# Understanding in order to learn: Comparing features and performance of three legal drafting systems in the EU

**Report prepared as a part of the EU-Brazil Sector Dialogues**

**FINAL VERSION**
**17 May 2013**

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# ACRONYMS

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|---|---|
| CEJUR | : Legal Centre of the Presidency (in Portugal) |
| DGJP | : General-Directorate of Justice Policies (in Portugal) |
| ECJ | : European Court of Justice |
| EU | : European Union |
| ECHR | : European Court of Human Rights |
| DILA | : Directorate of Legal and Administrative Information (in France) |
| IIA | : Inter-Institutional Agreement |
| ICT | : Information and Communication Technologies |
| ISO | : International Standards Organisation |
| IT | : Information Technologies |
| JPG | : Joint Practical Guide (of the EU institutions) |
| MEP(s) | : Member(s) of the European Parliament |
| OECD | : Organisation for the Economic Cooperation and Development |
| OJ | : Official Journal |
| OPOCE | : Office for Official Publications of the European Communities |
| REACH | : Registration, Evaluation, Authorisation and Restriction of Chemicals |
| SGG | : General Secretariat of the Government (in France) |
| TEU | : Treaty on European Union |
| TFEU | : Treaty on the Functioning of the European Union |

# EXECUTIVE SUMMARY


- As a contribution to supporting the EU-Brazil Sectoral Dialogue on "Regulatory policies", this paper looks into approaches to legislative drafting in selected European executives: the European Commission, France and Portugal. The purpose of the paper is to highlight practices and possible lessons for Brazil in its commitment to improve legislative quality.
- Legal drafting – or "legistics" – is widely considered as being integral part of the regulatory reform toolkit. Deeply rooted in the rule-of-law principle, legal drafting is concerned with the intelligibility of laws and regulations. Legal acts must be fully readable and comprehensible – i.e. they shall be clear and expressed in a simple and precise ("plain") language; due attention shall be paid to internal and external legal and semantic consistency; and consideration shall be given, wherever appropriate, of the multilingual contexts.
- Arguably more than any other regulatory instrument such as impact analysis, public consultation or administrative simplification, legistics is visibly influenced by the legal tradition informing the decision-making context at hand. While the pure "common law" and "civil law" features are less and less evident in modern world jurisdictions, they significantly shape not only the style of legislation, but also the way legislation is communicated, interpreted and complied with.
- The extent to which legal acts are accessible to the wider public is a further crucial junction in addressing legislative quality. "Good accessibility" is not merely about setting up a well-performing technical machinery. Its relevance is vital to the very credibility (and hence: the legitimacy) of the whole legal and political systems, because under the rule-of-law such systems can operate fully only on the presumption that everybody is informed of their rights, their duties, and the law. Credibility, in turn, creates stability, trust, and confidence. As such, it can significantly contribute to boosting economic performance.
- The diffusion of ICT has immensely facilitated practices that enhance accessibility. Electronic databases are commonly available for free across EU Member States; courts accept electronic versions of legislation as authentic acts; and IT-assisted, transparent processes for the development and enactment of legislation are largely deployed by government and legislative assemblies.
- The paper reviews the selected case studies from a number of perspectives, including the underlying legislative culture; the measures undertaken over the past two decades to improve legislative quality; the institutional and administrative arrangements; and the initiatives taken to enhance capacities in specialised legal drafting through training.
- The analysis highlights a possible gap between centralising top expertise for legal drafting while maintaining primary drafting responsibility in the (sectoral, policy-oriented) line departments. Investment in improving the very first drafts of legislative proposals appear to be likely to pay off later on throughout the various phases of the legislative process, including at the moment of implementing and enforcing legislation.

- The introduction of guidance material is considered an indispensable but not sufficient condition to diffuse adequate know-how across the administration. Also for those jurisdictions where dedicated guidelines have been introduced since long time, criticism persists about the real impact of such guidance material and the overall quality of legal texts. Capacity-building is likely to be maximised through continuous training and sharing of experience. In this respect, inter-institutional agreements as well as opportunities to interchange among various levels of government are critical success factors.
- As hinted above, the legislative quality domain is one of the areas most prone to rapidly benefit from the diffusion and sophistication of modern ICT. This is particularly evident when it comes to computer assisted drafting (which allows for format standardisation, language correction and speedy transmission) and to online accessibility of official gazettes and ancillary databases.

# 1. ABOUT THIS REPORT

## 1.1. CONTEXT

This paper is a deliverable of the Dialogue on "Regulatory policies", a strand of the Sector Dialogues between the EU and Brazil.[1] This Dialogue envisages promoting a high-level international event in which senior EU and Brazilian civil servants and international experts discuss experiences with RIA in the EU. This paper serves as a background study for that discussion, to be held in Brasilia on 23-24 May 2013.

The paper fits the overall commitment by the Brazilian Government to raise the quality standards of the legal acts prepared and adopted at the federal level. Legal drafting is considered in this context as one of the strands of actions that are believed to yield the most visible fruits for both private sector end-users and citizens in Brazil as well as the country's international partners.

## 1.2. PURPOSE AND SCOPE OF THE REPORT

This paper highlights practices and possible lessons for Brazil that can be drawn from approaches to legislative drafting as experienced in selected European jurisdictions. Its purpose is to identify key features for each of the systems analysed, presenting the underlying mechanisms that characterise legislative drafting in the various institutional, administrative and legal contexts.

The case studies principally focus on the role of and the measures undertaken by the executive branch in ensuring legislative quality. The input provided to legal drafting by legislative bodies and the latters' control over the quality of the legal acts fall outside the scope of this report.

A number of elements constituting the peer-review and benchmarking approaches will be the basis of the paper – embodying thereby the spirit and purpose of the EU-Brazil Sector Dialogues.

## 1.3. METHODOLOGY AND CASE STUDY SELECTION

"Benchmarking" good practices fosters mutual learning processes and contributes to convergence of international practices from a "race-to-the-top" approach. The identification of best practices goes beyond simple comparison of indicators as it deals with the possible factors and mechanisms underlying differences in performance. A best practice can be identified only within the context at hand.

As it is typical for every comparative analysis, the choice of the case studies must reflect determinate assumptions and criteria. This has also been the case for this paper, where the underlying assumption was that no "best legisitcs model" exists *a priori*, and it is not possible to

[1] See http://www.dialogossetoriais.org/.

imagine a simple "plug-and-play" of European – and, for that matter: international – good practices into the Brazilian legal drafting context.

Neither administrative nor regulatory practices can easily be defined in terms of input and output, and performance is affected not only by national particularities and international trends, but also by specific features of each organisational entity. This peer review hence supports the analysis of organisational settings; regulatory standards; as well as operational practices. As a result, the paper is based on a structured design that not only describes the good practices, but above all includes the mechanisms that allow causal linkages yielding to success reform outcomes. The case studies are presented in such a way that they highlight why a certain legistics system works the way it works in a given jurisdiction.

This study compares legistics practices in the executives of three jurisdictions – France, Portugal, and the European Union:

- One major criterion for the selection of these case studies was looking into jurisdictions with civil law tradition – one that fundamentally characterises the Brazilian legislative culture, too. While modern legislative contexts can be classified less categorically under a pure common law or civil law archetype,[2] France (together with Spain) is considered one of the founding legal systems of the civil law tradition. The Portuguese system is also deeply informed by the same legal family. The civil law traits of the EU may well be less evident than in the other two national cases selected, both for its unique, supranational character and for the influences in its *modus operandi* brought about by the various EU enlargement waves. The fact that the European Commission must issue legislative proposals in more than 20 official languages which then need to be transposed and implemented in soon 28 EU Member States further contributes to developing a less pure civil law approach at the EU level. Nonetheless, the Commission is often described as a polity conceived and rooted in the French administrative and legislative culture and its consideration in this paper opens up the interesting perspective of how malleably legislative drafting practices can (must) evolve in mixed contexts.
- A further rationale for selecting the European Commission is the acknowledgement that legal drafting agreements between the EU institutions are among the first regulatory reform arrangements signed at the EU-level, arguably setting the path for reforms in other better regulation areas such as impact assessment, public consultation or risk management practices (Hummer, 2007). This can provide inputs on how to organise a comprehensive regulatory reform agenda which encompasses both formal legal improvements and changes in elaborating the substantial aspects of regulatory decisions.
- Including the case of Portugal, finally, allows for presenting the unique combination of a European jurisdiction working in the same language as Brazil. Investigating influences of Europeanization in the Portuguese system may bring stimulating insights for reflection in Brazil.

