

Polishing what others have written: the role of the European Commission's legal revisers in drafting European Community legislation

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“The drafting of legislation does not consist in polishing what others have written Even assuming that a perfect Bill is submitted to the draftsman, he must still subject it to the complete drafting process, for how else can he discover that it is a perfect Bill and satisfy himself that it will give legislative effect to the intended policy? Draft measures prepared by inexperienced persons are usually defective, and then the draftsman must spend much time in undoing what has been done. This is particularly awkward where the draft has been circulated and discussed before submission to the draftsman, because those who have seen it expect that the final draft will closely resemble it and will resist any attempts to alter its fundamental structure”²

Outline of the European Community legislative process

The role of the different institutions

Almost all European Community (EC) acts start life in the European Commission. Most substantive legislation is now adopted by the European Parliament and the Council although in certain fields it is adopted by the Council alone. As part of the institutional balance, however, the EC Treaty generally requires the proposal for an act to be drawn up by the Commission. Under the Treaty on European Union the Commission does not have the same “monopoly of legislative initiative” since acts may also be adopted at the initiative of Member States. This article focuses on the drafting of proposals for EC legislation.

Apart from drafting the proposals for legislative acts, the European Commission itself adopts a large number of essentially implementing and administrative acts, generally under one of the procedures involving committees composed of representatives of the Member States.

Drafting in the European Commission

Each technical department or Directorate-General (DG) is responsible for preparing and drafting all acts in its own field. It carries out any necessary consultations and impact assessments and may issue Green Papers to expound problems and invite comment and White Papers to outline its ideas. On that basis it

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² Professor Elmer A Driedger, *The Composition of Legislation* (2 edn, 1976).

produces a preliminary draft which will form the basis for all subsequent discussions within the European Commission. The first drafts are produced by technical experts, who rarely are lawyers or have specific drafting expertise.

A few DGs that generate large numbers of acts, for example in the field of agriculture, have, within their legal departments, lawyers who will offer some help with drafting.

Once a DG has formulated its preliminary draft, it submits it to the other DGs concerned as part of the Inter-Service Consultation (ISC). The Legal Service must be consulted on all draft acts. Within the Legal Service, compliance with the rules on drafting is checked by the legal revisers while a lawyer specialising in the technical sector concerned examines the substantive aspects.

The revisers' comments on drafting will generally be incorporated in the Legal Service response to the ISC and taken into account by the DG responsible for the text. In some cases the DG, the reviser and the lawyer may work together to resolve problems.

The Legal Service's opinion will in most cases be accepted by the DG but the Legal Service cannot actually block the adoption of a text. A DG can override a negative Legal Service response to an ISC if it is prepared to put the matter to the vote of the full European Commission. The Legal Service will give a negative response generally for substantive legal reasons and only exceptionally on grounds of drafting quality alone.

The originating DG takes account of the comments it has received from the ISC, some of which may be in the form of textual amendments, and may if necessary carry out further internal and external consultations. It then submits its revised draft for formal adoption by all the members of the European Commission. The text may again be revised by the legal revisers.

All these procedures are overseen by the European Commission's Secretariat-General which coordinates the legislative programme and ensures that any necessary impact assessments and consultations are carried out.

Drafting languages

With effect from 1 May 2004 the Community has 20 official languages. Irish will become the 21st from 1 January 2007. As soon as Romania and Bulgaria become members, their languages will be official languages as well. All regulations and other documents of general application must be drafted and published in the *Official Journal of the European Union* in all the official languages³. All the language

³ See Articles 4 and 5 of EEC Council Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385/58.

versions are available free of charge on the Europa website EUR-Lex⁴. They are all authentic and the European Court of Justice (ECJ) will never interpret one version in isolation.

To enable the institutions to operate efficiently, however, almost all acts are originally drafted in either French or English. The drafting language is determined by the DG or unit. There is no requirement for the person producing the first draft to be a native speaker of the language concerned. The institutions are obliged to recruit their staff on the broadest possible geographical basis from the Member States⁵. The proportion of staff who are native English and French speakers is therefore quite small and most drafters will have to work in a foreign language. A draft act passes through all the internal discussion stages within the European Commission in just one language but it must be translated into all the official languages before it can be submitted to the European Commission for adoption.

All translations are produced by the Translation Directorate-General (DGT) which has a large staff of its own permanent translators and a network of free-lances. DGT has to translate documents across all fields ranging from economic or scientific reports to publicity material. It does not have units specialising in the translation of legislation although some of its translators do have legal qualifications. DGT also offers an editing service to improve the linguistic quality of texts of all kinds written by non-native speakers.

