Accessibility of European Union legislation

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1. Introduction

Access to legislation is a key element of the rule of law.[2] This contribution considers aspects of accessibility of European Union (EU) legislation and focuses on whether the rules are physically available, findable and understandable, in particular whether their form, structure and language create barriers to understanding.[3]

Calls for accessible EU legislation

The heads of State and Government of the EU Member States have twice called for EU legislation to be made more accessible, prompted by concern for the rights of citizens and a favourable regulatory framework for business.

In 1992, the European Council adopted the Birmingham Declaration which included the resounding demand: "We want Community legislation to be clearer and simpler".[4]

Just five years later the 1997 Intergovernmental Conference adopted a declaration annexed to the Amsterdam Treaty[5] in which it:

> notes that the quality of the drafting of Community legislation is crucial if it is to be properly implemented by the competent national authorities and better understood by the public and in business circles. ... It also stresses that Community legislation should be made more accessible.

The Conference called on the EU 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

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[2] See "The rule of law", Tom Bingham, Allen Lane 2010, Chapter 2.
[3] An overview of barriers to accessing and understanding legislation was given by Duncan Berry in "Obstacles to Communicating Legislation", a paper presented at International Conference on Clarity and Obscurity in Legal Language, Boulogne-sur-Mer, France, July 2005.
[4] European Council Presidency Conclusions, 16.10.1992, DN: DOC/92/6, point A.3.
[5] Declaration No 39 on the quality of the drafting of Community legislation (OJ C 340, 10.11.1997, p. 139).

> these guidelines are properly applied [and] make their best efforts to accelerate the codification of legislative texts.

The European Parliament, the Council and the Commission reacted the following year by adopting an Agreement establishing 22 drafting guidelines and listing the internal organisational measures they would take.[6] The guidelines, which are not binding,[7] call amongst other things for the drafting of acts to be clear and simple[8] and to take account of addressees.[9]

In 2003 the EU institutions reaffirmed their commitment to improving the technical quality of EU legislation and agreed a package of other measures to improve broader aspects of law-making, including in particular "Greater transparency and accessibility" and "Simplifying and reducing the volume of legislation".[10]

2. Rules on access to EU legislation

General

The preamble to the Treaty on European Union (TEU) twice affirms the importance of the rule of law[11] and Article 1, second paragraph, of the TEU provides:

> This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

A general right of access to EU documents is given by Article 15(3) of the Treaty on the Functioning of the European Union (TFEU):

> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.[12]
>
> General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.
>
> Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph…

[6] Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation of 22 December 1998 (OJ C 73, 17.3.1999, p. 1).
[7] "these guidelines are to be regarded as instruments for internal use by the institutions. They are not legally binding" (recital 7).
[8] "Community legislative acts shall be drafted clearly, simply and precisely" (Guideline 1).
[9] "The drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect" (Guideline 3).
[10] Interinstitutional Agreement on better law-making of 16 December 2003 (OJ C 321, 31.12.2003, p. 1). See in particular points 25 to 31 (quality), 10 and 11 (accessibility) and 35 and 36 (simplification).
[11] Second and fourth recitals.
[12] An almost identical provision is contained in Article 42 of the Charter of Fundamental Rights of the EU, which, according to Article 6 of the TEU, has "the same legal value as the Treaties".

Pending the adoption of the regulations provided for in the second subparagraph, the detailed rules applying are still those laid down in a 2001 Regulation.[13]

Publication of legal acts

Article 297 TFEU requires the publication in the *Official Journal of the European Union* of all legislative acts and all Regulations, as well as of Directives addressed to all the Member States.

Language rules

The EU now comprises 27 Member States and some 500 million citizens who need and expect access to EU legislation in their own languages. Under Article 342 TFEU the rules governing the languages of the EU institutions are to be determined by the Council acting unanimously by means of regulations.

Regulation No 1[14] provides that regulations and other documents of general application must be drafted in 23 languages which are recognised as "official languages" and also that the *Official Journal* must be published in all those languages.

3. Barriers to accessibility of EU legislation

Complex procedures

One reason why EU legislation is less accessible than it could be, probably common to many legal systems, is that the legislative and administrative machinery turns with more regard for compliance with the basic rules and for the smooth running of the machinery than for the needs of users of legislation.

The EU machinery is more complex than most. Agreement has to be reached between the 27 Member States whose circumstances and views may be very different. To achieve such agreement, texts may, at one extreme, resemble international agreements and be left sufficiently vague or ambiguous to cover many eventualities or else, at the other extreme, made subject to numerous conditions, riders, qualifications and exceptions.

The draft texts originate in the Commission and are submitted for adoption to the European Parliament and the Council. The three institutions are quite independent and each body jealously guards its own prerogatives. The legislative process is a lengthy one, leaving scope for distortion of the draft.

Numerous official languages

At every stage the text must be negotiated by drafters speaking 23 languages and the final text must be authentic in all those languages. Most of the substantive negotiations will centre on one language version but it cannot be optimally drafted because the majority of those involved will not be native speakers of the drafting language. Also some solutions which are the neatest and clearest for the drafting language may have to be rejected because they are not capable of being rendered accurately in all the 22 other languages. At the end of the process the 23 language versions must be coordinated to ensure that they all reflect the outcome of the final negotiations and have the same legal effect.

[13] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43). In 2008 the Commission submitted a proposal for a regulation laying down new rules and repealing Regulation (EC) No 1049/2001 (COM/2008/0229).

[14] EEC Council Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

Non-specialist drafters

Some accessibility problems are undoubtedly also attributable to the fact that drafting specialists play little part in the EU legislative process.

