
LEGISLATIVE DRAFTING IN ENGLISH FOR NON-NATIVE SPEAKERS: SOME DO'S AND DON'TS (WITH REFERENCE TO EU LEGISLATION)

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Abstract

Many EU legislative texts are drafted today by non-native speakers. EU legislative texts are examined in detail and subject to negotiation and amendment by non-native speakers throughout the EU law-making process.

EU legislative texts are written using legal terms and expressions, as well as terms and expressions which are of more general usage. The legislative acts are constructed in a highly formalized fashion and use language in particular technical ways. There is an art to legislative drafting and it is a specialized skill in any legal system.

This paper takes a look at the drafting of EU legislative acts in English from a pragmatic perspective. It considers the drafting context, useful preliminary information which assists a drafter, the structure of the EU act and a range of language points on particular aspects to bear in mind, including terms and expressions to avoid. The purpose is to provide some insights into EU legal language through adopting a viewpoint of a drafter of EU legislative texts and presenting this in terms of practical guidance to non-native drafters of EU legislative acts. It is hoped that this approach can be of pragmatic use and at the same time provide insights for non-drafters by presenting a creator's 'internal' viewpoint in addition to the more usual 'external' viewpoint of the linguist. In particular it enables one to address questions touching on the 'why's and wherefore's' of EU legislative drafting.

1. Introduction

This paper looks at EU legislative drafting from the pragmatic point of view of a legal-linguistic reviser. It draws on personal experience of many years working with, and reflecting on (see *inter alia* Robertson 2009; 2010), EU legislative texts, in particular as regards their legal-linguistic revision, drafting, translation and finalization within the EU institutions. It has been prepared in order to do two things: first, to provide some pragmatic guidance; second, to address what may be perceived as an area where linguists are less well informed, namely on the 'internal' (or first person) viewpoint regarding legislative texts, that is to say the viewpoint of those involved in the creation and drafting of the legislative text as opposed to the inferences that linguists make about their viewpoint through 'external' and objective analysis of the text as revealed in the final linguistic product.

¹ The views expressed are entirely personal to the author.

If one thinks of EU legislative texts as linguistic creations that lie within the field of study of legal linguistics, that is to say the study of linguistics applied to legal texts, then it can be argued that there are a range of persons who are directly interested in legal texts. Chromá (2008) identifies three: linguist, translator and lawyer. One could add that other persons also have an interest, for example politicians, administrators, persons addressed by the legislative text and the general public at large. Nonetheless, while the linguistic and translator viewpoints are well represented in linguistic literature on law, the viewpoint of the lawyer is less frequently seen and it seems appropriate to redress that balance by offering a legal-linguistic viewpoint here. The context selected is that of legislative texts of the European Union because it is a domain that is multilingual, multicultural, and of growing importance; so there is a need for information. The focus is on the English language because of the status of that language in contemporary international and EU discourse. Quite simply, most EU laws are currently discussed and negotiated on the basis of an English draft text².

This paper is oriented towards non-native English speakers since much EU legislative drafting (whether in English or French) is undertaken by non-native speakers. It takes a look at the drafting activity from a pragmatic perspective, places it in context, highlights some aspects and makes suggestions on good practice. This is intended to provide some insights into the way in which an EU drafter might approach particular tasks, and some of the reasons why. EU sources of drafting guidance are included. It should be noted at the outset that care is needed with regard to guidance on English legislative drafting practice. That is because such drafting takes place in a different context (see among others Bennion 1980; Thornton 1987). If one thinks in terms of intertextuality, then each legislative text is created within the legal and linguistic 'matrix' of the particular legal system in which it is to be embedded. Thus, a secondary level law derives from a higher-ranking primary law and must conform to what that law prescribes. All the laws must conform to the Constitution, expressed in the highest-ranking legal text. Each legal text must also be adapted to all the other legal texts, in all sorts of ways. It is this background legal context which frequently determines the precise form that a legislative act has to take. It follows from this that English common law drafting is adapted to the context of English law, and common law drafting is different from civil law drafting.

Gotti (2008: 30) has commented (citing previous work):

[...] in common law legislation sentences are very long, consisting of three or more main clauses, each modified by many subordinate clauses, this remarkable sentence length depends on the great number of details to be inserted and the need that specifications should be precise and clear. [...] Civil law sentences are shorter, with a less strict use of paragraphing; this makes the understanding of the sentences easier, but renders the reconstruction of the relationship between the various sentences more complex.

