The legal orders of the European Community and of the Member States: peculiarities and influences in drafting

by Jean-Claude Piris

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IS LEGISLATIVE DRAFTING AN ART OR A SCIENCE?

There is a French book on legislative techniques entitled: *Legistics, The Art of Legislating* (Dominique Rémy, *Légistique – L'art de faire les lois*). But making laws is not only an art, it is also a science, or more exactly a technique, and it is a difficult one. The frequency of criticism it attracts proves this difficulty. Such criticisms, which exist in all countries, concern both the quantity and the quality of legislation.

If it is difficult in one country, with one language, one legal order, one legal culture, you can imagine what it is in the EU, with 25 countries and 20 languages. Therefore, of course, European legislation is not immune from criticism. It is even more subject to it than national laws. For instance, even if the *Bellis Report* (at page 2) begins by saying : "Considering the difficulties, the quality of EU legislation is not at all bad" , this Report continues by stressing the too detailed character of EC Directives; the misuse of recitals, where the law-maker often inserts elements other than a statement of reasons, so that they become "almost a third kind of law-making"; the character of EU law as "negotiated law", and, in general, the rather poor drafting quality of EU law (*Implementation of EU Legislation – An Independent Study for the Foreign and Commonwealth Office*, Robin Bellis (November 2003)).

For a long time, the Community institutions appear not to have been sufficiently aware of these problems. It was in the beginning of the nineties that they took steps in order to try to solve them. Let me just recall some of the texts adopted in that connection:

- the Conclusions of the Birmingham European Council (October 1992)
- the Conclusions of the Edinburgh European Council (December 1992)
- the Inter-institutional Agreement on Codification (December 1994)
- the Inter-institutional Agreement on the Quality of Drafting (December 1998)
- the Inter-institutional Agreement on Recasting (November 2001) and, finally,
- the Inter-institutional Agreement on Better Legislation (December 2003).

This list of conclusions and inter-institutional agreements shows that the institutions' actions cover the various aspects of what should be good legislation. It deals

Firstly, with the problem of the quantity of legislation, ie of legislative inflation, trying to react both *ex ante* and *ex post* ; this means that we are trying both to legislate less, and to simplify existing legislation, in particular through codification and recasting

and

Secondly, with the quality of legislation, as it concerns both the content of EC legislation (material legistics) and its drafting (formal legistics – See Jean-Claude Piris, "The

Quality of Community Legislation: The viewpoint of the Council Legal Service", in *Improving the Quality of Legislation in Europe*, T.M.C. ASSER Instituut, 1998, The Hague (Kluwer Law International) and Thérèse Blanchet, "Transparence et qualité de la législation" in RTD eur, 33(4) Oct–Dec 1997). It is especially under this latter aspect, the drafting, that EC legislation shows its particularities. I will try to describe these particularities in my lecture. By way of conclusion, I shall briefly touch on some topics of material legistics, ie of better law-making as to the content of the norm.

INFLUENCE OF NATIONAL LEGAL ORDERS

From the point of view of drafting EU law, the fact that the European Union is a union between different cultures and different languages is of essential importance. Problems of drafting a European law would appear even if it were possible to draft it in one single language. The reason is that the different legal orders of the different Member States are not only expressed in different languages, but first of all because they are built on different legal cultures.

If the legal system of the European Union and those of the Member States are, in principle, independent of each other, they are actually interwoven. Both have in common the fact that they have to be implemented within the same territory and for, or by, the same population. To address a population, you have obviously to use a language which can be read and understood by that population. Thus, the legal order of the EU and the legal orders of the Member States share languages. This is not peculiar to the European Union. Worldwide we can see that English, Spanish, French, and so on, are official languages shared by different states. Problems of understanding are bound to arise in such a situation, because each state has its own legal order with its own concepts, built by history and culture, over the centuries.