A final note refers to the sources used in this paper. The analyses are grounded in a variety of sources consisting of primary information as available on official websites; and secondary literature, for instance drawing from official (OECD) reviews as well as academic articles and papers.

[2] See the discussion at Point 2.2 below.

## 1.4. STRUCTURE OF THE REPORT

Chapter 2 of the paper introduces legislative drafting as an integral part of the international regulatory reform toolkit, putting emphasis on the necessity to consider the overarching context as a key determinant for the understanding of legislative style.

Further to the research design and methodological assumptions outlined above, Chapter 3 will then take account of the following issues when presenting the key features of legisitcs in each case study jurisdiction:

- the domestic legislative culture;
- past and current forms of practices with legal drafting;
- the allocation of roles and responsibilities; the organisation of the oversight function; and the adoption of guidelines; and
- the deployment of capacity-building arrangements.

Finally, the paper synthetizes the main lessons which Brazil may consider when consolidating its efforts to reform legislative drafting at the federal level.

# 2. INTRODUCTION

## 2.1. LEGAL DRAFTING AS A PART OF THE REGULATORY REFORM AGENDA

A number of factors well explain the growing concern among both developed and emerging economies with the quality of regulation.[3] The goals have ranged from enhancing "good governance" and improving the transparency and participatory character of decision-making; to boosting competitiveness through better operating conditions for private sector development; and raising and maintaining standards for public health and safety and environment protection. In Europe particularly, initiatives have fallen under the label of "Better" and now "Smart Regulation" strategies, taking place at both the EU and the national level.

One of the common features of the many regulatory reforms programmes that have mushroomed over the past decade is the ambition to improve the overall quality of decision-making and it outputs, most notably of legal acts. The notion of legislative or regulatory "quality" – as much as the corollary attributes "better" and "smart" – remains however largely difficult to grasp. Dictionaries of the English language commonly define "quality" by referring to the fundamental character or property of something, most often in relation to a given requirement of standard of excellence. As noted also by Voermans (2009:64), the ISO-9000 definition of quality mirrors this interpretation of the term, therefore "legislative quality" can be defined as the extent to which legislative instruments and procedures meet legislative standards. "But then a new question emerges: what are the relevant or proper standards for […] legislation?" Voermans (*ibid.*) answers this question by sketching a number of "functions" that legislation fulfils in rule-of-law systems, and which contribute to frame its quality:

- the *constitutional function* denotes the property of legislation to both provide and guarantee the level playing field for government action;
- the *political function* of legislation refers to its property of allowing mediation among interests represented and operating in a given jurisdiction;
- its *democratic function* frames how popular participation is to be organised in the preparation, enactment or implementation of law;
- the *instrumental function* expresses the property of legislation to serve as an instrument to further public policies; while
- the *bureaucratic function* refers to the basic framework that legislation provides for the operation of the administrative apparatus.[4]

In order to perform most of these functions, legislation must meet some basic requirements. The rule-of-law principle implies meeting at least three fundamental pre-requisites to the activity of legislating.

- First, there ought to be a constitutional power to legislate, while legislative processes and legislative discretion are confined by law. Voermans (2009:66) speaks in this context of

[3] In this paper, "regulation" and "legislation" are used as almost interchangeably terms, unless excplicity specified.
[4] Further "communicative" and "symbolic" functions of legislation are to be mentioned.

"principle of legality", referring to the preparation and enactment of law according to "due procedures, not acting contrary to higher ranking laws, and [respecting] some form of accommodation to existing law".

- Second, the rule-of-law imposes on the legislator to consider the implementation and enforcement of legislation to be enacted – in Voermans' terminology this is the "principle of effectiveness".
- Finally, the resulting legislative act must abide with the legal certainty requirement – what Voermans (*ibid.*) calls the "principle of intelligibility", i.e. "the principle that legislative acts need to some extent to be readable and intelligible to their addressees."

It is on this last key feature of legislation that this paper focuses – less on other aspects of regulatory quality understood, for instance, as means to achieve net benefits for the overall societal welfare.[5] In particular, the paper makes reference to the *technical quality* of a legislative act. This notion includes the act's readability and comprehensibility – i.e. whether it is clear, expressed in a simple and precise ("plain") language; whether due attention is paid to internal and external legal and semantic consistency; and whether consideration is given, wherever appropriate, of the multilingual contexts.[6]

It shall nonetheless be noted that the overall technical quality of an act does not necessarily result from the maximisation of each one of the above-mentioned factors. For instance, seeking the simpler and "plainer" language possible may sometimes clash with the objective of guaranteeing legal certainty. It has for instance proven particularly difficult to translate existing legislation into a legally equivalent plain language version (Tanner, 2006).

When it comes to regulatory reform agendas, therefore, the very style of legislation – i.e. the way legal acts express a given message – clearly matters. Linguists and sociologists understand laws as "coded in language" (Gibbons, 1999), thereby stressing the cultural and symbolic relevance that these texts have in informing and shaping individual and societal behaviour. There is, moreover, more or less anecdotal evidence in economic and comparative literature suggesting that poorly drafted legislation does not merely irritates end-users, but it can also cause deficient implementation, lower compliance rates and complicate enforcement. While "admittedly, we know little about the way in which the form or style of legislation affects the outcomes of legislation" (Voermans, 2011:39), it is commonly acknowledged that a complex, verbose style (see Box 1) and texts full of jargon tend to create additional burdens because of the need for further legal and administrative explanation and accessibility enablers.

[5] On this aspect, cfr. "Understanding in order to learn: Comparing features and performance of four RIA systems in the EU", Report prepared as a part of the EU-Brazil Sectoral Dialogues, 17 May 2013.

[6] These are by the way defining points christallised in the EU IIA 1998 (see below), at Points 1 to 19. On the multilinguism aspect, see Voermans (2011:43-46).

**Box 1. Plain language starts from the title**

Examples may be produced in dozens from all jurisdictions, but a couple of cases often quoted from the EU *acquis communautaire* well illustrate the struggle with producing concise and clear texts – starting with the *titles* of the legal acts.

Example 1: The often-used example of a EU Regulation title of 92 words is probably an extreme:

> "Commission Regulation (EC) No 2592/1999 of 8 December 1999 amending Regulation (EC) No 1826/1999 amending Regulation (EC) No 929/1999 imposing provisional anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway with regard to certain exporters, imposing provisional anti-dumping and countervailing duties on imports of such salmon with regard to certain exporters, amending Decision 97/634/EC accepting undertakings offered in connection with the anti-dumping and anti-subsidies proceedings concerning imports of such salmon and amending Council Regulation (EC) No 772/1999 imposing definitive anti-dumping and countervailing duties on imports of such salmon".[7]

Example 2: Also recent EU laws suffer from similar shortcomings. The famous "REACH" Regulation governing chemicals has a byzantine original title:

> "Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC".[8]

That title is too long for an act affecting a vast number of economic operators across many sectors within the EU and globally. No short title is given and the short form "REACH" does not indicate the subject matter and is meaningless in most of the EU official languages.

