

► LEGISLAÇÃO

◆ The European Parliament as the legislative conscience of the European Union?

OBSERVATIONS AND EXPERIENCES ON THE BASIS OF A YEAR OF TEACHING LEGISLATIVE DRAFTING AND LEGISLATIVE INSTRUCTION FOR THE EUROPEAN PARLIAMENT

1. INTRODUCTION: EVENTFUL TIMES IN COMMUNITY COOPERATION

These are interesting times for Europeans. No matter how one looks at it, the European Union is at the threshold of an entirely new era. In the words of the Laeken Declaration,¹ a 'crossroads' has been reached in the development of European unification. The accession of ten new member states, the arrival of the euro, the dynamism of the common market, the development of the political union, and the geopolitical challenges increasingly facing the Union have accelerated cooperation. This farther-reaching cooperation influences relations not only between member states and community institutions but among the institutions themselves. In many cases, the current frameworks of treaty law do not suffice to meet the new challenges.² For this reason, as a consequence of the Nice Treaty³ and the ensuing Laeken Declaration, a European Convention was put to work in February of this year whose task it is to make proposals for the political

¹ This Declaration was passed by the European Council, then under Belgian chairmanship, at Laeken on December 15, 2001

² See also Wim Voermans, 'Nieuwe wetgevingsprocedures en regelingsinstrumenten voor de EU?' ('New legislative procedures and regulating instruments for the EU?'), *RegelMaat* (Dutch Magazine for Legislative Studies) 2001, no. 6, pp. 204-215 and the

³ Nice Treaty of February 26, 2001. Especially Declaration 23, laid down in that treaty, goes into the future of the European Union and contains the intention to revise the Treaties in 2004, preceded by a new and open preparatory process. In this framework, the national parliaments of member states and candidate member states were also heard in Brussels

on 10 and 11 July 2001. The European Convention was also commissioned to initiate the public debate about these matters. See also R. Barents, 'Het Verdrag van Nice een eerste indruk' ('The Nice Treaty, a first impression'), *Nederlands Juristenblad* 2001, pp. 113ff, and J. W. de Zwaan, 'Het Verdrag van Nice', *SEW* 2001, pp. 42-52



and administrative reform of the Union.⁴ This should lead to a reform of the Union and adaptation of the treaties in 2004.

Amidst these changing relations, the European Parliament (henceforth EP) is trying to position itself.⁵ Until recently, the democratic legitimacy of that parliament was slight, and in many fields, the EU lacked the possibilities and instruments to exert real influence on administration and legislation within the Union.⁶ In recent years, a lot has changed there. Since 1999, the consultation procedure, which enables the EP to have a say in community legislation, has been introduced in far more fields than before, thus allowing the EP to tighten its grip on the Commission. Preparatory to the extension and revision of the Treaties, the EP is seeking a new role for itself as a representative of European citizens. To this end, the EP is using a combination of words and deeds. Through words, the EP is demanding an even more influential role for itself after 2004;⁷ through deeds, it is trying to acquire an authoritative status in European relations and to present itself as an important (f)actor in Europe's future. This dynamism is evident from, for example, many resolutions and numerous amendments to commission proposals, and from the intensity with which the Commission's actions are monitored. In the current parliamentary term, the parliament has been very active indeed.

⁴ The Convention was installed on February 26, 2002, and is chaired by former president Valérie Giscard d'Estaing. Representatives of all member states and candidate member states and of a number of European institutions have seats on the Convention. It is the Convention's task to prepare the following inter-governmental conference, at which the adaptation of the Treaties will be on the agenda, as broadly and transparently as possible. To this end, the problems of the future development of the Union will be discussed at the Convention. A central position will be occupied by such questions as: What do the European citizens expect of the Union? How should the delimitation of authority be organized between the Union and the member states? How should the delimitation of authority between

the institutions be organized within the Union? How can a coherent and efficient external manifestation of the Union be guaranteed? How can the democratic legitimacy of the Union be assured? See also the Convention's website <http://european-convention.eu.int>, on which the most important documents are published.⁵ In observations in the literature on the consequences of the enlargement for European cooperation, views pertaining to the role of the EP are often lacking, which is remarkable, to say the least. See, for an example, H. C. Posthumus Meyjes, 'Europa met zijn dertigen, een onbekommerde toekomstverkenning' ('The thirty of Europe, A blithe exploration of the future'), *SLW* 2001, pp. 2-7.

⁶ We use the terms 'administration' and 'legislation' (and its synonym 'regulation') in the meanings they are

usually given in the Netherlands. The concepts of legislation and implementation do occur in the Treaties but are not defined by them. The question of whether a community measure is to be labelled 'legislation' or 'implementation' depends on the question of whether a decision is directly based on a Treaty article (legislation) or on a secondary decision (implementation). Since, in this article, we mainly speak for a Dutch audience, the Dutch convention is adhered to. See also K. Lenaerts and A. Verhoeven, 'Comitologie en scheiding der machten' ('Comitology and the separation of powers'), *SLW* 1999, pp. 394-413.
⁷ Resolution of the European Parliament about the Laeken European Council meeting and the future of the Union (2001/2180(INI)) PE 304 286.

