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## **Legislative drafting in the EU: recruitment, training and continuing education of those involved in the drafting process**

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### **I. Introduction**

#### **A. Composition of the European Union**

The European Union (EU) now consists of 27 Member States with a total population of almost 500 million citizens. It is, following the entry into force of the Treaty of Lisbon at the end of 2009, founded on two main treaties, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

#### **B. Institutional structure**

The institutional structure of the EU is as follows:

The European Parliament consists of up to 750 members directly elected by European citizens. It meets in Strasbourg or Brussels and has a permanent secretariat based in Brussels and Luxembourg of some 4 000 staff.

The European Council consists of the heads of State or government of the 27 Member States and a permanent President, Mr van Rompuy. It meets four times a year and takes decisions by consensus to define general political directions and priorities. It does not exercise legislative functions.

The Council exercises jointly with the Parliament legislative and budgetary functions. It consists of one minister from each Member State meeting in different configurations depending on the subject concerned, such as economic and financial affairs or agriculture and fishing. Preparations for its work are in the hands of the Committee of Permanent Representatives of the Governments of the Member States. The Council has a secretariat in Brussels of some 2 500 staff.

The European Commission consists of 27 Commissioners, one from each Member State, who promote the general interest of the Union and must not take any instructions from Member States or any other bodies. It is led by a President, currently Mr Barroso, chosen by the European Council and elected by the Parliament. The Commission is the executive of the EU and sees that the Treaties and other rules are observed. It has a staff of some 30 000 based mainly in Brussels and Luxembourg.

The Court of Justice of the European Union chiefly includes the Court of Justice, which is the highest court, and the General Court, each consisting of one judge from each Member State. It ensures that “in the interpretation and application of the treaties the law is observed”. It has a staff of some 2 500 based in Luxembourg.

Other institutions are the European Central Bank and the Court of Auditors and there are also consultative bodies, such as the Economic and Social Committee, and specialised agencies.

#### **C. Legal acts**

The legal acts of the EU are as follows (Article 288 TFEU):

Regulations have general application, are binding in their entirety and directly applicable in all Member States.

Directives are binding, as to the result to be achieved, upon each Member State, but leave to the national authorities the choice of form and methods.

Decisions are binding in their entirety on those to whom they are addressed.

There are also recommendations and opinions, which have no binding force, and a range of other instruments such as resolutions, interinstitutional agreements and guidelines.

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## **D. Official languages**

Article 342 TFEU provides that the rules on the languages of the EU institutions are to be laid down by the Council. Under Council Regulation No 1<sup>1</sup> the EU now has 23 official languages, which formally are all working languages of the institutions.

To enable the Commission to function efficiently, however, all acts are drafted in English (over 80%) or French. A draft legislative act passes through all the internal discussion stages within the Commission in just one language but it must be translated into all the official languages for adoption by the Commission.

All 23 language versions of acts are authentic and no one version has any higher status than the others.

## **II. How EU acts are drafted and adopted**

### **A. Commission proposal**

#### *1. Basic principles*

Almost all EU legal acts begin life in the Commission. Legislative acts are adopted by the Parliament and the Council but on the basis of a draft text (“proposal”) submitted by the Commission. The other institutions can ask the Commission to present a proposal, but they cannot oblige it to do so since the Commission’s independence is guaranteed by the Treaties. It is the Commission that decides on the content of its proposal and on the type of act it will propose (unless the latter is specified in the Treaties).

The Commission adopts a large number of acts itself: generally acts of an administrative nature or acts serving to implement the legislative acts adopted by the Parliament and the Council. Under the TFEU, the acts adopted by the Commission are legal acts, not legislative acts.

#### *2. Drafting within the Commission: preparatory work and first draft*

The Commission is divided into some 26 Directorates General (DGs), each responsible for one sector of EU activities. Each DG prepares the legal acts for its sector, whether proposals for legislative acts or legal acts to be adopted by the Commission itself.

The DG carries out any necessary preliminary work, in particular consultations and impact assessments, and then produces a first draft, which forms the basis of all the subsequent discussions within the Commission. The first drafts are generally produced not by drafting specialists but by experts in the technical sector without legal training. They have generally been given little drafting training and they are almost always drafting in a foreign language.

#### *3. Consultation of other Commission departments*

Once the DG’s first draft is sufficiently stable, it is submitted to the other DGs to ensure close cooperation and coordination between all the Commission departments.

