

SUGGESTION FOR A NEW INTERINSTITUTIONAL AGREEMENT ON EU REGULATION

Regulation in the EU is currently governed by a complex patchwork of rules, principles, agreements, guidance and mere convention.

The rules are spread between the Treaties, the Rules of Procedure of the European Parliament and the Rules of Procedure of the Council and some EU legal acts. Various principles have been laid down by the Court of Justice of the EU. The number of Interinstitutional Agreements and Joint Declarations is approaching double figures. The EU institutions have issued numerous guidelines and manuals, some publicly available and others not, and online drafting guidance, such as LegisWrite. A plethora of Commission Communications cover diverse aspects of regulation at EU level. And still, much is left to convention, tacit agreement or more or less consistent practices of the EU institutions.

That patchwork constitutes a barrier to those seeking to understand the regulations, directives and decisions that make up the EU acquis. The acquis fills some 150 000 A4 pages of the Official Journal according to experts who worked on translating it into Croatian in 2013. That is daunting enough. But bearing in mind the warning by the Court of Justice of the EU that to understand an EU provision it is necessary to compare all the language versions,¹ users are confronted by a total acquis of some 3.6 million pages. Some 3 million users access EU legislation on EUR-Lex each month (Source Publications Office 2014). Many must be left bemused by its volume, complexity and alien terminology.

The Commission's proposal in May 2015 for an Interinstitutional Agreement on Better Regulation (COM(2015)216), which is to be a cornerstone of an EU agenda of "Better Regulation for better results" (as explained in COM(2015)215), would leave in place that confused and confusing patchwork with minor updating and a handful of additional provisions. It is wholly inadequate for today's needs, as has been explained in the Institute of Advanced Legal Studies Think Tank on Law Reform: Robinson Report 2015.²

The European Parliament, the Council and the Commission should instead replace that patchwork by a new Interinstitutional Agreement (IIA) with a single coherent set of rules and guidance fit for the 21st century covering all aspects of EU regulation, including the approach to regulation and the preparation, drafting, publication and interpretation of legislation.

The underlying concept is that all the basic principles of EU regulation should be laid down by the legislative authority in agreement with the Commission and made accessible to all those concerned by EU regulation and to EU citizens generally.

A uniform approach should be taken to each aspect. All the basic principles of EU regulation should be set out in the IIA itself. Detailed rules and guidance may then be set out in annexes to the IIA, or in joint guidelines or ancillary texts agreed by the legislative authority and the Commission. As much as possible should be expressly set

¹ See the judgment in Case 283/81 *CILFIT* [1982] ECR 3415

² http://ials.sas.ac.uk/news/IALS_Think_Tank_Robinson_Report.htm

out in the IIA and the associated texts, with less being left implicit or at the discretion of the Commission. All the present agreements and declarations should be expressly repealed.

The IIA should be divided into chapters, each dealing with one aspect of regulation. Possible chapters are:

1. General principles of regulation;
2. Preparatory work: programming, planning, consultation, impact assessment;
3. Legislative procedure;
4. Drafting;
5. Publication;
6. Implementation, application and evaluation after adoption;
7. Updating the statute book;
8. Interpretation;
9. Reporting on the IIA and review.

There should be broad consultation at all stages in the preparation of the IIA of all concerned parties, including at least the Court of Justice of the EU, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, the Publications Office of the EU, national parliaments, national administrations with expertise in regulation, those concerned by EU regulation, the academic world and EU citizens at large.

The IIA should be structured in such a way that it can be readily updated by replacing discrete parts of the content. It should be subject to a regular review.

A new standing body on EU regulation should be established, the Forum on EU Regulation (FEUR). It should be composed of representatives of all the EU institutions and of other concerned parties and should be charged with overseeing all aspects of EU regulation and the working of the IIA.

