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Legal Revisers Group

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THE QUALITY OF EC LEGISLATION AND WAYS TO IMPROVE IT

Seminar by Professor W. Voermans and Professor W. Konijnenbelt

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Summary report

Mr P.-J. Kuijper, Principal Legal Adviser in the Commission Legal Service, opened the seminar. He noted that the Netherlands had long worked towards placing high on the agenda the issue of quality of legislation, quality in the broadest sense. He reviewed some of the steps taken at European level, including the Interinstitutional Agreement of 1998 and the new Interinstitutional Agreement now being finalised. Finally he recalled the speakers' long and varied experience in the field of legislation.

Professor W. Voermans, Professor in constitutional and administrative law at the University of Leiden, welcomed the opportunity to talk to those with inside knowledge of European drafting. To produce good legislation, he suggested, requires drafters with knowledge, experience and the stamina necessary for the lengthy discussion process.

While there may not be complete agreement on standards for good legislation, the ultimate test must be whether the legislation works. Poor drafting undermines the clarity and simplicity of legislation as well as its internal consistency and its comprehensibility. Accessibility is hindered by a piecemeal approach to legislation with the large number of small acts leading to consistency problems.

There is a danger of a paper-implementation culture in which the paperwork is duly completed but the practical problems are not tackled, leading to "silent losses". Another danger is of a one-dimensional policy-oriented legislative process with a rush or a push for adoption of an act, perhaps just for cosmetic purposes, without systematic assessment of the alternatives or an external review of the need for an act.

Better cooperation can help, in particular between the institutions, so that they can rationalise their efforts, and between the institutions and the Member States. That will help to ensure that legislation is workable, that it can be complied with and enforced. Prior impact assessments can prevent unforeseen burdens or complications and overintrusiveness while feedback on operation of acts should become part of the culture.

The sheer number of legislative acts in existence poses problems, particularly since the proper function of specific legislative instruments is not always respected.

Effects of poor legislation include: non-compliance, divergent application, distortion of markets, loss of competitiveness, implementation and enforcement difficulties, and excessive litigation.

Past attempts to address these problems at European level include the SLIM and BEST initiatives as well as the 1998 Interinstitutional Agreement but the results so far have not been wholly satisfactory. The new Interinstitutional Agreement will seek to tackle more substantive aspects of quality such as a common commitment to quality, better

coordination between the institutions, greater transparency and accessibility, improved evaluation, better choice of instruments and consideration of alternatives to regulation.

The Netherlands had only a small number of rules on legislation in the 1950s but they expanded rapidly in the 1990s. Based on the evolution in the Netherlands, key factors in improving quality of legislation include: awareness of the issue, a new legislative culture, training, acknowledgement of importance of quality, strict application and enforcement of the rules, and exploitation of information technology.

Experience had shown the value of training in legislative drafting in impressing on practitioners the background to drafting rules, some of them of universal application, and in drawing lessons from comparison of different approaches in practice.

Professor W. Konijnenbelt, President of Section at the Raad van State and professor at the University of Amsterdam, stressed that producing good legislation takes time and involves striking a balance between political factors and technical elements. To see what quality of legislation means, he examined formal criteria and substantive criteria, pointing out that the latter are less developed.

Drawing on research in the Netherlands in the 1990s, he listed a number of factors to be taken into account. Is legislation actually necessary? Are the principles of proportionality and subsidiarity respected? Is the new legislation compatible and consistent with existing legislation and also internally coherent? Is the nature of the act respected? In particular, a regulation must be precise enough to be directly applicable while a directive must specify the result to be achieved and leave enough leeway for transposition. The competent authorities must be clearly identified and their tasks duly circumscribed. An act must be clear and accessible, efficient and effective: Can it be applied? Can compliance be checked and breaches punished? Appropriate provision must be made for transition to the new regime. Explanatory memoranda accompanying legislation must give enough detail of certain elements such as the legal basis chosen, the aims pursued, and compliance with the principle of subsidiarity. Provision must be made for review mechanisms.

Mr. Konijnenbelt compared and commented on guidance on legislative drafting in various countries.

Substantive criteria to be taken into account when planning legislation include the following. The problems to be solved and aims of legislation should be identified clearly. A thorough analysis should be carried out of the problems to be tackled and possible ways of achieving the aims. Legislative constraints are not the only solution: the carrot is sometimes more effective than the stick. Legislators must also sell their products to the consumer and to do this they need to be able to empathise with those affected.

Mr Bevis Clarke-Smith, Head of the Legal Revisers Group, thanked the speakers for giving the participants an invaluable insight into the formal and substantive quality of legislation seen not just from one national perspective but also from a universal perspective.

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