These recent developments in the Community formed an exciting backdrop to a course on legislation developed by the Tilburg Centre for legislative issues and taught for the EP. In the first part of this contribution, we want to discuss the experiences gained when teaching this course, which gave us a unique inside view of the work of the European Parliament and the way it continues to tighten its grip on legislative procedures and the European Commission. It is our tentative impression that the EP is taking an ever more active part in the legislative processes in the Community, which is partly due to the bigger role assigned to the EP in these processes by the Treaty of Amsterdam,⁸ but also to the EP's own 'emancipatory' activities. In the second part of this contribution, we will give a number of examples to illustrate how the EP is trying, within, and sometimes even outside, the Treaties, to tighten its grip on community legislation and the consequences of this approach.

The course

2. A LEGISLATIVE TRAINING COURSE FOR THE EUROPEAN PARLIAMENT

At first sight, the EP is an unlikely candidate as a participant in a legislative course set up by Dutch instructors. Even more than is the case in, for example, the Dutch Parliament, the EP seems, in the first instance, to be an institute whose main task is supervising,⁹ a task which is limited, at that, to supervising the EC Commission. Unlike the national parliaments, the EP lacks the right to take legislative initiatives and can suggest amendments only when the consultation procedure is applicable. In the field of legislation, therefore, it is more or less a 'toothless' club, or at least, that is what it looks like, for it manages to make the most of its modest set of instruments.

⁸ In these Treaties, the co-decision or consultation procedure of Article 251 of the EC Treaty was declared applicable to far more sub-

jects and themes than used to be the case

⁹ The European Parliament has three main powers, namely, the legislative

power (in the framework of the consultation procedure), the budgetary power, and the power of supervision over the executive power

What prompted us to set up this course was the establishment of the interinstitutional agreement with respect to common guidelines for the editorial quality of community legislation in 1998.¹⁰ This agreement contains a modest collection of 22 guidelines, mainly pertaining to matters of legislation, which must be taken into account by the institutions when making community decisions. The purpose of the guidelines is to improve the intelligibility and uniform applicability of decisions by means of their clear, simple, and exact formulation and thus to enhance legal certainty and the quality of legislation. To ensure that the interinstitutional agreement would gain a firm foothold, its establishment in December 1998 was accompanied by agreements about its implementation.¹¹ One of these agreements concerns the setting up of a course in designing and editing legal rules, with a focus on problems that can arise as a result of multilingualism. As a consequence of that agreement, the EP published a call for tenders concerning a course on 'Designing legislation' in all member states in May 2000. Within this framework, the Centre for legislative issues of Tilburg University submitted a tender. In August 2000, the contract was granted to the Centre.

Design and development of the course

Even though we had taught legislative courses before, also outside the Netherlands, a course for the EP was new and special. Right from the start, it was obvious that a course for the EP could only be interesting and effective if the following conditions were met.

- a) The instructors must have sufficient insight into the legislative issues and context of the EP; and
- b) the course should not merely be an elucidation of 22 legal guidelines but must be a fully fledged course that, on the basis of a realization of the

¹⁰ The Interinstitutional agreement concerning common guidelines for the editorial quality of community legislation, *PbEG* 1999, C 73/1. See about this E. L. H. de Wilde, 'Gebrekkige Europese regelgeving kent alleen maar verliezers' ('Inad-

equate European legislation only has losers'), *SEW* 2000, pp. 410-413; Wim Voermans, 'Aanwijzingen voor de regelgeving in een Interinstitutional akkoord (Objects trouvés)' ('Indications for the legislation in an Interinstitutional

agreement'), *RegelMaat* 1999, no. 6, pp. 230-232.

¹¹ These concerned eight intra-organizational measures judged necessary by the institutions (EC Commissions, Council, and EP) for a correct application of these guidelines.

meaning and function of community legislation, aims at enabling the participants to make comparative assessments about quality aspects and dimensions associated with this legislation.

With such ambitious aims in an unfamiliar environment, it is tempting to fall back on the safe haven of Dutch legislative policy, experience gained in Dutch legislative courses, and knowledge of the way the Dutch parliament functions. However, that would have meant not giving the EP's training needs their due. Therefore, a lot of effort went into the preparation of the course, which was to be taught in 2001, both in English and in French. In the framework of that preparation, a round of interviews was conducted in the various departments of the EP that directly or indirectly deal with legislation. On the basis of the results of these rounds, the course 'The Art of Co-Legislation/*Savoir Colégiférer*' was developed. In February 2001, the course concept was tested by a specially composed group of experienced people drawn from the staff of the EP in a four-day trial course. Subsequently, starting in March 2001, the course was taught in four French and four English versions of 2.5 days each, alternately in Brussels and Luxemburg.

Content of the course

The course 'The Art of Co-Legislation/*Savoir colégiférer*' was a crash course lasting two and a half days, in which we tried – on the basis of concepts from the interinstitutional agreement – to sensitize the participants to the importance of high-quality community legislation and the way that quality can be improved, by using, for example, concepts from the interinstitutional agreement. In order to achieve this, the course focused, among other things, on the meaning and function of community legislation, the consequences of quality defects in that legislation, the role and position of the EU institutions – and the civil servants working there – in the legislative process of the community, methods and techniques in designing regulations and – especially – amendments, issues relating to multilingualism in EU legislation, and the themes of maintenance, entry into force, transition law, final provisions, and appendices.