Common law drafting is the domain of highly trained legal specialists and there

² <http://europa.eu>.

are many differences that distinguish it from EU drafting, which has its roots in civil law systems, adapted to the EU legal and linguistic context. Originally EU drafting was mainly undertaken in French: the English versions were translations. We have an example of this with the foundation treaty establishing the European Coal and Steel Community (expired after 50 years)³ which was authentic in only the French language (see Article 100). All other language versions were translations. Nowadays, the other languages of EU legislative texts may as a matter of fact be translations, but in law they are declared to be original, authentic and of equal status. One can see this, for example, from the final articles of EU primary treaties and Regulation No. 1 determining the languages to be used by the European Economic Community⁴ (now the EU). The French influence remains strong, particularly at the level of drafting primary treaties and in the work of the Court of Justice of the European Union. Among other factors, this helps maintain a certain conceptual and terminological consistency with the original foundation texts which is a stabilizing factor.

Nowadays EU drafting is done in English as well as French (texts are also initiated in other languages but that is less frequent)⁵, while maintaining the genre and discourse structures previously established in the *acquis* of what began as the European Economic Community, later became the European Community and is now the European Union. However, EU drafting is also becoming more specialized: the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community⁶, which entered into force on 1 December 2009, has introduced a large number of new terms and procedures which must be reflected in the drafting of EU legislative acts. It is probably the case that EU legislative acts now reflect hybridity between common law and civil law approaches and that some texts will tend in one direction while others tend the other way.

This paper adopts a fairly narrow focus and assumes that the reader finds him/herself in the position of having to draft a new EU legislative text and is thinking about what to do. This perspective allows us to explore issues that are not readily accessible from a purely evaluative or explanatory approach. It is a 'hands on' approach of learning by doing. The paper starts by considering some preliminary issues. Then it looks at the drafting process, structure and the standard parts of the act. The aim is to show how the act is constructed in outline and to address some practical points in relation to each part. From there, attention shifts to language points. For convenience, attention is addressed to one type of act: the EU 'directive'; typically this act requires 'transposition', or implementation, in the Member States through the creation of national legislation. There is thus a direct relationship between EU language and national legal language. They are separate kinds of discourse, and legally and linguistically distinctive, but closely linked and intertwined.

³ http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm.

⁴ OJ L 17, 6.10.1958, p. 385.

⁵ http://ec.europa.eu/dgs/translation/publication/brochures/translations_eu_brochure_en.pdf; see also Goldsmith 2009.

⁶ http://europa.eu/lisbon_treaty/full_text/index_en.htm.

2. Preliminary issues

It is possible to make a formal analysis of all the participants in a typical piece of EU legislation, but they are invariably very numerous, since each EU act is a product of extensive consultation and negotiation between the EU institutions, the member states, business and sectoral interests, and so on. For the present purpose, however, this information is of limited interest. If we adopt the personal standpoint of the drafter, we can perhaps express the matter differently and look at it in a different way. One approach, offered by Paltridge (2006) in a discourse-analytical context, is to make use of words beginning with *wh-*, as keywords to introduce different aspects to think about. We can apply that approach here and see what information it leads to. Thus, following that line of thought, one can say that when a request to draft an EU legislative text is received, it is useful to pause and consider some preliminary issues, using as a point of departure some *wh-* words: *who*, *what*, *which*, *when*, *where*, *why*, but also *how*.

Who?

Who is to do the job? This is not just who is to draft the text but who else is involved? Who is the policy expert? Who is the legal expert? Who else participates in the making of the act, for example its revision, amendment, translation, signature? Which departments, services, bodies and institutions are involved? It is good practice for the drafter to have a clear idea as to the participants involved in creating and making the text a legal act, i.e. 'validating' it (Bennion 1980). It is also useful to know how they work. For example, for EU 'ordinary legislative acts' under Article 289 on the Functioning of the European Union (TFEU) the legal-linguistic revisers of the Council (Gallas 1999a, 1999b; Morgan 1982; Robertson 2010) and of the European Parliament review and revise all language versions with an eye to conformity to a number of documents containing guidance on EU legislative drafting. These include the *Manual of Precedents for Acts Established within the Council of the European Union*, the *Interinstitutional Agreement of 22 December 1998 on Common Guidelines for the Quality of Drafting of Community Legislation* and the *Joint Practical Guide for the Drafting of Community Legislation* which are available in all EU languages⁷. It helps if the drafter follows them from the outset.

What?

Next we can ask: what is to be done? What is the exact job? What is the policy to be implemented? What is the legal context of the new act? What is the 'legal base' of the proposed text, that is to say the legal authority, or power, which has been handed down to the adopting body to make the text to be drafted? Making laws is an exercise in delegated power; if no power is given, there can be no valid legal act. Usually, there is a higher-ranking enactment that gives the 'power', and part of the drafting process is to mention precisely the source of power in the text

⁷ <http://europa.eu> in particular http://ec.europa.eu/translation/index_en.htm.