In principle, it would be ideal if each concept were expressed, in the same language, by its own specific terminology, different to any other terminology expressing another concept. In practice, that is not the case: we have to recognize that, often, one similar term, when it is used in various countries, has a meaning which differs from one legal order to another. Let us take the example of the term "contract". It is known in different national laws, but it implies different substantial and formal requirements and different legal consequences in each of those laws. Lawyers used to operating in a single national context have difficulties in understanding this kind of problem.

In the case of the European Union's legal order, this question often arises and is difficult to solve, because the link between the different meanings of the same term within different territories is missing. For instance, it is easier for a French lawyer to understand that the same French legal term has a different meaning in Belgium than in France. It is easier to understand, because the two sets of laws do not apply in the same territory. However, it is more difficult to understand such a difference in the use of the same term in the French legal order and in the EU legal order, because they are both applicable in the same territory, in France. In such a case, one could think about creating a new word. But the accusation of using "euro speak" or "jargon" prevents the creation of a new word ("neologism") to express a new concept. Indeed, the use of such neologisms is rather rare in EU law.

Usually, the practice is rather to give a new meaning to words which already exist (see the example of "consolidation"/"codification"/"recasting" to describe three different concepts of "consolidating" legislation).I am not sure that this is always better.

The influence of national legal orders in the drafting of laws in the EU legal order not only concerns words and concepts, but also the structure, the architecture of the laws. In the first years of the EEC and of the EC, laws were drafted according to the French standards. Later, the influence of Common Law has become more and more important. For instance, nowadays, it is common practice to have, in the beginning of a piece of legislation, a first article listing all the concepts which are to be mentioned in that legislation, in order to provide for a precise definition of each of them. The French have accepted that for EU law. Actually, things go further than that, because it happens now that even national French laws, in a few cases, are beginning to follow this pattern, which was unknown in French legal drafting before it was imported from Brussels.

INFLUENCE OF MULTILINGUALISM

The coexistence of different legal orders using the same language is one of the problems of the European Union legislator. However, another of its challenges is multilingualism, ie the obligation to draft the same rule in different languages, all of which are legally equally authentic.

The respect and safeguard of the cultural identities of its Member States is, of course, one of the basic principles of the European Union. Language represents a fundamental element of this cultural identity. Thus, it is not surprising that the very first regulation adopted by the EEC-Council in 1958 (Regulation No 1/58) established that French, German, Italian and Dutch, ie all the languages of the Member States at that time, were official and working languages of the Communities' institutions. With the successive enlargements of the Union, today 20 languages have received the same status and, in anticipation of the next enlargement, my service already has some Bulgarian and Romanian staff.

Clearly, such diversity of languages does create practical problems. To begin with, there is even a lack of translators, interprets and lawyer-linguists for some of those languages. But there has never been any real temptation to question

the status of any of those languages as an official EU language. Why ? Because many EU laws are directly binding on their addressees, often individuals, without prior ratification or transposition at national level. And because each citizen has the right to be able to know in his own language the legislation applicable to him. This is a fundamental principle.

Theoretically, one solution could have been that only one linguistic version would have been authentic and capable of being invoked before the courts. In that case, the other versions would have been considered as mere translations, provided just in order to facilitate the understanding of the law by people who did not speak the sole official "legal" language. This solution has been excluded for obvious political reasons. Nevertheless, as recently as October 2004 a group of European personalities of different nationalities, including two present Prime Ministers, suggested that the French language should be the only official legal language for the EU legislation ("*Manifeste Druon*").

In such a situation, the big challenge is that the meaning of the legal rule cannot differ in the various linguistic versions. An identical rule must be applied and interpreted in the same way in each and every part of the Union. The Court of Justice has stressed this basic principle several times. In 1969 it stated in case 29-69 (*Stauder City of Ulm*), judgment of 12 November 1969 (Reports 1969, page 00419) that :

> *"When a single decision is addressed to all the Member States the necessity of uniform application and, accordingly, for uniform interpretation, makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in particular of the version in all four languages".*

This remains the settled case-law. However, there have not been many cases lodged before the court in which differences between different linguistic versions of a legislative act would have been decisive for the outcome of the case.

