

The Art of Co-Legislation

A course in legislative drafting for
the EP

Introduction

- The Art of Co-Legislation
- Occasion: **Interinstitutional agreement (IA)** on common guidelines for the quality of drafting of Community legislation (*OJ EC 1999 C 73/1*) – 22 December 1998
- Implementing measures →

Implementing measures IA

- Institutions:
 - (d) shall ensure that their officials and other servants receive *training* in legislative drafting, making them aware in particular of the effects of multilingualism on drafting quality;
 - (e) shall promote *cooperation* with Member States with a view to improving the understanding of the particular considerations to be taken into account when drafting texts;

Introductory remarks

- Why and how of the course
- Personal introductions
- Course materials
- Programme

Why a course for the EP?

- Mostly amendments, besides oversight and power of the purse
- Legislative drafting is a *shared* responsibility

Why a course for the EP?

- Possible benefits EP:
- Learn about the consequences of poor drafting
- Create a (new) awareness for and discussion on the quality of drafting
- Prepare for future developments (e.g. drafting units – see IM c)
- Explicit quality notions, develop (new) expertise (see IM)
- Improve communication between and services (translation, advice, review, revision) of the DG's
- Improve the quality of amendments

Goals of the Course

- Familiarize with IA
- Reflect on drafting problems and experiences
- Learning from each other/trainers as 'sparring partners'
- Learning by doing
- Create a (new) quality awareness & quality discussion as regards the quality of drafting Community legislation

High and modest ambitions

- A lot of work in two days (assignments, group work)
- Active cooperation (your experiences, your expertise, your views are at the basis)
- Not about correct or wrong, good or bad, but about possible alternatives, arguments, seeing consequences & discussion

High and modest ambitions

- Not merely linguistic, legal, policy or political aspects: drafting is all of that at once (An Essay in Communication, G.C. Thornton)
- Drafting EU-legislation is a joint operation: everyone involved is responsible
- Whom are we drafting for?
- Rule of empathy
- Improving by generating or seeing alternatives

Limitations/challenges

- Mixed company – DG 1, DG 2, DG 7 and Legal Service - each with a distinct perspective on drafting
- Non-native teachers
- Brief period
- Your input (experiences and examples) is vital

Course materials

- **Work book: Course guide ‘The Art of Co-Legislation’**
 - Assignments
 - Primary reading material

Programme

- **Today** (see Course guide)
- **Tomorrow** (see Course guide)

Primary objective Interinstitutional agreement

- Improve clear, simple and precise drafting of Community legislative acts

Why? (1)

(1) clear, simple and precise drafting of Community legislative acts is essential if they are to be *transparent* and *readily understandable* by the public and economic operators.

(1a) It is also a prerequisite for the *proper implementation* and *uniform application* of Community legislation in the Member States;

Why? (2)

- (2) according to the case-law of the Court of Justice, the *principle of legal certainty*, which is part of the Community legal order, requires that Community legislation must be *clear and precise* and its application *foreseeable* by individuals
- (especially when acts have financial consequences or impose obligations)

Consequences bad drafting

- Non-compliance
- Interpretation problems
 - restrictive application: ECR ARDvPro Sieben 1999 case c-6/98 ECR I-7599)
- Heterogeneous application
- Problems with enforcement & compliance
- Delayed or incorrect implementation
- Law suits - damages
- Ineffectiveness of policies

Content of IA

- **General principles**
 - (wording, phrasing, terminology, style) 1-6
- **Different parts of the act**
 - (structuring) 7-15
- **Internal and external references**
 - (referencing) 16-17
- **Amending acts**
 - (amending) 18-19
- **Final provisions, repeals and annexes (20-22)**

Clear, simple and precise drafting

- **A. Simple language**
- **B. Appropriate style**
- **C. Consistent terminology (internal/external)**