(in EU legislation this is done in the ‘citations’, see below). The ‘what’ question also extends further down into the minutiae of the proposed text and one should ask at each stage, for example: ‘What is the purpose of these words here and what do they signify?’

We can ask ‘what?’ questions about the policy domain (e.g. agriculture, competition, environment) or legal aspects, such as previous enactments, case law, existing practice and the ways in which these are to be changed by the new text. Thirdly, we can ask questions about language style: what register (formal), what ‘person’ (usually third person), what types of verb (preferably active voice), what degree of abstraction (preferably as concrete as possible), what lengths of sentences (preferably as short as possible), and so on. (Language points are discussed later on in this paper.) Fourthly, we can ask questions about what the text is intended to achieve. What actions should result? What are people affected required to do, or not to do? And we consult the experts in these various matters in order to obtain information and guidance that is clear and specific, since you cannot draft a text if you do not know what is to be achieved and how to do it.

Which?

The question ‘what?’ slides imperceptibly into the question ‘which’ as soon as the context becomes one of making a choice between alternatives, or of entering into detail. On the other hand, there is, it would seem, no clear dividing line between ‘what’ and ‘which’ and the questions posed under ‘what’ could also be posed under ‘which’. That said, it can be asked here: which particular policy approach (among alternatives) is to be followed, which legal rules apply and which do not, which linguistic style is to be preferred, which terms and expressions are to be preferred. When this question is being asked the drafter is already engaged in the drafting process and making choices between different approaches that have become apparent as possibilities. The skill lies in knowing how to make the choices.

When?

When is the text wanted? This is both simple and complex as a question, since the drafter will probably be working within a structured context where time limits are already known and laid down, but the document must go through steps and overcome hurdles which may take place quickly or slowly, depending on the subject matter, its complexity and attitudes towards it by the various participants in the legislative process (if there is an opposing vote in Parliament, a text will not become law, regardless of the time planning). Most legislative texts are first examined within the ‘executive branch’ for policy, legal, budgetary and financial implications, and then they are introduced into a ‘parliamentary’ scrutiny process that involves review and amendment⁸. So the ‘when’ question is not always an easy one to answer.

⁸ <http://europa.eu>.

Where?

Where is the text wanted? Usually it is for a meeting devoted to its study. There is the preparation for the meeting, with the agenda and the list of points to be discussed and, it is hoped, resolved by the meeting. There is also the report after the meeting of the results achieved and a new version of the text, which will move to its next phase. Concretely, the EU draft legislative text is typically prepared in the EU Commission on the basis of prior negotiations and discussions (for a Commission view on drafting, see Robinson 2008) and then sent physically to the European Parliament and the Council of the European Union, as well as to national parliaments and all bodies who must be consulted. It is also made available to the general public, via the Official Journal and the <http://europa.eu> website. So the draft text becomes physically available potentially everywhere.

The main discussions leading to the final EU legislative act take place in the European Parliament, where members of the European Parliament meet to debate and propose amendments, and in the Council where the representatives of the Member States meet at political level or official national-expert level to debate and also propose amendments. For ordinary EU legislation, the final text is agreed and signed on behalf of each institution. So the drafters and participants follow the text round as it is being debated, discussed and amended in the different institutions.

Why?

Now we come to 'why'. Why is the text being made? This takes us into the policy domain. There are many possible reasons and these are closely linked to the powers given to the organization as a law-making body and the functions conferred on it. On the one hand there is the question 'why is the legal position to be changed?' and on the other hand there is the question 'why is it this particular body which does the job?' In an EU context this could be a question of why pass a law at the EU level and not at the Member State level? This question touches on the role of the EU and its institutions; there are many matters, involving cross-border cooperation and international business, where it is complicated and time-consuming to make national laws that harmonize with each other internationally. The EU has a treaty structure and methods of work which allow for fast and efficient collaboration and support between Member States; that is why the EU exists and continues to expand. However, in general terms the question 'why?' is answered by saying that there is a specific need, or that the Commission, the Council, the European Council, etc, has issued a policy statement proposing to deal with a particular issue. Legislation is created in order to meet a social need; it is a tool made of words. The drafter's job is to produce a tool that is fit for service.