Legal revision in the European Commission

It is clear that such a drafting process can give rise to particular problems. The Legal Revisers Group in the Legal Service attempts to resolve some of those problems. Set up over 30 years ago, the Group now consists of some 55 revisers with legal qualifications covering almost all the Member States and language skills covering all the official languages. They check compliance with the rules on drafting⁶ and ensure that the different language versions all produce the same legal effects.

The Legal Revisers Group has responsibility for the drafting quality of acts across all areas of the European Commission's activities but is split into three units in order to allow a degree of specialisation. Its main work is revising draft acts but it also issues rules and other guidance, provides direct drafting assistance, devises standard forms and templates and gives courses in drafting.

⁴ <http://europa.eu.int/eur-lex/lex/en/index.htm>

⁵ See Article 27 of the Staff Regulations of officials of the European Communities.

⁶ In particular the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions (http://europa.eu.int/eur-lex/en/search/search_lip.html), the Commission's Rules on legislative drafting (RTL), Annex IV to the Rules of Procedure of the Council (OJ L 230, 28.8.2002, p.7), the Council's Manual of precedents, and the Interinstitutional style guide drawn up by the Office for Official Publications of the European Union (<http://publications.eu.int/code/en/en-000300.htm>).

In 2004, when some 3500 Community acts (regulations, directives and decisions) appeared in the Official Journal, the legal revisers examined 1100 texts. Many of the texts which were not revised covered routine management of the agricultural markets.

Revision of preliminary drafts

Revision at the relatively early stage of the ISC offers major practical advantages because the text is still in one language only and the time pressures are generally not so great. If the revisers identify problems, they can work with the author and the lawyer to find solutions.

Improving the quality of the draft at this stage makes all the work downstream easier. Discussions and consultations will be based on a clearer text, leaving less scope for misunderstandings or confusion between departments. It will be quicker and simpler to determine what has been agreed.

The translators' job should be made easier and the translations more accurate. As a result, the final product in all the languages should be of a better quality.

Revision of final drafts

There may be a further opportunity to improve the quality of the text when a proposal is tabled for adoption by the full European Commission. Revision at this stage may be requested by the DG concerned. More often, though, it will have been suggested by the Legal Service at the earlier revision stage either because the text had been heavily revised and needed rechecking or because it was in an area where terminological problems might be expected.

By now the draft act has been translated and revised in all the official languages and it is hard to make changes to the original, however flawed, because so many people have had a hand in its preparation who are neither lawyers nor drafting specialists and are not native speakers of the language.

Such revision must be limited in scope because the draft has passed through almost the entire procedure within the European Commission and been the subject of consultations both internally and externally. The text is almost certainly the fruit of compromise and may in consequence contain deliberate ambiguities. Other ambiguities may simply be the result of bad drafting or the incorporation of textual changes suggested by a non-native speaker.

Any such flaws will have been addressed by 19 skilled translators who, with their background knowledge and extensive research facilities, will have found thoughtful solutions. They have a difficult balancing act: should they be faithful to the original and reproduce any ambiguities or should they make the meaning clear. Their natural inclination to clarify ambiguities is dangerous since it may lead to translations which are quite clear but open to a quite different interpretation from the original.

Even the author of the first draft can no longer be sure of the precise meaning of the text because it has been redrafted "by committee" at every level. If a textual change was demanded by another DG or

delegate, the author of the first draft may be uncertain of the precise intention underlying the change.

Since the text is due to be adopted by the European Commission within a matter of days, revision must focus on ensuring total consistency between the language versions rather than on rewriting or restructuring.

Quality controls in the subsequent legislative procedure

The proposal from the European Commission is passed to the European Parliament and the Council acting together in the co-decision procedure (in certain fields the Council acts alone). In the European Parliament the proposal is assigned to the appropriate standing committee of Members of the European Parliament and a rapporteur is designated. The committee reports to the plenary and generally proposes amendments to the proposal.

Within the Council, the proposal is examined by a working party composed of representatives from all the Member States. They are generally technical experts rather than lawyers and their work focuses on technical issues and the text of the proposal before them. The proposal then passes to the Permanent Representatives Committee (Coreper), made up of the Member States' ambassadors or their representatives, which ensures consistency in the work and resolves technical-political questions before submitting the dossier for decision by a vote of Ministers from the Member States.

