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GUEST EDITORIAL: KNOCKING EU LAW INTO SHAPE

1. Politics, diplomacy and law

In Brussels there are politicians, diplomats and civil servants who all know the art of moving the colossal EU vessel forward. Even if the first result is modest – the adoption of an orientation or a political guideline or something similar – the end result might well be a binding legal act. In the Member States many politicians are also very familiar with what is going on, as are officials of all kinds (in ministries, authorities and organizations) and legal advisers. On top of that there are researchers and others within the academic world who give their picture of what is happening, sometimes from the perspective that it is all a great and thrilling challenge.

The focus in leading political and official circles is increasingly on "building Europe". How the Lisbon strategy will develop and what will come of European employment policy is more exciting than the old domestic issues. Everyone who has worked on a major project – whether a doctoral thesis, tax or pension reform, an EU charter on fundamental rights or a constitutional treaty – knows the heady feeling it can give. All energies are concentrated on working towards the desired aim.

The general public know very little about what is going on and the strong forces involved in the process. Members of national parliaments know more, but not as much as they should. On the whole, there does not seem to be much interest on either side. This leads of course to an enormous information gap and lack of connection with the citizen.

Now the Convention is over and the IGC is well underway. The attention of politicians and the media in most Member States is focused on questions of the powers of the institutions. At this stage there is little time to identify such deficiencies in the present treaties as will make interpretation difficult.

2. The EU legislative procedure

Experience from legislation in a national environment shows that the best resultsin legal and technical terms are achieved if qualified lawyers are able to work more or less undisturbed and without too much time pressure. However, EU legislation comes into being in what can be called organized chaos where

politicians and diplomats have the upper hand while lawyers have a relatively weak position.

The aim in the EU legislative procedure is to obtain rapid results in various policy areas rather than to produce lasting legislation. Progress is measured in terms of the number of legal acts adopted rather than their legal and technical quality.

It is therefore not surprising that national legislators, courts and others who actually get to grips with EU legislation sometimes have to conclude that a rule in a legal act is difficult to understand or to reconcile with other rules in the same act or in other acts. The reason why a certain rule has been included in an act may be obscure. The precise content of a rule may vary among the official EU languages. So EU legislation leaves much to interpretation. The judges in the Court of Justice can of course only deal with a tiny proportion of all the questions of interpretation that arise.

On the surface there is nothing wrong with EU legal acts. While the language is often heavy and bombastic, there are comparatively few careless errors. Even the references in the footnotes are correct. If mistakes do occur, corrigenda are published. They – like everything else – can be found in EUR-Lex for example. Order in the midst of chaos. The bureaucracy carries on, come what may, and guides the work with a firm hand.

In the preambles to the legal acts and in the Commission's Green Papers and White Papers, Communications and so on, the nice, fine-sounding phrases line up. Reference is made to various implemented and proposed legal acts, programmes and action plans in a manner that gives the reader the impression that this is indeed "the only way". And that EU citizens really do demand that the EU adopt measures in this precise area and do so quickly.[1] Yet another legal act is pushed through with inadequate time for Member States to fulfil their obligations properly.[2]

1. G. Lambertz, formerly Director-General for Legal affairs in the Swedish Ministry of Justice and now Chancellor of Justice, has written: "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" ((2000) *Svensk Juristtidning*, 247).

2. The Swedish Lagrådet (Council on Legislation) criticized the short transposition periods when scrutinizing Government proposals based on Council Framework Decision 2002/475/JHA on combating terrorism and Council Directive 2003/48/EC on taxation on savings income in the form of interest payments. In the first case Lagrådet stated that it was

A general observation is that much of the force of conviction of a document lies precisely in its presentation and appearance. It therefore takes a considerable effort to find the technical weaknesses in EU legal acts and the average member of parliament cannot do it without expert help. But those who do take the trouble find all too often that under the surface of an EU act lie provisions that do not stand up to close scrutiny. The focus on political and diplomatic compromises is partly to blame but also the inadequate resources devoted to legislative drafting.

The institutions' lawyers concentrate in particular on such politically important questions as the choice of the legal basis for a legal act and the form of decision-making that is applicable. Of course they have many other concerns as well; a major task for the Commission lawyers is to defend the Community's interests before the ECJ.

Relatively little attention is paid to legislative drafting. It is commonplace for example for a veterinary expert or other technical expert, rather than a lawyer, to be given responsibility for preparing the Commission's first draft of an act, often on the basis of the work of a group of technical experts representing the Member States. Legal revision of draft acts within the Commission is now more extensive than before but is not yet given the weight it deserves. The problems are compounded by the multilingual nature of the process. Since work within the Commission is done on the basis of one drafting language, all but a small minority of those involved have to work in a language which is not their own.