Some multilingual states found a good solution. In those states, the different linguistic versions of a text are not only equally authentic, but they are also drafted by using a technique of "co-editing". This is the case, for instance, in Canada and Switzerland. By this technique, the raw material of the legislative act is put into legal form in two (or more) languages by two (or more) drafters. These drafters are acting at the same time and work side by side, so that they can take into account their respective needs and problems in drafting. This method is certainly the most efficient and also the most elegant, as it has regard to the *génie de la langue*, the characteristics of each language.

Such a method is, however, not possible in the Union, due to the large number of its official languages. One cannot imagine 20 drafters elaborating 20 versions at the same time without a first draft being used as a common base ("source text"). So, the Union method of ensuring that the same rule is applicable to the whole population lies between the two extremes I have just pointed out, the authenticity of one sole text (with translations), and the method of co-editing.

THE ESSENTIAL ROLE OF THE "LAWYER-LINGUISTS"

For this purpose, the Council created, as early as in the sixties, a section of "lawyer-linguists" within its legal service. Their task is to ensure the concordance of all linguistic versions of legislative acts. This section includes, at present, a minimum of three members for each of the Union's official languages. They all have at least a law degree and an excellent level of skill in several languages. After the Council, the Commission – and later the European Parliament and the Central Bank – also recruited such lawyer-linguists.

The working method of the lawyer-linguists of the Council is the following: a "source text" is drafted in one of the most frequently used languages, English or French, and is translated into all the other languages by the translation services. The lawyer-linguists work on this basis. (See the very useful *Manual of precedents for acts established within the Council of the European Union*, written by the lawyer-linguists of the Council, 4th ed, July 2002, 150 pages, (Council of the EU)). This manual is designed to harmonize the drafting of the various types of Council acts).

But the source text is not unchangeable. Before the act is adopted, all its versions are finalized in a meeting bringing together lawyer-linguists for each official language and experts in the subject matter of the legislation, coming from all the Member States. At this stage, modifications of the source text might happen, if it contains mistakes or has been so badly drafted that it has given rise to divergent translations. In more general terms, such meetings are a good occasion for an exchange of expertise in drafting between European and national levels. Correct terminology is often found in these meetings, having regard to the experience and needs of all sides.

This enrichment is one of the positive aspects of multilingualism. Actually, multilingualism, which is of course a burden, can also lead to improvements. The comparison between the different versions, and the resulting discovery of discrepancies between them, can show up weaknesses in the source text. It points out difficulties in interpreting that otherwise would not have been detected or would have been detected only at the stage of implementation of the legislation.

Confronted with the difficulties raised by the texts they had drafted, at the stage when they are being translated, the officials responsible have to realize that the blame for

the sometimes poor quality of drafting of EU legislation cannot always be placed on the translators, that the source text also has to be subjected to serious examination, and they learn to draft in a simpler and clearer way.

One has to understand that the proposal for a legislative act is normally drafted by the Commission services where staff work in English, French or German, even when these languages are not their mother tongue. Although EU officials normally have a good knowledge of different languages, the quality of the drafting suffers.

Equally important are the following successive stages of the procedure in the Council and in the European Parliament. The work of these institutions consists in adopting more or less numerous amendments to the Commission's proposal. Again, these amendments are often not drafted in the mother tongue of their author. Again, these amendments have to be translated, and then harmonised by the lawyer-linguists, both of the European Parliament and of the Council in the more and more frequent cases of legislation adopted by co-decision between these two Institutions.

A NEGOTIATED LAW

Another cause of the lack of elegance and of clarity in EU legislation is that this legislation is often the result of difficult compromises and this affects its drafting. This is another important peculiarity in EU legislation, which may be less evident but which is as influential as the multilingualism factor. EU law is a negotiated law. It is the result of carefully crafted compromises reached through negotiations.