The course method used can be characterized as problem-oriented and interactive. For each of the seven components of a course version, a short stock-taking introduction to the subject was given first. The participants, who came from various directorates general of the EP, were invited to contribute their thoughts about the matter in hand on the basis of their specific backgrounds. The translators of the EP (mostly coming from DG 7) had a totally different perspective on, and experience of, legislative problems than the lawyers of the Judicial Department or of the far more strongly procedurally oriented civil servants of DG 2 (Committees and delegations). Especially when participants from the circles of the EC Commission and Council joined the discussion, interesting debates arose about the various aspects and facets of legislative problems seen from the different perspectives of the institutions. These discussions were most valuable in the framework of the information exchange among participants who, even though often working for the same organization, admitted that, in daily practice, they just did not get around to them. The exchange had a galvanizing effect. Right at the beginning of the course, the participants would rush in and out with copies of documents that could be used as illustrations of remarks made earlier that day.

The introductions and discussions about the themes formed a basis on which to further explore and debate the legislative issues and problems in hand. In addition, there was one extraordinarily interesting document that provided illuminating insights into issues and problems arising in the design of community regulations: the 'Joint Practical Guide/*Guide Pratique Commun*'. This guide, which was drawn up in 2000 in the wake of the interinstitutional agreement, is a comprehensive practical handbook in which the 22 guidelines of the agreement are further elaborated and provided with a variety of practical examples and models, of the kind we also know from, for example, the clarification of the Legislative Directives (*Aanwijzingen voor de regelgeving*) in the Netherlands. Especially for the participants, this Guide made clear to which problems the guidelines of the agreement gave an answer.

After the introductions and discussions, the participants were invited to carry out assignments. What they usually had to do was to adopt a legislation perspective from which to comment – individually or in groups –

on proposals made by the Commission for directives or regulations, and amendments to these submitted by EP members. In doing so, the participants were asked to formulate an alternative text or design an alternative amendment straightaway. At the end of the course, a roleplay was scheduled in which three groups of participants were to act as three EP factions.¹² Each group was assigned a «secret» mission to introduce certain goals and elements into a proposal for a transport and traffic directive by means of amendments. To this end, the groups could submit four strategic amendments, which were then dealt with according to the rules of the EP Regulations in two different rounds. Naturally, the secret missions were designed to engage the groups in conflict, which produced heated debate. As there were only three groups, preparations for the second round and the final vote also required them to draft compromise amendments in collaboration with other groups. This roleplay was both very instructive and highly amusing.

The participants' background: legislative work in the EP

The participants in the course mainly came from the circles of the European Parliament. The permanent official staff of the European Parliament, organized in the secretariat-general, is sizeable. The EP employs 3,500 civil servants, besides party employees working for the delegates. This size is not surprising considering the fact that the EP has 626 members and 17 permanent Commissions, often dealing with various drafts for regulation proposals.¹³ The secretariat-general has eight directorates and three departments, distributed over the EP's established meeting sites in Strasbourg (plenary meetings), Brussels (most Commission meetings), and Luxembourg. Most participants came from Directorate-General 1 (Presidency),¹⁴

¹² Group of the Party of European Socialists (PSE), Group of the European Liberal, Democratic, and Reform Party (ELDR), Group of the Greens/European Free Alliance

¹³ In addition to these standing committees, Parliament can set up sub-committees, temporary committees,

which deal with specific problems, or committees of inquiry. Joint parliamentary committees maintain relations with the parliaments of States linked to the European Union by association agreements. Inter-parliamentary delegations do the same with the parliaments of many other countries

and with international organisations. See Chapter XX of the Rules of Procedure of the European Parliament.

¹⁴ DG 1 is subdivided into a Central Secretariat and Directorates A (Presidency services), B (Sittings), and C (Parliamentary planning), and an Information Technology Directorate

DG 2 (Committees and delegations),¹⁵ DG 7 (Translation and general services),¹⁶ and the Legal Service; a few individuals came from DG 3 (Information and public relations). The fact that translators and information officials participated in what was, strictly speaking, a legislation course may seem surprising. However, their participation was certainly productive: as the EU happens to use eleven working languages and as all EP texts must be made available in all of those languages, translators make up one-third of all civil servants employed by the secretariat-general. Translators are certainly not mechanical translation automata. Because most translators have long-term experience in their service, their legal knowledge ranges between fair and good. This may also help to explain why there are so few «lawyer-linguists»¹⁷ attached to the various language groups in DG 7, the translation DG. Even if translators complain a lot about this omission, while their service has also been facing both cutbacks and an increasing workload due to the flood of amendments¹⁸ over the last few years, they are on the whole sufficiently experienced and well-versed in law to be able to recognize and, if qualified, to solve legal problems in texts.¹⁹ The participation of translators in the course, at any rate, automatically helped to focus attention on problems generated by multilingualism in the EU in designing community regulations.