The Council working parties are chaired by representatives of the country which holds the presidency. Often they are not lawyers, although they will generally be assisted by a lawyer from the Council Legal Service. In the working parties, the texts are negotiated article by article and recital by recital. No one person has responsibility for ensuring that the text as a whole hangs together.

Things become still more difficult when the Parliament is involved. It often proposes extensive amendments that can lead to hard compromises in the codecision procedure. Even amendments which are substantively well founded may often in practice have a further negative effect on the quality of the act.

One can but speculate as to why the drafting of legislation in the EU is not taken more seriously. In the case of directives, there may be the view that the precise wording is not so important since a directive has to be transposed at national level. But that disregards the fact that national law must be interpreted

fundamentally unsatisfactory that Sweden should be party to the adoption of a binding act in the knowledge that it would probably be impossible to comply with the obligations it laid down. In the second case Lagrådet considered the period which the Directive allowed the Member States for transposition to be wholly unrealistic.

in conformity with the directive, which will in any event often take precedence by virtue of the principle of direct effect.

I had my first real contact with EU legislation when I took part in preparatory work for transposition of the Fourth and Seventh Company Law Directives. Since then, as a judge in the Swedish Supreme Administrative Court, I have had occasion to interpret and apply EU rules in numerous cases. During the Swedish Presidency in the first part of 2001 I chaired a Council working party and gained an inside view of the EU legislative process. I have recently completed two years as a member of Lagrådet (Council on Legislation), an assignment that gave me and my colleagues many opportunities to revise Government legislative proposals based on EU legal acts. On the basis of those experiences I venture to suggest some improvements to the EU legislative procedure.[3]

3. Measures to improve the quality of EU legislation

For many years, ambitious work has been undertaken within the institutions with a view to improving the quality of drafting. It has led to various manuals on drafting, with guidance on such matters as formal presentation, headings, definitions and references. Such manuals are of course useful. It is regrettable that more notice is not taken of them.

But no-one should think that it is possible to remedy defects in quality merely by strictly following manuals. The more subtle questions of interpretation arise only when the text is subjected to close scrutiny, as by a national court. With the help of manuals, the language and structure can be cleaned up – thus revealing the precise content of the proposed act – but there still remains a task to be carried out by lawyers with considerable experience of legislation. It is a task that cannot be described in any manuals and involves such things as completeness and consistency with other acts.

Sometimes the Commission's proposal for a legal act is preceded by a consultation paper. If such a paper suggests that legislation is necessary, it should generally also contain a preliminary draft of the act. Giving more concrete form to the suggestions ensures that all aspects are covered and facilitates subsequent work on the matter.

In the long run, it will hardly be possible to maintain a system in which EU legislation is to such a large extent created and written by non-lawyers, by laymen. In all the institutions – Parliament, Council and Commission – the lawyers should be given an enhanced role in drafting legislation. Most

3. I have already expressed some of these ideas in an article in (2003) *Svensk Juristtidning*, 469.

importantly, a culture should be created which ensures that the lawyers really do take full account of questions of quality rather than acting as players in a diplomatic and political game.

When a proposal for an act is received by the Council, a first step could be for a comprehensive written report on the proposal to be made by the Council Legal Service – perhaps together with the competent lawyer from the country holding the Presidency. If major changes are called for, a new text could be produced without undermining the Commission's monopoly of legislative proposal.

This would set the agenda for work in the Council working parties and ensure that from the outset the lawyer from the Council Legal Service is fully implicated in the working party's work on the text. Such involvement is significant if the representatives of the Member States – often officials from the capitals and from the Member States' representative offices in Brussels who have little interest in quality of legislation – subsequently assume that they can change the text at will.

The persons chairing Council working parties have a key role. Even if a legal act concerns complex technical matters, the chairman should be a lawyer with experience of legislative matters. The ambition of any such chairman should be to thoroughly understand the act and to communicate that understanding in as clear a way as possible. There is much in legal acts that is not or need not be subject to diplomatic negotiations and could be treated as matters of legal technique. A committed chairman of a working party can benefit from superior knowledge and often attain almost the same standard of drafting as in a domestic context, particularly if there is effective cooperation with the Council Legal Service.

Without closer experience, it is hard to identify means of ensuring that quality is also maintained in the work of the Parliament. As there is more and more codecision, sometimes exercised in slightly chaotic conditions, steps to improve quality there too are clearly needed.