Example 3:

> "Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91"[9]

This is commonly referred to as the "Air passengers' rights regulation", however at 45 words the official title is too long while the sector concerned is, in the English version, identified only indirectly by the reference to "delay of flights".

*Source: Robinson (2011:85-86)*

## 2.2. THE RELEVANCE OF CONTEXT FOR LEGISLATIVE QUALITY

As noted also above, when it comes to "drafting" the context does matter extensively. To illustrate, it is useful to shortly outline the elements that are commonly believed contributing to the nature, type and quality of drafting – or, in other words, to the "style" of legislation.

[7] OJ L 315, 9.12.1999, p.17.
[8] OJ L 396, 30.12.2006, p.1.
[9] OJ L 46, 17.2.2004, p.1.

Contributors to an international conference on "Style of legislation" held in The Hague in December 2009[10] have consolidated the following elements concerning style:

- *Its wording and phraseology* – The first component of style is obviously also the closest one to the language itself. The way the text is worded and phrased refers to the general exploitation of language; the definitions used; and the terminology introduced. Reference should nonetheless be made here not only to the words *per se*, as these may create vague meaning and blurred interpretations. Sometimes typography and graphics are indeed more instrumental and effective than words in conveying meaning. Even when words are used, the way they are presented and placed does have an impact on the overall reader-friendliness – for instance by using alphabetical labels, lists, boldface and italics to indicate repeals or insertions, etc. This notwithstanding, legal texts (in European jurisdictions) tend not to have often recourse to these non-verbal expressions.
- *Its structure* – The way an act is structured very much guides the user searching for relevant provisions. The element "structure" pertains not only to the way in which the legal texts are divided (e.g. in chapters, sections, etc.) and are referenced. It also refers to how a text is presented in relation to other legal acts, being them either of equal legal status or hierarchically superior or inferior. This may further help avoiding unnecessary and potentially misleading repetitions. If the structure is well conceived and the overall legal system is consistently applied across domestic and external jurisdictions, readers are easily directed towards the parts of the texts most relevant for them, thereby enhancing the overall accessibility.
- *Its legal-cultural identity* – This component of legislative style explicitly hooks the technical process of drafting with the overarching characteristics of the own legal system. The two main families that have developed in Europe (and globally, over time) over the past centuries are the "civil law" and the "common law" traditions (Merryman and Pérez-Perdomo, 2007).[11] The assumption is that the closer a legal act is with the tradition in which it is originated and applied – i.e. the stronger its identity with the legal-cultural system, the clearer and more effective it will tend to be. Legislative style can also depend on which institution is at the origin of drafting. Legislation is often hallmarked by the department or policy field it originates from and specific jargon and technical style may become a notable feature of legislation regulating a particular policy area. If that is overlooked, individual institutional practices may result in "legislative silos", despite the existence of common frameworks within the same legal tradition.

So defined, it is manifest that these three core legislative features are highly dependent on – and, in turn, they considerably shape – the language and the culture (both legal and political) of a society. A *style* of legislation that differs from the set of values, symbols and meanings that you are familiar with can generate important barriers to your comprehension of the legal act – irrespective whether the text is translated into your domestic *language*. While intimately linked, therefore, language and style are not fully overlapping concepts and they both contribute to legislative quality.

[10] The conference proceedings have been summarised by Voermans (2011).

[11] Conventionally, civil law systems are considered to be those where laws are predominantly codified, and the code rather than individual judicial decision is dominant. The primary trait of the common law tradition, by contrast, is the large development of the rule of law through judicial decision.

Against this background, it shall yet be noted that we are living a world where jurisdictions are drawing nearer under the influence of globalisation and the subsequent rise of international and transnational law. Not only domestic legislation and its distinctive features can no longer be considered in isolation. Also the dichotomy between civil law and common law system becomes progressively simplistic in modern times. They certainly reflect idealised archetypes, but it is a truism that modern jurisdictions are subject to several international and supranational (even private) legal standards, influences and courts.[12] This prompts cross-cultural, legislative interactions resulting from the imperative of implementing international legal norms through domestic rules. Economic operators and the citizens are increasingly affected by several legislative sources, informed by foreign cultures and approaches.[13] In such environment, differences in the structure and the use of language in legislation may impede the implementation or co-ordination efforts of domestic legislators. And context-specific features, instead of catalyse and stimulate quality standards, may work the opposite way.

In the case of EU law in particular, the very nature of the game makes EU and national legislation far from being self-contained. EU legislation largely relies on the national administrations for its application and implementation and national judicial authorities are primarily responsible for its enforcement. From the moment EU directives are transposed, EU law is intimately embroiled with the legal systems in the Member States, whose constitutional structures range from strongly centralised systems to federations of regional entities enjoying considerable autonomy.[14]

On the other hand, the "globalisation" trend affecting legislative drafting is particularly supported by a further determinant of legislative quality that should be added to the above-mentioned features – namely, the *legislation accessibility*. Accessibility is here understood as the way legislation is communicated, for instance through promulgation, publication, public relations, press releases, etc. Communication and forms of access may be both formal and informal. "Good accessibility" is not merely about setting up a well-performing technical machinery. Its relevance is vital to the very credibility (and hence: the legitimacy) of the whole legal and political systems, because under the rule-of-law such systems can operate fully only on the presumption that everybody is supposed to be informed of their rights, their duties, and the law.[15] Credibility, in turn, creates stability, trust, and confidence. As such, it can significantly contribute to boosting economic performance. The diffusion of ICT has immensely facilitated practices that enhance accessibility. Electronic databases are commonly available for free across EU Member States; courts accept electronic versions of legislation as authentic acts; and IT-assisted, transparent processes for the development and enactment of legislation are largely deployed by government and legislative assemblies.

[12] This argument was for instance expressed at the mentioned conference in The Hague in 2009 by Helen Xanthaki, in her contribution "Legislative drafting styles: is there really a common versus a civil law divide?".

[13] We can easily think of the implications of the Europeanisation of commerce and the reduction of barriers to the free movement of persons, goods, capital and services, in Europe especially since the creation of the Single Market. But international phenomena are equally potent, as embodied by the relevence of the World Trade Organization, the World Health Organisation or ISO standards, just to name but a few.

[14] Not to mention the economic and geographic diversity of the EU Member States.

[15] As early as in 1979, the The European Court of Human Rights (ECHR) held that "the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case". See case *Sunday Times v United Kingdom* (no 1), judgment of 26 April 1979, Series A no 30, p. 30, paragraph 49.

# 3. UNDERSTANDING THE MAIN FEATURES OF LEGAL DRAFTING SYSTEMS

Paragraphs 3.1 through 3.4 systematically present the experiences and practices in the executives of the three selected jurisdictions. The paper does not report them in country-specific fiches but rather considers the key features of legisitcs for each three case studies together. This is likely to facilitate comparison.

## 3.1. THE LEGISLATIVE CULTURE

### a) European Commission

While it has not (yet) all the features of a fully-fledged state, since the founding treaties the EU is instituted on the rule-of-law. The preamble to the Treaty on European Union (TEU) twice affirms the importance of this principle,[16] while a general right of access to EU documents is given by Article 15(3) of the Treaty on the Functioning of the European Union (TFEU).

Because its origins stem from the French notion of administrative organisation and legislative culture, the European Commission presents many traits of the civil law legislative culture. The European Court of Justice (ECJ) has for that matter used to interpret EU law differently than the literalist approach of courts in common law countries. Not only the EU Treaty, but also the EU Directives and Regulations differ from the common law statutory instruments, which do not leave much room for the interpretation of the judges. The letter and the spirit of law very much matters in the ECJ case law. A legal provision is looked at in its context, such as the other provisions of the same act and other related acts, and in the light of the aims of the act. The Court has regard to the reasons on which the provision is based, in particular as stated in the preamble. It also takes account of general principles of EU law such as legal certainty and fundamental rights.