Simple language

- **Every day language preferred**
- **Keep it simple:**
 - Short sentences, succinct expression (e.g. no illustrations)
 - One sentence one idea
 - One article = a group of ideas logically linked = one rule
 - No convoluted language
 - No double negatives
 - No excessive use of abbreviations
 - No jargon, Latin or 'vogue' words (5.2. 4 JPG)
 - Translatable
 - SAP -Singular. Active voice. Present tense

Appropriate style

- **Who are the addressees?**
 - Experts/specialists?
 - General public?
- **What type of act?**
 - Regulation or Directive?
 - Legiswrite/Interinstitutional Style Guide
- **Legislative character**
 - Normative nature of enacting terms
 - Character of recitals

Consistency

- **Internal**
 - One concept, one term
 - Use terminology consistently
 - Try to stay close to the ordinary, legal or technical meaning of terms
 - How does it translate?/multilingualism (avoid terminology specific to one national legal system)
- **External**
 - Other EU-legislation, Treaties
 - Member states

Definition techniques

- **Guideline 14 on definitions**
 - Definitions only when terms are not unambiguous
 - Every-day meaning or specialised language preferable
 - No fictions
 - No normative provisions in definitions

How to define: techniques

- **No definition**
 - Every-day meaning
 - Specialised language-meaning
 - No ambiguities
- **By context**
- **Definitions**

Definitions

- **General definitions (a whole new meaning)**
 - A. Generalisations
 - B. Specifications
 - C. Abbreviations
 - D. Recursive definitions
- **Partial definitions (a partial new meaning)**
 - On the basis of a known term or concept (extensions or limitations)
 - In or outside a definition article
- **Definition by reference**

Referencing

- **Internal** (same act)
- **External** (another act: Community legislation or another source)
- **Guidelines 16 and 17** apply

Referencing principles

- To avoid repetition and thereby simplify the text
- Never compromise comprehensibility
- Act referred to is published or sufficiently accessible to the public
- It must be possible to understand a legislative act – at least the enacting terms – without consulting other acts
- References must be specific (citations and recitals: full title/enacting terms only when absolutely necessary – cite to the full, including amendments)

References by sort

- **Static references**
 - Reference to a specific text as it stands on a specific date
 - Stating title of the act and the source, and specifying, where appropriate, an amending act
 - References to non-Community acts → static
- **Dynamic references**
 - Reference to a specific text including any amendments made to it
 - References to Community acts → generally dynamic
 - Risk of being indeterminate

Rödиг's rule of thumb 1

- **How to choose between:**
- A. General definition (identity),
- B. Partial definition (identification),
- C. Definition by reference
- D. Combination General Part (general provisions) & Special Part

Rödig's rule of thumb 2

- Frequent repetition + grouped repetition
→ General definition (identity)
- Infrequent repetition + but grouped repetition
→ Partial definition (identification),
- Infrequent repetition + scattered repetition
→ Definition by reference
- Frequent repetition + scattered repetition
→ Insertion of a General Part & Special Part

The Art of Co-Legislation

Style, structure, preamble

Consistency

- **Internal**
 - One concept, one term
 - use terminology consistently
 - try to stay close to the ordinary, legal or technical meaning of terms
 - How does it translate?/multilingualism (avoid terminology specific to one national legal system)
- **External**
 - Other EU-legislation, Treaties
 - Member states

Structure of Community acts

- **Title**
- **Preamble**
 - Citation
 - Recital
- **Enacting terms**
 - scope, definitions, rights & obligations, implementing powers, procedural provisions, implementing measures, transitional and final provisions
- **Annexes (optional)**
- **See guidelines 7 and 15**

Title

- **Title gives as succinct and full an indication as possible of the subject matter of an act**
- **A. Full title**
 - type of the act
 - abbreviation of Community concerned
 - name of institution(s) which adopted the act
 - date of adoption
 - subject matter
- **B. Short title (optional)**

Citations

- **Purpose: set out the legal basis of an act & the main steps of the procedure leading to its adoption**
- **See guideline 9 and no. 9 JPG**