The DG 1 participants' daily work is to prepare the plenary meetings in Strasbourg. This is an enervating task, especially due to the multitude of amendments to Commission proposals that are being submitted. EP members are very active in this matter, which is fine from the point of view of

¹⁵ DG 2 is subdivided into a Directorate-General and Directorates A (External Relations), B (Legislative coordination and interinstitutional and inter-parliamentary relations), C (Internal affairs and quality of life), D (Economic, monetary, and budgetary affairs), and E (Common policies)

¹⁶ This Directorate is subdivided into the following services: Interinstitutional Cooperation Unit, the Planning Division, Directorate A (Publishing and distribution), and Directorate B (Translation). This latter Directorate of DG 7, within some language divisions, employs spe-

cialised lawyer-translators who help with translations in legal matters, among other things

¹⁷ I.e., lawyers who, briefly, assist translators with translation problems that require legal expertise

¹⁸ Resulting from the fact that the Maastricht Treaty has greatly extended the scope of the co-decision procedure

¹⁹ Pursuant to the EP's «house rules», translators, when translating amendments, may even inform the members of potential legal problems, mistakes in the source text, or differences between the language ver-

sions. They do this by italicising the relevant text in a translated amendment. The way in which amendments are laid out is highly standardised, so any one who is at all informed can directly notice a possible glitch in an amendment. Naturally, the translators cannot submit written explanations with such remarks because official and political responsibilities would clash. See the Models Forum (Recueil des Modeles) used by EP staff as it has been in force since 1 March 2001, <http://www1.europarl.eu.int/forum/rccueil/dispatch.cgi>

political participation but an outright disaster from the point of view of the quality and coherence of regulations. It is not unusual for a Commission proposal to meet with several hundreds of amendments in its Commission phase. The members themselves have little or no eye for the quality or translatability of these amendments. For them, it is only their political contribution that counts. In the division of roles within the EP, it is mainly left to EP staff to monitor the legal and linguistic quality of amendments and its consequences for the basic text. This is an impossible task due to the enormous number of amendments, but they do the best they can.

Amendments submitted during the Commission phase do not all end up in the Commission's report, but several dozens of amendments generally do. In this Commission phase, it is quite a puzzle to work out how all these amendments relate to each other and to the basic text of the proposal before and after voting.²⁰ These problems intensify in the period leading up to and immediately following the plenary debate. Fairly extensive collating sessions are usually required to insert adopted amendments in the final text in a consistent way. In versions that could also be final versions, the EP itself has lately attempted to establish a consolidated version, much against the will of the Commission and the Council. The status of a consolidated version, after all, is a bit like having the final say. We will return to this topic in Section 4.

DG 1 participants generally do not have a great deal of experience revising amendments themselves, in contrast with DG 2, which predominantly supports the work of the permanent EP Commissions. In close cooperation with the Commissions' rapporteurs, these civil servants supervise the flood of amendments, often providing the services of a «Drafting Office», as in the US federal state parliaments²¹ or the House of Commons in Great Britain. This means that EP civil servants themselves revise amendments at the request of the members. An additional advantage of this procedure is that it is better able to make allowance for the «environment» of the amendment. It also promotes legislative quality. Members of Parliament and their politically oriented staff mostly have little eye or feeling for the legal and linguistic quality of an amendment.

²⁰ See also Article 130 of the Rules of Procedure of the European Parliament.

²¹ Such »Drafting Offices« are also used in the states of Louisiana and Texas.

Participation by Commission and Council members

The EP initiative to organize this course ‘The Art of Co-Legislation/*Savoir légiférer*’ did not remain unnoticed by the other institutions in 2001. The Commission and the Council initially meant to arrange their own in-house courses for their staff. Partly as a consequence of the relatively low priority that has regrettably been given by the institutions to the implementation of the interinstitutional agreement so far, neither the Council nor the EU Commission had arranged such courses. Staff interest, however, was tremendous. Even various participants from Council and Commission staff circles enrolled in several versions of the course, with the approval of the training DG of the EP. Things became hectic and, in 2001, the course was taught an additional three times in English and twice in French. The participation of Council and Commission members was most enriching. It was remarkable that Commission participants said that the attention for the quality of legislation, and the attendant extension of specialized formation, was now back to square one, after a small upsurge around 1998, while more and more legislation needs to be prepared. Whether such remarks are representative of all departments and sections of the EU Commission is a question that obviously cannot be answered on the basis of observations made in the course.

We took great pleasure in teaching the course alternately in Luxembourg and Brussels. Group size ranged between ten and sixteen participants, mixed for workplace derivation. All in all, approximately a hundred civil servants completed the course in 2001.

