

# The Problem of Quality in EU Legislation: What on Earth is Really Wrong?

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## A. Quality of EU legislation: a new area of focus

Despite the recent qualms about the obviously bad quality of EU legislative texts,<sup>2</sup> in the past the quality and style of legislation at the EU level was treated as an irrelevance by EU legislators and legal commentators alike. This was mainly due to the fact that, especially with reference to Directives, the main aim of EU drafters has been to achieve the actual passing of new legislation agreed by all or most of the fifteen Member States whose difference in interests and legal systems rendered the procedure of passing legislation at the EU level a rather lengthy and painful sequence of sensitive compromises. After all, EU law has often been considered a *droit diplomatique*.<sup>3</sup> In this already difficult process concerns on the quality or style of the text produced was viewed, and possibly not without basis, a mere luxury.

However, a combination of two events changed this attitude. First, the introduction of detailed legislation on an increasing number of fields of law created extensive rights and obligations addressed and enjoyed by individuals. EU natural and legal persons are increasingly being called to comply with complex EU legislation affecting a huge chunk of their lives and ranging from equal employment rights to sex equality and from the determination of technical standards for products sold within the EU to the accountancy obligations of EU companies. Second, the introduction and further development of the direct effects principle signified that most EU legislative texts -even Directives- are applicable within Member States even if they are not transposed into national law. This, by definition, demanded EU legislative texts which can be easily interpreted and smoothly applied by national courts even when the EU text is the only source of relevant law available to national judges.

Moreover, while this was taking place at the individual level, Member States were finding the task of transposing the large number of Single Market measures into their national laws rather difficult to cope with. At the same time, as Jean-Claude Piris, the Director-General of the Council Legal Service, the institutions themselves found the task of passing accessible

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<sup>2</sup> See House of Lords, Session 1993-1994, Select Committee on the European Communities, Enforcement of European Competition Rules.

<sup>3</sup> See C.W.A. Timmermans, "How to improve the quality of Community legislation: the viewpoint of the European Commission" in A. Kellermann, G. Ciavarini-Azzi, S. Jacobs and R. Deighton-Smith, *Improving the Quality of Legislation in Europe* (1998, Kluwer Law, The Hague), pp.39-59, at 41.

laws on the Single Market at a short period of time a considerable burden.<sup>4</sup> All this has led to the common realisation that the issue of quality of EU legislation affects directly both EU citizens individually and the European integration process as a whole.

## **B. The need for quality in EU legislation**

In fact, the quality of EU legislation affects legal relationships and everyday situations at the individual, national, EU and international levels. At the individual level, bad EU legislation may lead to lack of certainty and security in the law,<sup>5</sup> including all aspects of social legislation. This is confirmed by the case-law of the ECJ, which has stated that good quality legislation is essential for effective judicial protection.<sup>6</sup> As far as companies are concerned, bad quality of legislation is a hurdle to the creation of a secure, properly regulated, competitive business environment.<sup>7</sup> Bad legislation leads to vague, conflicting, inaccurate provisions, under- or over-regulation, which damages the credibility of the EU legislator and wounds public support to the cause of European integration.

At the EU level, bad legislation involves conflicting provisions which may lead to severe problems in the areas of monitoring the application of EU law from Member States and EU citizens, and of enforcement. Lack of support to the cause of integration caused by bad legislation creates the need for measures by the EU to re-gain public support. These cost in effort, work hours and recourses. Moreover, bad internal legislation can be responsible for lack of clarity in the role of the European institutions in an ever changing environment, especially with reference to the increasingly complicated legislative process.

At the international level, EU legislative drafting affects non-EU countries through the increasingly high volume of transactions between the EU and third countries, or between third countries and Member States whose national provisions are influenced by EU law.

Since the quality of EU legislation affects EU citizens at a multitude of levels, it really is interesting to note that the reasons for the lack of such quality has rarely been the subject of debate especially amongst academics. The question therefore is, what lies at the root of the many problems of a large number of EU legislative texts, such as titles which do not reflect

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<sup>4</sup> See J.-C. Piris, "The quality of Community legislation: the viewpoint of the Council Legal Service" in A. Kellermann, G. Ciavarini-Azzi, S. Jacobs and R. Deighton-Smith, *Improving the Quality of Legislation in Europe* (1998, Kluwer Law, The Hague), pp.25-38.

<sup>5</sup> See for example cases 137/85 *Maizena* [1987] ECR 4603, and C-172/89 *Vandemoortele* [1990] ECR I-4690.

<sup>6</sup> See cases 212-217/1980 *Amministrazione delle Finanze dello Stato v Salumi* [1981] ECR 2735.

<sup>7</sup> See R. Pagano, *Le direttive di tecnica legislativa in Europa* (1997, Camera dei deputati, Roma), pp. xxix and xxx.

accurately the substance of the text, extremely long preambles which often include confusing or purely political statements, obscure terminology which is often conflicting even within the same text, clashing and complicated provisions, unworkable texts and generally inefficient legislation. Is it a question of lack of rules and guidelines for the quality of EU legislation, is it simply a question of bad rules, or is it a question of bad application of the existing rules?

### **C. EU rules on legislative drafting**

The question of the manner in which EU legislative texts must be drafted and the rules which must be followed in that process is a very recent one. In October 1992 the Sutherland Report<sup>8</sup> suggested that each new legislative measure must be assessed on the basis of five criteria, namely the need for action, the choice of the most effective course of action, proportionality of the measure, consistency with existing measures, and wider consultation of the circles concerned during the preparatory stages.

In December 1992 the European Council asked for new legislation to be clearer and simpler.<sup>9</sup> In June 1993 the Council adopted a Resolution on the quality of drafting legislation covering a number of issues, ranging from the wording and structure of the text to its consistency with the content of existing legislation and the role of the preamble.<sup>10</sup> The aim of the Resolution, as determined in its text, was to make Community legislation more accessible. For the achievement of this aim, the Resolution called for clear, simple, concise and unambiguous wording. Practices encouraged by the Resolution were the use of the same term throughout the act, the use of the accepted structure of chapters/sections/articles/paragraphs, compliance with the role of the preamble as a means of justification of the enacting provisions in simple terms, clear determination of the rights and obligations deriving from the act, clear reference to the act's date of entry into force, and consistency of the provisions of various acts. Practices discouraged by the Resolution were the use of unnecessary abbreviations,

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<sup>8</sup> See "The internal market after 1992: meeting the challenge", Report to the EEC Commission by the High Level Group on the operation of the internal market, SEC(92)2044; also see Supplement to European Report no 1808 of 31 October 1992; Commission Communication to the Council and the EP, "Follow-up of the Sutherland report", COM(93)361 final and SEC(92)2227 fin; Opinion of the Economic and Social Committee of 5 May 1993 "On the Commission Communication on the operation of the Community's internal market after 1992: follow-up to the Sutherland Report", OJ no. C 201/59 of 26.7.1993; Communication from the Commission, "Follow-up to the Sutherland Report: legislative consolidation to enhance the transparency of Community law in the area of the internal market", 16 December 1993, COM(93)361 fin.; Communication from the Commission to the Council, the EP and the ESC "On the handling of urgent situations in the context of implementation of Community rules: follow-up to the Sutherland Report", COM(93)430 fin.

<sup>9</sup> See Edinburgh European Council, "Conclusions of the Presidency", Bulletin EC 12/92, pp.7-40.