We can ask another preliminary question: why drafting in English? The context normally determines the language of drafting, but sometimes there is a choice. In the EU context English, or French, may be chosen to work with because those are the languages which are most widely known to the participants, but a non-native speaker is more familiar with the mother tongue and can draft more easily in it. With access to skilled translators, it may be more efficient to write in the mother

tongue, have the text translated into English, and then work on that text, rather than drafting in English. As an alternative, one could ask for assistance by a skilled translator to construct the text together.

How?

This brings us to ‘how’. How is the policy to be implemented? Answers depend on many factors: the policy domain (e.g. agriculture, competition, environment); the applicable law (treaty base, previous enactments, case law) and existing practices and habits in the field, including the degree to which there is agreement on a single unified EU approach. In some fields (such as agriculture and competition) there are ‘hard’ laws (regulations, directives, decisions), in others there may be ‘softer’ instructions such as resolutions and recommendations (for example in areas of social policy).

On a narrower level we can ask questions about how the act is to be written. This raises questions about language, and they overlap with the ‘what’ questions since the question ‘how to write?’ leads inextricably to ‘what to write’, in the sense of producing specific words and phrases. These choices determine the style of the act.

How is the draft act to be constructed? What are the various parts that go to make up the text? What must be included and what should be left out? (And why?). These questions relate to the art and science of constructing the legislative text. We will look at them in the next section. However, before doing so it is useful to consider that a legislative act is best prepared on the basis of detailed instructions regarding policy, detailed instructions regarding legal background and context, clear guidance as to the existing acts and instruments that need to be amended or repealed.

Language must be used in a clear, precise and consistent way in order to draw up an act that is well structured and complies with the established rules for the creation of a valid legal act of that type. It is good practice to study carefully previous texts of the legislative genre in question with an eye to the *wh*- questions. It may be advisable to look at the Official Journal⁹ in the different language versions, study the variants and reflect on them.

3. Structure and parts of the act

The Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation is the starting point for EU drafting. It contains 22 guidelines to follow which state general drafting principles, set out the different parts of the act, give guidance on internal and external references, as well as on amending acts and final provisions, repeals and annexes. The guidelines are explained in a Joint Practical Guide (JPG). So the first step is to study these documents and past EU legislative acts to see how similar texts were done in the past, while taking into account that the Lisbon Treaty amending the EU and EC

⁹ <http://europa.eu>.

Treaty is in force since 1 December 2009 and the drafting must be adapted accordingly; for example, the EC Treaty has been replaced by the Treaty on the Functioning of the European Union and the 'European Community' has ceased to exist. Guideline 7 of the Interinstitutional Guidelines provides for all EU acts of general application to be drafted according to a standard structure: title, preamble, enacting terms and annexes, where necessary. The Guidelines should be referred to for their terms, together with the explanatory Joint Practical Guide. The term 'preamble' covers 'citations' and 'recitals'.

An EU legislative act can be thought of as a 'single sentence' with lots of complicated insertions. For example, an ordinary legislative act might say:

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION (enacting bodies), **HAVING REGARD TO** (citations, in which the relevant treaty and empowering articles are indicated, as well as formal procedural requirements for the act), **WHEREAS** (recitals, setting out background, reasons for the act and what it is aiming to do, in numbered paragraphs), **HAVE ADOPTED THIS DIRECTIVE** (enacting provisions, set out in articles and the core of the text). **DONE AT ... ON** (place and time of signature), **'FOR THE EUROPEAN PARLIAMENT, THE PRESIDENT'** (and signature), **'FOR THE COUNCIL, THE PRESIDENT'** (and signature), **ANNEX(ES)** (for technical matters).

Note that declarations and protocols are not included; these belong to international law texts, which include EU primary treaty texts, not discussed here. We can now briefly consider the various parts of the act.

Title

The first element is the title of the act. This brings one immediately face to face with how to construct the title and its relationship to the rest of the act. What is the text to be called and how to decide? One can start by looking at past examples in the same domain and see what was done there. One can consult the drafting guidance. A title is constructed in a rigid way: type of act, name of enacting bodies, year, number of the act and indication of the treaty, date of signing (inserted at the end) and the subject matter. This latter is the most difficult to decide. How short or how long? Which might be best of the following: (a) 'Directive on wild animals', (b) 'Directive harmonising Member State legislation relating to wild animals', (c) 'Directive introducing common provisions aiming to protect, under certain conditions, wildlife roaming within the territories of the Member States'? It all depends on what the act is doing. As a rule of thumb the title should be in line with the opening articles on defining the scope and subject matter.

Citations

Readers who want to identify the legal foundation of the act and the compulsory procedures and consultations look at the citations. If there is an omission here the act could be defective in form and declared void by the courts. So it is important to

make sure the essential information is present. The language is formal and minimalist (Guideline 9 and the JPG), and there is no verb.