Course materials

Designing and implementing a legislation course for the EP was a unique experience. It was largely a pioneering job since legislation courses dealing with methods and techniques of community legislation did not exist up to that point. EP civil servants in Brussels and Luxembourg tend to learn by doing, as do civil servants in the EU Commission and the Council. Little documentation is available to provide guidance. To be sure, there

are countless reports and documents detailing processes and problems of drafting community legislation,²² but these tend to concern actual legislation aspects. There is also a small body of international literature on legislation methodology and technique, but this is often specifically tailor-made for legislation in a given country or a particular legal structure.²³ An exception is *Essays on Legislative Drafting*²⁴, edited by Robert C. Bergeron. This book is the result of the 'Canadian-Ukrainian Legislative Drafting Program', which was implemented by the Canadian government for the Ukraine in 1998; it presents contributions by mainly European authors on «universal» aspects of methodology and techniques of legislative drafting in continental legal systems. These essays were useful as background material, and, as they were bilingual (French and English), they also helped to maintain congruence between the French and English versions of our course. In the English course, we also made use of the rather amusing brochure *Fight the Fog: How to Write Clearly*,²⁵ a style guide for simple and comprehensible English published by the EU Commission. In addition, we used *Clarifying Eurolaw*, a highly recommendable brochure from 2001, in which Martin Cutts, an authority in the Plain Language Commission in Great Britain, redrafted an EU directive in terms that made it accessible to ordinary citizens in Member States. The remainder of the materials was mainly produced by us.

²² For example, the reports of the Molitor group, which made recommendations on desirable community de-regulation in the mid-1990s (to the European Council of Cannes 1996) or the work of the SLIM working groups (*Simpler Legislation in the Internal Market*, COM (96) 204 def.) and the work done in the Netherlands because of worries about the quality of community legislation in projects like the Report of the Quality in EC legislation working group (Koopmans working group), *De kwaliteit van EG-regelgeving*, Den Haag 1995 as well as results of the conference of the Asser Institute during the Dutch presidency in the run-up to the Treaty of Amsterdam, Alfred E Kellermann et al., *Improving the*

Quality of Legislation in Europe, The Hague/Boston/London, 1998

²³ There is quite a lot of literature that discusses the methods and technology of legislative work in the Commonwealth. The Anglo-Saxon orientation of this literature and, especially, the ~ frequent ~ colouring of the common law tradition make these volumes almost useless for a course on legislative drafting in a community context. In this context, the continental legal tradition predominates. For examples of this Anglo-Saxon literature, see G. C. Thornton, *Legislative Drafting*, Butterworths U.K., 4th ed., London 1996, R. J. Martineaux, *Drafting Legislation and Rules in Plain English*, St. Paul, Minn., 1991, R. Dickerson, *The Fundamentals of*

Legal Drafting, Boston Mass 2nd ed., 1985, the famous *Plain English Guide* by Martin C. Cutts, Oxford 1995, etc. There is also an excellent international programme for legislative drafting in the Commonwealth that has been taught every year since 1988 by the International Legislative Drafting Institute at Tulane University, New Orleans, Louisiana, in the United States. It is of course strongly oriented on the Commonwealth and indebted to the 'Plain English Movement', but it is a must for those who, will be drafting treaty texts, etc. in international law

²⁴ Ottawa 1999

²⁵ Brussels 2000. Under the auspices of Emma Wagner, head of the translation service of the EC Commission

The changing role of the European Parliament in establishing community regulations

Since the Treaty of Amsterdam came into effect, the position of the European Parliament in the legislative process continues to change dramatically, which is evident in everything. The EU legislature of the 1999-2004 period is characterized by a lot of legislative activity, emancipation, and self-confidence.

3. THE EP AS AN ACTIVE CO-LEGISLATOR

The Treaty of Amsterdam has simplified and democratized legislative procedures; the cooperation procedure of Art. 252 EU Treaty has vanished from many areas,²⁶ and the co-decision procedure, in consequence, has gained a much larger scope of application. At present, this latter procedure applies to many important policy areas, such as the free flow of employees, the internal market, research and technological development, the environment, consumer protection, education, culture, and public health. In the co-decision procedure of Article 251 EU Treaty, the European Parliament acts on an equal footing with the Council, for this procedure aims to achieve joint positions of the Council and the European Parliament. The procedure offers the possibility of different readings and operates roughly as follows. The EU Commission submits a proposal for a decision to the Council and the EP. The EP discusses the proposal and presents its advice to the Council. This EP advice to the Council may contain proposals for amendments to the original proposal.²⁷ If the advice contains no amendments and is approbatory, or if the Council concurs with all amendments proposed in the advice and is therefore prepared to accept the proposal as

²⁶ This procedure is still applicable to certain issues that are subject to the Economic and Monetary Union.

²⁷ Also the EC Commission gives its opinion on the advice of the EP, both in the first and in the second readings. See Article 251, second and third paragraphs, EC Treaty.

it is, then the end of the procedure has been reached, and the Council accepts the proposal. If this is not the case, a second reading follows. This starts with establishing a so-called joint position of the Council, in which the Council specifies which amendments it does or does not consider

acceptable, or what the Council's objections to the proposal are. In the second round, the EP once again issues its advice, again with the possibility of amendments to this joint position. If the EP's advice endorses the joint position, it is accepted; if it does not endorse it, that is, if any further amendments to the joint position are proposed by the EP or if the advice is negative, a mediatory committee is composed, consisting of delegates from the EP and the Council, which is to draft a compromise text that is acceptable to both the Council and the EP.