Community jargon, long sentences, imprecise references to other texts, too many cross-references, political statements without legislative character, pointless repetitions of existing provisions, and inconsistencies with existing legislation. With specific reference to acts amending earlier legislative texts, the Resolution discouraged the inclusion of autonomous provisions which could not be directly incorporated into the existing act. Although the Resolution contained the mere core of well established and non-contentious rules of drafting common to the majority of Member States, its value for the cause of quality in legislation must not be underestimated. The Resolution is the first EU text which focuses on quality in legislation at the EU level. Moreover, it determines the concept of accessibility of legislation and introduces clear criteria to be used for the evaluation of EU legislative texts.<sup>11</sup>

In December 1994 the Council, the Commission and the Parliament adopted an Inter-institutional Agreement on the official codification of legislative texts.<sup>12</sup> In June 1995 the Molitor Group submitted its report on legislative and administrative simplification which followed the recommendations and criteria set by the Sunderland Report.<sup>13</sup> In 1995 and 1996 the Commission in its *Better Law-making Reports*<sup>14</sup> made clear that the aim of its guidelines on legislative policy is to ensure that legislative texts are of the proper quality and consistency, that the drafting process is open, carefully planned and co-ordinated, and that the monitoring and evaluation of the legislation enacted is more thorough. On 8 May 1996 the Commission launched the SLIM initiative (Simpler Legislation for the Internal Market) with the strong encouragement of Internal Market Ministers, aimed to identify ways in which Community and national legislation could be simplified.<sup>15</sup> In the meantime, the Commission declared that the quality of EU legislation depends on the quality of national measures. Thus, in June 1997 the Commission adopted a broader approach to simplification covering not only Community leg-

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<sup>10</sup> See Council Resolution of 8 June 1993 on the quality of drafting Community legislation, OJ C 166/1, 17 June 1993, p.1.

<sup>11</sup> These rules are also included in the Council Decision 93/662/EC of 6 December 1993 adopting the Council's Rules of Procedure, OJ L 304/1 of 10.12.1993.

<sup>12</sup> See Interinstitutional Agreement of 20 December 1994, "Accelerated working method for official codification of legislative texts", OJ no C 293/2 of 8.11.1995, OJ no C 102/2 of 4.4.1996.

<sup>13</sup> See Report of the Group of Independent Experts on legislative and administrative simplification: Summary and Proposals, COM(95) 288 final of 21 June 1995; also see Commission's comments on the report SEC(95) 2121 final of 29 November 1995; and the European Parliament Resolution of 4 July 1996, OJ C211, 22 July 1996, p.23.

<sup>14</sup> See Better Lawmaking 1995: report of the Commission to the European Council [of Madrid] on the application of the principles of subsidiarity and proportionality, on simplification and codification, CSE(95)580, Bulletin, 11-1995, point 1.9.2; also see Better Lawmaking 1996: report of the Commission to the European Council [of Dublin] on the application of the principles of subsidiarity and proportionality, on simplification and consolidation, CSE(96)7.

<sup>15</sup> See Communication from the Commission to the Council and the European Parliament, "Simpler legislation for the internal market (SLIM): a pilot project", COM(96)204 fin.; also see Resolution of the EP of 10 April 1997 on the communication

islation but also national measures.<sup>16</sup> In its *Better Lawmaking Report (1997)* the Commission called the drafting authorities of Member States “to work towards the effective implementation of Community law and play an active part in the process of improving the quality of legislation”.<sup>17</sup> In the Informal Meeting of Internal Ministers of 13-14 February 1998, Ministers unanimously stressed their strong support for legislative simplification of national and Community rules.<sup>18</sup>

However, the EU had so far avoided to tackle the exact content and scope of quality in legislation. In the *Commission Staff Working Paper* entitled *Making Single Market Rules More Effective, Quality in Implementation and Enforcement* of 25.5.1998<sup>19</sup> the Commission undertook the task of clarifying the necessity for, purpose and content of quality in legislation. The Commission explained that clear and simple legislation helps businesses and citizens to comply with the law without imposing excessive burdens and facilitates the task of authorities who have to enforce it. It can also prevent damage to the image of the Union which is wrongly accused of bureaucracy and puts an end to cases for damages, such as *Francovich*. Thus, quality legislation must be easy to transpose and apply. Moreover, quality legislation takes into account the views of interested parties, all of which must be consulted before the proposed measure is put forward in compliance with the Regulatory Policy Guidelines of the Commission.<sup>20</sup>

In another Commission Communication to the European Council entitled *Legislate Less to Act Better: the Facts*<sup>21</sup> the Commission emphasised that its slogan “legislate less to act better” means not only concentrating on policy priorities with strict application of the subsidiarity and proportionality principles (legislate less), but also improved consultation procedures and clearer, simpler and more accessible legislation (act better). The main guidelines for action put forward were observance of the subsidiarity and proportionality principles through the reduction in the number of legislative proposals and the use of alternatives to legislation (see for example, the voluntary agreement between the Commission and European car manufacturers<sup>22</sup>), improving the quality of legal drafting through the introduction of drafting guidelines for clear, coherent and unambiguous legislation), simplification of EC legislation

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from the Commission to the Council and the EP ‘Simpler legislation for the internal market (SLIM): a pilot project’, COM(96)204 fin. (A4-0108/97, OJ no C 132/213 of 28.4.1997).

<sup>16</sup> See COM(97)618 final, p.2.

<sup>17</sup> See Bulletin EU 11-1997, point 1.1.1.

<sup>18</sup> See <http://europa.eu.int/comm/dg15/en/update/general/camb.htm#1>, p.1.

<sup>19</sup> See SEC(1998) 903, pp.3-5.

<sup>20</sup> Also see Communication from the Commission to the European Parliament and the Council, Making Simple Market Rules More Effective, COM(1998)296 final.

<sup>21</sup> See Bull. EU 5-1998, point Institutional Affairs, 1.8.3.

through SLIM, formal consolidation (inhibited by multi-lingualism and constant change of he rules), recasting (i.e. adoption of a single legislative measure which introduces changes to an earlier instrument, consolidates these amendments with the provisions that remain unchanged and repeals the earlier one) and informal consolidation. Equally important are easier access to information, proper transposal, sharing of responsibility amongst institutions, and rationalising of national legislation.

In the Commission's *Better Lawmaking Report 1998: A Shared Responsibility*<sup>23</sup> the role of Member States in the process of improving the quality of EU legislation was fully established. The Commission declared that Member States also have a role to play to complement the efforts of the institutions, as "they are, after all, the main producers of legislation and hence the most direct cause of the burden [on firms]." In fact, the correct transposal of EU Directives was one of the eight main guidelines for action introduced by the Report.<sup>24</sup>

However, it was with the *Inter-institutional Agreement on common guidelines for the quality of drafting of Community legislation* of 22 December 1998<sup>25</sup> that all three EU institutions, namely the Commission, the Council and the Parliament finally agreed on comprehensive guidelines for the quality of drafting. According to these Community acts must be clear, simple and precise, drafting should be appropriate to the type of act concerned, it shall take into account the persons to whom it is addressed, provisions shall be concise and their content homogenous, and acts shall take into account the translation implications of their structure. From a stylistic point of view, terminology shall be consistent throughout the act itself and EU law in general, the standard structure of title-preamble-enacting terms-annexes if necessary) shall apply, the title shall give a full indication of the subject matter, citations must set out the legal basis of the act, recitals set out concise reasons for the chief provisions of the enacting terms without paraphrasing or reproducing them, only phrases of normative nature will be included, internal and external references will be kept to a minimum, repeals will be expressly introduced, and dates on transposition or enforcement will be clearly introduced expressed as day/month/year.

The question is, whether this *Agreement* -as the only joint authoritative text of the European institutions on the issue of legislative drafting- introduces the only even partially binding text of guidelines for the drafting of quality legislative texts at the EU level. Since the *Agreement* itself is not a legally binding text, but just the written outcome of the perception of

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<sup>22</sup> See COM(1998)495.

<sup>23</sup> See COM(1998)715 final.

<sup>24</sup> See Bulletin EU 5-1998, point 1.8.3.

EU institutions of what is good quality in legislation and an indication of their resolve to meet these standards, I would suggest that there really is little difference between that *Agreement* and previous texts of self-regulation on drafting composed by individual institutions. Since the legislative process within the EU involves in the majority of occasions at least the Commission, the Council and the Parliament, an undertaking by one of these three institutions to follow an additional guideline on drafting would result to the imposition of this guideline to the process itself. Thus, the rule of the 1993 Council Regulation on the exclusive use of the preamble as a means of justification of the enacting terms will inevitably be applied in all texts vetted by the Council, even if that specific rule is not included in the *Inter-institutional Agreement*. Similarly, the reduction of the number of actual legislative texts passed introduced by the 1998 Commission Report *Legislate Less to Act Better* will be incorporated in the legislative policy of the EU even though it is not expressly included in the *Agreement*, as the Commission will be pressuring for alternative types of regulation in all the processes that it is involved. On that basis, ignoring all other rules of drafting on the grounds that they are not included in the *Agreement* is not a realistic approach, assuming of course that the rules in question were included in texts which the relevant EU institutions intend to put to practice.