One may observe that this aspect is not peculiar to Community legislation. Indeed, no legal rule, be it national or European, is the result of a purely logical exercise of deduction. The legal norm is the answer given by the constitutionally competent authorities to a complex series of requirements and stimuli coming from civil society. It is always a matter of balance between different or contrasting interests, for instance between those of the environment and agricultural or industrial production, or between welfare or safety and a competitive economy. In the case of the European Union, the different interests of the Member States may complicate this picture, without however modifying the substance: it is simply one additional complexity.

Negotiation means compromise. However, compromise does not necessarily mean unclear drafting. Negotiated law is not necessarily obscure law. For example, if a negotiation over numbers between two parties each proposing two different figures allows for the choice of a third figure, this result is unambiguous. Even if the compromise is expressed in words, a legislator conscious of its function as the sender of a social message to its addressees – the population – must formulate the legal rule in the clearest possible way. It has to try and avoid opaque legislation.

The scenario changes when the author has the attitude of somebody who formulates a rule, not as a social communication, nor as an order or a right given to the citizen, but rather with the aim of laying down in a written form the result of a negotiation, a result that is already known by all the parties involved. This happens in the case of an internationally negotiated text, the best examples being the resolutions of the General Assembly of the UN. Such texts do not have to be clearly formulated: often it is quite the reverse, their opacity allows for an agreement to be reached more easily. It is called "the constructive ambiguity". It is not rare to hear complaints in the negotiating room about a text being too clear. The choice is then between less clarity or no possibility of adopting a text at all.

As for EU legislation (at least as far as regulations are concerned, but in reality it is often also the case of Directives), their character is to be directly applicable to the citizens, ie to persons who are not insiders to the preparatory negotiations. It is, in its substance, social communication.

Consequently, EU law should be drafted using the same criteria as those which govern national legislation: clarity, simplicity, precision. In practice, however, the manner in which EU law is written and the mentality prevailing among the drafters are (not always but still too often) those that belong more properly to negotiated international texts. Do not forget that among the main bodies participating in the legislative process are bodies composed of diplomats *("Coreper")*. This explains why, in its "Rapport public" of 1992 on Community law, the French Conseil d'Etat coined the term "*droit diplomatique*" – diplomatic law – and characterised this legislation as an "opaque law".

Taking into account this other peculiarity of EU legal drafting, we shall now examine how the EU institutions face these challenges in order to try and obtain good quality in law-making. It was only in the early nineties that the EU institutions began to adopt measures in order to face the problem of the unsatisfactory drafting quality of their laws (irrespective of the multicultural and multilingual aspects). The completion of the internal market made it necessary, during that period, to adopt a large quantity of legislative acts in a short period of time. Their quality was sometimes neglected. Criticism of the drafting of EU law increased (see the October 1992 "Sutherland Report" to the Commission (Supplement to European Report n° 1808 of 31 October 1992).

Then followed the "shock of Maastricht", the refusal of the Danish citizens to accept the Maastricht Treaty in the first referendum in 1992. One of the reasons for that first referendum's negative outcome was supposed to be that the text of the Treaty was difficult to read and to understand. The European Council reacted immediately, in the autumn of 1992. At its Birmingham session, in October, it issued the "*Birmingham Declaration – A*

Community close to its Citizens". In this Declaration, the issue mostly considered is subsidiarity. The problem of the quality of legislation is not mentioned in detail, but it is stressed: "We want Community legislation to become simpler and clearer".

MEASURES TAKEN BY THE EU INSTITUTIONS IN ORDER TO IMPROVE THE DRAFTING OF EU LEGISLATION

Two months later, in December 1992 at Edinburgh, the European Council took up the question expressly. This time, it went into details to implement in concrete terms the necessary improvement of legislative quality. In the Presidency conclusions (Bull. EC, n° 12 (1992), p 9), one Annex is devoted exclusively to the implementation of the Birmingham Declaration.