How the co-decision procedure is used

Today, the co-decision competency of the European Parliament is one of its most important competencies, which allows EP amendments to be included in community legislation. Full advantage is taken of this opportunity: the last few years, amendments have been pouring in in first and second readings of Commission proposals for directives and regulations. This increases the pressure on the widely applicable co-decision procedure, and dealing with proposals mostly requires more than one reading. Two readings are the rule rather than the exception, and the mediatory committee, intended to be an instrument to overcome incidental deadlock, is frequently resorted to. It will be clear that the EP's active attitude serves to consolidate its grip on community legislation processes, though it is a moot question whether the co-decision procedure itself will not get out of hand this way. In the build-up to the Laeken Conference, therefore, the Eu Commission proposed in its White Paper on European Governance to confine the co-decision procedure to one reading only, that is, to skip the joint position stop-over.²⁸

Submitting (many) amendments is attractive to delegates to signal to their electorate that the EP is important and influential. For delegates in the EP, it is much more difficult to spread the news about achievements than for members of national parliaments, who are monitored by the parliamentary press and therefore need to bring up far less 'physical evidence' of their contribution than EP members.

²⁸ European Commission, 'White Paper European Governance, 25 July 2001, COM (2001) 428 def.

Amendments to preambulatory deliberations

For EP members, it is more important to submit amendments to proposals in their own names and get them accepted than for politicians in Member States. To a certain extent, EP delegates must take care of their own «press». This also helps to explain the flood of proposed amendments and the fact that many of these amendments do not embody changes of or additions to the body of the proposal itself but attempt to modify or flesh out the preambulatory deliberations. Proposals for such amendments are much more likely to be accepted than proposals for amendments to components of the body of the regulation. Such amendments are highly popular and are sometimes improperly used as disguised mini-resolutions. The preambulatory deliberations to a proposed directive or resolution are then seized to summon the EU Commission, the Council, or the Member States, by way of an amendment, to promote a particular interest or take some action.²⁹ This is really in violation of Directive 5 of the interinstitutional agreement, which stipulates that the preambulatory deliberations should only serve to describe the motives for the most important provisions in the body of the regulation, without, however, paraphrasing it. Directive 5 also forbids the inclusion of independent norms or purely political wishes in the preambulatory deliberations. In our experience, this command is often broken. The deliberations are an excellent carrier for delegates who like to have something to show to the folks back home.

It is very difficult to take action against such practices. First of all, one might wonder whether it will really do any harm, which, in most cases, seems very unlikely. Contamination of the deliberations will generally not have any dramatic consequences, or so the chairpersons of the permanent committees feel. In addition, it makes for valuable political change. If an amendment to the deliberations could do some harm, for instance, if it introduces a norm that does not reappear in the regulation or if the Member States or a community institution use it erroneously to replace the reso-

²⁹ See, for example, the Report on the proposal for a directive of the European Parliament and the Council with respect to a change in Directive 95/21/EC of the

Council concerning compliance, by ships that use Community ports and sail in waters that fall under the jurisdiction of member states, with international norms in

the fields of the safety of ships, prevention of pollution, and living and working conditions on board – especially Amendments 11 and 13



lution instrument, then the question is who is going to be the whistleblower. Commission chairpersons try to allow as much political latitude to the members as possible. In addition, there is very little discretionary scope for commission chairpersons to reject amendments on the basis of Art. 140 of the Regulations of the European Parliament.³⁰ The Commission and the Council do have some scope to oppose improper amendments in the deliberations: the former in the framework of their advice on EP recommendations in their first and second readings, and the latter if the EP has accepted a recommendation. However, this does take some political courage. From a strategic point of view, it will often make more sense for the Commission or the Council to look the other way if amendments to preambulatory deliberations are improper. This may preclude the necessity of another reading, but it may also mean that any remarks or objections to other amendments actually gain weight. This, however, should not be taken to mean that the Council or the Commission never object to such practices.³¹

The quality of amendments

The flood of amendments to proposals that are established in the co-decision procedure also has consequences for the editorial quality of the eventual EU regulations. Amendments are drawn up by many different delegates who are not always legally trained and are assisted by staff who may not have any legal training either; this is a mixed blessing for the quality of those regulations. It is a devil of a job to translate and control the amendments

³⁰ The first paragraph of Article 140 recognizes four situations of possible non-admissibility, namely that a) its content is not at all directly related to the text it intends to change; b) it intends to delete or replace a text completely; c) it intends to change more than one of the articles or paragraphs of the text to which it pertains (and there is no compromise amendment); or d) it turns out that the editing of the text to which it pertains need not be

changed in at least one of the official languages. In this last case, the chairperson of the commission, in consultation with those involved, tries to find an appropriate linguistic solution.

³¹ See, for example, Advice of the Commission, in accordance with Article 251, paragraph 2, under c), of the EC Treaty, about the amendments of the European Parliament to the common point of view of the Council with respect to the proposal

for a decision of the European Parliament and the Council concerning the creation of a community framework for cooperation in the field of accidental or purposeful pollution of the sea, concerning change of the proposal by the Commission in conformity with Article 250, paragraph 2, of the EC Treaty, document 500PC0475, in which, under point 5 with respect to Amendment 23, an objection is raised by virtue of the interinstitutional agreement.