In view of this, it is necessary to bring to light the rules for legislative drafting as these appear in official Reports, Regulations and Agreements of EU institutions. These rules can serve as criteria for the assessment of the quality of EU legislative texts. Jean-Claude Piris has stated that there are two aspects in the issue of quality: quality in the substance of the law and quality in the form of the law. Quality in the substance of the law refers mainly to issues of legislative policy and covers tests of subsidiarity and proportionality, choice of the appropriate instrument, duration and intensity of the intended instrument, consistency with previous measures, cost/benefit analysis and analysis of the impact of the proposed instrument on other important areas of policy, such as SMEs, environment, fraud prevention etc. Quality in the form of the law concerns accessibility, namely transparency in the decision-making process, and dissemination of the law.<sup>26</sup> I would classify the drafting rules of the EU in three categories: rules concerning the substance of the legislative text, rules related to the legislative process which leads to their passing, and rules relevant to technical drafting issues. Before actually identifying the rules which belong to each category, it is worth stating that these are interconnected and inter-related. In that respect, a rule may -and usually does- belong to or affect more than one categories.

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<sup>25</sup> See OJ C 73, 17.3.1999, pp.1-4.

<sup>26</sup> See J.-C. Piris, op.cit., p.28.

As for the substance of the legislative text, EU legislation must be an essential and effective means of achieving the aim of the law in question: thus, alternative means of regulation, such as inter-trade agreements, must be encouraged, and so is abstinence from regulation in areas which do not fall within priority policy issues.<sup>27</sup> EU legislation must be proportional to the aim to be achieved,<sup>28</sup> and consistent with existing legislation. Moreover, it must take into account the particular needs of the users of the final texts: thus, it must determine the new rights and obligations introduced by it in a manner which can be easily understood by lay persons. Furthermore, it must take into account the issue of transposition and the need for translation of the text in the many different EU official languages.

As for the legislative process, EU institutions must respect the principle of subsidiarity thus leaving it to Member States to regulate matters which are more effectively dealt with at the national level (another aspect of wise regulation).<sup>29</sup> The drafting process must be open,<sup>30</sup> transparent,<sup>31</sup> with full information of legislative dossiers available to all interested parties,<sup>32</sup> and consultation must be as wide as possible. The legislative process must also be carefully planned and co-ordinated. Furthermore, planned legislation must be subject to cost analysis, and already enacted laws must be monitored and evaluated.

As for the technical side of drafting, EU legislation must be clear, unambiguous and simple; this is all the more important for texts which are going to be translated and transposed into fifteen different legal orders. Clarity includes the use of plain language,<sup>33</sup> and the avoidance of too many cross-references, and of political statements without legislative character. Unambiguity covers the use of the same term throughout the text, lack of unnecessary abbreviations, and lack of pointless repetition of existing provisions. Simplicity incorporates lack of

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<sup>27</sup> See General guidelines for legislative policy: Communication of 9 January 1996 by the President of the Commission, SEC(95)2255.

<sup>28</sup> Proportionality is defined as appropriateness to meet the needs; see case C-84/94 *UK v Council* ECR [1996] I-5755, at para. 47, 55, 57 and 58.

<sup>29</sup> See Communication from the Commission on Subsidiarity, SEC(92)1990; also see Interinstitutional Agreement of 25 October 1993 on the procedures for implementing the principle of subsidiarity, Bull. EC, no 12, 1993, p.129.

<sup>30</sup> See Communication of the Council, the Parliament and the Economic and Social Committee, "Openness in the Community", COM(93)258 fin., OJ no C 166/4 of 17.6.1993.

<sup>31</sup> See Interinstitutional declaration on democracy, transparency and subsidiarity, Bulletin EC, 10/93, pp.119-123; also see Resolution of the European Parliament of 6 May 1994 on the transparency of Community legislation and the need for it to be consolidated, A3-0266/94, OJ no C 205/514 of 25.7.1994.

<sup>32</sup> See Code of Conduct 93/730/EC concerning public access to Council and Commission documents, OJ no L 340/41 of 31.12.1993; also see Commission Decision 94/90/ECSC, EC and Euroatom of February 1994 on public access to Commission documents, OJ no L 46/58 of 18.2.1994.

<sup>33</sup> See Opinion of the Economic and Social Committee of 5 July 1995 on plain language, OJ no C 256/8 of 2.10.1995.



Community jargon, long sentences and imprecise references to other legal texts.<sup>34</sup> The now well established structure of title-preamble-enacting terms-annexes (where necessary) must be followed. Provisions must be formed in chapters-sections-articles and paragraphs. The title of EU legislative texts must be a full and clear indication of their subject matter. Preambles must only be used as means of justifying the enacting provisions in simple, non repetitive terms. Citations (namely the short title within the title) must provide the legal basis of the text, whereas recitals within the preamble must be used as a means of presenting the concise reasons for passing this piece of legislation. Moreover, there must be a very clear reference of the date of entry into force which must be clearly distinguished from the date of the actual text. Furthermore, the practices of consolidation, recasting and informal consolidation must be actively pursued for already existing legislation.

#### **D. Quality of legislation at the national level**

From this synthesis of existing rules for quality legislation at the EU level, it is immediately obvious that there is a surprising number of standards of good legislative quality already introduced by a number of Reports, Regulations, Inter-institutional Agreements and Manuals.<sup>35</sup> Thus, the current dubious quality of some EU texts cannot be attributed either to a lack of commitment of EU institutions to the cause of better quality of EU legislation, or to a lack of standards imposed upon EU institutions which take part in the legislative process. However, the mere existence of certain rules of drafting does not necessarily secure good quality of legislation. The question is, whether these drafting rules are capable of guaranteeing good quality of legislation, or whether –perhaps in their struggle to balance the common and civil law styles of drafting followed by the various national legal systems of the Member States- EU institutions have trapped themselves in a legislative style which is unworkable and therefore inefficient. In order to assess whether this is the case, it is helpful to compare the EU rules with the rules for drafting within the national legal orders of the Member States. National drafting guidelines provide a representative sample of the drafting rules followed by modern drafters both in the civil and common law traditions. In view of the lengthy and tested drafting traditions of the Member States, it must be accepted that their main drafting trends -albeit far from perfect- are the means currently used by national legislatures for the achievement of

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<sup>34</sup> See Resolution of the EP of 4 July 1996 on the report of independent experts on simplification of Community legislation and administrative provisions, COM(95)288 fin.; also see A-4 0201/96, OJ no C 211/23 of 22.7.1996.

good quality in legislation. Thus, these trends can be used as a measure of quality for the EU drafting guidelines.

Most EU Member States introduce rules of legislative drafting which bind the professional drafters or legal experts who participate in the process of drafting. Austria,<sup>36</sup> Belgium,<sup>37</sup> France,<sup>38</sup> Germany,<sup>39</sup> Italy,<sup>40</sup> the Netherlands,<sup>41</sup> Portugal,<sup>42</sup> Spain,<sup>43</sup> and the UK<sup>44</sup> have introduced texts which include some guidelines or standards of quality for national drafters. It is widely accepted that, despite the expected differences between countries of the common and the civil law tradition, the general principles of drafting legislation are surprisingly similar. Clarity, simplicity, precision, accuracy and plain language are common standards of good quality of legislation both in the common and in the civil law drafting styles.<sup>45</sup> Moreover, consideration of the circle of persons which are the main users of the legislative text in question,<sup>46</sup> consideration of the interpretative problems which may arise from the text,<sup>47</sup> the need for consistency with existing legislation, avoidance of irrelevant provisions within the legislative texts and the use of uniform terminology within the text are all rules of drafting which are common within the legislative guidelines of EU Member States.<sup>48</sup>

Let us examine each of the EU guidelines on legislative drafting separately beginning with the rules concerning the substance of the legal text. One of the recent EU rules as to the substance of the legislative text relates to the choice of a legislative solution only if this is an essential and effective means of ending legal uncertainty. Member States have already introduced express provisions within their drafting guidelines which share the same philosophy: in

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<sup>35</sup> See European Commission (ed.), *Manual for legislative drafting* (1997, European Commission, Brussels); similar manuals have been introduced by the Council.