At the very end of the procedure when the European Parliament and the Council have reached political agreement on the proposal, and often after its formal adoption, it is vetted by the legal revisers of those institutions. The text is finalised at a meeting of the revisers for each language attended by representatives of the Member States, who can veto changes suggested by the revisers.

Problems inherent in such a decentralised drafting system

Problems facing drafters

European Commission staff called upon to draft legislation may have complete technical mastery of the subject matter but struggle with the unfamiliar task of legislative drafting. Commonly they are not lawyers and have been given little or no training in legislative drafting. Often the only guidance they have received is from their immediate colleagues, who are likewise technical experts, not drafting specialists. Under the internal procedural rules, they will have few contacts with the only European Commission staff who do specialise in drafting legislation, the legal revisers. Most of them will be obliged to work in a foreign language.

The drafters have to create their own structure for their act, sometimes with difficulty. But then they have to incorporate in it suggestions that may fit awkwardly in the chosen structure. They know the legal framework in their sector well but, if not lawyers, they will not appreciate all the needs of legislation or have the reflex to aim for consistency and coherence. Even the drafters who have legal qualifications will rarely have specific expertise in legislative matters.

The drafters will have carried out preliminary consultations and possibly published Green and White Papers, often with drafts of the proposed rules posted on the Internet. Increasingly impact assessments are being carried out to analyse what effect new rules will have in practice. Drafters may be unwilling to accept any changes to the draft rules for fear that they will call in question the preliminary work.

From an early stage the main statement of the policy is in draft rules and any attempt to influence the policy takes the form of changes to the text of the draft rules. There is plenty of scope for misunderstanding because of the language problem. Those consulted may have misconstrued the original draft and make comments based on false premises. The drafter may not grasp the precise rationale of textual changes suggested by others and fail to take proper account of them.

It is often hard for drafters to accept that their drafts must be substantially altered. No-one likes to be corrected but it is worse when the corrections can be seen by all other participants in the process, as happens in the European Commission system.

As a rule, novice drafters and those without legal qualifications tend to welcome help and to recognise the improvements while older hands and lawyers will resent having their handiwork changed and may challenge the changes suggested by the revisers.

The greater the effort that the drafters have put into the first draft, the more they will tend to resist changes. It is even worse when hard-won compromises have to be unravelled, especially when concessions made to obtain consent have to be withdrawn. A typical example is where a drafter has inserted words in the statement of reasons for an act to satisfy concerns of another department which would really have liked a provision in the articles but those words are deleted by the revisers because the rules require all the statement of reasons to relate to the articles.

There is also a danger that drafters who have taken a lot of trouble in preparing an important new text will believe that only a light final polish is required. They may then fail to allow enough time for a thorough revision and be surprised at the number of changes suggested by the revisers.

Problems facing revisers

If a first draft is very poor, it may be impossible for the revisers to grasp exactly what was intended and it will certainly be hard to raise the quality to a satisfactory standard. In particular, if the original structure is bad, it will be difficult to straighten it out fully in the course of revision.

It is all too common for revisers to misunderstand the drafter's intentions. Since the drafters are generally not native speakers of the language they have to use, not lawyers nor even specialists in drafting, nothing can be taken at face value. In fact, revisers often need some knowledge of the language of the drafter in order to understand the words and constructions used in the draft.

It is relatively simple for the revisers to ensure superficial or formal consistency within the text before

them at a given moment. But since they are not specialists in the subject-matter, they do not know the wider context, the legal framework of the sector, well enough to ensure substantive consistency and coherence. For example, they will not necessarily recognise that draft provisions submitted to them are modelled on parallel provisions in the same sector or a neighbouring sector. They are, to some extent, reliant on the contextual knowledge and terminology of the drafter. Unfortunately, for procedural reasons they cannot always have all the contact they would wish with the drafter or the lawyer concerned.

Revisers tend to preserve as much as possible of the original draft and to make changes only where there are actual mistakes of language or form or breaches of the drafting rules. They do this so that they can get through their work in the time available and maintain cordial working relations with the clients but also because they lack in-depth knowledge of the subject matter. As a result, if two drafts are submitted that have been drawn up on two different models, they may be revised in different ways even by a single reviser. Indeed this should be the result if the original is respected and changes are made only where there is a breach of an express rule.

Drafters often use as a model their own drafts of earlier acts. The risk is that they will rely on their draft before revision; as a result, the new draft will repeat the mistakes of the past. Revisers have to try to spot them all again, as well as deal with any new problems in the text.