### b) France

The French legal system is one of the epitomes of the civil law tradition. The system was immutably influenced by Portalis' approach, according to which it is the task of the legislator to lay down the general maxims of the law; to establish principles to determine their implications; and not to go down into detailed regulation of all the issues that may arise in every matter.[17]

The body of statutes and laws governing civil law and procedure are set out in the Civil Code of France.[18] Its ancestor, the Napoleonic Code of 1804, was not the first legal code ever but was the most influential. It the first modern legal code to be adopted with a pan-European scope, and it strongly influenced the law of many countries in Europe and beyond.

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[16] Article 1 TEU provides: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."

[17] J.-É.-M. Portalis (1800) *Discours préliminaire au premier projet de Code civil. (l'An VIII)*, Reprint in Voix de la cité Paris 1999, pp.18–19.

[18] http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721.

### c) Portugal

The Portuguese legal system is characterized by a strongly centralised government. The system is deeply rooted in the continental, civil law tradition; hence it is similar to the French system. French law was indeed the most influential source for Portuguese legislation till the beginning of the 20th century,[19] when it was replaced by the German Law approach and, more recently by the influence of the EU law – notably in relation to domains such as corporate law, administrative law and civil procedure.

## 3.2. THE POLICY OF IMPROVING LEGAL DRAFTING: A SHORT HISTORICAL BACKGROUND

### a) The European Commission

It is not by chance that one of the most explicit and resounding demands from the European Council to the EU decision-making process – "We want Community legislation to be clearer and simpler"[20] – was declared further to the Birmingham Summit in 1992, the same year in which the French Council of State issued a report that looked at the growing influence of Community legislation on French law and in which it expressed concern at the volume of Community rules and how difficult they were to understand (Conseil d'Etat, 1992). The EU and the national dimensions are clearly intertwined.

In response (Robinson, 2010), the EU institutions rashly adopted ten non-binding drafting guidelines (1993),[21] whose practical effect however must have remained quite modest if we consider that the Inter-Governmental Conference felt the need to draw up a Declaration on the matter to be annexed to the Amsterdam Treaty only five years later (1997).[22] That represented a political and legal step of another league and clearly was the expression of the strongest political commitment so far to address legislative quality at the EU level. The resulting 1998 Inter-Institutional Agreement (IIA) on drafting quality – *nota bene* the first of such EU agreements on regulatory reform-related aspects – established 22 non-binding drafting guidelines and listed the internal organisational measures that each EU institution would take to meet those standards.[23] That commitment to improving the technical quality of EU legislation was confirmed again by the European Commission, the European Parliament and the Council of Minister in the mile-stone 2003 IIA on several measures to improve broader aspects of law-making.[24]

[19] The work by Guilherme Moreira on Civil Law (*Instituições de Direito Civil*, published from 1906 to 1916) proved decisive in that respect.

[20] European Council Presidency Conclusions, 16.10.1992, DN: DOC/92/6, point A.3.

[21] Council Resolution of 8 June 1993 on the quality of drafting of Community legislation (OJ C 166, 17.6.1993, p.1).

[22] Declaration No 39 on the quality of the drafting of Community legislation (OJ C 340, 10.11.1997, p. 139).

[23] IIA on Common guidelines for the quality of drafting of Community legislation of 22 December 1998 (OJ C 73, 17.3.1999, p. 1).

[24] IIA on Better law-making of 16 December 2003 (OJ C 321, 31.12.2003, p. 1). This IIA was also the result of the more comprehensive "Better Regulation" agenda launched by the European Commission in 2001-2002, futher to the Mandelkern Group Report (2001) and the White paper on European Governance. On the matter, see Allio (2009).

### b) France

One of the main drivers for regulatory reform and initiatives to improve legislative quality in France has been the wide concern about regulatory inflation (OECD, 2010a:98-99). The production of too many regulations within very short periods of time was considered to be a source of legal insecurity.

In a series of rulings, the first of which dated 1999,[25] the French Constitutional Council recognised the constitutional value of seeking accessibility and intelligibility of the law. Over the past decade, increasing attention has been paid to the implementation of a precise methodology for producing legislation and regulations.

In recent years, many parliamentary reports – in certain cases commissioned by the prime minister – have considered the subjects of regulatory reform. Of them, the so-called "Warsmann report on legal simplification" of 2009 advocated simplifying processes for producing the law, methods for evaluating it and its accessibility (Warsmann, 2009).[26] Besides stressing the importance of enhanced impact assessment and public consultation practices, the Report pushed for eliminating pointless complexity, improving readability and easier access. The Warsmann report triggered a legislative initiative which ended up with the adoption of a law in May 2011.[27] Most recently, a further official report devoted to regulatory inflation has highlighted the interface between quality of legislation and its quantity, stressing among other things the need to invest in training on legistics and to make compliance with established drafting guidelines mandatory (Lambert and Boulard, 2013).

### c) Portugal

The development of regulatory reform initiatives in Portugal have traditionally been closely associated with – in general – managing the transformation of the public sector since the promulgation of the new Constitution in 1976 and – more specifically in recent years – with meeting the goals of the EU strategies on economic growth and job creation. There is emerging recognition that the public sector must become more cost-efficient and closer to public needs, which requires a shift in the administrative and legislative culture.

A Commission for Legal Simplification, under the guidance of the Minister for State and Administrative Public Reform, was created in 2001 with the aim to create conditions to actively participate in the work of the High Level Group of Legal Quality (the so-called "Mandelkern Group"). Between 2003 and 2006 a Technical Commission dealing with the Strategic Programme for Quality and Efficiency of the Government Legal Acts (*Programa Estratégico para a Qualidade e Eficiência dos Actos Normativos do Governo*) has operated as part of the work of the Council of Ministers.

It is nonetheless not until the *Legislar Melhor* Programme for enhancing legal quality, launched in 2006, that the government embarked in a more comprehensive reform strategy.[28] Ensuring access

[25] Constitutional Council Decision No 99 421 on the Codification Act. See also Decision No 2003-473 DS of 26 June 2003.

[26] http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/114000377/0000.pdf.

[27] Loi de simplification et d'amélioration de la qualité du droit (n° 2011-525 du 17 mai 2011), JORF n°0115 of 18 May 2011, p.8537.

[28] Resolution of the Council of Ministers 63/2006 of 18 May 2006, at http://www.dgpj.mj.pt/sections/politica-legislativa/anexos/avaliacao-do-impacto/anexos9170/programa-legislar-melhor/. Another recent strand of inititiatives relates to the *Simplex* Programme to measure and reduce administrative burdens and the launch of e-Government (see OECD, 2010b).

to legislation and developing related training of officials and use of ICT count among the main objectives of *Legislar Melhor*.

In May 2010, the programme *Simplegis* was launched to simplify and streamline the Portuguese legal system through enhanced accessibility and better implementation. *Simplegis* sought to revoke hundreds of unnecessary laws and regulations; make their access easier for citizens and business through consolidation; and improve the enforcement of laws so they can attain their intended objectives.[29]

## 3.3. INSTITUTIONAL AND PROCEDURAL ARRANGEMENTS

### a) European Commission

The European Commission is the only EU institution with the right of legislative initiative. It has so far not established legal drafting units in its services. The first draft of each Commission legal act is almost always produced in the technical department concerned, by the experts in the technical subject matter rather than drafting experts. The drafters are therefore generally not lawyers and most of them have to work in a language that is not their own. Drafting expertise in the Commission is largely concentrated in the Legal Revisers Group, which almost always revises a draft produced by others. In just a handful of cases are legal revisers brought into a drafting team at an early stage.