Broadly speaking common-law countries tend to regard the drafting of legislation as something to be done by specialists, legislative counsel or parliamentary counsel.

In many civil-law countries the job is done by civil servants who are generally lawyers but have many other responsibilities apart from drafting. There are often mechanisms to permit a central department or independent body to check the quality of drafting against set standards.

In the EU legislative process the first drafts are generally prepared by civil servants of the Commission who are technical specialists in the sector concerned. In most cases they are not lawyers and have had little training in drafting. For this reason, and also because most of them will have to draft in a language that is not their mother tongue, they rely heavily on standard templates and on precedents from their own sector or other sectors of EU law. The resulting off-the-peg solutions may be ill adapted to the problem, with some being unnecessarily complex and others incomplete.

The Commission's technical specialists have very wide-ranging responsibilities for their respective sectors: carrying out preliminary work for all legislation, including consultation of the Member States, business circles and the general public and impact assessments; drafting proposals for basic legislation and steering them through the legislative process; drafting secondary legislation; advising Member States on how to implement the EU rules, both in the basic legislation and in the secondary legislation; giving interpretations of those EU rules to business circles; drafting interpretive notes; publishing guidance on websites and awareness-raising materials such as press releases; monitoring compliance and following up non-compliance by Member States or by business circles; and bringing proceedings before the European Court of Justice (ECJ) if appropriate.

They may sometimes fail to recognise the requisite boundaries between the different functions. For example, if something is not covered in the basic legislation, they may see no reason not to put it in the implementing legislation, if something is not covered in the implementing legislation, they may put it in guidance notes and so on.

They may believe that it is not so necessary to make the actual legislation particularly easy to understand because simpler explanations are provided in the interpretive notes, guidance or citizens' summaries. They are often unaware that some of the language they use is jargon impenetrable to those outside the sector. And they have such wide-ranging responsibilities and so many documents to produce that they overlook the fact that drafting legislation requires more skill, more care and more time than writing a guidance note or a press release.

Revision

At quite an early stage in the Commission internal procedures, lawyers with specific responsibility for drafting quality, the legal revisers in the Commission Legal Service,[15] are consulted on the draft. The legal revisers check that the draft is clear and precise, complies with the rules on form and presentation, and is translatable into all the other official languages. Their work is, however, hampered by the fact that generally they have just eight days to revise a text, they have little contact with the drafter, and their suggestions are not always followed.

[15] The Legal Revisers' public website is at: http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm .

The legal revisers of the European Parliament and of the Council check the text at a late stage in the legislative procedure. However, by then it is very hard to improve drafting quality and the main emphasis must be on compliance with the basic formal rules and consistency of all the language versions.

4. Physical accessibility of EU legislation

Publication

The Publications Office of the European Union (Publications Office) is responsible for publishing all EU legislation.[16] Since the inception of the European Communities it has published the *Official Journal* on paper for a modest subscription. Since 1998 it has also published it online but the electronic versions are not authentic.

In addition, in response to the calls for improved accessibility of EU law over the years, the Publications Office has developed a system of websites and databases covering all aspects of EU law. Between 2003 and 2005 it created a single portal, called EUR-Lex, for accessing all that information which is now available without charge.[17] That portal gives access in particular to:

- the electronic version of the *Official Journal*;
- collections of the treaties, international agreements, legislation in force, legislation in preparation, case-law, parliamentary questions – all accessible via hyperlinks;
- search engines for legislation and related measures;
- consolidated texts of legislation, that is to say non-authentic texts combining the enacting terms of original acts and all amendments to them (covering some 3 000 acts);
- Pre-Lex, the database on the interinstitutional decision-making process; and
- a site on legislative drafting.

The Europa website also includes 3,000 summaries of EU legislation divided into 32 subject areas.[18] The summaries have no legal force but they are “validated” by the relevant department of the Commission and updated regularly.

The EU institutions also maintain large databases of information about the legislative process and its preparatory stages.[19] The European Parliament, where EU legislation is debated by 736 Members directly elected by EU citizens, goes to great lengths to offer access to its sessions.[20] When the Council deliberates and votes on draft legislation, its sessions are open to the public.[21] Most of the departments of the Commission maintain public websites offering explanatory material about legislation in their respective sectors.[22]

While the rules on publication are generally complied with, as recently as 2009 the European Court of Justice (ECJ) was confronted with provisions of an EU regulation that had not been published at all. The provisions

[16] In this article, “legislation” is used to cover both basic legislation adopted jointly by the European Parliament and the Council and secondary legislation adopted by the European Commission.
[17] http://eur-lex.europa.eu/en/index.htm
[18] http://europa.eu/legislation_summaries/index_en.htm
[19] See the websites of the EU institutions accessible from their common server Europa:
http://europa.eu/about-eu/institutions-bodies/index_en.htm
European Parliament Legislative Observatory:
http://www.europarl.europa.eu/oeil/index.jsp?language=en
European Commission database on the EU decision-making process:
http://ec.europa.eu/prelex/apcnet.cfm?CL=en
[20] See http://www.europarl.europa.eu/eng-internet-publisher/eplive/public/default.do?language=en .
[21] See Article 7 of its Rules of Procedure, OJ L 325, 11.12.2009, p.35.
[22] http://ec.europa.eu/about/ds_en.htm

related to aviation security and had remained unpublished not through inadvertence but as a result of a deliberate decision to keep them secret. An Austrian citizen, who had been removed from a plane because his hand luggage included a tennis racquet, an item prohibited by the EU regulation, challenged the validity of those provisions. His challenge was upheld by the Court.[23]

In the EU system the principle that laws must be physically accessible to those to whom they are to apply has implications that do not exist in other systems and are perhaps not immediately obvious.