A draft outline of the possible content of the IIA is set out in the Annex.³

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³ For background see also my paper on *Drafting EU Legislation* produced at the request of the EP Legal Affairs Committee in 2012:

http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462442/IPOL-JURI_NT%282012%29462442_EN.pdf

DRAFT OUTLINE OF A NEW INTERINSTITUTIONAL AGREEMENT ON EU REGULATION

(NOTE: This is very much work in progress and the notes under each heading are merely examples of the sort of material to be included rather than an exhaustive list)

Preamble

Keep it short and move the present content of the recitals in COM(2015)216 to the appropriate chapter of the IIA

Stress the need for a clear and coherent comprehensive framework for EU regulation and set out the reasons for that need, in particular so that EU rules can be better applied and complied with and understood by business sector and the general public and because a sound regulatory policy and framework is a basis for a fair and competitive Union.

Clearly the institutions will draw heavily on the work of the OECD, in particular the Recommendation of the Council on Regulatory Policy and Governance of 2012.⁴

Where appropriate the institutions may draw inspiration from the Commission's Better Regulation Guidelines published as a Staff Working Document⁵ and from other Commission papers but the three institutions should agree all the basic ground rules, rather than leaving it to the Commission.

Chapter 1. General principles of regulation

The IIA should lay down the general principles of EU regulation such as transparency, democratic legitimacy, legal certainty, subsidiarity and proportionality and so forth (ex-recitals 1, 2 and 5 COM(2015)216) unlike the Commission's proposal for an IIA on better regulation which does not specify what "better regulation" is.

Choice of type of act: principles

Light touch, self regulation, co-regulation (see point 3.1 COM(2015)215)

Evidence based

Accessibility:

Language of legislation to be as simple as possible

Linguists should be involved

Explanatory materials to be in plain language (OECD)

⁴ www.oecd.org/gov/regulatory-policy/49990817.pdf

⁵ SWD(2015) 111 of 19.5.2015:

http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf

Chapter 2. Preparatory work: Programming, planning, consultation, impact assessment

Programming and planning

Basic principles of programming (see points 2 to 6 COM(2015)216)

Planning of legislation and planning of review and evaluation

Consultation

The ground rules for consultations should be laid down in the IIA, not in various Commission texts (see details of the present position in point 2.1 COM(2015)215).

Stakeholder consultation (see point 14 COM(2015)216)

Stakeholders to be able to provide feedback at any time (point 2.3 COM(2015)215).

Public consultation

Impact assessment

IIA should specify what impacts are to be assessed and other basics (see points 7 to 13 of COM(2015)216).

Ground rules of impact assessments should be in the IIA, not left to the Commission.

Impact assessments are to serve as the basis for ex-post evaluation

Further details can then be set out in Joint Guidelines based on the Commission's present text.

Chapter 3. Legislative procedure

Incorporate revised text of Joint Declaration of 13 June 2007 on practical arrangements for the co-decision procedure⁶

Choice of act

Criteria for choice, explanation of choice, ... (see point 20 of COM(2015)216).

Delegated or implementing acts

Ex-points 21 to 23 of COM(2015)216

Proposal

Commission to give serious consideration to request for action from EP or Council, ... (ex-point 4 of COM(2015)216).

What must be in a proposal: draft text of act, explanatory memorandum, content of memorandum, ...

All suggestions for changes to the Commission proposal to be in the form of text to be inserted in the proposal (ex Rules of Procedure EP and Council).

Withdrawal of proposals

Procedure for taking account of views on the proposal

National parliaments

⁶ OJ C 145, 30.6.2007, p. 5.

Stakeholders (see point 15 COM(2015)216).

European Economic and Social Committee and Committee of the Regions

Coordination (see points 24 to 29 COM(2015)216)

Trilogues (see Joint Declaration on practical arrangements for the codecision procedure).⁷

Finalisation - Role of lawyer-linguists

Signature

Chapter 4. Drafting

1. Set out a clear and strong commitment to drafting quality in the IIA, for example:

EU legislation must be clear, consistent and precise.