GUIDELINES FOR DRAFTING EU LEGISLATION

One section of this 1992 Edinburgh text is devoted to "Simplification and easier access to Community legislation". Point I of it bears the title: "Making new Community legislation clearer and simpler" The European Council recognised that the technical nature of most texts and the need to compromise among the various national positions often complicate the drafting process. Nevertheless, the European Council stressed that "practical steps should be taken to improve the quality of Community legislation, such as the following:

> *(a) guidelines for the drafting of Community legislation should be agreed upon, containing criteria against which the quality of drafting of legislation would have to be checked;*
>
> *(b) delegations of Member States should endeavour, at all levels of the Council proceedings, to check more thoroughly the quality of legislation;*
>
> *(c) the Council Legal Service should be requested to review draft legislative acts on a regular basis before they are adopted by the Council and make suggestions where necessary for appropriate redrafting in order to make such acts as simple and clear as possible;*
>
> *(d) the jurist-linguist group, which does the final legal editing of all legislation before it is adopted by the Council (with the participation of national legal experts), should give suggestions for simplifying and clarifying the language of the texts without changing their substance".*

Such guidelines as envisaged in point (a) existed already in some of the Member States. In Edinburgh, they were mentioned for the first time at the European level.

1993 Guidelines for drafting the EU legislation

These guidelines were enacted six months later by a Resolution of the Council of 8 June 1993 on the quality of drafting of Community legislation (OJ n° C 166, 17 June 1993, p 1).

The fundamental principle is set out in the first of the 10 guidelines:

> *"1. The wording of the acts should be clear, simple, concise and unambiguous".*

The guidelines which follow are largely derived from this fundamental rule, on specific aspects of legislative drafting. They require that an act be clearly, simply and concisely worded, internally consistent, consistent with other acts, have a standard structure, clearly define rights and obligations, clearly state the date of entry into force and any transitional provisions, and that the preamble justify the enacting provisions. The guidelines further list pitfalls to avoid, such as too many cross-references or references to other acts, provisions without legislative character and autonomous provisions in amending acts.

However, reflections and reports criticizing the drafting of Community law continued during the following years. (In June 1995 the Molitor Group, a working party of experts set up by the Commission, submitted a Report on "*Legislative and Administrate Simplification*": COM(95) 288 final of 21 June 1995. During the same period, the Koopmans Group, a working party of senior officials set up by the Netherlands, produced a report entitled *The quality of EC Legislation – Points for Consideration and Proposals*. During the same period, see the OECD Council Recommendation of 9 March 1995 on *Improving the Quality of Official Regulation*).

The 1997 Declaration in the making of EU legislation

During the negotiations of the Amsterdam Treaty, the Intergovernmental Conference again paid attention to the issue and the Declaration n° 39 on the quality of Community legislation was adopted on 2 October 1997 and attached to the Final Act of the Treaty of Amsterdam. This Declaration points to the quantitative aspect, insisting on the importance of the "efforts to accelerate the codification of legislative texts". The emphasis, however, is put on quality:

> *"the Conference declares that the European Parliament, the Council and the Commission ought to establish by common accord guidelines for improving the quality of the drafting of Community legislation and follow those guidelines when considering proposals for Community legislation or draft legislation, taking the internal organisational measures they deem necessary to ensure that these guidelines are properly applied".*

Let me draw your attention to the second part of the sentence ("internal organisational measures"). It shows that the Conference was aware of the risk that the sole adoption of rules on good lawmaking without the necessary practical measures preparing the drafters and encouraging them to apply the rules in their everyday work

would very likely have an insufficient practical impact. The rules would run the risk of remaining simply symbolic law.

In order to implement Declaration n° 39, the European Parliament, the Council and the Commission set up a common Working Group. The work of this Group benefited from the expertise of the bodies which are responsible in the Member States for legislative drafting. It was an opportunity for a useful bench mark of different legislative styles and cultures.