The Legal Service is an internal department that provides legal advice to the Commission and its departments and represents the Commission in all court cases.<sup>2</sup> It must be consulted on all drafts of legal acts and on all documents with legal implications.

When the Legal Service is consulted on a draft act, lawyers specialising in different areas of the Commission’s work check the substantive legal aspects: the legal basis, the conformity with provisions of the EU treaties and the fundamental principles of EU law, the coherence with other acts and finally the conformity with international law and international agreements, such as those of the WTO.

At the same time, the draft act is examined by the legal revisers, who are part of the quality of legislation team.<sup>3</sup>

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<sup>1</sup> EEC Council Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58), as amended by successive Acts of Accession.

(All EU legal acts are available without charge on the EUR-Lex website: <http://eur-lex.europa.eu/en/index.htm>.)

<sup>2</sup> See its public website: [http://ec.europa.eu/dgs/legal\\_service/index\\_en.htm](http://ec.europa.eu/dgs/legal_service/index_en.htm)

At this stage, the draft act exists in only one language, usually English. The revisers check that the draft is clear and precise and complies with the rules on form and presentation<sup>4</sup> and with the principle of multilingualism (the text must be translatable into all the other official languages).

After revision, the text is sent back to the originating DG, which must take account of the comments from all departments that have been consulted before submitted the draft for formal adoption by the plenary Commission (the *College*).

The Commission's Secretariat General ensures coordination between the different departments, and checks that procedures are properly applied and that the Commission's Rules of Procedure<sup>5</sup> are respected. It must be consulted on all draft legal acts of any significance. It also plays a central role in the 'Better Regulation' programme and coordinates consultations of interested parties and impact assessments. The impact assessments are checked by an Impact Assessment Board within the Commission.

#### *4. Translation*

For the formal adoption of a draft act, the text must be translated into the other 22 official languages by the Directorate General for Translation which has a staff of 1 600 linguists and also manages the use of freelance translators. Because of the very wide range of texts that it has to translate, it does not have specialist teams of legal translators but there is a measure of technical specialisation.

### **B. Legislative authority**

#### *1. Introductory*

The Commission's proposal is submitted to the legislative authority, the European Parliament and the Council, and to consultative bodies such as the Economic and Social Committee. The text of that proposal forms the basis for all discussions in the other institutions.

#### *2. Parliament*

The proposal is assigned to the relevant parliamentary committee and a rapporteur is chosen. The parliamentary committee submits its report to a plenary session. In over 70% of cases, the Parliament and the Council quickly agree on a proposal and the act can be adopted at the first reading; however, a second reading is often necessary, after which, if there is no agreement, a conciliation procedure is launched. In most cases, the Parliament's role consists in suggesting textual changes (known as 'amendments') to the proposal.

#### *3. Council*

Within the Council, the proposal is examined by a working group composed of representatives of all Member States and chaired by the representative of the country holding the presidency of the Union. Those representatives are generally all technical experts rather than lawyers and the system encourages them to reach a compromise on the text of the proposal. They focus on just one language version, now almost always the English version. To accommodate the different interests of all Member States, many textual changes are suggested to the Commission's text, in particular in the form of exceptions or derogations.

#### *4. Revision*

At the end of the procedure, the text of the proposal undergoes a final legal-linguistic revision (see Point IV. D below).

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<sup>3</sup> The Legal Revisers' public website is at: [http://ec.europa.eu/dgs/legal\\_service/legal\\_reviser\\_en.htm](http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm)

<sup>4</sup> In particular the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ C 73, 17.3.1999, p. 1).

<sup>5</sup> OJ L 308, 8.12.2000, p. 26.

### *5. Role of Commission*

If the Commission takes the view that its proposal has been “denatured”, that is, changed to such an extent that it no longer reflects the original intention, it may withdraw its proposal at any time before its adoption, after which the other institutions may no longer adopt an act. That power, while rarely exercised, gives the Commission a stronger position during the negotiations with the other institutions but all three have to make compromises and the Commission may often agree to submit an amended proposal in order to take account of the other institutions’ concerns.

## **III. Technical experts in the Commission**

### **A. Recruitment and responsibilities**

The technical experts in the Commission, who produce the first drafts of most acts and then guide the drafts through the whole legislative process, are selected for their technical expertise, whether in economics, in a branch of science, in statistics or something else. They will be recruited on the basis of an open competition and as part of the selection procedure their knowledge of English or French will be checked. But that check will be geared towards whether they are able to function in that language, rather than to whether they can draft legislation in that language.