Recitals

- **Purpose: set out concise reasons for the chief provisions of the enacting terms**
 - No reproduction or paraphrasing of the enacting terms
 - No normative provisions
 - No political exhortations
- **EP amendments and recitals**
 - Political statements
 - Triangling the Commission
 - ‘Bussing’
- **Number recitals**

Structure of a norm and reading order

- **Who? (norm subject)**
- **Ought to do or not to do? (norm operator)**
- **What? (norm object)**
- **In or under which conditions? (norm condition)**

Structuring techniques

- **Considerations of a substantive nature**
- **Considerations on a technical level**

Considerations of a substantive nature

- **Keep together what belongs together**
- **What comes first should be in front**
- **Structure should lead the reader from what he knows to that what he doesn't know**
- **Choose a consistent structuring perspective**
 - chronology
 - groups of persons
 - legal relation
 - etc.

Considerations on a technical level

- Basic unit: **Article**
- Higher division: **Part, Title, Chapter, Section**
- Subdivision of an article: **Paragraph, Point**
- See page 29 of the Joint Practical Guide

Afternoon session Day 2

- The basic structure of rights & obligations

Elements of a norm (Norm sentence structure)

- **Norm subject** (addressee)
- **Norm operator** (verb expressing what ought to be: obligation, prohibition, permission or dispensation)
- **Norm object** (what is obliged, prohibited, permitted, or dispensed)
- **Norm condition** (under which condition does the norm apply?)

Basic modalities of a norm

- **Obligation** (+O = -D)
- **Prohibition** (+P = -Pm)
- **Dispensation** (+D = -O)
- **Permission** (or license) (+Pm = -P)

Norms by sort

- **Norms of conduct** (primary rules: divide behavior in legal or illegal)
- **Norms of competence** (secondary rules: decide when an authority or person is competent or not competent to act)
- **Meta-norms** (norms on making or amending other norms - e.g. Rule of recognition)
- (H.L.A. Hart, *The Concept of Law*)

Norms of competence

- Legal powers: administrative, regulatory or judicial powers
- But also: sanctions, rights to litigate, rights to act under law, etc.

Norms of competence

- When awarding administrative, regulatory or regulatory powers, please bear in mind:
 - Margin of discretion (large or restricted)
 - Substantive or procedural restrictions
 - Specific or (deliberately) vague norms

**Final provisions, transition,
entry into force & annexes**

At the end of an act

- **Enforcement**
 - Criminal
 - Civil
 - Administrative
 - Disciplinary
- **Implementation**
 - Who is doing what?
- **(optional) Provisions on application**
- **(optional) Provision on evaluation**
- **Final provisions**

Provisions on application

- **Provisions on limits or extensions to application:**
 - a. laying down dates, time limits
 - b. exceptions, derogations,
 - c. transitional provisions
- **Final provisions:**
 - a. entry into force
 - b. deadline for transposition
 - c. sunset clause?

Evaluation

- Assessing the effectiveness of an act or a policy in relation to the goals originally set
- Evaluation of policy or legislative evaluation?
- Continuous or periodically?
- Systematically/scientific or 'quick and dirty' (opiniating evaluations)
- Not all that common in EC Acts (except environmental acts)

Transitional provisions

How does an act relate to previous, existing and new situations? (e.g. acquired rights, new cases etc.)

- Three basic relations:
- A. **Retroactive** application (a new act also applies to situations in or from the past)
- B. **Direct** application (a new act applies to all existing and new situations after it's entry into force)
- C. **Deferred** application (the act does not apply to some existing situations - right away. Existing situations may be respected)

Entry into force

- **Entry into force**
 - directly
 - (partly) delayed
 - on a specified date or dependant on the date of publication
- **Deadlines for transposition**
 - specify date
 - guarantee adequate period for transposition
- **Note:** expressly repeal obsolete acts and provisions

Annexes

- **Technical aspects**
- **Reference to these aspects in the enacting terms**
- **No new rights and obligations in relation to the enacting terms**