The 1998 Agreement on the quality of EU legislation

The result of the meetings of the Working Group is the Inter-institutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ n° C 73, 17 March 1999, p 1). It contains, (after the recitals – the "Whereas" clauses) two parts: 22 guidelines and eight practical measures to make sure that they are applied properly.

The 22 guidelines are grouped into several parts. The first part (guidelines 1 to 6) gives the general principles. The following ones have a more technical character; they deal with the structure of the act, the references, the amending acts, the final provisions, repeals and annexes.

I am going to comment only on the most important of those guidelines. Guideline 1 says simply: "*1. Community legislative acts shall be drafted clearly, simply and precisely*".

At first sight this statement sounds banal. Common sense should be sufficient to impose such requirements. In reality, it conceals more complex problems. The guideline seems to put clarity, simplicity and precision on the same level, but actually clarity is the result of a correct balance between simplicity and precision. To a certain extent, there may be a synergy between both: the use of a precise word, for instance, makes further explanations useless and allows for conciseness. But the assertion that a formulation is clearer if it is more precise is only true insofar as the addressee is able to understand the precise wording, ie where he or she knows the precise terminology. Just think about specialists' terminology. On the other hand, the formulation should not be as simple as possible, as simplicity often involves the risk of a lack of precision. Unclear drafting infringes the principle of legal certainty and may create problems for citizens and courts.

Therefore, guideline 1, which, at first reading, seems so obvious that it might be considered as superfluous, does actually express the core question of good legislative drafting. Bearing in mind that law means social message, a difficult balance between simple and precise formulation must be found, with the aim of making legislation clear. Indeed, clarity is the main quality of a normative text.

A useful contribution towards solving this difficult issue may be found in guideline 3. It stresses the central position of the addressee of the norm; it reads as follows:

> *"3. The drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect."*

At first reading, it seems that this guideline has to be reconciled with guideline 1 and the requirement of simplicity. If it aims at the public as a target, why doesn't it simply mention the addressee of the norm? "Addressee" is, after all, a well-known term of the science of communication.

Actually, this term was not retained because it would have caused confusion between the formal addressee and the real addressee of the norm. Remember that EC Directives are formally "*addressed to the Member States*", but in practice they directly target persons or bodies – test laboratories, for instance – in the Member States.

Therefore, this guideline is very important: the difficulties of legislative drafting must always be solved while bearing in mind the real addressee of the legal norm, its language code and its mental skills. Let me shortly come to guideline 4, just to cite an example of reciprocal influences of legislative cultures in the drafting of EU law. Guideline 4 stresses, in particular, the need to avoid "overly long articles". This was an important concern for the Scandinavian experts in the working group that elaborated the 1998 Inter-institutional Agreement.

It is, however, a fact that the complexity of a regulation is dependent upon the issue to be regulated. As EC legislation is mainly economic legislation and as economic reality is by nature a complex one, it is not easy to draft this legislation simply and shortly.

Nevertheless, a recent example shows that it is possible to avoid overloading articles and to articulate a difficult matter in a series of rather short provisions. The sixth Council directive on a common system of value-added tax, when it was adopted in 1977, had only 38 articles, but some of them were long and complicated. In the following years, further modifications made these articles even more complicated and difficult to understand, and other articles were inserted as well. Now, the Commission is proposing a recasting of the directive. The number of articles will grow to 402, but they will be much shorter and, as a consequence, the whole directive will be easier to read.

Among the 22 guidelines one, of course, is devoted to multilingualism.

Guideline 5 reads :

> *"5. Throughout the process leading to their adoption, draft acts shall be framed in terms and sentence structures which respect the multilingual nature of Community legislation; concepts or terminology specific to any one national legal system are to be used with care."*

This guideline has as its aim to make the drafters more aware of what I mentioned earlier, ie that each Member

State has its own legal order, with its own concepts, built by history and culture, over the centuries. When reading this rule, attention is to be placed on the terms "throughout the process". The drafter cannot postpone compliance with multilingualism to a later stage, as if it were a task for translators and lawyer-linguists; he himself has the duty to bear this aspect in mind.