In 1998, in a case in which a Greek trader was contesting a charge levied on it under EU law, the ECJ held that a corollary of the principle that EU laws are authentic in all official languages is that a trader in a Member State cannot be bound by a regulation if the text has not been published in the language of that trader, even if the other language versions have been published.[24]

In 2006 a case was referred to the ECJ concerning the non-availability of the paper version of the *Official Journal* in Czech shortly after the Czech Republic joined the EU. The ECJ held that, as EU law stood, the only acceptable form of publication was in the *Official Journal* on paper and that the availability of texts on the internet did not equate to valid publication.[25]

Can we find the act we are looking for?

It is not enough for legislation to be published in the prescribed form and in the requisite languages. It must be published in such a way that it can be identified, found and consulted without undue burden.

All EU legislation is indeed published in the *Official Journal*, which, however, has a complex structure not explained on the *Official Journal* page of EUR-Lex.[26]

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[23] Case C-345/06 Gottfried Heinrich [2009] ECR I-1659. Commission Regulation (EC) No 622/2003 (OJ 2003 L 89, p. 9) contained in an annex measures on aviation security. Article 3 provided: "Those measures shall be secret and shall not be published". The ECJ held "the annex to Regulation No 622/2003, which was not published in the *Official Journal of the European Union*, has no binding force in so far as it seeks to impose obligations on individuals" (paragraph 63).

[24] Case C-370/96 *Covita AVE* v *Greek State* [1998] ECR I-7711, paragraphs 26 and 27:
"it is mandatory for Community provisions introducing a countervailing charge to be published in the Official Journal of the European Communities. From the date of that publication no person is deemed to be unaware of that charge ...
None the less, ... it cannot be accepted that a trader such as Covita was aware that Regulation No 1591/92 had been adopted if it proves that the Official Journal of 23 June 1992 was not available on that date in its Greek language version at the Office for Official Publications of the European Communities, situated in Luxembourg. If evidence is produced that actual publication of the Official Journal was delayed, regard must be had to the date on which the issue was actually available".

[25] Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paragraphs 33, 34, 38, 48 and 49:
"... a Community regulation cannot take effect in law unless it has been published in the Official Journal of the European Union.
... the proper publication of a Community regulation, with regard to a Member State whose language is an official language of the Union, must include the publication of that act, in that language, in the Official Journal of the European Union.
... the principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies ....
...although Community legislation is indeed available on the internet and individuals are using this means more and more frequently to acquaint themselves with it, making the legislation available by such means does not equate to a valid publication in the Official Journal of the European Union in the absence of any rules in that regard in Community law.
... although various Member States have adopted electronic publication as a valid form, it is the subject of legislation or regulations which organise it in detail and set out exactly when that publication is valid. Accordingly, as Community law now stands, the Court cannot consider that form of making Community legislation available to be sufficient for it to be enforceable".

[26] The OJ is divided into three series, the L series for legislation, the C series for information, and the S series, a supplement with public procurement notices. The C series has two annexes: the C A series with notices of staff vacancies

To make EU acts easily identifiable, they are given titles, composed of text and a number.

The numbering system itself may confuse lay users because there is one numerical sequences for regulations, another sequence for directives and yet another for most decisions. So each year there will be three legal acts bearing the number 1, and three bearing the number 2 and so on (four acts counting those of the European Central Bank, which form a separate sequence).[27]

A further complication is that decisions of the European Parliament and Council are treated as regulations for the purposes of numbering. That means that it is possible that there will be two decisions with the same number, although the format is different.[28] Staff of the EU institutions are familiar with the different types of acts and may be able to find the one they want without difficulty but for others the numbering may be a source of confusion.

Titles of legal acts should be concise so that they fulfil their purpose of handy identifiers. The Member States have different ways of making their titles concise: in France laws may be known by the name of their sponsor: a noted law on language matters was the *loi Toubon*; in Germany a complex system of abbreviations is in common use: the *Bundesausbildungsförderungsgesetz* (Federal law promoting education) is widely known as the BAföG; in the United Kingdom and Ireland the aim is to have a convenient short title such as the Human Rights Act.

The EU it seems has not always managed to find appropriate and concise titles for its legal acts. In a speech in 2000[29] the Swiss Chancellor Ms Huber-Hotz spoke of the "all too grotesque inaccessibility, laboriousness and incomprehensibility of EU legal acts"[30] which she illustrated by two titles of EU regulation: the first was 92 words long and she described it as "quite simply incomprehensible";[31] of the second, which referred to coefficients for "cereals exported in the form of Irish whiskey",[32] she said:

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and such things as common catalogues of plant varieties; and the C E series with links to electronic texts that are not published in the paper version of the OJ, often of preparatory materials from the legislative procedure. The L series itself is divided into section I "Legislative acts", section II "Non-legislative acts", section III "Other acts" and "Corrigenda". Section I "Legislative acts" may be divided into: "Regulations", "Directives" and "Decisions".
Section II "Non-legislative acts" may be divided into: "International Agreements", "Regulations", "Directives", "Decisions", "Recommendations", "Acts adopted by bodies created by international agreements".
A very concise overview of the structure of the Official Journal is given on the EUR-Lex homepage:
http://eur-lex.europa.eu/en/tools/about.htm
More detailed information is given in the Interinstitutional Style Guide:
http://publications.europa.eu/interinstitutional_style_guide/index_en.htm .