in terms of their consistency, both with respect to each other and with regard to the source text. The sheer quantity of amendments also means that Parliament's civil service is having increasing difficulty to carefully check these amendments for translation problems, or other technical or legal problems. The number of amendments that are being filed is simply too large. Since the Treaty of Amsterdam, the production of amendments has increased approximately five-fold according to staff, while Parliamentary staff numbers have remained the same. Most legal experts and translators, therefore, feel that they are not abreast of things. If they manage to translate the amendments into the eleven working languages more or less on time, all available time will have been used up. Potentially, this is a major problem because, in its advice, the Commission often does not get round to dealing with the technical, legal, or linguistic quality of the amendments. This is partly a capacity problem but also a matter of expediency. The Commission prefers not to use up all its ammunition in order to raise really important issues in its advice to the Council. It is strategically unwise to keep harping on the dots and dashes of amendments, and it probably irritates the delegates. The lack of an independent advisory body to assess the quality of community legislative proposals and perhaps the amendments is making itself increasingly felt.³²

4. THE EMANCIPATION OF THE EP IN THE LEGISLATIVE PROCESS

In the field of legislation, it seems that the EP is undergoing an emancipation process. Since Amsterdam, the EP has had a firm but not yet dominant position in the regular legislative processes of the co-decision procedure. The Commission and the Council are much more powerful. The Commission has a head start in terms of expertise, personnel, and means, besides having the exclusive right of initiative.³³ The Council has

³² At the time, such an independent advisory body for the preparation of community regulations was recommended by the French Conseil d'Etat (Rapport Public Considérations générales sûr le

droit communautaire, *Etudes et Documents*, nr. 14, 1993) and the Koopmans Working party, *De kwaliteit van EG-regelgeving* ('The quality of EC rules'), The Hague 1995.

³³ see also P. J. G. Kapteyn, P. Verloren van Themaat (eds.), *Inleiding tot het recht van de Europese Gemeenschappen* ('Introduction to the law of the European Communities'), Deventer 1995, p. 128.



more influence in many ways because, for instance, it directly represents governments of Member States; it can indirectly influence the Commission's preparation of proposals and regulations and directives; it may mobilize expertise or means as it sees fit; and it generally has the final say in the co-decision procedure as the Council usually enacts decisions in the final instance.³⁴ As against all this, there are only modest opportunities to exert influence at the disposal of the EP, although it is doing its best within and sometimes even outside the scope offered to it by the treaties. One way in which the EP is gaining more clout in legislative procedures is by using the possibility of 'quasi-initiative' provided by Article 192, second clause, of the EC Treaty to institute a so-called legislative resolution. In such a resolution, the Parliament requests the EC Commission to make appropriate proposals for community decisions with respect to matters that in the opinion of the EP are necessary for the implementation of the Treaty. The use of this instrument is on the increase. It *is* difficult, though, to force the Commission to stick to deadlines. If the Commission does not develop any proposals as a result of such a resolution, or procrastinates, it is not politically easy to call it to account. It is true that the EP controls the EC Commission, but sending the Commission home for failing to implement a legislative resolution does not, for the time being, seem a very likely option. According to many course participants, however, the collective dismissal of the Commission in 1998 and the Cresson affair have left their mark on relations between Parliament and EC Commission.

There is yet another way in which the EP is trying to make its influence felt in community legislation procedures. This is done in a procedure that may be described as 'riding on' a commission proposal, and it applies in the following situation. The EC Commission has the right of initiative, also as far as proposals to change existing regulations or directives are concerned. Such proposed changes are presented to Council and EP, but only if the consultation procedure is applicable. According to the letter of the Treaty, which accords the exclusive right of initiative to the EC Commission, the EP can, in such a case, only propose amendments to the proposed regulation of change, and *not* to the basic text which is changed by the Commission's proposal. Nonetheless, amendments to changes proposed by the Commission

³⁴ See Article 251 of the EC Treaty.



increasingly go beyond amending the proposed change. Sometimes entire new articles are added via the proposed change, or changes are directly made to the basic text by amendments.³⁵ In this way, the exclusive right of initiative of the EEC Commission is subtly being eroded.

Also the manner in which Parliament takes the lead when making consolidated versions of regulations – i.e., versions of decisions in which the amendments have already been taken into account – testifies to an urge to move forward. As a matter of fact, it is the Council which in nearly all cases is authorized to decide on the final version of a regulation, but since collating amendments closely resembles making consolidated versions, and since the Parliament feels the need to express how and what was its contribution to an earlier version (for example, proposal or common point of view), it often turns its recommendations – certainly if in a material sense they constitute the terminal station – into consolidated versions. This is very much against the wishes of the Council and the Commission, but there is relatively little they can do about it. It goes without saying that such a version consolidated by the EP acquires a certain factual authority that it does not formally deserve.