We recently had an example of what may happen if this requirement is neglected by the drafters. Council Directive 2001/113/EC relating to fruit jams and similar products gives a certain number of definitions. Inter alia, it imposes the term "jam" for jams of any kind of fruit, reserving the term "marmalade" for jams made of citrus fruit, although the literal equivalent in several other languages – "Marmelade" in German, for instance – means any kind of jam, whatever the fruit may be. The translators used a literal equivalent for the English definition and some objections by the lawyer-linguists were not taken into account. So, the directive was adopted with the terminology taking the English wording as a model. However, at the stage of implementation of the directive the Austrian government realized that the definition of "Marmelade" contained in it would not be accepted by its population. Consequently, the institutions had to modify the directive in question on this particular point. This would not have been necessary if the drafter had respected this very sensible guideline 5.

This latter consideration leads us to the second part of the 1998 agreement. It is useless to adopt guidelines on better drafting if one does not take the necessary practical measures to help or oblige the drafter to apply them. Recognizing this simple reality, the authors of the agreement pointed out, after the 22 guidelines, a range of practical measures. They are: the elaboration of a practical guide for drafters; internal procedures for each institution, intended to ensure that drafting suggestions with a view to applying the guidelines are made in good time by the Legal Services; the creation of drafting units within the relevant departments; training in legal drafting; cooperation with the Member States in this matter; the use of information technology tools in legal drafting; cooperation between the institutions in the field of the quality of drafting; periodical reports.

It is on this basis that the legal services of the three institutions have drawn up in 2003 a *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions.*

With regard to the training of the drafters, each institution has its own approach. The Council has involved its own lawyer-linguists. They give two seminars twice a year, one in English and one in French, in order to train the drafters in the General Secretariat of the Council. This is a first step of a pedagogical process that will be pursued over the years and will produce its results in the medium or the long term.

THE 2003 AGREEMENT ON "GOOD LAW-MAKING"

Up to now, I have been dealing with the editorial quality of EU-legislation. Now, before my concluding remarks, I shall make a few observations on good law-making seen from the point of view of the quality of the content of the law. Not only must the drafting of the norm be proper, but the substance to be expressed must be well-reasoned, based on suitable data and on a right assessment of the circumstances. We are in the field of material legistics.

Measures which may apply in the EU under this aspect are still under examination, as the relevant principles have just recently been laid down in a new Inter-institutional Agreement on "Better law-making", adopted in December 2003 by the European Parliament, the Council and the Commission (J.O. C 321 of 31 December 2003, p 1). On Friday 5 November 2004, the European Council (Presidency Conclusions, Brussels 4/5 November 2004, document n° 14292/04, para 12) invited the Council to pursue work and decided to come back to the issue of "better regulation" in its 2005 spring session (22-23 March 2005).

However, one of the applicable principles is already well-known: the principle of subsidiarity has already been introduced as an obligation in the Community process of law-making with the Maastricht Treaty. It means that decisions are to be taken *"as closely as possible to the citizens of the Union"*. In any act, if relevant, a special recital should justify the action at Community level. This has become a legal obligation subject to the control of the Court of Justice. In practice, compliance with the subsidiarity principle is not always easy to assess. One has to evaluate each case on its own merits and weigh up the reasons for concluding why a Community objective can be better achieved by Community action.

One of the points stressed in the Inter-institutional Agreement on "Better law-making" concerns the coordination of the legislative process. For the most part, European legislation is the result of an interplay of the three institutions. Each of them has its own rules and practices, and it is essential that they are coordinated. In order to fulfil the commitment of better coordination, a first step that is envisaged is the creation of a *tableau de bord*, a road-map in which the different stages of the legislative procedures are put together and coordinated, with a timetable based on the criteria and common objectives to be achieved. This should allow agreement to be reached on a target – date for the adoption of each legislative act under discussion.

