decision lays down obligations for Member States, provides for cooperation between them and creates a coordination role for the Commission.

117 OJ L 312, 30 November 2007, p. 49.

118 For example, Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes (OJ L 323, 10 December 2009, p. 20), Art. 33: "The Member States shall ensure that their national law conforms to this Decision by 27 May 2011."

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character of a directive. It seems that these decisions are being replaced by regulations. That, at least, can be seen as a positive trend.[119]

E Conclusions

EU law is a very extensive legal system. It comprises about 35 000 legal acts of a different character.[120] It seeks to cover many legal relationships in different areas of law. It sets out to regulate many areas directly (especially by regulations) and others indirectly through national implementation measures (especially by transposition of directives).

Therefore it is not surprising that EU law touches the everyday lives of individuals and of public bodies, and has significant effects on them.

For such a system to be effective, one important precondition has to be achieved: The norms have to be of good technical quality. And this is not just a matter of aesthetics,[121] but about much more: The norms must be sufficiently clear, that is they must not be ambiguous, complex or incomplete. Their form must correspond to the character of legal relationships that are to be regulated; and their structure and form must be appropriate to the kind of norms (for example, procedural or substantive, binding or advisory), those to whom they are addressed (individuals or public bodies), and in what manner they are to be framed (especially at what level of detail).

If the legislation does not meet these preconditions, it cannot comply with basic principles of law, such as the rule of law, legal certainty or legitimate expectations.[122] There is a grave danger of the system falling into chaos, which has to be avoided at all costs.

119 For example, Commission Decision 2006/504/EC of 12 July 2006 on special conditions governing certain foodstuffs imported from certain third countries due to contamination risks of these products by aflatoxins (OJ L 199, 21 July 2006, p. 21) was repealed by Commission Reg. (EC) No. 1152/2009 of 27 November 2009 imposing special conditions governing the import of certain foodstuffs from certain third countries due to contamination risk by aflatoxins and repealing Decision 2006/504/EC (OJ L 313, 28 November 2009, p. 40). Commission Decision 2005/402/EC of 23 May 2005 on emergency measures regarding chilli, chilli products, curcuma and palm oil (OJ L 135, 28 May 2005, p. 34) was repealed by Commission Reg. (EC) No. 669/2009 of 24 July 2009 implementing Reg. (EC) No. 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin and amending Decision 2006/504/EC (OJ L 194, 25 July 2009, p. 11).

120 Data from the system existing in the Czech Republic for monitoring legislative obligations ensuing from the membership of the Czech Republic in the European Union – the Information System for Approximation of laws (ISAP).

121 *See* words of AG Geelhoed, Opinion cit. in note 33, para. 88: "On the one hand, it [a legislative act] is an instrument for pursuing and, if possible, achieving justified objectives of public interest. On the other hand, it constitutes a guarantee of citizens' rights in their dealings with public authority. Qualitatively adequate legislation is characterised by a balance between both aspects. The wording and the structure of the legislative act must strike an acceptable balance between the powers granted to the implementing authorities and the guarantees granted to citizens."

122 W. Robinson, 'Legislative Drafting and Human Rights. The Example of the European Arrest Warrant', *European Journal of Law Reform*, Vol. 13, No. 2, 2011, pp. 210-235.

The foregoing concrete examples show that the EU process often has difficulty producing norms of a technically sound quality. This is despite the fact that the EU does have the tools to ensure correct legal drafting. It seems that the EU is unable to comply with its own drafting guidelines. But how can things be made better?

It is probably necessary to slow the process down, to reflect carefully and at length before creating any new laws. Quantity should not outweigh quality. The negotiation process should be improved: Discussions on all proposals for legislation and all draft legislation should pay much more attention to the technical side of drafting. Proposals not meeting the requirements concerning technical quality should not pass further through the legislative process.[123] There should be a serious debate on implementing acts and delegated acts, especially on the precise criteria for what are non-essential elements. And close attention should be paid to problems in implementing EU acts at the national level as a result of legal drafting issues.

This would impose a heavy burden on the EU institutions, especially the Commission, and on the experts from the Member States. But if the challenge is not met, neither EU legislation nor national implementing legislation will work effectively. And that is a risk that Europe simply cannot take.

123 *See* measures to improve the quality of EU legislation through an external review body. G. Sandström, 'Guest Editorial: Knocking EU Law into Shape', *Common Market Law Review*, Vol. 40, No. 6, pp. 1307-1313.

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