<sup>36</sup> See *Legistische Rechtenlijnen*, 1990.

<sup>37</sup> See *Traité de légistique formelle*, Circular of the Prime-Minister of 23 April 1982.

<sup>38</sup> See *Circulaire relative à la codification des textes législatives et réglementaires*, Circular of Prime Minister of 30 May 1996; also see *Circulaire relative aux règles d'élaboration, de signature et de publication des textes au Journal Officiel*, Circular of the Prime Minister of 2 January 1993.

<sup>39</sup> See *Handbuch der Rechtsförmlichkeit*, 1991.

<sup>40</sup> See *Formulazione tecnica dei testi legislativi*, 1986; also see *Regole e suggerimenti per la redazione dei testi normativi*, 1992; also *Istruttoria legislativa nelle commissioni*, 1997.

<sup>41</sup> See C. Borman (ed.), *Aanwijzingen vor de Regelgeving* (1993, Zwolle, the Netherlands).

<sup>42</sup> See Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects for normative acts.

<sup>43</sup> See Directives on the form and structure for the schemes of projects of laws, 1991; also see Norms on the consultation regime of the *Congreso de los Diputados e del Senado*, 1989.

<sup>44</sup> See Consolidation of Enactment (Procedure) Act 1949, 41 *Statutes* 741; also see Statutory Instruments Act 1946, 41 *Statutes* 717; Interpretation Act 1978, 41 *Statutes* 899.

<sup>45</sup> See G. C. Thornton, *Legislative Drafting* (1996, Butterworths, London/Dublin/Edinburgh), pp.52-54; also see R. Pagano, *Introduzione alla legistica: l'arte di preparare le leggi* (1999, Giuffrè Editore, Milano), pp.26-30.

<sup>46</sup> See M. Ainis, *La legge oscura* (1997, Laterza, Bari), p.103.

<sup>47</sup> See V. Fronsini, *Lezioni di teoria dell'interpretazione* (1993, Bulsoni, Roma), p.1993; also see W.A. Leitch, "The Interpretation Act: ten years later: 16 *Northern Ireland Legal Quarterly* (1958) 215, at 236-237.

<sup>48</sup> See R. Pagano, 1999, *op.cit.*, pp.37-39.

fact, some national guidelines require justification of the necessity and the timing of the legislative solution within the actual text. This is expressly the case in Belgium, France, Germany and Portugal.<sup>49</sup> Within the framework of the use of legislative texts only where alternative means of regulation have failed, Member States are as opposed to regulation in areas outside the current policy priorities as is the EU, where agreements between the parties of disputes are now actively encouraged. Included in this manner of thinking is the EU requirement for the proportionality of legislative measures, which -although obviously shared by the Member States- is not expressly introduced in the national drafting rules. However, it must be accepted that only proportional measures are necessary and efficient means of attaining the aim of the law and, consequently, only proportional measures may fulfil the imposed national tests of necessity and efficiency.

Equally common to the systems of Member States is the principle of legality which in the EU is expressed as the requirement of consistency of all new acts with existing EU legislation. At least two Member States, Germany and Portugal, expressly regulate that new legislation must comply with existing provisions.<sup>50</sup> However, the lack of a relevant categorical provision in other Member states does not signify freedom for their national legislators to introduce provisions which are contrary to the Constitution or other national laws. Thus, although Greece does not introduce such an express requirement, following the hierarchy of sources of Greek law any new law which is in conflict with the Constitution or constitutional laws is void and is not be applied by the Greek judges. It must therefore be recognised that the EU legality requirement is indeed part of the legal tradition of the Member States.

Moreover, the EU rule as to the consideration of the particular needs of the users is reflected in the Austrian and German appreciation that legislative texts are mainly used by lay persons whose lack of legal knowledge does not allow for complicated, specialised texts full of legal terminology.<sup>51</sup> This general rule is also reflected in the German requirement for the clear determination of the new duties and rights introduced by the legislative text, which is identical to the relevant EU rule.<sup>52</sup> An expression of this rule can be found in the EU call for

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<sup>49</sup> See the French Circular of 2<sup>nd</sup> January 1993 on the rules for the elaboration, signature and publication of texts in the Official Journal and to the coming into force the particular procedures of the Prime Minister, art.2.1.1.1.; German *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.40; German Manual of judicial formalities, 1991, para.26-28; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.1a.

<sup>50</sup> See the German Manual of judicial formalities, 1991, para.31-32; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.4.

<sup>51</sup> See Austrian *Legistische Richtlinien*, 1990, art.9; also see the German *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.35; German Manual of judicial formalities, 1991, para.34.

<sup>52</sup> See the German Manual of judicial formalities, 1991, para.59.

plain language and unambiguity.

The EU guidelines on the legislative process, openness and transparency in the passing of legislation is the source of public discussions and debates in the national Parliaments on the new laws. In that respect, the principles of legislative process followed at the EU level does not differ too much from that of the Member States. However, the practice of consultation which is introduced by the EU rules of drafting is not as common in the national rules of Member States. Although Belgium, France, Germany, the Netherlands Spain and the UK do introduce some form of consultation process before the passing of a law, this -at least in the countries of the civil law tradition- usually includes the discussion of the draft law either by specialists in the field, or before the Constitutional courts.<sup>53</sup> However, the wide consultation of interested parties as introduced by the EU rules is very similar to at least the French, Dutch and British practices and in that respect it is not strange to the Member States. In fact, for legislation passed at the EU level, where the sources of information on legislative proposals may not easily reach the lay persons of all Member States who will be the main users of the text in question, the requirement of consultation must be actively encouraged. This is all the more important within a legislative function as the EU which still suffers from serious problems of democratic deficit.

Equally progressive to the consultation process is the new EU rule on the need for an impact analysis of new draft laws. This can also be traced in the Finnish,<sup>54</sup> French, Dutch and UK traditions, where the process of the cost and impact analysis is compulsory.<sup>55</sup> In fact, the UK assessment of the cost of application of the new legislative measure for the actual users, namely for businesses,<sup>56</sup> is quite similar to the EU cost analysis.

As for the EU rules related to the technical side of drafting, clarity of legislation is a principle common to the laws of the Member States which is expressly introduced in Austria,

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<sup>53</sup> See Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.28; French Circular of 2<sup>nd</sup> January 1993 on the rules for the elaboration, signature and publication of texts in the Official Journal and to the coming into force of the particular procedures of the Prime Minister, art.1.7 ; German *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.40; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.269; Spanish *Normas sobre regimen de asesamiento a las Comisiones del Congreso de los diputados y del Senado* of 26 June 1989; for the common law approach to consultation, see A.D. Jergensen, "The legal requirement of consultation" [1978] PL 290; also see *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280, [1972] 1 WLR 190; *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 All ER 164.

<sup>54</sup> For an analysis of the relevant Finnish tradition, see S. Arkio, "Assessment of draft legislation in Finland", in A. Kellermann, G. Ciavarini-Azzi , S. Jacobs and R. Deighton-Smith, *Improving the Quality of Legislation in Europe* (1998, Kluwer Law, The Hague), pp.227-244.

<sup>55</sup> See the French Circular of 21 November 1995 relating to the conduct of an impact study for projects of laws and decrees at the Council of the State; also see the Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.331

<sup>56</sup> See Department of Trade and Industry (ed.), *Checking the Cost to Businesses: A Guide to Compliance Cost Assessment* (1999, DfI, London).