Among the measures aiming at improving the quality of legislation, the 2003 Agreement also indicates pre-legislative consultation. It says, in point 26, that "during

the period preceding the submission of legislative proposals, the Commission … will conduct the widest possible consultations". What is at stake is to involve civil society in the European legislative process, as was already mentioned in the Commission's 2001 White Paper on European governance. In preparing its legislative proposals, the Commission must, and does, from the very beginning, benefit from the impulses and the expertise given by the citizens, the consumers, the economic actors, etc and of course by their organisations.

The commitment has been taken to widen these contacts, inter alia by taking advantage of the new communication technologies, and to spread widely the results of such consultations.

The improvement of the impact analysis of future legislation is a further significant aim of the Inter-institutional Agreement. Such analysis is especially useful at the stage of elaborating legislative proposals. It is thus, first of all, one of the Commission's duties. Actually, the Commission has for several years been applying different analysis systems and has now replaced these sectorial assessments of the impact of its proposals on business, the environment, etc by a global method, adopted in 2002.

What is new in the 2003 Agreement is the objective, first, of adopting a methodology for impact assessment which will be common to the three institutions and, second, of extending such assessment to modifications brought into the Commission proposal by amendments of the Parliament and of the Council. Point 30 of the Agreement provides:

> *"Where the co-decision procedure applies, the European Parliament and Council may, on the basis of jointly defined criteria and procedures, have impact assessments carried out prior to the adoption of any substantive amendment".*

The objective is logic, because it is evident that such amendments may alter significantly the basis on which the analysis was carried out at the drafting stage of the proposal. However, it will not be easy to achieve. An effective impact assessment is time-consuming and runs the risk of delaying the adoption of an act during the final stage of the legislative procedure, which is always politically difficult. Furthermore, the European Parliament and the Council do not have at their disposal the necessary resources to carry out such an assessment. This topic is thus still under discussion. A specific piece of legislation, concerning batteries, has been taken as a test case (Proposal for a Directive on Batteries and Accumulators of 2003, doc COM (2003) 723).

Another objective is to simplify existing Community legislation while respecting the *acquis communautaire*. Priorities are likely to be identified in the environment, transport and statistics sectors. The Council should agree, as soon as this month (of November 2004) on priorities in the form of a list of 10 to 15 existing legislative acts to be simplified.

CONCLUSION

In conclusion, I wish to come back on what I said at the beginning, and to draw your attention to another concern of the EU Institutions. My lecture was focused on the quality of drafting of European legislation. There is also, however, a pressing claim for less quantity. The EU Institutions are aware of this and, to tackle this issue, they have decided to work in two directions.

Limiting the production of new normative acts

The principle of subsidiarity is one of the means for this purpose, but there are some other instruments to achieve this aim, such as different forms of self-regulation and co-regulation, which are presently quite rare at the European level and which might be developed.

Reducing and simplifying existing legislation

The Inter-institutional Agreements on Codification of 1994 and on Recasting of 2001 will produce their results in the next few years. However, this debate should not ignore the fact, highlighted by the Council in its Resolution of 8 July 1996 on "Legislative and Administrative Simplification in the Field of the Internal Market", that "the achievement of the internal market in itself leads to simplification, either because it replaces a series of national rules by one Community rule, or through the principle of mutual recognition" (OJ n° C 224, 1 August 1996, p 5).

Each and all of these efforts actually have the same aim, which is to serve better the citizens or, more generally, all addressees of European legislation, through limiting the adoption of this legislation to texts which are really needed, useful, clear and easily understood and applicable. This permanent and difficult task is not under the limelight. However, it is an essential one for the European Union, its Member States and its citizens.

- The views expressed in this lecture are the author's personal views and do not in any way commit the position of the Council of the European Union. The author thanks Mr Tito Gallas, Head of the Section of the Lawyer-Linguists of the Council's Legal Service, for his assistance.

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