Revisers may be blinded by the draft, particularly if it is superficially well presented with all the requisite parts, an apparently satisfactory structure and plausible wording. Some revisers focus on certain aspects such as protocol rules or avoidance of jargon or Latin and may overlook other defects. Since only a small number of the revisers are native speakers of the drafting languages and it is not possible to assign one of them to each job, some linguistic errors are not corrected.

Revisers must always be aware of the need not to revise just what is on the page but also to think whether others provisions should be added, for example on transitional measures, review or repeals. They also need to step back to consider the broader picture: is the act as drafted needed or could the result be achieved in some other, simpler way?

Long and complex draft acts can present very serious problems for revisers. It can be difficult to straighten out the structure if it is fundamentally misconceived. The revisers' analysis may reveal so many inconsistencies, ambiguities, omissions or even "black holes" that a simple revision process is not enough. Such texts may have to be altogether redrafted in meetings between the technical experts, lawyers and revisers concerned. Each redraft may bring to light further problems and in some cases the process can take many weeks as the text passes through numerous redrafts.

Decentralised drafting systems

In some countries legislation is drafted by a corps of staff who specialise exclusively in legislation. Others have decentralised drafting systems more akin to that in the Community institutions. In most of those systems, however, the staff who produce the first drafts will be lawyers and they will always be writing in

their native language. Stringent checks are built in, often with a final comprehensive review by a high-ranking independent authority such as the French Conseil d'État.

The Community's present system was apparently satisfactory in the early days, perhaps because of a combination of the following factors.

The fabric of Community law was loosely woven. There were fewer earlier acts for new ones to be fitted around. Such acts as did exist were less technical, tending to be confined to broad principles which would be filled in by administrative practice.

Fewer acts were adopted each year than is the case now. The process was slower, there was time to check and polish. Most acts were adopted by the Council alone, while the EP had only a consultative role. Once the proposal had been formulated by the European Commission, it had to be adopted only by the Council with just six Member States, rather than having to pass through both the European Parliament and the Council, each with representatives from 25 countries.

In the early days there was a single working language for all the institutions, French. It was an official language of three of the six original Member States, namely the three in which all the main offices of the institutions were located. All officials developed a good standard of French because it was the first foreign language learned in most of the original Member States and a good knowledge of it was a condition for recruitment and advancement in the institutions. French is a language with a lot of grammatical rules and there is often only one right way to say something. Moreover, almost all documents were prepared by secretaries who could correct mistakes and improve linguistic quality as they worked.

Community acts were drafted in quite simple language and the European Court of Justice (ECJ) did not take a literal approach to interpretation but took account of the purpose and context, sometimes going to lengths that are surprising to lawyers from common-law systems.

Advantages of a decentralised system

The decentralised system may be satisfactory for short, routine texts. Staff who have had basic training and make full use of the templates, guidance and checklists provided are able to produce texts which, after fairly light checking by trained revisers, are of an acceptable standard. It is flexible because large number of people can draft and there is no bottleneck at the level of a single drafting unit whose staff require long training periods before they can become operational.

It is generally easier for non-native speakers who are not lawyers to draft acts than to draft precise instructions; they are familiar with all the technical terminology and with the sectoral legal framework. They can express themselves more concisely and rely on existing formulations rather than have to express policy in abstract terms.

If the precedents chosen are appropriate and well drafted, repetitive acts can be produced efficiently and

rapidly and a degree of consistency with existing acts is automatic.

Trained and experienced revisers are able to work out what was intended quickly. They see drafts through new, critical eyes and are aware of common problems. Because they have before them a complete draft, they can approach the text from a different perspective from the drafter.

Good communications between the departments concerned are essential. If the revisers are able to obtain clarification of the drafter's intentions, their work is easier and of a higher quality. If the revisers' comments are understood by the drafter, if necessary after further consultation, and then incorporated properly, the system can work effectively.

Improving the system

In the 1990s concerns began to be expressed about the quality of Community legislation in various Member States⁷. Eventually those concerns led to a major initiative to improve drafting.

Intergovernmental Conference of 1997

At the Amsterdam Intergovernmental Conference in 1997 the heads of State and government adopted Declaration No 39 on the quality of the drafting of Community legislation⁸. It called on the institutions to “establish by common accord guidelines for improving the quality of the drafting of Community legislation ... and [to take] the internal organisational measures they deem necessary to ensure that these guidelines are properly applied”.