[27] The numbers have different formats. Examples are: Regulation (EU) No 232/2010, Directive 2010/107/EU, Decision 2010/424/EU.

[28] See for example: Decision No 283/1999/EC of the European Parliament and of the Council of 25 January 1999 establishing a general framework for Community activities in favour of consumers (OJ L 34, 9.2.1999, p. 1) and Commission Decision 1999/283/EC of 12 April 1999 concerning the animal health conditions and veterinary certification for imports of fresh meat from certain African countries (OJ L 110, 28.4.1999, p. 16).

[29] Recht haben - gerecht sein, 6.11.2000: http://web.archive.org/web/20030701101153/http://www.admin.ch/ch/d/bk/hu20001106.html

[30] "Die grösste Herausforderung für die Verständlichkeit unserer Gesetze stellt aber zurzeit zweifellos das EU-Recht dar, das wir seit längerem "autonom nachvollziehen" und mit den bilateralen Abkommen zum Teil nun auch direkt anwenden. Verstehen Sie mich richtig: Ich bin eine überzeugte Europäerin, aber ich meine, wir sollten die manchmal geradezu groteske Unüberschaubarkeit, Umständlichkeit und Unverständlichkeit der EU-Rechtserlasse nicht einfach als ein Naturgesetz hinnehmen".

[31] Commission Regulation (EC) No 2592/1999 of 8 December 1999 amending Regulation (EC) No 1826/1999 amending Regulation (EC) No 929/1999 imposing provisional anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway with regard to certain exporters, imposing provisional anti-dumping and countervailing duties on imports of such salmon with regard to certain exporters, amending Decision 97/634/EC accepting undertakings offered in connection with the anti-dumping and anti-subsidies proceedings concerning imports

> If whiskey is a form of cereal, that is almost touching the fundament of our language. Such legislative pomp does not promote trust in the legal order. Belief in the law cannot flourish.[33]

Still today the titles of EU acts seem problematic, especially in the case of the acts which are liable to be referred to most frequently. Two examples may illustrate this.

The major new system for regulating all chemicals used in the EU is commonly known as "REACH". The full title of the regulation which established that system is:

> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.[34]

That title is too long for an act that is referred to often, no short title is given, and indeed the full title cannot easily be abbreviated. The short form REACH does not indicate the subject matter and is meaningless in most of the official languages.

The full title of the important act commonly referred to as the "Air passengers' rights regulation" is:

> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.[35]

Once again, at 45 words that title is too long, no short title is given, and the sector concerned is identified only indirectly, by the reference to "delay of flights".

5. Stability

Law must be stable if those subject to it are to be able to know and avail themselves of their rights and to know and comply with their obligations. As James Madison, the "Father of the US Constitution", wrote:

> It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?[36]

Some EU acts are certainly changed quickly and often, either by amendments or corrections or both.

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of such salmon and amending Council Regulation (EC) No 772/1999 imposing definitive anti-dumping and countervailing duties on imports of such salmon (OJ L 315, 9.12.1999, p. 17).

[32] Commission Regulation (EC) No 1632/1999 of 26 July 1999 fixing the coefficients applicable to cereals exported in the form of Irish whiskey for the period 1999/2000 (OJ L 194 , 27.7.1999, p. 9).

[33] "Den Titel der Lachsverordnung versteht man schlicht und einfach nicht. Wenn Whiskey eine Form von Getreide sein soll, rührt das schon beinahe an die Grundfesten unserer Sprache. Solch ein gesetzgeberischer Pomp fördert das Vertrauen in die Rechtsordnung nicht. So kann Rechtsüberzeugung nicht gedeihen".

[34] OJ L 396, 30.12.2006, p. 1.

[35] OJ L 46, 17.2.2004, p. 1.

[36] *The Federalist*, No. 62

Amendments

One example of an oft-changed act is Regulation (EC) No 881/2002[37] which in November 2010 was amended for the 139th time![38]

That may be a special case but another example is the new basic regulation on the agricultural markets, Regulation (EC) No 1234/2007.[39] It was adopted in October 2007 and in three years has already been amended by at least 15 other acts. The original text consisted of 204 articles but some 120 complete new articles have been added (quite apart from other changes to the articles and to the annexes). The consolidated text is some 330 A4 pages and it is not easy to navigate.

It is possible that EU acts would not need to be changed so often if more time was allowed for their preparation and drafting. The tendency of those involved in the EU legislative process to rush to adopt acts has been noted and criticized.[40]

All amendments to EU acts can be tracked down using EUR-Lex but since the beginning of 2009 the texts as published in the Official Journal no longer contain any indications of amendments to acts cited.

It should be noted that the EU institutions are aware of the problems resulting from the frequent amendment of EU legislation, which is now estimated to exceed 100,000 A4 pages. They have taken steps to reduce the volume of legislation and offer users simpler texts by codification and recasting[41] and by repealing obsolete acts.

[37] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ L 139, 29.5.2002, p. 9).

[38] By Commission Regulation (EU) No 1027/2010 (OJ L 296, 13.11.2010, p. 13).

[39] Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ L 299, 16.11.2007, p. 1).