Recitals

Guideline 10 states: ‘The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations.’

Recitals are often misunderstood (for a legal view on recitals see Klimas & Vaičiukaitė 2008). They do not form part of English common law drafting. It is worth emphasizing that the core contents of an EU legislative act are in the enacting terms which contain the ‘hard’ conditions and obligations. Everything to be covered in terms of the policy wishes, set within the legal context, should be included in the articles of the enacting provisions. It is good practice to adopt the idea that the text stands, or falls, solely on the basis of the articles, together with technical annexes, if any. Thus, the aim is to deal with every aspect in the articles. The recitals should be seen against that background. They fulfil a different role. English common law legislative practice is to reduce recitals to virtually zero in the interests of precision of legislative drafting and control over meaning and ways of (not mis)reading the text. EU practice, deriving from civil law traditions, and international law, is different.

The recitals are subordinated to the articles; for example, the definition of terms is primarily in the articles. Definitions apply throughout the whole text. It is bad practice to insert definitions in recitals and not in the articles as there should not be uncertainty as to their status. The articles contain normative provisions, the recitals do not. It is important to mark clearly through the drafting of the recitals their difference in status and function. This is done, in particular, through the use of verbs such as *is/are* to indicate background facts and modal verbs such as *should* to indicate the policy intention lying behind some provision in the articles. By adopting this approach, the articles are reinforced in their role and acquire a greater degree of certainty; that is an important feature of law and legal language. The auxiliary *shall* should not be used in recitals; if there is a quotation of text using *shall*, the verb is replaced by *is to/are to* as reported speech.

There is a tendency for recitals to become ever longer and to repeat the wording of articles. These are poor drafting practices as they tend to undermine the legal certainty of the enacting terms. Is it necessary to have one hundred recitals for an act? Who can assimilate the information? What is its purpose? Why repeat a few selected articles by changing *shall* to *should*? What is the added value of the information? The text must be translated into 22 or more languages and this costs time and money.

Nonetheless, recitals are an important part of the EU act. They are used by the courts for interpretation as they can clarify the problems being addressed and the legislative intention. They provide a space for ‘flexibility’ in a multicultural negotiating environment. Such space is needed because of divergences between national interests and contexts. The texts are the product of sometimes very difficult negotiations. It may simply not be possible to achieve ‘hard’ rules in articles on a topic, or

there may be a minority opinion which needs to be reflected and recorded somewhere. Guideline 10 says there should be no 'political exhortations' in recitals, but it is frequently difficult to adhere to this completely in practice.

Enacting terms

The enacting terms (articles) are constructed in line with the Interinstitutional Guidelines (Guidelines 12 to 17), the Joint Practical Guide and internal drafting manuals. The enacting terms are binding, contain normative provisions and should follow a standard structure: subject matter and scope, definitions, rights and obligations, provisions conferring implementing powers, procedural provisions, implementing measures, transitional and final provisions (for examples, see past texts from the Official Journal¹⁰). The basic drafting unit is the 'article'; there are subdivisions into paragraphs, subparagraphs and points or indents; there are higher-level groupings: sections, chapters, titles (ascending order). Statements of fact are to be avoided; these are for the recitals. Political wishes are to be avoided, as are sentences without substance. The language should be as clear, specific and simple as possible; this facilitates comprehension and translation. Ordinary British English grammar and syntax is used; this is the basis on which second-language learners and linguists have been trained. The aim is to contain only 'norms' or 'commands' which state rights, obligations, powers, liabilities, procedures to follow, etc. The wording is terse and minimalist; it is written in the third person. English drafting prefers active voice rather than passive voice and concrete expressions rather than abstract expressions. The terminology is drawn from the policy domain as well as EU technical legal terms and expressions. *Shall* is used to convey obligations, but one should be aware that there is a trend in some legal systems that have English as their official language to use the present indicative instead (see Williams 2007). Practice may shift in that direction, but *shall* has value in a multilingual context as its function is well understood as normative and it is a clear and unambiguous sign, whereas the present indicative already has a factual signification and there could be ambiguity. This is an argument for retaining *shall*.

One can say much more on the drafting of articles, but an issue which often arises concerns the relationship between the articles and the recitals. Suppose we have the following recital: *'Member States should take steps to ensure that domestic cats and dogs are treated humanely.'* Either this is just an empty political wish, or it introduces an article. That article might read: *'Member States shall ensure that cats and dogs are treated humanely by adopting the following measures: (list the obligations here).'* The discourse styles of articles and recitals are different, but they are connected through context and intention; they form a whole.