2. Establish basic principles for drafting in the body of the IIA:

Ex-Guidelines 1 to 6 in the 1998 Interinstitutional Agreement on common guidelines for the quality of drafting Community legislation⁸ but thoroughly revised and expanded to include for example requirements identified in COM(2015)215 such as in point 1⁹ and point 3.3¹⁰.

3. Rethink the way that an EU act is presented to make it accessible to modern readers, in particular on the internet.

4. Set out in an annex to the IIA rules relating to parts of an act and so forth which must be comprehensive, covering also the enacting formula and the closing formulas and as detailed as possible. In particular, more detailed guidance should be given on the different provisions in the enacting terms, such as provisions on:

implementing and delegated acts;

transitional measures;

reporting obligations and monitoring and evaluation;

start of validity (see point 30 COM(2015)216);

transposition (see point 30 COM(2015)216);

the end of validity of an act.

⁷ OJ C 102E, 24.4.2008, p. 111.

⁸ OJ C 73, 17.3.1999, p. 1.

⁹ "it is so important that every single measure in the EU's rulebook is fit for purpose, modern, effective, proportionate, operational and as simple as possible. Legislation should do what it is intended to do, it should be easy to implement, provide certainty and predictability and it should avoid any unnecessary burden. Sensible, realistic rules, properly implemented and enforced across the EU. Rules that do their job to meet our common objectives - no more, no less".

¹⁰ "legislation should be comprehensible and clear, allow parties to easily understand their rights and obligations include appropriate reporting, monitoring and evaluation requirements, avoid disproportionate costs, and be practical to implement" and "Commit to better legal drafting so that EU laws are correct, comprehensible, clear, and consistent - so that everyone understands their rights and obligations easily and with certainty".

Chapter 5. Publication

The IIA should set out the basic rules on publication of EU legislation and information about EU law to provide all users with transparency about the publication process and the responsibilities of the Publications Office of the European Union.

Since the Publications Office is an interinstitutional office serving all the institutions of the European Union (under Decision 2009/496/EC, Euratom) it should be the primary source of objective information from the EU about EU law, under the authority of the legislative authority. The websites of the Commission, invaluable though they are, should be clearly distinguished as representing the views just of the Commission.

The IIA should set out rules covering (and making a clear distinction between):

1. formal publication in the Official Journal and on EUR-Lex of the official texts of the Treaties and of the Official Journal (Regulation (EU) No 216/2013);
2. provision of information about EU law, such as databases, summaries and consolidated texts of amended acts.

It is time to rethink the whole approach to publication of EU legislation to move it into the 21st century. Millions of ordinary EU citizens access EUR-Lex each month. Small businesses now want to consult the EU rules for themselves rather than using the intermediary of an expensive lawyer every time. The approach to publishing EU law and legislation must be updated accordingly to make it readily accessible to and intelligible to users without specific legal expertise.

In addition to the formal Official Journal publication of all acts there should be an internet version of all major legislative acts assisting the user with more explanation and clearer internet-based presentation making full use of hyperlinks.

EUR-Lex should give more prominence to better explanatory material on the nature of the different types of texts published in the Official Journal and the bodies competent to adopt them and on the structure of an EU act.

EUR-Lex should include databases of definitions and abbreviations in EU legislation and terms that have been interpreted by the Court of Justice of the EU.

The IIA should set out rules on correction of EU legal texts and on the treatment of confidential texts.

Chapter 6. Implementation, application and evaluation after adoption

Ex-post evaluation (see points 16 to 19 COM(2015)216)

Member States to apply EU acts swiftly and correctly and give citizens appropriate information (see points 30 and 31 COM(2015)216)

Member States to provide data (see point 33 COM(2015)216)

Chapter 7. Law reform: consolidation, codification and recasting, repeal

Consolidation (overlap with Chapter 5 on Publication)

It is the main tool for making EU legislation that has been amended more accessible and so it needs to be made as reliable, fast and user-friendly as possible.

One weakness is that it does not include recitals.