[40] G. Sandström, "Knocking EU law into shape", *Common Market Law Review* 40, 1307 (2003). Sandström had experienced the haste first hand as representative of Sweden in an EU legislative procedure and then seen the ensuing problems in his own country as judge of the Swedish Supreme Administrative Court and a member of Lagrådet. He quoted G. Lambertz, who was later Swedish Chancellor of Justice: "It is not easy to see why many of Europe's legislators allow themselves to be carried away by the temptation to demonstrate their rapidity rather than to assume their responsibility for ensuring that the laws are properly worked out. Short-term gains in rapidity almost always entail long-term structural defects and enormous costs, not least in the form of distrust and lack of respect for the European legislative apparatus. The mania for being clever and the desire to impress which are bound up with the obsession with rapidity – often accompanied by the quite pathetic arguments that 'The people of Europe are waiting impatiently for these rules' or 'We shall be overtaken by events if this act cannot be adopted immediately' – are in my view irresponsible. Sweden should work energetically and single-mindedly to ensure that endeavours to improve the quality of EU legislation are not merely confined to paper" (*Svensk Juristtidning* 2000, p. 247).

[41] Codification under the Interinstitutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts (OJ C 102, 4.4.1996, p. 2) is a process whereby an original act and its amendments are repealed and replaced by a single new act adopted by the legislative authority by an accelerated procedure.
Recasting under the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts (OJ C 77, 28.3.2002, p. 1) is a process whereby an original act and its amendments are repealed and replaced by a single new act adopted by the legislative authority, which makes further changes to the rules.

Corrections

The problem of legislation that has to be corrected after adoption seems more prevalent in the EU system than in national systems. The requirement to adopt acts in 23 languages may be part of the explanation, but the phenomenon is a cause of concern.[42]

The correction may be made by a new act which may include express provisions on temporal effects in the interests of legal certainty. Most corrections are, however, effected by a corrigendum, which is published in the *Official Journal* and takes effect from the date of the adoption of the original act. All too often an act is republished in its entirety by means of a corrigendum, in which case it is hard to ascertain what the errors in the original text were. Users have to familiarise themselves with whole text twice and there is still a risk that a user will rely on the wrong version because the original incorrect text remains in the *Official Journal* and in the databases.

Examples of corrections are to be found affecting some of the most important EU acts.

Regulation (EC) No 1234/2007 on the agricultural markets has, according to EUR-Lex, already been corrected six times.

The REACH regulation has also been corrected six times. Some of those corrigenda relate just to specific language versions but the first involved the republication of the entire act, some 1,500 pages, in all the official languages.

It is not easy to ascertain the full extent of the problem.[43]

On occasion there are signs of large numbers of corrigenda. In 2004 the EU institutions rushed to publish a large number of acts before the accession of 10 new Member States on 1 May 2004, which made it necessary to work in another 9 official languages. Many of those acts were published on 30 April 2004, the last day before the accession. Because those acts were published in great haste, there was not time to prepare them as thoroughly as usual and after accession no less than 20 issues of the *Official Journal* containing 2897 pages had to be republished in their entirety in all the official languages.[44] It seems that those corrigenda were also prepared in haste because in April 2005 a special *Official Journal* had to be published in all the official languages republishing for the second time as "corrigenda to corrigenda" four of the acts concerned.[45]

Again, shortly after the accession of Bulgaria and Romania in 2007, it was necessary to republish in all languages as corrigenda the acts contained in 14 *Official Journals* totalling 3,225 pages.[46]

For the anecdote, the Interinstitutional agreement on better law-making itself had to be corrected, apparently because of mistakes in the signatures.[47]

[42] See Michal Bobek, "Corrigenda in the Official Journal of the European Union: Community law as quicksand", ELRev 2009, 950.
[43] A search in EUR-Lex amongst all legislation published in 2009 revealed 19 correcting acts (accessed on 8.11.2010). A search using the English search term "corrigendum" yielded 152 hits but the reliability of that search cannot be guaranteed. To obtain the full picture, it would be necessary to repeat the search using the appropriate search term in the other 22 official languages.
[44] See the list of *Official Journals* concerned inside the back cover of OJ L 244, 16.7.2004.
[45] OJ L 92, 12.4.2005. A search in EUR-Lex (accessed on 8.11.2010) for "corrigendum to corrigendum" resulted in 11 items, some of which did not concern legislation.
[46] See the list of *Official Journals* concerned inside the back cover of OJ L190, 21.7.2007.
[47] OJ C 321, 31.12.2003, p. 1; corrigendum in OJ C 4, 8.1.2004, p. 7.

6. Technical barriers to accessibility

One barrier to accessibility arises when the rules on a matter have to be found in several places ("scatter"), whether in different acts or within the same act.

Rules scattered in various acts

Some scatter is inherent in the EU system (as it must be in any system) and cannot be eliminated. The structure of EU rules is a hierarchical one with the most fundamental rules being laid down in the EU Treaties. Other basic rules are laid down in legislative acts adopted jointly by the European Parliament and the Council under the "ordinary legislative procedure" under Article 289 TFEU. Those fundamental acts may then be fleshed out by delegated acts adopted by the Commission under Article 290 TFEU or by implementing acts under Article 291 TFEU.

In some cases a first act will establish a framework for a sector and then specific acts will be adopted for subsectors. The rules on waste are an example of a particularly complex area of regulation.[48] One directive lays down a general framework.[49] A number of acts establish a more detailed framework for all types of waste covering such things as: prevention and control of pollution, waste management statistics, landfill, incineration and shipment. Further acts apply to specific types of waste such as: hazardous waste, waste from consumer goods, packaging and packaging waste, spent batteries and accumulators, waste oils, motor vehicles, waste electrical and electronic equipment, and radioactive waste. Some acts apply to waste from specific activities such as: extractive industries, ship dismantling, and offshore oil and gas installations. A search in EUR-Lex for legal acts on waste produced no less than 213 hits.[50]

The structure of the EU rules is not always rational. It is not unusual for EU rules to have been adopted piecemeal, as and when needs were perceived and as and when progress with a legislative initiative was possible. Sometimes too it is only after the adoption of an act that the need for exceptions and special provisions becomes apparent and they will then often be adopted by a series of ad hoc acts.