Annexes

Annexes contain technical information. They have no predetermined structure. It is entirely a matter of convenience, logic, clarity and efficiency which dictates how

¹⁰ <http://europa.eu>.

they are constructed. The only point is to ensure an article validates them by reference (Guideline 22).

4. Language points

Linguistic aspects have already been touched on. The legislative text is a linguistic product and the art of drafting consists in the expert use of language to achieve clear and precise objectives. Mastery of English grammar, morphology, spelling and syntax is essential. Prior training on writing legal texts (in any language) is an advantage, especially in the EU multilingual environment where the English version in the end forms just one out of many language versions. Sometimes a translated text is clearer and more elegant and precise than an original as the translator can decipher the intention and express it more clearly.

The text is a legal act. It uses legal language and legal concepts. It is fitted into an existing legal and legislative structure and has to be in harmony terminologically with the rest of that structure. There should be no conflicts of interpretation about 'how to act' as legal rules are essentially 'binary' in the sense that a rule either applies or does not apply to any given facts. There can be conflicts between rules that apply and impose opposing obligations (overlap), which require solution through deciding which rule prevails (role of the courts) and there can be gaps or 'black holes' where there is no rule on a topic and so an uncertainty exists as to how to act, which can mean making reference to deeper level principles in the legal system (again a role for the courts). The drafter constructs a 'jigsaw puzzle' of elements drawn from the policy and legal briefings, fitted into the legal context and avoiding overlaps and 'black holes'.

Discourse environment

EU language looks odd to outsiders. There are reasons for this which emerge when one considers the context and how the texts are produced. EU language can be thought of as a separate type of discourse from national language. The roots are in national language, law and cultures, but the result is a new synthesis, with its own features and reference points. English EU legislative texts are not written in UK legislative style. The words and expressions (terminology) have an EU meaning, taken from context. EU discourse structures are different; they are influenced by multilingualism and multiculturalism. This is difficult to understand at first. Nonetheless, efforts should be maintained to keep the EU language as close to national language as possible and to follow the development of the national language. In that respect EU language is a specialized dialect of the national discourse. This point is important for transposition into national law. Another factor is that EU law tends towards a higher level of generalization (and therefore abstraction) in order to accommodate all the national variations on a matter. This may perhaps be a defining feature.

Style

There is a recognizable EU style, characterized probably by hybridity: cultural hybridity, linguistic hybridity, civil law/common law hybridity, conceptual and se-

mantic hybridity between member state traditions and between international legal culture and national legal culture. The style is simultaneously familiar and alien, as perhaps befits something which is culturally new. It is still undergoing change and evolution and has not yet achieved the stability of national legal systems in terms of style and method. That means that there is scope for the personal style of individual drafters, set within the EU legal and linguistic context, but the element of personal style is diminished by virtue of the extent to which a draft text may be amended and rewritten through the legislative procedures; common law drafters may have more control in this respect; they work within a single cultural context and their texts are the end product. In the case of EU directives, the text itself can be seen as a set of detailed instructions for the creation of new national law through transposition. That function necessarily has an effect on language, the drafting and the style.

Thus there is arguably a recognizable EU legislative style which derives from a civil law culture of drafting, adjusted to common law influence, and adapted to the EU multilingual, multicultural context and the need to find compromise solutions that can work for everyone. This leads to 'creative ambiguities', to careful definitions of terms, to higher levels of generalization in terms and concepts, to adjusting the terminology to reflect relevant national terms, in order to facilitate transposition. Idiosyncratic terms connected too closely with one or another legal system need to be avoided as they create problems for other languages. There tends to be considerable use of standard formulae, which have the advantage of being pre-translated and provide a certain degree of uniformity across different texts for the same thing (for example, recitals on subsidiarity and committee procedures). There is no EU 'Interpretation Act' and the standard formulae partially fill the gap.

There is considerable variation in style across domains and types of text, as can be seen by perusing the Official Journal. For example, a directive on gender equality is not written in the same way as a text setting out common customs tariffs. They are different genres. A particularly specialized category is that of amending texts which follow very precise methods in order to mark clearly text which is being repealed, text which is unchanged, text that constitutes new insertions and additions, and the text which is operating these actions (this requires very clear mental visualizations of the different levels of text). Technical guidance is available from the Council Manual of Precedents in respect of EU ordinary legislative texts. Later on, after many amendments, legislative texts are consolidated into a single new version; in multilingual EU jargon this is termed 'codification'.