As a result of the inter-institutional arrangements developed throughout the past twenty years, like the other two EU institutions also the Commission has centralised and specialised staff expressly dedicated to the form and presentation of legal acts. These officials all have similar qualifications in law and languages.

The service of the Commission's Legal Revisers[30] primarily checks all draft legal acts within the Commission at an early stage to ensure that the drafting rules are complied with and that the drafts are clear and precise. In addition, the Legal Revisers oversee the text of some acts after translation to ensure that all the different language versions have the same legal meaning. They are closely involved also in the Commission legislative simplification initiatives, notably in the preparation and checking of all codified and recast versions of EU acts. Many of the revisers represent the Commission in cases before the ECJ, a part of their role that is assuming ever greater significance.

In terms of guidance material and tools to support legal drafters, as mentioned above the main reference document is the Joint Practical Guide on drafting issued by the three EU institutions in 2000. The Guide is intended to serve as a key tool for all staff in the institutions who draft legislation, for Members of the European Parliament (MEPs) and for officials from the Member States involved in the EU legislative process. It has been made available in all Community languages in booklet form and on the Internet (see Box 2).[31]

[29] http://www.ceger.gov.pt/INDEX_PHP/PT/GOVERNACAO_ELECTRONICA/34_SIMPLEGIS_MENOS_LEIS_MAIS_AC.HTM.

[30] http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm.

[31] The Joint Practical Guide can be freely accessed in its most updated version at http://eur-lex.europa.eu/en/techleg/index.htm.

**Box 2. The Joint Practical Guide for the Drafting of Community Legislation**

The overall of the Joint Practical Guide (JPG) for the Drafting of Community Legislation is to "develop the content and explain the implications of those guidelines, by commenting on each guideline individually and illustrating them with examples".

The Guide has been translated into all the official languages and has been widely disseminated both within the institutions and in the outside world. Some 40,000 copies of a paper version have been distributed and electronic versions in various formats have been published. When a new Member State joins the EU, the translation of the Guide into the new official languages serves to establish the legal drafting terminology in those languages.

The Guide sets out to be practical by:

- using simple language and wherever possible avoiding technical terms;
- using numerous examples of both good and bad drafting;
- including model wording for certain provisions;
- having an accessible structure and layout (with a decimal numbering system); and
- keeping to a minimum references to other documents or Court judgments.

The JPG includes also templates, but it tends to cover only the most elementary points. Little guidance is given on more technical points. Nonetheless, the JPG is explicitly mentioned in the 2003 IIA on Better Law-making – a reference that grounds its use as the key document for EU legal drafting over any other sectoral or institutional approach.

*Source: http://eur-lex.europa.eu/en/techleg/index.htm; Robinson (2010)*

The Commission has recently launched a *Clear Writing Campaign* and issued basic guidance to all staff.[32] It has also made mandatory, since 1999, the use of an IT tool (*LegisWrite*) to offer more assistance to legal drafters. The tool ensures that documents distributed by the Commission to the other institutions are well presented and consistent. Incorporated into Word, *LegisWrite* is used for drafting and translating Commission's official (legislative) texts. As it has been tailor-made to facilitate the drafting and typing of texts, it produces properly structured documents with a uniform presentation, making subsequent amendments or conversions easier. *LegisWrite* can also display different language versions side by side, aligned.

The Office for Official Publications of the European Communities (OPOCE), which is the EU's publishing house, bears responsibility for the accessibility of EU law. The EU Official Journal (OJ) has been published also online since 1988, and the electronic versions will be authentic from July 2013.[33] In addition, in response to the calls for improved accessibility of EU law over the years, OPOCE has developed a system of websites and databases covering all aspects of EU law. Since 2005 thus a single portal (*EUR-Lex*)[34] was launched for accessing, free of charge and in all the official languages:

[32] http://ec.europa.eu/translation/writing/clear_writing/how_to_write_clearly_en.pdf.
[33] According to Council Regulation (EU) No 216/2013 of 7 March 2013, OJ L 69, 13.3.2013, p.1.
[34] Eur-Lex serves as the EU's legislation one-stop-shop at http://eur-lex.europa.eu/en/techleg/index.htm.

- the OJ electronic version;
- collections of the treaties, international agreements, legislation in force, legislation in preparation, case-law, parliamentary questions – which can be accessed via hyperlinks;
- search engines for legislation and related measures;
- *Pre-Lex*, the database on the inter-institutional decision-making process; and
- a site on legislative drafting.

In addition to *EUR-Lex*, the Europa website includes "Summaries of EU legislation", a collection of fact sheets on EU legislation which are updated daily. Some 3,000 fact sheets are currently divided into 32 subject areas and cover both existing measures and legislative proposals, providing immediate and handy information to navigate the so-called *acquis communautaire*.[35]

The detailed rules governing the applications for accessing EU documents are laid down in a Regulation of 2001.[36]

### b) France

The constitutional reform of 1958, which established the Fifth Republic and was amended in 1962 and 2008,[37] set strict limits on the legislative to the benefit of the executive.[38] Bills can be introduced by Members of Parliament (parliamentary bills) and by the Prime Minister (government bills). In practice, the government prepares most legislation (90%), which it submits to parliament as bills for discussion and approval, after their prior adoption by the Council of Ministers. The bills concerned are altered by deputies and senators by means of amendments.

Since its creation is 1935, the General Secretariat of the Government (SGG)[39] plays a co-ordinating administrative role for government. It oversees the drawing up and publishing of laws, orders and the main regulatory acts. In particular, the SGG follows all procedures for the drafting and approval of laws and the most important regulatory acts in liaison with the parliamentary chambers, the Council of State and, where appropriate, the Constitutional Council.

The initiative for and drafting of legislation are nonetheless decentralised within each government department, which chooses its own internal organisation. Draft bills are drawn up by the department administrators – not by specialised legal teams, who are also responsible for carrying out any impact assessments necessary. Accordingly, drafting is the work of departments in the ministry concerned, and does not involve a team of legal specialists specifically trained to draft acts.

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[35] http://europa.eu/legislation_summaries/index_en.htm.

[36] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43); see http://ec.europa.eu/transparency/access_documents/index_en.htm.

[37] Constitutional Law No 2007-724 of 23 July 2008 on modernisation of the institutionsof the Fifth Republic, at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019237256&dateTexte=&categorieLien=id. The Fifth Republic is described as "an hybrid system, which simultaneously displays features associated with the presidential system as well as with the parliamentary one." (OECD, 2010a:52)

[38] While members of parliament may introduce draft legislation, Article 40 of the Constitution prevents this if its adoption would decrease public financial resources or increase public expenditure.

[39] http://www.gouvernement.fr/gouvernement/le-secretariat-general-du-gouvernement-6.

The Council of State performs an essential role as regards regulatory quality in the law-making process.[40] It is mandatorily consulted on any bill or draft order, as well as on all draft decrees for which its intervention is prescribed by a text of higher level (around 40% of the most important decrees). Among other opinions, the Council of State issues a recommendation on the presentation of the draft (ensuring that draft legislation is well-written) and on its the validity (checking that competence rules are complied with and, in respect of content, compliance with hierarchically superior legislation).

The rules for drawing up new legislation were until 2004 spread over a number of circulars from the Prime Minister, before being collected under the aegis of the SGG and the Council of State in the voluminous (more than 500 pages long) "Guide for drafting legislation" (see Box 3).[41] This guide is considered a key element in improving legislative quality, not least thanks to its wide diffusion across government departments and because it is the source of official training on legistics.