For example a comprehensive system of registration of all cattle was introduced in the wake of the mad-cow-disease crisis in the late 1990s with the aim that animals and food derived from them should be traceable from farm to table. The system provided in particular for: double ear tags for each animal with an individual number, a register on each farm; cattle-passports; and national computerised databases.[51]

Once the system was in place, a series of acts had to be adopted providing for exceptions from the obligation for each animal to be fitted with ear tags soon after birth, in particular for bulls appearing in bull fights,[52] cattle being displayed on show farms portraying old farming practices,[53] and calves born in remote areas where they might not be found by the farmer for some months.[54]

[48] See the overview with references to many of the individual acts given in the summaries of legislation on the Europa website: http://europa.eu/legislation_summaries/environment/waste_management/index_en.htm .
[49] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste (OJ L 312, 22.11.2008, p. 3).
[50] Search for "Secondary legislation" including in the title the word "waste" (accessed 4.11.2010).
[51] See: Regulation (EC) No 1760/2000 of the European Parliament and of the Council (OJ L 204, 11.8.2000, p. 1) and Commission Regulation (EC) No 1825/2000 (OJ L 216, 26.8.2000, p. 8).
[52] Regulation (EC) No 2680/1999 (OJ L 326, 18.12.1999, p. 16).
[53] Regulation (EC) No 644/2005 (OJ L 107, 28.4.2005, p. 18).
[54] Decision 2006/28/EC (OJ L 19, 24.1.2006, p. 32).

Rules scattered within one act

Even within a single act, provisions may be scattered, partly because of the structure of EU acts which, in addition to the enacting terms, always include a title and a statement of the reasons on which the act is based and often include one or more annexes which are intended for technical elements.

For example, if one wishes to ascertain the aims of the important regulation on the rights of air passengers,[55] elements are to be found within the act:

- in the title: "common rules on compensation and assistance to passengers";
- in recital (1) "aim ... at ensuring a high level of protection for passengers", "full account should be taken of the requirements of consumer protection in general";
- in recital (4) "raise the standards of protection set by" Regulation (EC) No 295/91, "strengthen the rights of passengers";
- in Article 1 "This Regulation establishes ... minimum rights for passengers"

This is quite apart from the sources outside the regulation itself such as:

- two explanatory memoranda that the Commission published when it submitted its original proposals to the other institutions;[56]
- two websites:
  http://ec.europa.eu/transport/passenger-rights/en/03-air.html
  http://ec.europa.eu/transport/passengers/air/air_en.htm
- a leaflet and a poster available at airports or from the website:
  http://ec.europa.eu/transport/passengers/air/air_en.htm
- numerous press releases, in particular the one of 16 February 2005 issued at the time of the entry into force of the regulation;[57]
- a summary: http://europa.eu/legislation_summaries/transport/air_transport/l24235_en.htm

7. Comprehensibility

Numerous authentic versions

Another feature of EU law which impacts on the accessibility of EU legislation is the existence of 23 language versions of each act. The ECJ stated in the *CILFIT* case:

> it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.[58]

The consequence is that no single version is authentic, reminiscent of Boswell's observation "He who praises everybody praises nobody".[59]

The results may be very surprising to those used to monolingual systems. For example, in one case where the Netherlands sought to rely on the Dutch version of a regulation to support its interpretation of the rules, the

[55] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1).
[56] Published in OJ C 103 E, 30.4.2002, p. 225 and OJ C 71 E, 25.3.2003, p. 188.
[57] IP/05/182.
[58] See Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 18.
[59] James Boswell, *Life of Johnson*, 1791, footnote, 30 March 1778.

ECJ held that the Dutch version contained a manifest error and that the Netherlands could not place reliance on an interpretation based on that version.[60]

Staff of the EU institutions know that to interpret EU legislation they must compare the different language versions. They can often do that themselves or with the assistance of colleagues nearby or of the institutions' language specialists. But few users in the Member States will be familiar with that principle and when they are made aware of it, find it a major barrier to arriving at a reliable interpretation of EU legislation.

When drafting EU legislation, staff of the EU institutions must ensure that the texts are translatable and that the different language versions will produce the same legal effects in all the Member States. They are accordingly instructed to avoid terms that are specific to one national legal system[61] and must aim for a neutral terminology.

This aspect was highlighted by the ECJ in *CILFIT*:

> It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.[62]

In fact the ECJ has held that: "the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect".[63] This suggests that the meaning of a term in national law will rarely be a reliable guide to its meaning in EU law.

Definitions

Definitions are increasingly being included in EU acts as a partial solution but problems remain. Since there is no interpretation act in the EU system, in contrast to most common-law countries, the status and effects of definitions in EU legislation have not been regulated by the legislative authority. They have not been settled by the case-law either. The ECJ appeared to suggest, for example, in February 2007 that if a term is not defined in the act under consideration a definition given in an earlier act may generally offer guidance as to the meaning of the term.[64]

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[60] Case C-132/99 *Netherlands* v *Commission* [2002] ECR I-2709. See paragraph 24:
"The Netherlands authorities were closely involved in the drafting of Regulation No 1469/94. By comparing the Dutch version with the other language versions, they should have noticed immediately that there was an error. In any event, they should have contacted the Commission's representatives to discuss the problem and find a solution to it".

[61] Joint Practical Guide, point 5.3.