Another aspect of style as regards English is that the syntax and certain terms are occasionally 'adjusted' to assist other languages (or written by non-native speakers who apply their approach to the English language). One example is sentence syntax, where a translator's pastime can be to detect a 'ghost' language behind an English text; another concerns individual words: 'action' pluralized to 'actions'; 'goods' singularized to a 'good' (French: *un bien*). The purist shudders, but the multilingual pressure is great. There have been many neologisms: two early ones were 'sheepmeat' and 'pigmeat'. And thus the familiar English language starts to look slightly alien; it is the same for all the EU official languages. Words are used in different ways. The drafter must be attuned to this. By being consistent in the use of

terminology the linguistic uncertainties are kept at as low a level as possible. Lower-ranking texts need to use the terminology of higher-ranking texts. Non-native drafters and revisers of English texts need to check regularly with native speakers to ensure that their texts remain 'on track'. Sources of guidance are also available, notably the Interinstitutional Style Guide.¹¹

Writing for translation

It is important for a drafter to be aware that the text will be translated into over twenty other languages. The translators follow every word and nuance. They see the mistakes. They worry over the ambiguities. Keeping sentences short and simple helps them. Their translations will have the same value as the source text. They can help the drafter avoid errors (Piehl & Vihonen 2003). Drafters and translators should be aware that older English texts themselves were translations and terminology may not always be consistent across acts. They should also check for possible ambiguities in the text. This means that no single EU text stands alone; it needs to be seen in context with the other language versions. The EU Court of Justice looks at many language versions to determine the meaning of a piece of text.

Multilingual context

The multilingual context has been repeatedly emphasized above. Discourse and terminology are adapted in ways which have already been mentioned. Guideline 5 advises against using concepts specific to any one national legal system. It should always be considered that the word will be translated into other languages. For example, if a word like *trespass* from English law is used in an EU text (unlikely because it relates to concepts of property, and property is broadly excluded from the scope of EU law – although consider 'intellectual property' rights), the word will be stripped of its specialized technical English legal meanings, will be translated, and there will be 23 (or more) equivalent terms across languages to convey the concept. The meaning of the term becomes connected to the terms used in the other languages and the EU context; that may result in a significant shift from the original technical legal English meanings. When it comes to transposition, for example into UK national law, the English word should be read and carried over into national law in its EU meaning and the English legal meaning should not be read into the EU term. This can be a difficult concept to manage as there may not be alternative words available for the national drafter to mark the distinction. It is one of the problems of transposition (see below).

Revision and amendment

The text will be revised and amended throughout the legislative process. The important factor is to maintain coherence and consistency. The original drafter should be able to stay with the text until the end.

¹¹ <http://publications.europa.eu/code/en/en-000100.htm>; for English style, see also, for example, The Economist Style Guide.

Consolidation and codification

Acts are created and then amended. When an act has been amended many times all the versions are often merged into a single new text setting out the whole combined text: this is 'consolidation' in English language. In EU language this is 'codification'. It is a 'multilingual' EU term. It is an example of how EU terms can diverge from national language. For the drafter, it is important not to change and 'improve' the previous language in texts being codified without good reason, because to change an EU text which is the foundation of national law may 'destabilize' it inadvertently by changing the base. Here we see the legal architecture: national laws constructed on a foundation of EU law.

Transposition

Transposition of EU law (e.g. directives) into national law is a delicate and complex matter. It involves intra-lingual translation from EU language to national language (consider the example given above). It is difficult for the EU drafter to know in advance where transposition problems might lie, so it is mainly a matter of sensitivity when messages are received from the future transposers while a text is going through negotiation and amendment. In practice it can mean adjusting the choice of terms used, or the insertion of definitions, so as to facilitate subsequent transposition.

Interpretation by users and the courts

The act is being drafted to be used as a tool and as an instruction to tell persons what to do. They learn their rights and obligations by reading, interpreting and applying the text. It must be drafted with that in mind. Reading is done by people from all cultures and backgrounds. They will bring different ideas to the reading of the text. This can involve misreading the text. The job of the drafter is to eliminate possible misreading. This, however, raises the question of the addressee of the text: general public, specialists, national government departments? The text needs to be adapted to the user (Gallas 1999a, 1999b). When a text is interpreted by the courts in the context of a dispute, it is done according to judicial methods. This may lead to interpretations which were not intended or expected by the legislator. Background information on past judicial rulings and the approaches of the courts should be sought from a legal adviser if it could influence the drafting. In particular, ambiguous wording in a text creates such a risk.