Belgium, France, Germany, the Netherlands, Portugal, Spain and the UK.<sup>57</sup> Unambiguity is required from Belgian, German, Italian, Portuguese, Spanish and UK drafters.<sup>58</sup> Simplicity is a rule of drafting in Austria, Belgium, Germany, Portugal, and Spain.<sup>59</sup> It must be noted that in the UK simplicity is indeed pursued, but not to the detriment of certainty in the law.<sup>60</sup> Plain language, as an expression of the rule for the consideration of the language accessible by the lay persons who will be the main users of the particular legislative text is expressly introduced in the Netherlands, Portugal and the UK.<sup>61</sup> In fact, at the EU level the principle of plain language is also served by the rule which discourages the use of Community jargon. Clarity, unambiguity and simplicity constitute the core of the drafting philosophy also at the EU level. The importance of this finding must not be underestimated. It has been demonstrated that at least the main themes in the drafting rules of the EU and the Member States are common. This leads to the conclusion that, at least *prima facie* the EU shares the drafting philosophy of Member States. Before reaching a final conclusion, however, it is necessary to assess the compatibility of specific stylistic rules in the national legal orders of the Member States.

Under a common drafting rule at the national level only provisions of a legal nature may be included in legislative texts. Thus, political statements or declarations of intention

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<sup>57</sup> See Austrian *Legistische Rechtlinien*, 1990, art.7; Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.1; German *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.35; German Manual of judicial formalities, 1991, para.33-39; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.2; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.218; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.7c; Spanish Guidelines on the form and structure of projects of laws, 1991, approved by the Decision of the Council of Ministers of 18 October 1991, OJ of 18 November 1991, no 276, disposition 27774, pp.37235-37, at 37235; also see L. Neville-Rolfe, "Good regulation: weighing-up the risks", in A. Kellermann, G. Ciavarini-Azzi, S. Jacobs and R. Deighton-Smith, *Improving the Quality of Legislation in Europe* (1998, Kluwer Law, The Hague), pp.245-249; G.C. Thornton, *op.cit.*, pp.53-54.

<sup>58</sup> See Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.1; *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.35; German Manual of judicial formalities, 1991, para.37; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.2; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.7c; Spanish Guidelines on the form and structure of projects of laws, 1991, approved by the Decision of the Council of Ministers of 18 October 1991, OJ of 18 November 1991, no 276, disposition 27774, pp.37235-37; for an analysis of ambiguity under British law see Black, *The Labyrinth of Language* (1972, Pelican Press, London), p.107.

<sup>59</sup> See Austrian *Legistische Rechtlinien*, 1990, art.1; Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.1; German *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.35; German Manual of judicial formalities, 1991, para.33; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.7c; Spanish Guidelines on the form and structure of projects of laws, 1991, approved by the Decision of the Council of Ministers of 18 October 1991, OJ of 18 November 1991, no 276, disposition 27774, pp.37235-37.

<sup>60</sup> See *The Preparation of Legislation – Report of a Committee appointed by the Lord President of the Council* (Renton Report) of May 1975, ch.XI, art.14.

<sup>61</sup> See the Dutch *Aanwijzingen Voor de Regelgeving*, 1992, arts.54 and 218; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.7a; for the UK see M. Faulk and I.M. Mehler, *The Elements of Legal Writing* (1994, Macmillan Press, London).

have no place in legal texts. This express EU rule is shared with the Austrian, Belgian, French, Italian and Dutch legal orders.<sup>62</sup> Similarly, the EU rule imposing the avoidance of too many cross-references or imprecise cross-references is also introduced in Italy, Portugal and the UK.<sup>63</sup> The EU requirement of the use of the same term when referring to the same concept is an expression of the principle of unambiguity and is expressly introduced in Austria, Belgium, Italy, the Netherlands and Portugal.<sup>64</sup> On the basis of the same principle of unambiguity, unnecessary abbreviations are to be avoided not only at the EU level, but also in Germany and Italy.<sup>65</sup> As an expression of the need for clarity and unambiguity, lack of pointless repetitions of existing provisions which is often followed by the use of different terms to reflect the same concept is to be avoided not only under the EU rules, but also under the Austrian, Italian and Dutch guidelines.<sup>66</sup> Under EU drafting rules long sentences must be avoided, as are in Austria, Germany, and Italy.<sup>67</sup> It is noteworthy that the UK does not introduce a general rule against long sentences; nevertheless, a similar result is achieved through restrictions in the use of subordinate sentences (especially before the subject of the phrase or between the subject and the verb of the sentence)<sup>68</sup> and against long sentences which are not split into paragraphs.<sup>69</sup> Moreover, imprecise references to other legal texts are expressly prohibited in the EU rules, as well as in the Austrian, German, Italian, Dutch, and Portuguese guidelines.<sup>70</sup> The

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<sup>62</sup> See Austrian *Legistische Rechtlinien*, 1990, art.2; Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.105; French Circular of 2<sup>nd</sup> January 1993 on the rules for the elaboration, signature and publication of texts in the Official Journal and to the coming into force the particular procedures of the Prime Minister, art.2.1.1.1.; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.11; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.24.

<sup>63</sup> See Italian *Formulazione tecnica dei testi legislativi*, 1986, G.U., no. 123 of 29 March 1986, Ordinary Supplement, no. 40, art.13 and 14; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.6c; The Preparation of Legislation – Report of a Committee appointed by the Lord President of the council (Renton Report) of May 1975, art.23; see G.C. Thornton, *op.cit.*, p.65.

<sup>64</sup> See Austrian *Legistische Rechtlinien*, 1990, art.31; Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.3a; Italian *Formulazione tecnica dei testi legislativi*, 1986, G.U., no. 123 of 29 March 1986, Ordinary Supplement, no. 40, art.16a; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.16; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.58; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.7a.

<sup>65</sup> See *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.34; Italian *Formulazione tecnica dei testi legislativi*, 1986, G.U., no. 123 of 29 March 1986, Ordinary Supplement, no. 40, art.9.

<sup>66</sup> See Austrian *Legistische Rechtlinien*, 1990, art.3; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.19; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.78.

<sup>67</sup> See Austrian *Legistische Rechtlinien*, 1990, art.18; German Manual of judicial formalities, 1991, para.51; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.1.

<sup>68</sup> See The Preparation of Legislation – Report of a Committee appointed by the Lord President of the council (Renton Report) of May 1975, art.16.

<sup>69</sup> See The Preparation of Legislation – Report of a Committee appointed by the Lord President of the council (Renton Report) of May 1975, art.8.

<sup>70</sup> See Austrian *Legistische Rechtlinien*, 1990, art.56; German Manual of judicial formalities, 1991, para.97-109; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.55; Dutch *Aanwijzingen Voor de Re-*

EU role of the title of legislative texts as a full, complete and clear indication of their subject matter, or perhaps better expressed as a complete and precise reflection of their true subject, is identical with the role of titles in Austria, Belgium, France, Germany, Italy, the Netherlands and Spain,<sup>71</sup> where a requirement for conciseness is added. In the UK it is now widely accepted that declarations as to the scope of the law must be in its provisions rather than in the title.<sup>72</sup> Although the practice of preambles is unknown in Austria, France, Germany and Greece, and actively discouraged in modern UK drafting, the EU partiality to their use is traced in the traditions of Belgium and the Netherlands. In fact, in a practice reminiscent of the EU use of preambles as a means of justifying the enacting provisions, in Belgium preambles are used to justify the need for the legislative text and the choice of its timing, as well as to confirm the completion of the consultation process.<sup>73</sup> However, in the Netherlands preambles must be brief,<sup>74</sup> whereas in the UK preambles may not include declarations of purposes.<sup>75</sup> Furthermore, the EU rule on the clear determination of the date of entry into force which must be clearly distinguishable for the date of publication of the text is shared by Austria, Belgium, Germany, Italy and the Netherlands.<sup>76</sup>

The comparative analysis of the main EU rules with the drafting guidelines of the Member States has shown beyond doubt that both the philosophy behind these rules, as well as the particular manner in which the general principles are realised is very similar to the philosophy and particulars of the national drafting theory and practice of the Member States. In fact, the number of countries which share the same rule with the EU in each particular point of this comparative analysis demonstrates that the drafting style of the EU may be a collage of

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*gelgeving*, 1992, art.78; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.6c.