**Box 3. The French Guide for drafting legislation**

The Guide is organised around topic-based datasheets which detail the rules for drawing up legislation (laws and orders) and regulations via theoretical considerations, practical application cases and flow-charts. The following aspects are covered:

- *preparation of legislation*: this introductory section, which includes several reminders about the hierarchy of legislation and the various categories of legislation, aims above all to incite authors of draft legislation to question, first and foremost, the usefulness and efficacy of their draft legislation;
- *stages in the drafting of legislation*: this section deals with questions of procedure by reproducing a large portion of the instructions of the prime minister;
- *preparing draft legislation*: good practice or rules as solutions to problems posed when drafting have been listed and organised around ten or so topics; and
- *rules specific to international and European Community legislation and to individual measures*: it appeared necessary to develop specifically questions related to the preparation, monitoring and introduction into domestic law of international and EC legislation and to present the procedural specificities of individual decisions, combined with a reminder of the rules of competence in the area.

*Source: OECD (2010a:105-106)*

Since 2007, the whole legislative preparation and drafting process is entirely based on an IT tool that covers the workflow of all institutional actors involved – from the government departments to the Council of State and the management of the Official Gazette. The *S.O.L.O.N.* system (*Système d'Organisation en Ligne des Opérations Normative*s) organises real-time transparent communications between the various stages of the process, enabling it to be speeded up and ensuring a high level of security.

[40] http://www.conseil-etat.fr/en/. The Council of State is also the highest level of administrative jurisdiction in France.

[41] *Guide pour l'élaboration des textes législatifs and réglementaires*, often referred to as the *Guide de légistique*, http://www.legifrance.gouv.fr/Droit-francais/Guide-de-legistique.

The publication in the Official Gazette of the French Republic of all governmental and ministerial laws[42] is managed centrally by the Directorate of Legal and Administrative Information (DILA). The DILA is a service of the Prime Minister's office, which was set up in January 2010. It falls under the SGG authority. The Official Gazette is fully available online and that electronic version is legally binding. A number of further economic and financial bulletins are also published by DILA, such as the Official Bulletin of civil and commercial announcements, the Bulletin of compulsory legal announcements, and the Bulletin of public markets' announcements.

The *Légifrance* portal[43] ensures general transmission of the law and its free access on Internet since 2002. The website is placed under the authority of the prime minister's office. It contains all texts published in the Official Gazette along with other data ranging widely from consolidated texts to judicial, administrative and constitutional case law. The website also provides links to national institutional judicial websites, the official bulletins of ministries, and websites concerned with European and international law (see Box 4).

**Box 4. A comprehensive access point to legislation: *Légifrance***

The main features of *Légifrance* are as follows:

- It makes available most prescriptive acts in force (the Constitution, codes, laws, regulatory acts issued by the state authorities, and acts that stem from France's international commitments, including the EU Treaties and the EU Directives and Regulations published in the EU Official Journal), set out in the form resulting from their successive amendments. The website also provides access to collective labour agreements in force and to the official bulletins of ministries.
- It provides access to several foundations of case law, be this constitutional, judicial, administrative or European case law.
- The website provides information on the production of legal norms: "Guide for Drafting Legislation and Regulations", monitoring of the application of laws, statistics on the production of laws, orders and decrees.
- It offers website users the possibility to subscribe to daily and free of charge email alerts with an electronic version of the Official Gazette of the French Republic.
- The site also serves as a portal to other authoritative public websites, such as those of the parliamentary chambers, and includes private judicial website references.
- Versions of the database are also available in Arabic, German, English, Spanish Italian and Chinese, and a few codes are translated into English and Spanish.

*Source: OECD (2010a:82-83)*

A number of ancillary public services complements *Légifrance*, including

[42] With regard to secondary regulation, the law of 17 July 1978 on administrative transparency obliges governments to publish directives, instructions, circulars, ministerial notes and replies which include an interpretation of positive law or a description of administrative procedures. The most important documents are published in the Official Gazette of the French Republic, while the remainder appear in an official ministry bulletin.

[43] http://www.legifrance.gouv.fr/.

- the *vie-publique.fr* portal, which contains information for the general public on on-going reforms and the development of regulation (offering for example fact sheets on laws nearing adoption); and
- the *service-public.fr* portal for private individuals and businesses, which provides easier access to various public bodies and online services, and lists relevant administrative formalities.

### c) Portugal

In Portugal, competence to enact primary laws is entrusted to the Assembly (laws), the government (decree laws) and the regional legislative assemblies of the Azores and Madeira.[44] Procedures for assuring legal quality and improving legal drafting may vary according to the entity responsible for enactment.

The government has exclusive legislative power over matters that concern its own organisation and proceedings. When the parliament has enacted a law of legislative authorisation, the government may enact further legislation within the limits of the subject area authorised by the parliament. The government may also develop the basic principles set out by parliamentary laws, so long as they are not within the exclusive competence of the parliament.[45] Lastly, the government can legislate over all matters that are not within the exclusive competence of the parliament (OECD, 2010b:67-68). Only the members of government themselves have the right to initiate government bills.

Government bills are initially prepared by staff within the line ministries, hence in a de-centralised approach. Further to the first review by the Office of the Secretary of State (a department of the Presidency of the Council of Ministers), possible adjustments occur before the bill is sent to the Council of Ministers. The *Centro Jurídico* of the Presidency (CEJUR), via its responsibility for the *Legislar Melhor* Programme launched in 2006, is the legal centre for the quality of drafting government bills.[46] CEJUR often participates in the process, for instance by conducting specific legal conformity tests with the constitutional or EU provisions and monitoring the phase in which those acts are enacted.[47] The Presidency of the Council of Ministers has particular further responsibilities with regard to the legislative process – the technical assessment of legislative acts from a legal point of view; the agenda of the Meeting of Secretaries of State; the agenda of the Council of Ministers; monitoring the phase in which legislative acts are enacted; and publication of legislative acts in the Official Gazette.

The General-Directorate of Justice Policies (*Direçao-Geral da Política de Justiça*, DGJP) is a central, autonomous service.[48] Created in 2006 with competences established by the Law-Decree of the Organic Law of the Ministry of Justice in 2011, the DGPJ provides technical legal support to the

[44] The parliament has the most important legislative powers, including that of amending the constitution. It can enact legislation on all matters, except for those which are the exclusive responsibility of the government.

[45] Art.164 of the Constitution.

[46] Quality control of draft bills initiated by the parliament is mainly carried out through specialised parliamentary committees, which are in charge of examining proposed texts and making recommendations to the plenary.

[47] http://www.portaldocidadao.pt/PORTAL/entidades/PCM/CEJUR/PT/ORG_cejur.htm. In addition, CEJUR draws up legislative studies; represents the Prime Minister and members of the Government in court; and maintains the management system DIGESTO. CEJUR has a staff of 40 people (12 of whom are lawyers and 12 working on the DIGESTO database).

[48] http://www.dgpj.mj.pt/DGPJ/sections/home.

Government in the preparation of legal acts and impact assessments, and deals with information on justice issues, as well as resolution mechanisms. Among its competences is the promotion of the use of legal impact assessments and ensuring that the adequate mechanisms of access to the law are in place, in particular in the legal consultation, legal aid and information field.

Legal quality control of secondary regulations is by contrast carried out by the legal services of each ministry in charge of the bill (unless the act requires approval by the Council of Ministers, in which case the procedure for the adoption of decree laws applies). As noted also by the OECD review (2010b:73), this poses significant challenges onto the ministries, which have to cope with the considerable flow of new regulations while sustaining the quality of the texts.

Very little procedural arrangements and guidance material was in place until recently within the Portuguese government. The Rules of Procedures of the Council of Ministers, introduced in 2006, established common rules for the preparation of legal acts.[49] The latter provide legal drafters with guidance on the structure and presentation of regulations and on formal drafting requirements. In addition to a number of style rules (such as use of abbreviations, foreign language, acronyms, etc.), the text requires "clarity of language". It recommends writing "short, clear and concise sentences", using a plain language level, and avoiding vague expressions. The Rules are now complemented by a practical guide to help law drafters.[50] These requirements are binding and legislative initiative must abide with them.