[62] Paragraph 19.

[63] Case C-103/01 *Commission* v *Germany* [2003] I-5369, at paragraph 33.

[64] Case C-34/04 *Commission v Netherlands* [2007] ECR I-1387, paragraphs 34 to 38: "It is common ground that neither Article 5 of Regulation No 3690/93 nor that regulation as a whole gives any indication as to how the phrase 'definitive withdrawal from fishing activities' is to be understood. However, in Regulation No 3699/93, more precisely in Article 8(2) thereof, it is stated that measures to stop vessels' fishing activities permanently may include, inter alia, scrapping, permanent transfer to a non-Member State, provided such transfer is not likely to infringe international law or affect the conservation and management of marine resources, and permanent re-assignment of the vessel in question to uses other than fishing in Community waters.
Regulations No 3690/93 and No 3699/93 differ greatly in both subject-matter and purpose... .
However, although the purpose of those two regulations is different, there is nothing to indicate that the meaning of 'measures to stop vessels' fishing activities permanently' applies exclusively to Regulation No 3699/93 and that it cannot be used in the context of other instruments of secondary legislation relating to the sphere of fishing policy.
Regulation No 3699/93, which defines the measures to stop vessels' fishing activities permanently, was, moreover, adopted after Regulation No 3690/93. As is clear from most language versions of Regulation No 3699/93 ... the

Just a few days later, however, the ECJ held that a term that had not been defined in the directive under consideration "should be interpreted independently on the basis of the wording of the provisions in question and on the purpose of the directive"[65] even though the Advocate General in that case had expressly stated that the definition given in another EU act should be adopted.[66]

Even though definitions are called for by the Interinstitutional Agreement on drafting of 1998,[67] there are wide divergences in the use of definitions in EU acts.

Framework Decision 2002/584 on the European Arrest Warrant[68] does not contain an article setting out definitions, even though the Commission proposal had contained an article with six definitions. The Framework Decision was challenged by a Belgian association of lawyers on the grounds in particular that it listed criminal offences in terms that were too vague and was thus contrary to the principle of legality in a case referred to the European Court of Justice for a preliminary ruling[69].

Regulation (EC) No 261/2004 gives air passengers certain rights if they are "denied boarding" or if their flights are cancelled or delayed.[70] Passengers are entitled to compensation **and** assistance (for example with meals and accommodation) in the first two cases but **just** assistance in the case of delay. The regulation defines the key terms "denied boarding" and "cancellation", but not "delay". In the *Sturgeon* case,[71] the ECJ noted the absence of a definition of "delay" and held that long delays could be equivalent to cancellation; the passengers concerned could accordingly claim compensation, despite the legislature's apparently deliberate exclusion of compensation for delay.

The REACH regulation contains well over 40 definitions extending to more than 2 A4 pages. The list is not in alphabetical order, which cannot be used in EU legislative drafting because it would be different in the various languages. Users therefore have to search it laboriously to find whether a given term has been defined.

It is both surprising and regrettable that the EU does not have a specific database of definitions given in legislation or of ECJ interpretations of concepts. As a result, drafters of new acts are often unaware of definitions already given in existing acts and draw up new ones diverging—perhaps unnecessarily—from those already given. In any case, since there is no interpretation act, many recurring terms have to be defined repeatedly in individual acts. What is more serious is that users cannot find guidance as to the meaning of terms in EU legislation, even though, in the light of the *CILFIT* case, they are unable to rely on the meanings of those terms in their national systems.

Community legislature knowingly intended to choose the same expression as that already used in Regulation No 3690/93.
Accordingly, there is nothing to preclude the definition ensuing from Regulation No 3699/93 being used in the context of the implementation of Article 5 of Regulation No 3690/93 regarding the temporary or definitive suspension of fishing licences".

[65] Case C-391/2005 *Jan De Nul* [2007] ECR I-1793, at paragraph 22.

[66] "By referring in that directive to 'inland waterways', without giving a specific definition of that term, the Community legislature must necessarily have been referring to the existing definition of what that term covers. Moreover, I consider that it would be inconsistent and contrary to the principle of legal certainty to adopt different definitions of the term 'inland waterways' depending on the Community measure in question" (point 79 of the opinion).

[67] OJ C73, 17.3.1999, p.1. See Guideline 14: "Where the terms used in the act are not unambiguous, they should be defined together in a single article at the beginning of the act".

[68] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1.

[69] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

[70] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1).

[71] Joined Cases C-402/07 and C-432/07 *Sturgeon* [2009] ECR 1-10923.

Interference effects

Another problem resulting from the number of languages in use in the EU institutions is the misuse of technical terms because of interference effects. Even though drafters are increasingly working in English, only a small minority of them are native English speakers (and some of those have become unsure of English usage after a long period abroad in a multilingual environment).

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

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

Long sentences

It is widely recognised that overlong sentences make legislation unnecessarily difficult to understand and the EU duly adopted a guideline recommending the use of short sentences.[72] The fact remains that in strictly grammatical terms each EU legal act consists of a single sentence. The name of the institution appearing immediately after the title is the subject. It is followed by the preamble setting out the legal basis, procedural steps and reasons for the act, which may occupy many pages. After the preamble is the predicate which begins with words such as “have adopted the following regulation:”. The colon indicates that the rest of the text of the act, comprising all the articles and any annexes, merely completes that sentence.