After recruitment they will have to handle all the aspects of one particular policy area. If a problem arises for which a legislative solution proves to be necessary they will have to identify the technical problem and the possible solutions, consult the Member States and interested parties on the best option, prepare all the policy papers, including technical reports, public consultations, impact assessments and minutes of meetings, as well as drawing up all the documents that must accompany a new act, such as briefing papers and press releases. After the adoption of an act, the technical experts will be responsible for advising Member States and operators on its implementation, monitoring its effectiveness, identifying instances of non-compliance, and if necessary launching proceedings against those who fail to comply. The actual drafting of the act is just one task amongst many.

### **B. Training in legislative drafting**

The traditional approach was that new experts had to learn on the job how to draft legislation. They could consult their more experienced colleagues and follow any precedents existing in their sectors.

The Commission’s very extensive training catalogue includes courses in foreign languages and clear writing, but not legislative drafting.

From 2001 the Commission Legal Revisers began offering introductory courses in legislative drafting lasting up to two days. They were designed to introduce our booklet of drafting guidance, the Joint Practical Guide,<sup>6</sup> and covered the background to the rules and general principles of drafting, the structure of an act and the basic rules applying to each part of an act, exercises in analysing an act, amendment and drafting a short act.

The courses were well received but merely served to whet the appetites of participants, who asked for follow-up courses. A few follow-up courses were organised but they proved too labour intensive for the legal revisers, who had many tasks other than training.

## **IV. Lawyer-Linguists**

### **A. General**

Each of the three institutions involved in the legislative process has staff responsible for the form and presentation of legal acts. They are variously known as ‘lawyer-linguists’, ‘jurist-linguists’, ‘legal/linguistic experts’ and ‘legal revisers’. Their actual role depends more on the stage at which they intervene in the legislative process

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<sup>6</sup> <http://eur-lex.europa.eu/en/techleg/index.htm>

than on the name given to them. But they all revise drafts produced by other, rather than actually draft a text from a blank sheet.

They all have similar basic qualifications: a legal qualification from one of the Member States, knowledge of EU law, and knowledge of at least two official languages other than their native language, which must include English. Knowledge of French is highly desirable and so too, but to a lesser extent, is knowledge of German.

## **B. Recruitment**

All lawyer-linguists are recruited on the basis of open competitions which are organised for the three institutions by the European Personnel Selection Office (EPSO).<sup>7</sup>

Posts are restricted to EU citizens with full civic rights. Candidates may first be sifted on the basis of their paper qualifications. The next stage of the procedure is a computer-based translation test from the first foreign language into the mother tongue. Candidates who pass that test are then generally invited for an assessment lasting one and a half days. That assessment covers their reasoning skills (with tests in verbal, numerical and abstract reasoning), specific competencies (a test in translation from their second foreign language), and general competencies (in particular analysis and problem solving, communication, organisation, and working with others, all tested by means of interviews and group work).

It is very rare for any candidate to have expertise in drafting legislation before recruitment and that is why the tests focus on ability to understand a legal text in a foreign language and to translate that text into the native language.

## **C. Commission**

The European Commission's sixty legal revisers are part of the Quality of legislation team in the Commission Legal Service. They are involved at a comparatively early stage in the Commission's internal drafting process, when they work to improve the original draft, which is generally in English only. This is the first time that the draft has been analysed by drafting specialists and it is often necessary to suggest extensive redrafting.

In a small number of cases the Legal Revisers check the text again at the end of the Commission's procedures, when they ensure that the different language versions of the Commission's proposal correspond.<sup>8</sup>

## **D. Council**

The ninety lawyer-linguists in the General Secretariat of the Council are part of its Legal Service.

When the Council receives a proposal from the Commission, it is becoming increasingly common for a quality team to be designated at the outset to follow the proposal as it passes through the procedures, with a lawyer-linguist as quality adviser. That is not yet, however, standard practice for all proposals. If a quality consultant has been designated, he or she will attend as necessary the meetings on the proposal and may make drafting suggestions at the time.

In all cases, once the Parliament and the Council have reached a political agreement on a text, a meeting is convened to revise the text in the basic language and is attended by a Council lawyer-linguist for each language, the technical experts from the Member States, and representatives of the Parliament lawyer-linguists. The versions in the other languages will then be finalised by the lawyer-linguists for the language concerned from the two institutions in close collaboration with the national experts from the Member States. However, at this stage it is difficult to improve the quality of drafting significantly because of the risk of undoing delicate political compromises. Furthermore, any change may be vetoed by one of the Member States' representatives.