<sup>71</sup> See Austrian *Legistische Rechtlinien*, 1990, art.100; Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.20; French Circular of 2<sup>nd</sup> January 1993 on the rules for the elaboration, signature and publication of texts in the Official Journal and to the coming into force the particular procedures of the Prime Minister, art.1.3; *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.29; Italian *Formulazione tecnica dei testi legislativi*, 1986, G.U., no. 123 of 29 March 1986, Ordinary Supplement, no. 40, art.10; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.37; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.98 and 105-107; Spanish Guidelines on the form and structure of projects of laws, 1991, approved by the Decision of the Council of Ministers of 18 October 1991, OJ of 18 November 1991, no 276, disposition 27774, pp.37235-37, art.1.

<sup>72</sup> See *The Preparation of Legislation – Report of a Committee appointed by the Lord President of the council (Renton Report)* of May 1975, art.15; 44 *Halsbury's Laws of England* (4<sup>th</sup> edition), pp.493-494.

<sup>73</sup> See Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.26.

<sup>74</sup> See *Aanwijzingen Voor de Regelgeving*, 1992, arts.109-110.

<sup>75</sup> See *The Preparation of Legislation – Report of a Committee appointed by the Lord President of the council (Renton Report)* of May 1975, art.11.6.

<sup>76</sup> See Austrian *Legistische Rechtlinien*, 1990, art.77; Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.121; *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.31; German Manual of judicial formalities, 1991, para.307; Italian *Formulazione tecnica dei testi legislativi*, 1986, G.U., no.

various national drafting conventions, but it certainly is not an obscure collection of sporadic drafting rules characteristic of one legal system only. This leads to the conclusion that the EU drafting system is very much a reflection of the collective modern drafting style of the Member States.<sup>77</sup> Of course some EU guidelines reflect the drafting conventions of only three or four countries and, in fact, some rules tend to sympathise with the minority common law approach to drafting. However, the general taste of the EU drafting style is at least partially familiar to the laws of the Member States.

Member States have a lengthy and tried drafting tradition which has been fine-tuned many a time by their national legislatures. Although it would be a mistake to consider the national drafting rules of Member States a collection of samples of infallible perfection, they undoubtedly are a compilation of the results of long theoretical debates and lengthy practical experience in the field of drafting legislation. In fact, they represent the modern approach to drafting needs and incorporate the prevailing solutions to common drafting problems. On that basis, it is difficult to argue that the lack of quality of EU legislative texts can be attributed to bad EU drafting rules.

In fact, there is a general argument in the field of drafting that bad legislation cannot be attributed to bad rules, only to bad application.<sup>78</sup> This argument, which so far has been put forward in relation to the national drafting rules of Western democracies, is based on the hypothesis that in these democracies drafters are obliged to fulfil their tasks within the framework of drafting guidelines which instil the hands-on knowledge and long standing drafting traditions of their mature legislatures. Consequently, the quality of the whole system of these sets of rules can not be attacked without disregarding the valuable and lengthy process of constant readjustment of these rules in order to accommodate the hands-on experiences of national legislatures. This leads to the argument that, although specific and isolated rules and drafting techniques may well result in bad legislation, the system of drafting rules in Western democracies must be considered at least adequate. What leads to examples of bad legislation, an undoubted and to an extent inevitable plague of all legislatures, is the quality of application of drafting rules by national drafters.

If this argument is applied to EU legislation, one could support the view that it is the application rather than the EU system of drafting rules per se which can be considered the

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123 of 29 March 1986, Ordinary Supplement, no. 40, art.18; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.178-180.

<sup>77</sup> See A.E. Kellermann, "Proposals for improving the quality of European and national legislation" 1-2 *European Journal of Law Reform*, pp.3-30, at 8.



culprit in the problem of bad quality of EU legislation. Is it possible that this is the case?

### **E. Application of EU drafting guidelines**

In order to establish whether the bad quality of EU legislation can be attributed to the ignorance or bad application of the existing drafting rules, it is necessary to utilise examples from actual texts. Sample texts used in this analysis include most types of EU legislation, such as Directives, Regulations, Decisions and Recommendations. Moreover, the texts chosen here have been either published or amended within the last decade, namely after EU drafting rules and guidelines came into place. In fact, most texts were drafted after the 1998 *Inter-institutional Agreement*. As the aim of this analysis is to assess whether EU laws are routinely drafted in accordance with the EU drafting rules, texts which are already considered to be known samples of bad drafting, such as the Time Share or the Working Time Directive, are not used here. Their use would leave this research vulnerable to the argument that well known samples of bad drafting indicate a mere sporadic failure of the institutions to follow the drafting rules. It is for this reason why a relatively larger number of EU texts is utilised here.

A frequent problem in the drafting of EU texts is their title, which tends to be very long and quite unclear. A characteristic, yet older example, is the title of Directive 77/91/EEC, as recently consolidated: “Second Council Directive 77/91/EEC of 13 December 1976 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent”.<sup>79</sup> The title is obviously fruitlessly long, unclear and ambiguous. In fact, all this could have been adequately expressed with a title “on the formation, maintenance and alteration of the capital of public limited companies”. A recent Commission Decision is entitled “Commission Decision of 5 March 2001 prolonging for the fifth time the validity of Decision 1999/815/EC concerning measures prohibiting the placing on the market of toys and children articles intended to be placed in the mouth by children under three years of made of

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<sup>78</sup> See F. Lanchester, *Elements of Drafting and Comparative Legislative Process 1988-1989* (1989, Cedam, Paris); also see House of Lords, *Debates* vol. 412, 7 august 1980.

<sup>79</sup> Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, *OJ L 026*, 30.1.1977, pp.1-13, as amended by Directive 92/101/EC, *OJ L 347*, 28.11.1992, p.64.

soft PVC containing certain phthalates”.<sup>80</sup> A possible title would be “on the partial prohibition of soft PVC toys containing certain phthalates”. Even worse, titles may be an incorrect reflection of the content of the relevant legal text. A typical, albeit older, example of this is the Electro-Magnetic Compatibility Directive,<sup>81</sup> whose title is not only incomplete but also misleading. In reality the Directive does not refer to “the approximation of the laws of Member States relating to electromagnetic compatibility”, but to provisions for the protection of radio communications from temporary electromagnetic disturbances. Similarly, the title of the relatively recent Directive 95/47/EC is “on the use of standards for the transmission of television signals” whereas the text of the Directive clearly regulates the promotion of fully digital transmission systems.<sup>82</sup>

Another common weak point of EU legislative texts can be traced in their preamble. The preamble of Directive 2000/26/EC<sup>83</sup> consists of thirty-one points. Some legitimately refer to the process followed for its passing and the justification of the need to introduce a legislative solution on its subject matter. However, the preamble also includes useless endless descriptive repetitions of the main legal points of the Directive in a manner which seems unclear and ambiguous. To be more precise, the analysis of the duties of representatives of insurance undertakings included in recital 15 of the preamble is an unfortunate repetition of Article 4, by use of terms which are different compared to the actual article that does not refer to representation in court.<sup>84</sup> This may only lead to confusion as to the sense of the relevant provision, which is expressed in two different, and at times conflicting, manners.

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<sup>80</sup> See Commission Decision of 5 March 2001 prolonging for the fifth time the validity of Decision 1999/815/EC concerning measures prohibiting the placing on the market of toys and children articles intended to be placed in the mouth by children under three years of age made of soft PVC containing certain phthalates, *OJ L 69*, 10.3.2001, p.37.

<sup>81</sup> See Council Directive 89336/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to electromagnetic compatibility, *OJ L 139*, 23.5.1989, pp.19-26.

<sup>82</sup> Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals, *OJ L 281*, 23.11.1995, pp.51-54.

<sup>83</sup> See Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive), *OJ L 181*, 20.7.2000, pp. 65-74.

<sup>84</sup> See point 15 of the preamble and juxtapose to Art.4: “...(15) In order to fill the gaps in question, it should be provided that the Member State where the insurance undertaking is authorised should require the undertaking to appoint claims representatives resident or established in the other Member States to collect all necessary information in relation to claims resulting from such accidents and to take appropriate action to settle the claims on behalf and for the account of the insurance undertaking, including the payment of compensation therefor; claims representatives should have sufficient powers to represent the insurance undertaking in relation to persons suffering damage from such accidents, and also to represent the insurance undertaking before national authorities including, where necessary, before the courts, in so far as this is compatible with the rules of private international law on the conferral of jurisdiction.”