5. A MORE SELF-CONFIDENT EP

The collective dismissal of the Santer Commission, the Cresson affair, the greater powers obtained by the EP after the Amsterdam Treaty, but also the forthcoming enlargement of the Union and the attendant necessary adaptations of institutional relations and the Treaties, have considerably boosted the EP's self-confidence. Where, five years ago, the Parliament had a somewhat difficult and vague message for the electorate – which can be deduced from the low turnout at the EP elections –, it now seems all ready and eager

³⁵ For one among many examples, see amendments 27 and 29 from the Report on the proposal for a directive of the European Parliament and the Council with respect to the quality of petrol and diesel fuel, and to change Directive ..., rapporteur Heidi Anneli Hautela.

to catch up. Apparently, it is the EP's intention to become a really active and recognizable parliament for the European citizens, with a voice and a character of its own. For example, it is closely watching the discussion concerning the institutional reform of the Union. Since 1999, the Par-

liament has repeatedly drawn attention to the danger of the present decision-making procedures within the Union bogging down within sight of the new challenges in the form of the enlargement and the increased legislation production.³⁶ Also in the discussion resulting from the Laeken summit, which constituted the start of the European Convention and the institutional reform process, the EP put up a good show. In a Resolution of the European Parliament about the European Council of Laeken and the future of the Union³⁷ of the end of December 2001, the Parliament argues in favour of simplifying the legislative procedures and making them transparent, a general principle being that, in the Council, votes are taken with a qualified majority, and that, for the sake of the democratic character of the Union, the European Parliament is involved in all legislation through a consultation procedure. At present, quite a number of subjects are excluded from that consultation procedure. A second wish of the Parliament concerns the introduction of a hierarchical system of norms which makes a distinction between basic legislation limited to essential and fundamental elements of a legislative complex, and implementation regulations – easier to draw up – in which details of regulation are laid down.³⁸ Besides change within Community legislation processes, the Parliament also argues in favour of complete involvement of the EP with the communal trade policy, external economic relations and the introduction of reinforced forms of cooperation, election of the Commission chairperson by the EP, and the appointment of the member of the Court of Justice with a qualified majority and the consent of the EP.

The Parliament as legislative conscience

In view of the dynamism of European development, the reform operation is also likely to result in increasing influence of the European Parliament. The present EP is establishing its credentials for this by making it clear,

³⁶ See, for example, the Resolution about the decision-making process in the Council in an enlarged Union, *PbEG* 1999 C150, p. 353 & ff., and the Resolution about improvement

of the functioning of the institutions without change in the Treaty, *PbEG* 1999 C219, p. 427 & ff.

³⁷ Resolution of the European Parliament about the European Coun-

cil of Laeken and the future of the Union (2001/2180(INI)) PE 302.286.

³⁸ See also W. Voermans, *a.w.* 2001 and the White Paper on European Governance.

through the way it functions, that it has an important added value in European decision-making processes. This is not only happening on the central stage but also in the cubicles where the editorial quality of community legislation is taken care of. In the year 2001, it was quite interesting to see how the EP, happy about the legislation course it had developed itself, immediately propagated its mission to the EC Commission and the Council, giving civil servants from these circles the opportunity to participate in the courses. Thus the EP was the only one among the institutions that openly did something about that training in the interinstitutional agreement. The EP as legislative conscience ... – that really is some paradox. In any case, it was great to be able to witness a little bit of constitutional community history at close quarters.

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◆ Bibliografia ◆

► RECENSÕES

DAVID DUARTE; ALEXANDRE SOUSA PINHEIRO; MIGUEL LOPES ROMÃO; TIAGO DUARTE, *LEGISTICA. Perspectivas sobre a concepção e redacção de actos normativos*, Ministério da Justiça, Gabinete de Política Legislativa e Planeamento, ALMEDINA, 2002.

O presente número da *Legislação* estava já na fase final de impressão quando veio a lume a publicação que ora se apresenta. Assim, considerando a importância desta obra, optámos por uma breve recensão que alerte, desde já, os nossos leitores para este trabalho sobre a feitura das leis, que consideramos merecer uma leitura atenta.

Esta publicação resulta de uma iniciativa do Gabinete de Política Legislativa e Planeamento do Ministério da Justiça, promovida pelo então Director do Gabinete, João Tiago Silveira, que em texto introdutório justifica a mesma devido à ausência entre nós de «...um guia prático que habilite quem tenha de elaborar projectos de actos normativos com a informação necessária para o fazer». Mais se adverte que não se pretendeu apenas formular regras de redacção legislativa, mas antes fornecer ao legista um leque alargado de informações sobre as diversas fases de preparação de um diploma. Por fim, menciona-se ainda que a obra que ora se recenseia é apenas um « contributo » na área em análise, não tendo, nem podendo ter, as regras propostas qualquer carácter vinculativo.

O termo *legística*¹, título principal desta obra, surge na doutrina, numa primeira fase, como sinónimo de técnica legislativa, ligado apenas aos problemas da redacção legal. Num segundo momento, a *legística* passa a ser

¹ Em 1988, Alain Viandier publica *Recherche de légistique comparée*, Springer Verlag, Berlin. Nesta obra o autor aborda somente as questões da técnica legislativa. Em 1994, Dominique Remy publica *Légistique. L'art de faire des lois*, Éditions

Romillat, Paris. Neste texto a expressão é já empregue em sentido lato, considerando-se a legística material e formal. Posteriormente, surgem duas obras que consagram este entendimento. Em 1999, Charles Albert Morand publica *Légisti-*

que formelle et matérielle, Presses Universitaires d'Aix-Marseille, Aix-en-Provence, 1999 e, no mesmo ano, Rodolfo Pagano publica *Introduzione alla Legistica. L'arte di preparare le leggi*, Giuffrè, Milano.