## **E. Parliament**

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<sup>7</sup> [http://europa.eu/epso/index\\_en.htm](http://europa.eu/epso/index_en.htm).

<sup>8</sup> See their public website: [http://ec.europa.eu/dgs/legal\\_service/legal\\_reviser\\_en.htm](http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm)

The Parliament has some ninety lawyer-linguists, who are in the Legislative Quality Units of the Directorate for Legislative Acts in the Directorate-General for the Presidency of the Parliament. They focus on the amendments proposed by the Members of the European Parliament, which are translated and revised in all the official languages, and are involved at the final stage of the parliamentary procedure.

They also take part in the meeting of the Council's lawyer-linguists, at which they can make general observations about the drafting of the text.

#### **F. What do the lawyer-linguists actually look for in practice?**

It must be borne in mind that the EU legislative drafting process faces a number of major challenges. Texts are drafted by committee over a long period with changes in the composition of the committee. They often pass through numerous different versions.

Few drafters are legally qualified, and most of those seeking to influence the original draft text will not be native speakers of the language in which it is written. Many of them will be more concerned to achieve a certain substantive result, such as to protect a national interest, than to draft a clear and precise text. Throughout the legislative process efforts will be made to obtain a consensus and to that end drafters will accept compromises and techniques that would in other circumstances be shunned by a conscientious legislative drafter.

In fact some participants may actually welcome a text that is not too clear and precise and has some deliberate ambiguities. Member States often approach EU law in the same way as they approach the negotiation of an international agreement and indeed in French it is sometimes described as '*droit diplomatique*'. In 1992 the French Conseil d'état drew up a report on the influence of EU law on French law and noted:

'while lawyers strive for precision, diplomats tend to leave things unsaid and do not shun ambiguity. More often than you would think, it happens, therefore, that they agree on a word only because it does not mean the same thing to everyone. And they encourage drafting techniques which will leave room here and there for interesting – and promising – contradictions'.<sup>9</sup>

The translators in the Commission, the Parliament and the Council are highly qualified and have long experience of translating legislation but only a small minority are lawyers.

As a result, the text on which the lawyer-linguists have to work may contain many basic flaws of different kinds. The lawyer-linguists have to verify the following aspects in particular:

- (a) The text must comply with the principle of legality (in particular, have an appropriate legal basis, have no retroactive effect, and respect basic principles of EU law).
- (b) All the formal drafting rules must be complied with.
- (c) The drafting must be appropriate to the type of act.<sup>10</sup>
- (d) The text must be grammatically correct and clear and precise.<sup>11</sup>
- (e) The act must be coherent and complete.
- (f) The terminology must be consistent with other acts in the same field and within the act itself.<sup>12</sup>
- (g) The text must correspond in all the language versions.

### **V. Training of legal revisers at the European Commission**

#### **A. General**

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<sup>9</sup> Rapport public 1992, Le droit communautaire (Etudes et documents n. 44).

<sup>10</sup> See Guideline 2: 'The drafting of Community acts shall be appropriate to the type of act concerned and, in particular, to whether or not it is binding (regulation, directive, decision, recommendation or other act)'.

<sup>11</sup> See Guideline 1: 'Community legislative acts shall be drafted clearly, simply and precisely'.

<sup>12</sup> See Guideline 6: 'The terminology used in a given act shall be consistent both internally and with acts already in force, especially in the same field.'

Identical concepts shall be expressed in the same terms, as far as possible without departing from their meaning in ordinary, legal or technical language'.

The traditional approach to training of lawyer-linguists was that new recruits learned on the job by observing what their senior colleagues did. When I arrived at the Commission in 1996, I was given a 70 page set of internal rules and told to get on with the job.

Fortunately some major changes to the approach to drafting and revising EU legislation were prompted by the Interinstitutional Agreement of 1998, which called for the legal revisers to be involved in the drafting process from an earlier stage and for all those involved in the drafting process to be given training.

## **B. Specialisation**

At the Commission the 1998 Agreement led to a structuring of the team of legal revisers in 2000. At the time the Commission had over 40 legal revisers, each of whom could be called on to revise drafts in any area of the Commission's activities. It was not possible for the head of unit to assign work rationally or fairly or to take account of the needs of newcomers. We decided to split the team into three groups to allow for greater specialisation and to improve staff management. I was given the task of coordinating the work of a group of 20 colleagues working in the sectors of agriculture, fisheries and health and protection of consumers, which are amongst the busiest areas of the Commission's activities. Within those sectors we divided responsibility up between us so that members of our group were able to develop a deeper knowledge of the law in their areas.