“...Article 4: Claims representatives...1. Each Member State shall take all measures necessary to ensure that all insurance undertakings covering the risks classified in class 10 of point A of the Annex to Directive

Another common occurrence is the use of non legal statements within EU texts, mainly -but not exclusively- in the preambles. For example, reference to “the internal market which comprises an area without internal frontiers in which the free movement of goods, services, persons and capital is ensured” is very common in texts relevant to the Single Market, although this statement really is void of any legal value and any original meaning since it repeats a well established motive for any further regulation within the EU. To make matters worse, this is usually followed by another senseless declaration of the known political wish of the EU to adopt measures for the realisation of the internal market. An example of this practice can be found in Directive 94/22/EC,<sup>85</sup> whose preamble reminds the reader the very obvious but merely factual event that Member States have sovereign rights over hydrocarbon resources on their territories. Similarly, paragraph 4 of Directive 2000/43/EC<sup>86</sup> expresses the importance awarded by the legislator to the respect of human rights, without, however, any indication of the legal value of this indication of the political will of the EU in the area.<sup>87</sup> The frequent inclusion of political, non-legal or commonly known statements and facts in EU legal texts is a practice which damages clarity and precision, confuses the user, and is in direct clash with the EU drafting guidelines.

Clarity is often wounded by ambiguous phrases whose meaning tends to be a mystery not only to lay persons, but to lawyers. For example, Article 5 of Directive 98/84/EC<sup>88</sup> includes a provision according to which one of the measures for the protection of providers of protected services is the application “for disposal outside commercial channels of illicit devices”. It seems that the purpose and content of this application is clear to the drafter. Only.

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73/239/EEC, other than carrier's liability, appoint a claims representative in each Member State other than that in which they have received their official authorisation. The claims representative shall be responsible for handling and settling claims arising from an accident in the cases referred to in Article 1. The claims representative shall be resident or established in the Member State where he is appointed...

....5. Claims representatives shall possess sufficient powers to represent the insurance undertaking in relation to injured parties in the cases referred to in Article 1 and to meet their claims in full. They must be capable of examining cases in the official language(s) of the Member State of residence of the injured party”...

<sup>85</sup> See Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, *OJL 164*, 30.6.1994, pp.3-8, “...Whereas the internal market comprises an area without internal frontiers in which the free movement of goods, services, persons and capital is ensured; whereas the necessary measures must be adopted for its operation;...”

<sup>86</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJL 180*, 19.7.2000, p.22.

<sup>87</sup> 4) It is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.

<sup>88</sup> Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access  
*OJL 320*, 28.11.1998, pp.54-57.

Internal and external references are often so many and confusing that it is very difficult to follow the actual text. In Article 5 of Directive 2000/26/EC there are eight references to other legal texts and five references to other paragraphs of the same text.<sup>89</sup>

Long sentences tend to be another plague of EU legislative texts, as is demonstrated by Directive 94/22/EC, according to which “A Member State wishing to apply this paragraph shall within three months of the adoption of this Directive or, in case of Member States who have not yet introduced such procedures, without delay arrange for the publication in the Official Journal of the European Communities of a notice indicating the areas within its territory which are available under this paragraph and where detailed information in this regard can be obtained.” The problem in the length of the Article which leads to ambiguity and complexity could have easily been resolved, if the drafter determined the deadline within which the notice must be published in the Official Journal in a separate sentence. Such a complicated and long sentence seems to be not only difficult to understand, but also quite complex to translate.

An equal sense of ambiguity and complexity is traced in provisions within a single text which seem to contradict one another. An example of this can be found in Recommenda-

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<sup>89</sup> Article 5: Information centres

1. For the purposes of allowing the injured party to seek compensation, each Member State shall establish or approve an information centre responsible:

(a) for keeping a register containing the following information:

1. the registration numbers of motor vehicles normally based in the territory of the State in question;
2. (i) the numbers of the insurance policies covering the use of those vehicles for the risks classified in class 10 of point A of the Annex to Directive 73/239/EEC, other than carrier's liability, and where the period of validity of the policy has expired, also the date of termination of the insurance cover;
- (ii) the number of the green card or frontier insurance policy if the vehicle is covered by one of those documents in case the vehicle benefits from the derogation provided for in Article 4(b) of Directive 72/166/EEC;
3. insurance undertakings covering the use of vehicles for the risks classified in class 10 of point A of the Annex to Directive 73/239/EEC, other than carrier's liability, and claims representatives appointed by such insurance undertakings in accordance with Article 4 whose names shall be notified to the information centre in accordance with paragraph 2 of this Article;
4. the list of vehicles which, in each Member State, benefit from the derogation from the requirement for civil liability insurance cover in accordance with Article 4(a) and (b) of Directive 72/166/EEC;
5. regarding the vehicles provided for in point (4):
  - (i) the name of the authority or the body designated in accordance with the second subparagraph of Article 4(a) of Directive 72/166/EEC as responsible for compensating injured parties in the cases where the procedure provided for in the first indent of Article 2(2) of Directive 72/166/EEC is not applicable, if the vehicle benefits from the derogation provided for in Article 4(a) of Directive 72/166/EEC;
  - (ii) the name of the body covering the vehicle in the Member State where it is normally based if the vehicle benefits from the derogation provided for in Article 4(b) of Directive 72/166/EEC;
- (b) or for coordinating the compilation and dissemination of that information;
- (c) and for assisting entitled persons to be apprised of the information mentioned in points (a)(1), (2), (3), (4) and (5).

The information under points (a)(1), (2) and (3) must be preserved for a period of seven years after the termination of the registration of the vehicle or the termination of the insurance contract.

tion 94/79/EC.<sup>90</sup> Its Article 1 determines the items of income where the Recommendation is applicable for residents of one Member State who are subject to income tax in another. These items, expressly referred to in the text of the Article, are income from dependent personal services, pensions and other similar remuneration received in consideration of past employment, including social security pensions, income from professional occupations or other self-employed activities, including that of performing artists and sportsmen and sportswomen, income from agricultural and forestry activities, and income from industrial and commercial activities. However, Article 3 of the same Recommendation states that “Where a natural person benefiting from the tax treatment referred to in paragraph 1 has, in the Member State of taxation, income other than that referred to in Article 1 (1), the provisions of that paragraph shall also apply to that other income.” The question here is, whether the list of Article 1 is restrictive, or whether other items of income may be subject to its regulation. If the aim of the drafter in Article 1 was to merely state some examples of items of income subject to the Recommendation, then this should have been expressly stated in the text of the Article. If, however, this is not the case and Article 1 states the items of income subjected to its regulation in a restrictive manner, then the purpose and meaning of Article 3 are difficult to determine.

Moreover, known errors of drafting are included even in very recent Directives, such as the repeated use of “and/or” in Directives 2000/43/EC<sup>91</sup> and 94/22/EEC,<sup>92</sup> or the use of an unexplained abbreviation (BAT) in the recent Council Decision 99/24/EC.<sup>93</sup>

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<sup>90</sup> See 94/79/EC: Commission Recommendation of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident, *OJL 039*, 10.2.1994, pp.22–28.

<sup>91</sup> Article 7: Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

<sup>92</sup> Article 1

For the purposes of this Directive:

1. 'competent authorities' means the public authorities, as defined in Article 1 (1) of Directive 90/531/EEC, which are responsible for granting authorization and/or monitoring use thereof;...

<sup>93</sup> See Council Decision 99/24/EC of 14 December 1998 adopting a multiannual programme of technological actions promoting the clean and efficient use of solid fuels (1998 to 2002), *OJL 007*, 13.1.1999, pp.28-30.

Article 1

1. Within the multiannual framework programme for actions in the energy sector, a specific programme for the promotion of clean solid fuel technologies, hereinafter referred to as the 'Carnot' programme, shall be implemented by the Community for the period 1998 to 2002.