As mentioned above, the *Legislar Melhor* Programme of 2006 sought the modernisation of decision-making. The quality of legislation and the efficiency of law-making was improved by boosting cooperation between all government departments and combining technological innovation with institutional reform and improved tools. A fundamental step was in this respect the agreement between the President, the Government, Parliament, and the Constitutional Court to dematerialise all phases of the legislative procedure and abandon paper. At the same time, manual signatures have been replaced by secure electronic signature mechanisms.

Initial Programme efforts also concentrated on providing easier access to legislation through electronic publication of regulations and codification. Since the introduction of the 2006 Rules of Procedures, access to legislation through the Official Gazette (the *Diário da República Eletrónico*) is made free and easier. Its electronic edition received full legal value.[51] The re-organisation of the Official Gazette and the switch to electronic publication without charge has yielded many benefits. Besides savings in paper,[52] the publication process is now faster and more secure, users enjoy rapid access to legislation and official documents and enhanced services are no longer offered to specialists, only. Many more members of the general public are now consulting the Official Gazette.

[49] Resolution of the Council of Ministers 64/2006 of 18 May 2006, at http://www.dre.pt/pdf1s/2006/05/096B00/34113425.pdf. The Rules provide also for a general framework for the dematerialisation of the legislative process, the introduction of impact assessment with the so-called "Simplex Test", internal and external consultation.

[50] See Annex II of Resolution of the Council of Ministers 29/2011 of 11 July 2011 on "Regras de legística na elaboração de actos normativos". These rules complement the equvalent manual issued by Parliament in 2008, "Regras de legistica a observar na elaboração de actos normativos da Assembleia da República" http://www.asg-plp.org/upload/cadernos_tematicos/doc_160.pdf.

[51] http://www.dre.pt/.

[52] The government estimated that transition to electronic transmission would save EUR 4 million related to publication and distribution costs (OECD, 2010b:60).

The launch of the Official Gazette online was accompanied by the computerisation of *DIGESTO* (*Sistema Integrado para o Tratamento da Informação Jurídica*), the central registry of regulations operational since 1992.[53] The system manages all legal and regulatory information, as well as jurisprudence, to support the Government and private and public stakeholders in need for legal information. While consultation of this database is free of charge, for more advanced research capabilities and information are offered upon a subscription fee.

Further online registries of regulations also exist at the level of ministries and specialised bodies, such as independent regulators or other administrative bodies. In some cases, these databases are extremely comprehensive.[54]

Portugal also introduced the free on-line dictionary *Jurislingue*, a database of legal terms currently available in 7 languages: Portuguese, French, English, German, Dutch, Spanish and Italian. The dictionary allows for searching legal terms, national and foreign government departments and/or organisations, as well as bilateral and multilateral agreements in 7 languages; finding word families and/or contexts in which the words are used, in those languages; finding a definition for each term in the Portuguese section; and finding acronyms in the section "Bodies".[55]

A further IT measures was introduced by Portugal in 2008, in the form of the System to Control Legal Acts (*Sistema de Controlo dos Actos Normativos*), with the aim to electronically screen the administrative activities of legal acts. This facilitates the monitoring of enforcement and compliance, notably in relation to the transposition of EU acts.[56] A network of contact points is being set up throughout ministries and co-ordinated by CEJUR.

## 3.4. CAPACITY-BUILDING MEASURES

### a) European Commission

While no dedicated "Academia for Legislation" for civil-servants exists at the EU level to date,[57] a European Academy for Law and Legislation was established in 2009,[58] whose remit is nonetheless broader than strictly legal drafting for EU acts.

Also because of the centralised approach mentioned in earlier sections of this paper, the training provided by the Commission on drafting for its staff has so far remained relatively limited in terms diffusion and rather elementary in terms of content. In 2010, it was estimated that "several hundred officials have followed a standard two-day introductory course" (Robinson, 2010:154).

The Commission has organised a programme of occasional seminars on quality of legislation which give representatives from Member States the opportunity to present their approach on legislative

[53] http://dre.pt/comum/html/digesto.html.
[54] See OECD (2010b:60-61) for explicit Internet links.
[55] http://jurislingue.qddc.pt/.
[56] Resolution of the Council of Ministers 197/2008 of 13 November 2008.
[57] For instance along the model of the institute of the same name in The Netherlands, http://www.academievoorwetgeving.nl/.
[58] http://www.eall.eu/index.php/en.

quality to an audience of staff from the EU institutions, experts from the other Member States and academics.[59]

### b) France

Training in drafting legal or regulatory texts is provided recurrently at ministerial and inter-ministerial levels. According to the OECD (2010a:66), some 100 officials a year are trained at the moment of joining civil service, being newly allocated to the specific departments, or as a part of horizontal new governance techniques. Further to reaffirmation by the Prime Minister in 2011 of the commitment of the government to enhance legislative quality,[60] the SGG has significantly expanded the offer of training.

Initiatives on live-long or specialised training on legistics are offered also by academic institutes, notably the *École Nationale d'Administration* (Biland and Vanneuville, 2012).[61]

### c) Portugal

Over the past few years, considerable efforts have been made by Portugal to develop training although capacities remain rather uneven. Noteworthy is an initiative to link staff performance assessment with results obtained on Better Regulation policies.

Specialised training centres for public servants are present in Portugal, of which one of the most important is the National Institute for Administration (*Instituto Nacional de Administração*).[62] The Institute is responsible for the development of training courses, formal certification courses, and academically-oriented courses on the Portuguese public administration, and it offers an annual course on law-making. Universities also provide training to meet increasing demand for ICT expertise (OECD, 2010b:52). In 2011, a course on "Legal Assessment" was for instance conducted by the Political and Legal Sciences Institute of the Law Faculty of the University of Lisbon. Some ministries have organised own training programmes for staff, notably the Ministry of Justice, although not exclusively on legistics.

[59] http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm#3.

[60] Circulaire du 7 juillet 2011 relative à la qualité du droit, JORF n°0157 of 8 July 2011, p.11835.

[61] On ENA training, http://www.ena.fr/index.php?/en/formation. For another example, see for instance the Science-Po in-depth seminar of 2012 at http://formation-continue.sciences-po.fr/pdf/IDP25.pdf.

[62] http://www.ina.pt/.

# 4. CONCLUDING REMARKS: ISSUES TO CONSIDER FOR BRAZIL

This paper has presented features of the legal drafting system developed by the executives in three jurisdictions – the European Commission, France, and Portugal. After stressing the role that each institutional context and legal and administrative culture play in determining the legislative style (including the properties of language), the paper has dwelled on the allocation of tasks for drafting and overseeing legislative quality and consistency; on the introduction of specific guidance documents and ICT solutions; and on the deployment of training programmes.

From the structured analysis, Brazil may retain elements for reflection on why barriers to legislative quality still persist, and how they may be addressed.

### Decentralised good drafting

The selected case studies are all, like Brazil, systems influenced by the civil law tradition, in which the primary legal drafting is carried out by civil servants who are often lawyers but who generally have many other responsibilities in the policy formulation process besides drafting. To somehow compensate, institutional and procedural mechanisms are often in place to permit a central department to check the quality of drafting against set standards and ensure the homogeneity and consistency of the legal text. This approach differs from common law countries, which tend to regard the drafting of legislation as something to be done by specialists, legislative counsel or parliamentary counsel.