1998 Interinstitutional Agreement on Quality of Drafting

The European Parliament, the Council and the Commission then adopted the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation.⁹ That agreement laid down 22 guidelines on drafting, based partly on suggestions from Member States, and listed organisational measures to make sure the guidelines were actually applied. Those measures were essentially aimed at improving the drafts produced by the DGs at an early stage.

The European Commission has taken a number of measures. The *Joint Practical Guide for the drafting of*

⁷ See in particular: the report of the French Conseil d'état of 1992; the Declaration of the European Council in Birmingham in 1992 including the words: “We want Community legislation to be clearer and simpler”; the Koopmans report from the Netherlands in 1995; the conference on the quality of European and national legislation organised by the Netherlands and the European institutions in 1997.

⁸ OJ C 340, 10.11.1997, p. 139.

⁹ OJ C 73, 17.3.1999, p. 1.

Community legislation has been made widely available in booklet form and on the internet¹⁰. Drafters are being made aware of the need for better drafting by means of circulars, seminars and other actions. They are being offered basic courses in legal drafting. DGs were encouraged to set up specialist drafting units.

The legal revisers are brought in to make drafting suggestions earlier. They have been given more staff and have created an internal structure to allow a degree of specialisation. As they have become embedded in the drafting process, they have developed their skills in response to the increasing demands made for drafting expertise.

The Translation DG has set up a specialist editing service to improve the quality of texts drafted in French and English by non-native speakers.

Concluding remarks

Suggestions for improving the drafting quality of Community legislation include establishing an independent body to review proposals for legislation just before they become law or a drafting office to serve all the Community institutions. Either of those solutions would entail major changes to the present structures and possibly amendment of the Treaties. Within the present framework, however, drafting quality could still be improved by practical steps such as the following:

Language skills—Greater attention should be focused on language skills, especially in the internal working languages. A decentralised system apparently works satisfactorily in various monolingual national systems. To make it work better in the Community institutions, further efforts are required. Staff must realise that the slips, infelicities and obscurity that are inevitable in a multilingual environment and are tolerated in internal and informal communications cannot be allowed to spill over into formal communications. More rigour is needed, for it is all too easy for fuzzy language to conceal confused thinking.

It is possible that in time English will come to be the sole internal working language, as French used to be, and that the standard of English in the institutions will improve as a result. However, fluency in everyday English is no guarantee of ability to communicate effectively on technical matters. Computer tools to highlight language problems in texts may come to offer some assistance.

Drafting skills—Drafting, especially legislative drafting, must be recognised as a specific skill to be mastered. All departments have designated drafting specialists. Non-native speakers should be given specialised language courses but even staff who are native speakers of the

¹⁰ See footnote 4.

language or are lawyers should be given specific drafting training and back up. No staff should be allowed to draft without supervision until they have attained a certain level of competence.

Differentiated approaches—A differentiated approach to preparing legislation should be adopted. The present system may work for short, routine acts but it is inadequate for bigger, more complex ones. For such acts, skilled drafters should be involved from an early stage. Each DG should have its own legally trained, specialist drafters. For complex acts they should form a team with the technical specialists. The team should take the time necessary to develop a well thought out first draft. It should consult the Legal Service, including its revisers, at an early stage and again allow the necessary time for revising the draft.

Unified responsibility and control—Drafting Community legislation is a fragmented process in which no one person takes full responsibility and control.

Each participant may assume that others will sort out the problems. Within the European Commission itself, the drafter may think that the editing service will correct any language errors and the legal revisers will address technical drafting problems. The legal reviser may assume that the drafter has resolved all substantive issues correctly. Various DGs intervene to address one single concern each. The European Commission then submits its proposal to the other institutions where such problems recur.

The creation of drafting teams will help to solve the problem of fragmented responsibility within the European Commission. To tackle the problem at the inter-institutional level, the European Commission could take a more active role at the final stage of the adoption process when the act is in the hands of the European Parliament and the Council. The European Commission is still a key player in the process by virtue of its right under the EC Treaty to withdraw its proposal at any time before the adoption of the act, thus making it impossible for the act to be adopted. At that stage the European Commission has traditionally focused chiefly on substantive issues but it could in theory use that leverage to improve the technical quality of the act adopted on the basis of its proposal. The European Commission drafting team, with its valuable knowledge of the early drafting stages, could intervene in the final polishing of the act by the European Parliament and Council revisers to ensure coherence and drafting quality.