## **C. Partnership or Mentoring**

Each text that we received for revision was assigned to two legal revisers, generally one very experienced and one much less experienced. Over time we developed a mentoring system or a flexible apprenticeship system. The system had a lot of advantages. The junior colleague could start as an absolute beginner merely observing what the experienced colleague did. The junior could start to undertake some of the preparatory work and then assume more and more responsibility, until she could be given almost complete autonomy, first for simple texts and then for more complex texts. But very interestingly, even some of the most experienced colleagues preferred always to work with another person, who could serve as a sounding board about drafting problems or as a second pair of eyes to identify the problems or as a devil's advocate.

The system has been in operation now for about 11 years and is generally regarded as useful and effective. Key to its success is the availability of experienced colleagues who have the time and the willingness to work with junior colleagues.

Some senior colleagues proved very good at the collaborating with and mentoring juniors and found the process enriching. Even after many years' work they would enthuse about the fresh insights they themselves had gained from having to explain things to the junior or from the remarks of the junior herself.

Other senior colleagues, including some of the best legal revisers we had, proved unable to adapt to working with others and would simply correct the work of the juniors like a schoolteacher correcting exercises done by 12 year old children. Juniors apprenticed to such senior colleagues would often find such an approach hard to accept and would either become demotivated or seek a transfer.

However, overall the mentoring system is still functioning reasonably well. The Commission is fortunate in that its Legal Revisers Group still has a sufficient number of experienced colleagues to offer mentoring to newcomers.

We recognised, however, that mentoring was not a complete answer to training needs for the legal revisers and sought to complement it by other means.

## **D. Group meetings**

Our group had weekly meeting to deal with administrative matters. To make sure that all colleagues were kept up to date with new information, we included on the agenda each week items on drafting topics, relevant legal developments and new case-law. The drafting topics were used to stimulate discussion with a view to promoting a consistent approach to drafting by all colleagues.

## **E. Seminars**

To counter the danger of the EU institutions failing to keep abreast of developments in the Member States and further afield, the Commission Legal Revisers launched a programme of seminars given by outside experts on the broad theme of quality of legislation. The experts were generally from the national administrations or the judiciary of Member States or from the academic world. The seminars were open not just to our legal revisers but to staff of all the EU institutions and to members of the public. The aggregate audience for the 14 seminars to date is approaching 3 000, thus helping to show the interest that is generated by the quality of legislation.<sup>13</sup>

## **VI. Joint Training for the lawyer-linguists of the Parliament, the Council and the Commission**

### **A. Need for joint training**

We were aware of the limitations to our approach to training our lawyer-linguists and were also concerned about the dangers of inconsistent approaches between the three institutions. We therefore suggested to our colleagues at the Parliament and the Council organising a joint course to give all lawyer-linguists a broader introduction to legislative topics. The other two institutions welcomed the suggestion of a structured training programme in particular because they have found that they no longer have enough experienced colleagues to provide mentoring to the large number of new colleagues.

We decided that the introductory training should:

- aim to make revisers more effective, rather than just serve an academic purpose;
- cover all aspects of legislation from cradle to grave;
- focus in particular on specific features of EU legislation, notably its multilingual nature.

### **B. Content of joint training**

Following lengthy internal discussions and valuable advice from external experts, we designed a course consisting of modules which can be completed independently but which together constitute a good basis for lawyer-linguists. Various sessions of each module will be given to fit in with the practical needs and availability of staff. The modules cover the following topics:

Better Regulation: impact assessment, consultation, alternatives to regulation, simplification, and evaluation;  
Legislative procedure: the various stages of work first in the Commission and then the EP and the Council;  
Drafting a Community act: the drafting rules in practice;  
Clear legal writing;  
Amendment and access to law;  
Implementation of Community acts;  
Interpretation of Community acts;  
How to "sell" a revised text: negotiation techniques;  
Legislative theory (including drafting styles).

To emphasise the practical nature of the course, colleagues from within the EU institutions who are actually carrying out the tasks in question are used as trainers where possible. The first sessions of the first modules have been given over the last 12 months and the feedback so far is broadly positive.

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<sup>13</sup> [http://ec.europa.eu/dgs/legal\\_service/seminars\\_en.htm](http://ec.europa.eu/dgs/legal_service/seminars_en.htm)