However, I do not believe that the measures described here are sufficient to bring EU acts up to a satisfactory quality; more radical steps are needed. My belief is that an external review body would help to significantly improve the quality of EU legislation.[4] I am certainly influenced in that belief by my own

4. The idea of an external European review body was raised in 1992 by the French Conseil d'État (Rapport public 1992) and in 1995 by a group of Dutch experts chaired by Koopmans, a former Dutch judge at the ECJ ("De kwaliteit van EG-regelgeving – Aandachtspunten en voorstellen"); cf. *Improving the Quality of Legislation in Europe* (T.M.C. Asser Instituut, 1998), p. 36 et seq., p. 54 et seq. and p. 100. See also the contribution by von Bahr, judge at the ECJ, in *Une communauté de droit, Festschrift für Gil Carlos Rodriguez Iglesias* (2003), Sandström in (2003) *Svensk Juristtidning*, 469, and the *Newsletter of the Association of the Councils of State*

experience as a member of Lagrådet.[5]

In such a review body – a European Council on Legislation (ECL) – a proposal for a legal act would be revised by a group of lawyers well-versed in national legislative work and EU law. It is important that the group be kept as small as possible so that it can work quickly and effectively. While a larger group would make it easier to take into account the problems of implementation in different Member States, the extra time needed and the loss of efficiency would probably make it unworkable.

The scale of the ECL will depend on the number of legal acts to be revised. If they are confined to what are at present called directives, regulations and framework decisions, and if acts adopted by the Commission are excluded**,** it will be at most a few hundred a year, many of which are amendments of existing acts. Of course, it will also depend on the intensity of revision in each case.

In Sweden, Lagrådet devotes itself primarily to legal and technical revision and the ECL should do the same. Lagrådet also assesses whether a proposal is compatible with constitutional requirements. Similarly, the ECL could examine whether a proposed legal act is compatible with EU law as regards the decision-making process and the like. The ECL's opinions should not be binding and such an examination could therefore be reconciled with the ECJ's role as ultimate arbiter of EU law.

It is harder to insert a Council on Legislation in the EU lawmaking process than in a national context. The Parliament, the Council and the Commission all play an active role in the legislative process and every position taken by one institution is noted by the others and influences the further course of the procedure.

A critical opinion by the ECL at a late stage in the process might make it necessary to start again from the beginning. In a way, that may be a good thing. It would lead, however, not only to the risk of considerable delays in

and Supreme Administrative Jurisdictions of the European Union, March 2003, p. 11 et seq. May 2003, p. 9 and September 2003, p. 9 et seq.: accessible from: www.raadvst-consetat.be/.

5. Lagrådet is composed of six judges drawn from the Supreme Court and the Supreme Administrative Court and divided into two chambers of three judges. Its work is devoted to reviewing the Government's proposals for new laws. Lagrådet delivers its opinion on a proposal for a law a few days or at most a few weeks after the proposal has been submitted to Lagrådet and the competent official of the ministry has responded to questions from members of Lagrådet (the opinions range from a single page to 50 pages or on rare occasions even more; they are immediately published on the Internet, www.lagradet.se.). The Government then completes its work on the text and puts its definitive proposal before the parliament. The Government normally accepts most of Lagrådet's suggestions. It is generally acknowledged in Sweden that Lagrådet, which has existed for almost 100 years, makes a major contribution to improving quality in the preparation of Swedish laws. To the best of my knowledge, the experience is the same in other Member States with bodies reviewing, as one of their functions, legislative proposals (Conseil d'État etc).

the legislative procedure but also to inefficient use of scarce human resources in the institutions and in the Member States. It is perhaps better, therefore, for the ECL to intervene at an early stage, provided that the necessary measures are taken to ensure that quality is maintained throughout the subsequent procedure.

One alternative is for the Commission to submit its proposal to the ECL for an opinion before finalizing it for submission to the legislature (Parliament and Council). That is a model reminiscent of the proposal by the Convention for ensuring the national parliaments' influence over observance of the subsidiarity principle.

Another alternative is for the ECL to deliver its opinion after the Commission's proposal has been submitted to the legislature, as is currently done by, amongst others, the European Economic and Social Committee and the Committee of the Regions. As long as the ECL's opinion does not entail the complete reformulation of the proposal or its outright rejection, the Council Legal Service could prepare a proposed text on the basis of the ECL's opinion.

It is important that the ECL should not further reduce the role of the institutions' lawyers in drawing up legal acts. On the contrary, efforts should be made to ensure that the establishment of the ECL strengthens their position. The legal competence that clearly exists within the institutions is something that should be fostered.

The common goal must be to achieve a substantial improvement in the quality of EU legislation for the benefit of all, not least of new Member States with weaker legislative traditions.

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