A mix of the civil law and the common law approaches might actually constitute the famous "right middle" in this trade-off. Civil law jurisdictions might consider better recognising that the elaboration of legal text, their structure and their style is a skill in itself which cannot be left up to non-specialised staff. Legal drafters may well have legal background and skills. However, because of the nature of the system they have to rely heavily on standard templates and on precedents from their own sector – while, on the other hand, they may overlook the relevance of professional drafting because they tend to see their various functions as a whole. William Robinson, a former senior legal reviser in the European Commission's Legal Service himself, aptly describes this challenge. Referring to the Commission technical specialists, who are also in charge of drafting, he notes that they "have very wide-ranging responsibilities for their respective sectors: carrying out preliminary work for all legislation, including consultation of the Member States, business circles and the general public and impact assessments; drafting proposals for basic legislation and steering them through the legislative process; drafting secondary legislation; advising Member States on how to implement the EU rules, both in the basic legislation and in the secondary legislation; giving interpretations of those EU rules to business circles; drafting interpretive notes; publishing guidance on websites and awareness-raising materials such as press releases; monitoring compliance and following up non-compliance by Member States or by business circles; and bringing proceedings before the [ECJ] if appropriate. (...) They may believe that it is not so necessary to make the actual legislation particularly easy to understand because simpler explanations are provided in the interpretive notes, guidance or citizens' summaries. They are often unaware that some of the language they use is jargon impenetrable to those outside the sector. And they have such wide-ranging responsibilities and so many documents to produce that they overlook the fact that drafting legislation requires

more skill, more care and more time than writing a guidance note or a press release." (Robinson, 2011:81)

Investment in improving the very first drafts, by contrast, is likely to pay off later on throughout the various phases of the legislative process, including at the moment of implementing and enforcing legislation. A good first draft cannot but be improved at even higher standards when it reaches the final (centralised) legal revision stage. If the draft is of poor quality, by contrast, legal revisers struggle with multiple interpretation possibilities and interaction with the line department expert might not be smooth. Establishing specialised units in the ministries involved in drafting legislation can hence enhance legislative quality.

### Joining up good guidelines and capacity-building

What emerges from this paper's overview is not a lack in the availability of technical guidelines. Portugal, who has embarked in deep reform at a relatively later stage, has now official drafting manuals in place and drafters can in any case rely on various sources within and outside government. Also for those jurisdictions where guidelines have been introduced since longer time, criticism persists about their real impact.

To illustrate, in 2006 the so-called "Davidson Review" commissioned by the UK Government to examine the impact of EU regulation on the United Kingdom stated that "it is widely acknowledged that the EU legislative process and practice (e.g. last-minute amendments by the Council or Parliament, without risk-assessment) still leads to poorly worded or ambiguous legislation. Management of such legislation is a challenging task for national governments and regulators."[63] In France, the mentioned Warsmann report of 2009 still noted a drop in legislative quality and also that the performance in drafting varied markedly across French ministries (Warsmann, 2009).

Technical guidelines and manuals are not enough. Besides constituting teams of legal experts within ministries, emphasis is almost unanimously put on the importance of reinforcing the ability to draft legislation through better, more systematic and specialised training and developing on-line tools to help those responsible for drafting. Often legal drafting training remains at a rather elementary level. Continuous training and capacity-building within government, supported by adequate financial resources, contributes to the effective improvements in the way legal acts are worded. In doing so, synergies should be sought with equivalent initiatives in the legislature in order to set up a common drafting culture and harmonised technical approaches. The approach undertaken by the EU with a series of inter-institutional agreement may constitute a model to be followed.

With the same rationale, a further interface to nurture is the one between institutions stemming from different levels of government. Even if they are unitary states, also the experience of France and Portugal reinforce the lessons that can be typically drawn from the EU system – the cooperation with lower legislative authorities is crucial. In the respect of the various autonomies and competences, the institution of regular seminars on legislative quality with representatives of federal, state and local authorities can provide the opportunity to illustrate the respective challenges, share experiences, and seek convergence.

[63] Davidson Review on implementation of EU legislation, HMSO 2006, see point 5.2.6., at http://www.berr.gov.uk/files/file44583.pdf.

Finally, the involvement of the judges and officials in the courts is a further element contributing to creating the best possible level-playing fields for the end-users to fully benefits from the rule of law.

## Reaping the benefits of ICT

Modern ICT including the use of the Internet create the conditions for diffusing e-government strategies and the legislative quality domain is one of the areas most likely to rapidly benefit from it. In all jurisdictions analysed in this paper, two areas have clearly gained from related reforms.

The first is computer assistance for drafting. In all the executives considered, a Word-processing software is in place to standardise the formatting of draft acts and to make for stable electronic formats for internal transmission of those drafts. The interface is often expanded to communication of acts to parliament. These programmes minimise mistakes, contribute to savings and allow for checking the pace and respect of procedures and deadlines in the legislative process. The IT system also enhances real-time exchanges among legal drafters in various parts of the administration, helping create a network of expert and a common drafting culture.

The second area benefitting from modern technologies is accessibility. Almost everywhere in Europe legislative database and the official gazettes are now accessible online. This immensely facilitates access to legislation and therefore general awareness of the duties and rights of each citizen and economic operators when interacting among them or with the public administration. Besides the desirability of granting the electronic version legal authenticity, a necessary precondition is that the legislative stock must be published in such a way that it can be identified, found and consulted without undue burden. The fact that all the experiences considered in the paper – and indeed almost if not all jurisdictions in Europe – offer access to the official records free of charge does not necessarily mean that those database and search engines are user friendly and do not require some sort of investment in skills and time. Ancillary and complementary portals with summaries and fact-sheet information on the norms in force can further facilitate access. Only by making access truly straightforward for also non-expert users is likely to make a difference.

# 5. REFERENCES


- Allio, L. (2009), *The emergence of Better Regulation in the European Union*, Unpublished PhD thesis, King's College London, London.
- Biland, É. and R. Vanneuville (2012), "Government lawyers and the training of senior civil servants. Maintaining law at the heart of the French state", in *International Journal of the Legal Profession*, Vol. 19/1, pp.29-54.
- Conseil d'état de la République Française (1992), *Rapport public 1992: Le droit communautaire*, Etudes et documents n. 44, Paris.
- Gibbons, J. (1999), "Language and the Law", in *Annual Review of Applied Linguistics*, Vol.19, pp.156-173.
- Hummer, W. (2007), "Annex: Interinstitutional Agreements Concluded During the Period 1958–2005", in *European Law Journal*, Vol. 13/1, pp.92-109.
- Lambert, A. and J.-C. Boulard (2013), *Rapport de la mission de lutte contre l'inflation normative*, Paris.
- Merryman, J.H. and R. Pérez-Perdomo (2007), *The civil law tradition: An introduction to the legal systems of Europe and Latin America*, Stanford University Press.
- OECD (2010a), *Better Regulation in Europe: France*, OECD Publishing, Paris.
- OECD (2010b), *Better Regulation in Europe: Portugal*, OECD Publishing, Paris.
- Robinson, W. (2008), "Drafting of EU acts: A view from the European Commission", in H. Xanthaki and C. Stefanou (eds.), *Drafting legislation: A modern approach*, Ashgate Publishing.
- Robinson, W. (2010), "Manuals for drafting European Union legislation", in *Legisprudence*, Vol. 4/2, pp.129-155.
- Robinson, W (2011), "Accessibility of European Union legislation", in *Loophole*, Festschrift for Duncan Berry (published by the Commonwealth Association of Legislative Counsel), February 2011, pp.79-95.
- Tanner, E. (2006), "Clear, simple, and precise legislative drafting: How does a European Community Directive fare?", in *Statute Law Review*, Vol.27, pp.150-175.
- Warsmann, J.L. (2009), *Simplifions nos lois pour guérir un mal français, rapport au Premier ministre*, La documentation française (Collection des rapports officiels), Paris.