Problem words and expressions

One can categorize words and expressions in various ways. Thus there are many technical scientific, economic, industrial, agricultural, budgetary, etc., terms which are specialized to their domain and which are known to the experts. Then there are the more 'legal' types of word and expression which appear in legal texts; typically these relate to power relations, duties, liabilities, time periods, committee procedures, reviews and reports and linkages to higher-ranking or equal-status texts which are being implemented, supplemented, extended, excluded, and so on. This is

the language of the legislative ‘vehicle’ which contains and expresses the policy message. This language is impersonal, written in the third person, and it contains many hypothetical situations and says what the rule for conduct is in those situations. The message is transmitted through articles and the articles may be made up of paragraphs, subparagraphs, sub-subparagraphs, indents, lettered or numbered points, and so on; there can be many levels below that of the article. In a particular context in a text it is frequently necessary to make references from one part of the text to another, to indicate, for example that there is an exception. There are efficient and less efficient methods for making such internal references; an efficient method is to state the exact location (for example: ‘referred to in Article 5’). An inefficient method, and therefore to be avoided in general, is to use one of the following words: *aforesaid*, *said*, *abovementioned*, *aforementioned*, *preceding*, *foregoing*, *succeeding*, *following*, *above*, *below*, *herein*, *hereinafter*, *hereinbefore* (see Thornton 1987). These terms tend to be vague and imprecise and the reader cannot always be sure of what is being referred to or where the reference is to be found in the text, unless it is short and uncomplicated. If inserted they must also be translated, so the uncertainty is spread to all language versions.

There is also a range of words which now serve no particular purpose. For example, certain terms such as *hereby*, *whatsoever*, *wheresoever*, *whosoever* are now regarded as archaic and inapt for modern drafting. They are insufficiently precise for EU drafting and one cannot be sure of their effects when reproduced across over twenty languages in parallel. Other types of words to avoid are of the ‘emotive’ type, such as *good*, *bad*, *nice*, *clever*, *stupid*, *truly*, *really*. These terms reflect personal value judgements and legal texts seek to be objective, while allowing for individual perceptions and decision-making, but in such cases there are procedures, methods and criteria for the exercise of discretion, so that the courts can check afterwards through judicial review. Another category of words to avoid is slang and low register expressions such as *bloke*, *chap*, *guy* for references to male persons.

Sometimes the anxiety to make something clear leads to introducing reinforcing words. An example of this for EU directives is the date by which the national law has to be made to conform: ‘Member States shall implement this Directive on or before 10 July 2010 at the very latest.’ First, the word ‘very’ adds nothing; second, one could replace ‘on or before’ by ‘by’, which is simpler and has the same result; third, the words ‘at the latest’ can be deleted as they also add nothing. Thus one can just say: ‘Member States shall implement this Directive by 10 July 2010.’ This is simpler to translate and has the same legal effects. A lot of drafting revision can consist in pruning out unnecessary words that serve no added purpose. The skill, however, lies in deciding whether they do or do not serve a purpose.

More complicated are terms such as *without prejudice to*, *notwithstanding*, *in derogation from*. These are technical linking terms whose function is to organize the hierarchical relationship between different articles or paragraphs of articles. With them we enter into the organization of the text and its various component parts, as well as the fitting of the new text into the existing background legal system. Thus, there may be a general rule against hunting a certain species of animal, but there may need to be an exception in certain circumstances where it may endanger

human life through its actions. This is done by stating the general rule and then stating the particular situation of exception, typically by starting a paragraph with words such as *without prejudice to*, *notwithstanding*, *in derogation from*. Where these words are used they should refer to the precise article, rather than just say 'without prejudice to the prohibition of hunting ...'. The text has to be clear in over 20 languages. Ambiguity needs to be avoided wherever possible. Some languages, notably German and Slavonic languages find it difficult to reproduce ambiguity and are frequently forced to make an interpretation. This derives from the structure of the language and its system of inflection; one is obliged to indicate the exact relationship between each part of a sentence. The EU drafter in English needs to be aware of that. This is what it means to draft multilingual legislation.

5. Conclusion

Drafting is a complicated activity requiring training and experience and it is not possible to give a full description of EU drafting practice in a short paper. Yet it is an important activity. European integration is founded on legal texts. If the texts are clear and well drafted, then everyone has an easier time. If the texts are not well drafted, it is a source of confusion, complication, misunderstanding, delay and expense. So good drafting saves money.

The emphasis in this paper has been structural and linguistic. Legal points have been intentionally backgrounded, as evidenced by a minimal reference to case law and treaty articles. EU drafting has been selected as it is an area where non-native speakers of English regularly draft and revise texts in English.

Some practical suggestions have been made, but it is for the drafters to make their own decisions and write in their own style, thereby contributing to the growing written legal discourse of the European Union.

Finally, it should be emphasized, yet again, that although the text is being drafted in English the final product is multilingual (Robertson 2009).

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