2. In addition to the priority objectives listed in Article 1(2) of Decision 1999/21/EC, Euratom, the objectives of the Carnot programme shall be to:

- promote the use of clean and efficient technologies to plants using solid fuels in order to limit emissions, including carbon dioxide emissions, from such use,
- encourage the development of advanced clean solid fuel technologies in order to achieve improved BAT at affordable cost.

Before concluding this presentation of examples of bad application of EU drafting rules, it is worth referring to another source of complexity of EU texts, especially for the lay user: the difficult distinction between the date of entry into force of the actual legal text and other dates introduced for its implementation. There have been occasions where bad drafting accentuated the difficulty, admittedly, inherently involved in the exercise of setting the various deadlines for the entry into force and implementation of EU texts. Thus, the now corrected text of Directive 77/91/EEC had a complex and ambiguous clause of its entry into force, which was to be within two years of the notification of the Directive to the Member States, whereas certain provisions “may come into force” eighteen months after the two years of the notification.<sup>94</sup> Although most recent EU texts manage to avoid such problems, they still tend to include complex provisions of entry into force and application. For example, Directive 2000/26/EC enters into force when it is published in the Official Journal; Member States must adopt the implementing measures before 20 July 2002 and apply the provisions of the Directive before January 2003.<sup>95</sup> Regulation 2121/98 “shall enter into force on the third day following its publication in the Official Journal of the European Communities” but “it shall apply from 11 December 1998, except for Articles 1(2), 4 and 10, which shall apply from 11 June

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<sup>94</sup> Article 43

1. Member States shall bring into force the laws, regulations and administrative provisions needed in order to comply with this Directive within two years of its notification. They shall forthwith inform the Commission thereof.

2. Member States may decide not to apply Article 3 (g), (i), (j) and (k) to companies already in existence at the date of entry into force of the provisions referred to in paragraph 1.

They may provide that the other provisions of this Directive shall not apply to such companies until 18 months after that date.

However, this time limit may be three years in the case of Articles 6 and 9 and five years in the case of unregistered companies in the United Kingdom and Ireland.

3. Member States shall ensure that they communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

<sup>95</sup> Article 10: Implementation

1. Member States shall adopt and publish before 20 July 2002 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

They shall apply these provisions before 20 January 2003.

2. When these measures are adopted by the Member States, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

3. Without prejudice to paragraph 1, the Member States shall establish or approve the compensation body in accordance with Article 6(1) before 20 January 2002. If the compensation bodies have not concluded an agreement in accordance with Article 6(3) before 20 July 2002, the Commission shall propose measures designed to ensure that the provisions of Articles 6 and 7 take effect before 20 January 2003.

4. Member States may, in accordance with the Treaty, maintain or bring into force provisions which are more favourable to the injured party than the provisions necessary to comply with this Directive.

5. Member States shall communicate to the Commission the text of the main provisions of domestic law which they adopt in the field governed by this Directive.

Article 11

Entry into force

1999”.<sup>96</sup> Although it would be unfair to attribute the difficulty of lay persons to determine the day when EU legal texts must be applied to EU drafters who merely apply the EU drafting rules setting a number of dates in the process of implementation, the complexity and ambiguity of EU texts at this point remains. The determination of the initiation of rights and obligation deriving from EU texts is a complex issue for the non-legally trained users and this tends to be problematic for the application and enforcement of EU texts. In view of the need to include a series of dates in EU texts, every effort may be made to ensure that these are expressed in a clear and unambiguous manner which will not confuse the users. Perhaps this is an example where the rule, rather than the application, suffers.

Nevertheless, the brief reference to only some of the drafting errors of EU drafters has demonstrated that the existing EU drafting guidelines are circumvented by EU institutions. In fact, one of the issues arising from this brief analysis concerns the fact that these faults were traced in existing legal texts which have been vetted by at least the Commission, the Council and the European Parliament. What seems to be more worrying than the commitment of obvious mistakes, which -after all- are not untypical of national legal texts, have not been spotted and rectified by the three main institutions. However, it would be both unfair and untrue to consider that this failure is a result of the inability of the persons involved in the legislative process to follow the EU drafting rules. The sheer bulk of their drafting task is more than adequate to provide them with the experience to anticipate and avoid drafting mistakes. Furthermore, examples of good drafting are present in EU legislation especially recently. One can therefore assume that the current bad quality of EU legislation is a result of the still minimal significance often awarded to the need for good drafting quality by the majority of persons taking part in the EU legislative process which includes national representatives.

#### **F. Application of EU drafting rules: The next area of focus**

The aim of this analysis was to bring to light the main cause of the current bad quality of EU legislation. The paper dealt with three hypotheses.

First, bad EU legislation is due to the lack of drafting guidelines at the EU level. The examination of relevant sources of drafting rules has demonstrated that this hypothesis is in-

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This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

<sup>96</sup> Commission Regulation (EC) No 2121/98 of 2 October 1998 laying down detailed rules for the application of Council Regulations (EEC) No 684/92 and (EC) No 12/98 as regards documents for the carriage of passengers by coach and bus (Text with EEA relevance), *OJ L 268*, 3.10.1998, pp.10–26.

correct and that a comprehensive set of drafting rules is indeed available to legislative drafters. In fact, the previously sporadically introduced drafting guidelines have been compiled in the 1998 *Inter-institutional Agreement*.

The second hypothesis put forward in this paper attributed the bad quality of EU legislation to an alleged bad quality of EU drafting rules. However, a comparative analysis of these rules with the national drafting guidelines in most EU Member States has shown that the existing EU drafting guidelines are an accurate reflection of the collective modern drafting style of the Member States. Since Member States have a long experience of drafting national laws, which has enhanced and fine-tuned national drafting guidelines within the framework of modern drafting approaches, their drafting rules must be considered adequate and efficient for the achievement of legislative quality. On that basis, the second hypothesis is faulty.

The third hypothesis of the paper ascribed the bad quality of EU texts to the bad or incorrect application of EU drafting rules. Several recent EU texts of all the main types were used as examples of errors in the application of the EU drafting guidelines. In view of the length of this paper, obvious examples of drafting technique were utilised: reference to, for example, cost/benefit analysis or subsidiarity tests would require a much longer piece of work which would inevitably focus on the actual topic and substance of the relevant legal text.<sup>97</sup> This was not deemed to be within the scope of this paper. Similarly, the breach of the general principles of drafting, such as clarity and simplicity, was considered to follow from reference to the circumvention of specific rules of drafting technique which reflect or incorporate the principles in question. These examples show, beyond doubt, that very often bad EU legislation is a result of bad application of the drafting rules. Thus, the third hypothesis has been proven correct.

Attributing the bad application of EU drafting rules to a single factor would be rather simplistic. Admittedly, bad application tends to be an inherent problem in the art of legislative drafting, even at national level. Moreover, there is still some truth in the argument that the nature of EU law as *droit diplomatique* demands some sacrifices in the drafting style if compromises in the substance, and consequently agreement on a legally binding text, are to be achieved. However, in view of the frequently demonstrated drafting ability and the lengthy experience of drafters at the EU level, bad application of EU drafting guidelines must be attributed to a lack of focus of the EU legislature to the drafting style of their documents. This

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<sup>97</sup> However, see for example Directive 77/99/EEC which has been criticised for introducing too onerous a burden to companies and has been subject of the SLIM treatment; see Report from the Commission to the European Parliament and Council, "Results of the 4th phase of SLIM", COM(2000)56 final, pp.2-3.



is shown clearly by the frequent bad shape of EU legal texts which have gone through the scrutiny processes of the Commission, the Council and the European Parliament.

The object of this article is not to attribute blame to institutions and staff already buried in a heavy burden of passing volumes of legal texts suitable for implementation by no less than fifteen Member States. However, the importance of clear, precise, unambiguous, simple, approachable and effective legislation at the EU level cannot be underestimated. It affects the EU, Member States, undertaking and -perhaps more importantly- EU citizens to a degree which we can no longer afford to ignore. It is hoped that this article will contribute to the realisation of EU citizens, Member States and EU institutions that EU drafting must become an area of focus both at the EU and at the national levels.