



EUROPEAN COMMISSION

LEGAL SERVICE

Legal Revisers Group

Brussels, 22 September 2004

SEMINARS ON QUALITY OF LEGISLATION

Challenges facing a common-law system, Brussels, 2 July 2004

Summary report

Mr Giuliano Marengo, Deputy Director-General of the Commission Legal Service, opened the seminar by recalling initiatives by the Member States and the institutions to promote the quality of European legislation. He listed practical steps already taken at Community level while stressing that the institutions are not complacent but ready and eager to meet the challenge of preparing legislation in a multicultural environment.

Ms Anne Lambert, Deputy Permanent Representative at the United Kingdom Permanent Representation to the European Union, put improving the quality of Community legislation in the context of the overall work at European level towards Better Regulation, which in essence means asking whether regulation is fit for its purpose. In March this year the European Council endorsed the Joint Initiative on Regulatory Reform launched by the four countries holding the EU Presidencies in 2003 and 2004. Greater attention is being focused on the role of impact assessments, the programme of simplification of existing legislation and the need for best practice on Better Regulation at national level. The political will to push this agenda is present in all three institutions and Better Regulation has a higher profile now than ever before. Progress is incremental and events like this seminar make a useful contribution.

Mr Philip Bovey, Legal Director at the Department of Trade and Industry, noted that it is in the nature of legal systems to approach problems differently. It is important to know and compare the various systems to identify divergences, in particular to examine whether it is more difficult for a common-law system to apply Community law. A number of studies and ministerial initiatives in the UK have considered the issue. Drawing on his experience of implementing Community legislation in the UK, he contrasted the UK penchant for defining terms to ensure that legislation has a determinable scope with the Community approach of relying on words carrying their natural meaning. A problem inherent in the latter approach is that equivalent words will not have the same meaning in all languages.

Certain aspects of Community drafting cause particular problems in the UK, such as including definitions in the recitals (contrary to the 1997 Interinstitutional Agreement), inserting riders that do not qualify the original proposition and assuming that a particular concept is meaningful in all Member States. A particular feature of the UK system is the absolute separation of functions between the drafting by the highly trained Parliamentary Counsel and the formulation of policy by the technical departments. In the case of Community legislation, the first draft is produced by a technical expert and is then the subject of changes by numerous different hands throughout the rest of the procedure. The lack of a single controlling hand means that it cannot always be assumed that the same word has the same meaning throughout the text, or that a drafting difference is intended to have substantive effect.

When transposing Community directives, Member States have two options: to integrate the directive in such a way that the domestic law and the Community-derived law form a single set of propositions; or to leave some or all of domestic law as it stands and to make parallel provision to implement the directive. Parallel provision will often be the best or only practicable course but may reinforce the perception that Community law is an added burden.

The next choice is whether to use the exact words of the Community provisions when transposing - “copy-out” - or to use different words more in line with the domestic legislative approach - “elaboration”. Both seek to provide certainty and there is no absolute right or wrong answer, with much depending on the nature of the particular directive. The UK Government has come down cautiously on the side of copy-out because of the risk of inadvertent “gold-plating” or imposition of an additional burden. Increasing recourse to copy out means that the citizen is exposed to the raw Community instrument which makes it all the more important for those involved in the drafting process to make that instrument of the highest quality legislatively.

Lady Justice Arden, of the Court of Appeal, first considered the English doctrine of Parliamentary sovereignty, under which a UK Act of Parliament can be held unenforceable only in exceptional cases, and its relationship with Community law.

Flaws in drafting create problems for citizens and the courts. When the Community introduced rules on work at height designed to protect window cleaners and house painters, for example, the UK Government produced implementing legislation (still in draft) which appears to take no account of the special position of those employed in outdoor sports and occupations such as instructors in abseiling or mountaineering.

Even provisions as simple as “Vehicles must not enter the park” can pose problems of interpretation, such as what is a “vehicle”. The English courts have adapted their approach to interpretation when dealing with Community law. They may take account of travaux préparatoires although they are not always conscious of the extent to which Community law texts are the product of negotiation. They may also look at the other language versions of a provision although this is not easy for national courts. UK legislation is interpreted in such a way as to make it compatible with Community obligations if at all possible, leading sometimes to strained interpretations which are a departure from the general rule that words carry their natural and ordinary meaning. There are a number of difficulties for English courts in interpreting Community legislation. Moreover, the English courts tend to take a more literal approach than the European Court of Justice. This may be either the cause or the effect of the high standards of professional drafting by the Parliamentary Counsel.

Those involved in drafting Community law must constantly question their assumptions since there may be significant differences in meaning between apparently equivalent concepts. They must always be aware of the end user of the legislation and seek to produce a clear text that does not need to be litigated.

Mr Bevis Clarke-Smith, Head of the Legal Revisers Group, noted that, with over 280 registered participants, attendance at this seminar was a record. While coming from the most diverse professional backgrounds, participants were united in their concern for the quality of legislation.