It would perhaps be hard to find a consensus amongst all the EU Member States about the appropriate length of sentences, with the Nordic countries seeming to favour much shorter sentences than southern countries. However, many EU acts contain sentences that are overlong by any standards. To take just one of our examples, Framework Decision 2002/584 on the European Arrest Warrant includes seven provisions with sentences of 150 words or more, the longest being over 400 words.[73]

8. Conclusion

Some of the problems discussed are common to all legal systems. Others are inherent in the nature of the EU system which is negotiated between and has to apply in 27 Member States and exists in 23 authentic language versions.

But the fact that some of the problems are inescapable reinforces the need for strenuous efforts to make EU legislation as clear and accessible as possible. One thing that would certainly help would be to involve specialists in legislation at an earlier stage and to give them a more central role in the process.

[72] OJ C73, 17.3.1999, p.1. See Guideline 4: “Provisions of acts shall be concise and their content should be as homogeneous as possible. Overly long articles and sentences, unnecessarily convoluted wording and excessive use of abbreviations should be avoided”.
[73] OJ L 190, 18.7.2002, p. 1: Article 2(2): 292 words; Article 3: 156 words; Article 4: 436 words; Article 5: 313 words; Article 8(1): 150 words; Article 27(3): 266 words; Article 28(2): 219 words.

When the EU institutions adopted an Agreement in 1998 on measures to improve drafting,[74] following the urgent call from the Member States,[75] they agreed on implementing measures, including the following:

> In particular, the institutions ... shall foster the creation of drafting units within those bodies or departments within the institutions which are involved in the legislative process.[76]

That measure has been repeatedly endorsed by the United Kingdom.[77]

Of the three EU institutions involved in the legislative process, the European Commission is the one primarily concerned since it produces the first drafts of almost all EU legislative acts and the final texts of almost all the implementing and delegated acts. In fact, though, the Commission has not set up any new drafting units. The first drafts are still almost invariably produced by experts in the technical subject matter, not drafting experts, and later revised by legal revisers working to tight deadlines (typically just over a week). In just a handful of cases are legal revisers brought into a drafting team at an early stage. In only one or two Directorates General (DGs), notably the Agriculture DG, are there also legal units which have some drafting expertise.

It is time that the EU institutions recognised that the preparation of legislation is a particular skill and that experts will produce a better result than laypersons. Investment in improving the very first drafts would pay off at every subsequent stage of the legislative process. If the first draft is good, the legal revisers can polish it to an even higher standard but if the first draft is poor, they struggle to identify the intended meaning and often have to work in the dark, as there is rarely the dialogue between the originating department and the revisers which should be the ideal.[78]

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[74] Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation of 22 December 1998 (OJ C 73, 17.3.1999, p. 1).

[75] Declaration No 39 on the quality of the drafting of Community legislation (OJ C 340, 10.11.1997, p. 139).

[76] Implementing measure (c).

[77] See in particular:
R. Bellis, "Implementation of EU legislation", a study for the UK Foreign and Commonwealth Office, 2003;
the Twenty-Second Report of the UK Parliament House of Lords Select Committee on EU law, 2007-2008:
"The Commission acknowledges that there can be problems with the quality of drafting of legislation. It is taking steps to address this issue and the associated difficulties of operating in many languages. The issue of drafting quality should not be exaggerated: lack of clarity often arises not in the original proposal but from the changes introduced as a proposal goes through the legislative process. **The Commission should give serious consideration to the creation of a cadre of specialist legislative drafters" (**point 157, in bold in the original)
http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/150/15002.htm ;
the statement by Lord Mance on that report:
"The final stage of any proposal is its drafting. The committee has concerns about the drafting of some proposals. Drafting is done by commission lawyers handling the proposal. The legal service of the Commission is formally involved only at a late stage. The committee considers that consideration should be given to introducing a cadre of specialist legislative drafters along the lines of the United Kingdom's domestic parliamentary draftsmen. On 30 September, the Government wrote welcoming the committee's report and analysis and indicating broad agreement with many points we made. They regarded our proposal for a specialist cadre of drafters as interesting, and we await their response to our question about whether they will actively promote it";
http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/81212-0001.htm#08121251000325 ;
An exchange of letters between the Minister for Europe (30.9.2008) and the Chairman of the Select Committee (6.11.2008) confirmed that the UK government was following up the proposal.

[78] See Geoffrey Bowman, "The Art of Legislative Drafting", the Sir William Dale Memorial Lecture for 2005, http://www.cabinetoffice.gov.uk/media/190031/dale.pdf :
"The process of analysis and coming up with a workable policy is sometimes called an iterative one. It involves throwing ideas back and forth between the drafter and the instructing department, whose administrators and lawyers will contribute ideas of their own. This iterative process is not simply an intellectual game. The whole object is to arrive at something that withstands examination in Parliament and in the courts. It is better that the ideas are tested and refined at the drafting stage than that they are torn apart later".

To make that possible, the Commission should act to establish centres of drafting expertise in every DG which is involved in the legislative process. Native speakers of the language with legal training and drafting experience would produce better first drafts. Because of the difficulty of improving drafting quality at later stages in the EU legislative process, it is highly desirable that the Commission's drafts should be of the highest quality.

If drafting units cannot be fitted into the Commission structure, perhaps it is time to give the European Parliament responsibility for the quality of all EU legislation or to revisit the suggestion for the creation of an EU Legislative Drafting Office independent of the present institutions[79] but that would require fundamental institutional changes.

[79] See R. Bellis, "Implementation of EU legislation", a study for the UK Foreign and Commonwealth Office, 2003. Bellis refers also to an article by R. Wainwright in *Statute Law Review* Vol. 17 Number I, pp 7-14 (1996), "Technique of drafting European Community legislation: Problems of interpretation".