Codification

The procedure for codification should be scrapped, or at most incorporated in the procedure for recasting.¹¹

Recasting

The 2001 Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts¹² should be carefully reviewed. In particular more thought should be given to cases where the Commission proposes changes limited to just certain parts and the legislative authority wishes to reopen discussions on other parts.

In addition provision should be made for users of legislation to be given information on precisely which parts of a recast act are unchanged and which parts are new (perhaps by publishing on EUR-Lex the marked-up versions used by the institutions in the adoption process).

Repeal

The IIA should set out a basic commitment to repealing obsolete acts.

The legislative authority should establish ground rules for repeals and agree with Commission any programme for screening the acquis for acts to be repealed.

Simplification

The IIA should set out a basic commitment to simplify the acquis.

The legislative authority should establish ground rules for simplifying the acquis and agree with Commission any programme for screening the acquis for acts to be repealed. They should not simply agree to take the Commission programme as a basis (see point 34 COM(2015)216).

Chapter 8. Interpretation

The three institutions involved in the legislative process should include in the new IIA guidance on basic principles of EU legislation and how it is to be understood¹³ such as:

- the status of the various language versions;
- the status of components of EU acts such as titles, recitals, headings to articles, annexes;
- the status of statements in minutes or declarations relating to acts;
- the use of definitions and the role of definitions in other EU acts;
- references to other acts (static and dynamic references);

¹¹ See the IALS Think Tank on Law Reform: Robinson Report 2015, point 3.
http://ials.sas.ac.uk/news/IALS_Think_Tank_Robinson_Report.htm

¹² OJ C 77, 28.3.2002, p. 1.

¹³ The only act at present giving guidance on interpretation is a 1971 Regulation on how time-limits are to be calculated, Council Regulation No 1182/71.98 (OJ L124, 8.6.1971, p. 1).

basic concepts such as penalties and sanctions, entry into force and application, transposition and implementation, repeal and withdrawal, and so forth;
effect of CJEU rulings on legal acts
publication and consequences of failure to publish;
consequences of repeal of an act (for example on other acts based on the repealed act).

Chapter 9. Reporting on the IIA and review

A specific reporting and review procedure should be established unlike the weak monitoring in the Commission's proposal (see points 35 and 36 COM(2015)216).

The IIA should set up a new standing body on EU regulation, the Forum on EU Regulation (FEUR).

The FEUR should be composed of representatives of the legislative authority and the Commission, as well as from the Court of Justice of the EU, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, the Publications Office, national parliaments, national administrations with expertise in regulation, those concerned by EU regulation, the academic world and EU citizens at large.

The FEUR should serve to bring some order to and to keep updated the present bewildering array of rules, principles, agreements, declarations, guidance and conventions. It should also have oversight over the several boards and panels in the field of EU regulation, and the various programmes, initiatives and websites in existence or announced.

The Commission should draw up an annual report on regulation in the EU to be completed by a set date (perhaps end of February). It should be sent to the national parliaments as well as the EP and Council.¹⁴

The report should be drawn up according to a prescribed format ensuring that each chapter of the IIA gets due coverage. It should be accompanied by detailed statistics according to a standard schema.

The other institutions and the Publications Office should also submit reports on their related activities by the same deadline.

The FEUR should coordinate the annual reporting exercise and make sure that it does not degenerate into a box-ticking exercise but is the occasion for a real appraisal of regulation in the EU and a broad debate amongst all parties concerned.¹⁵

¹⁴ See the IALS Think Tank on Law Reform: Robinson Report 2015, point 2.
http://ials.sas.ac.uk/news/IALS_Think_Tank_Robinson_Report.htm

¹⁵ See also the recommendation by the Mandelkern Group: 'As of 2003, the Commission should produce an annual report to the European Parliament and to the spring European Council on developments in better European regulation by the EU and each Member State, bringing together existing reports in overlapping areas (e.g. Better Lawmaking, better regulation elements of the Cardiff report)', Mandelkern report, Action Plan, General, first paragraph.