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Comprehensibility of EU Legislation: Reform for a sustainable EU

Helen Xanthaki

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EU legislation is currently speaking to EU institutions, and Member States and their national authorities. It is therefore detached from EU citizens. Enhancing the comprehensibility of EU legislation can forge a direct channel of communication between the EU and its citizens, thus strengthening their trust and loyalty to the organization and its ideals. This can nurture sustainable integration for the longevity and prosperity of the EU.

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1 Legislative expression in EU legislation

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The Treaty of Lisbon clearly sets the aim of the Union: to promote peace, its values, and the well-being of its peoples. The pursuit of these benevolent policy super-goals is undertaken by means of regulatory choices. The EU identifies areas, within its competences, where common regulatory results are best achieved via common action. Once agreement on the policy aim is offered by the Member States, the regulatory analysis of the current regulatory status in the Member States is explored, and common trends are identified. On the basis of the juxtaposition of this survey and analysis against the aim to be achieved, policy options are put forward and consensus is gauged amongst Member States. If consensus is present, the EU proceeds with its regulatory process. The most appropriate regulatory tool is selected, with legislation being, at least in theory, a solution of last resort. If necessity and subsidiarity allow, EU legislation is put forward as a tool for regulation. This starts the ball of law-making rolling.

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EU legislation is simply a tool for regulation. It is a mere mechanism that EU regulators use to achieve the desired regulatory results. For the purposes of achieving the desired regulatory results, thus reaching efficacy of regulation, EU law-makers communicate the regulatory message to all of the nations and peoples of the EU. They express what rights and obligations EU citizens acquire by virtue of the legislative text, and they state what modification of action or behaviour is sought by the EU for the purposes of achieving efficacy of regulation. This communication is crucial. It is only through legislation as a channel of communication between the EU and its legislative users that reform requirements are expressed. If they are conveyed in an accessible manner, the users may understand them, and, in turn, may decide to actually put them to effect. Implementing the regulatory reforms *en mass* leads to the successful execution of the selected regulatory mechanisms. This allows the latter to perform as envisaged by the EU regulators. And so, if their regulatory strategy was correct, they will reap the desired regulatory results. So, accessible communication of the new requirements to the users of EU legislation is absolutely crucial for the EU's regulatory success. As the latter constitutes the main means of EU governance, it is absolutely crucial for the long term sustainability of the EU as a union of states and peoples.

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Traditionally, this crucial communication has been entrusted to Member States, which, via the transposition of EU measures, communicate the EU regulatory message and its implementation in the Member State to their own nationals. However, the conceptual basis of this traditional EU set-up is no longer current. EU law is often still viewed as *droit diplomatique*, namely an expression of diplomatic success in achieving consensus via compromise. But this is no longer the case. EU law has evolved. First, the principle of direct applicability renders Regulations binding as they stand: there is no intermediary and no interpreter of the regulatory message. Second, the principle of direct effect empowers EU citizens to rely on the EU

text rather than any national implementing measures. And third, the prevalent method of copy pasting for transposition eliminates the envisaged role of regulatory intermediaries for national legislatures.

EU legislation is no longer a diplomatic law. It is the legislative expression of the EU's regulatory message to EU citizens directly.

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This creates the urgent need for a reform of EU law-making as an initiative and as a policy, to reflect the current usage of EU legislative texts as the final legislative text for EU regulation both at the EU and the national levels.¹ The demand for corrective, strategic, reformative action in the EU's law-making strategies and procedures derives directly from the now blindingly marked change in the usage of EU legislative texts. A single legislative text is now, in theory and practice, called to express and serve both the generic EU regulatory results and the diverse national regulatory sub-results of 27 Member States. From a legislative drafting perspective, this is an impossible task, especially since the real pursuit is the actual achievement of regulatory results rather than the mere passing of yet another legislative text. And this impossible task becomes even more unrealistic, since the *de facto* purpose of EU legislation is effectiveness to a supra-state union plus 27 Member States (see XANTHAKI 2018b: 28-47).

There is little doubt, therefore, that the EU must proceed to a reform of its law-making approaches and tactics in order to respond to the now changed usage of its legislative texts.

However, apart from the functional necessities exposed above, there is a second, equally important, argument for EU legislative reform. Legislative texts aim to contribute to the regulators' desired regulatory results. They do so in two main ways. First, by detailing how the users' behaviour must be changed in order to participate in the selected behavioural change, how this change contributes to the selected regulatory mechanisms, and how this feeds to the desired regulatory results. And second, perhaps even more importantly, in narrating the above regulatory story, they offer the user an understanding of the regulatory aim and entice them to undertake often burdensome action in order to achieve a longer term positive result. In other words, the expression of a beneficial ultimate regulatory aim cajoles the execution of the demands of the legislation, thus not only promoting regulatory success but, even more importantly, rendering users as participants to the regulatory effort. This sense of participation instils a sense of ownership of the regulatory effort, and creates a sense of trust to the regulators and loyalty to the regulating organisation.²

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If this structure is applied to the EU, then there is a second imperative for legislative reform. Reformed EU legislative texts can detail not just the demands of EU regulators but also the rationale behind them. They can offer EU citizens and Member States, as the collective

1 For an analysis on plain language in the EU, see CUTTS (2001).

2 For an expert analysis on the link between trust, trustworthiness, and legislation at Regulatory Impact Assessment (RIA), see RADAELLI/TAFFONI (2020).

demos of the EU, an understanding of the benevolent reasoning behind legislative measures. They can tell the EU's regulatory story without possible distortion from national texts (see BERG 2019: 65, 87): namely why legislate, how this contributes to regulatory results, and what is the added value for citizens and states³. This latter message is not being received by EU citizens.⁴ The EU's popular trust and its ability to handle crises is therefore suffering, especially by those affected by the economic and other crises (see HOBOLT/DE VRIES 2016: 413, 431). In addition, there is a generally reduced trust in political institutions and political actors both at the international and the national level (see DALTON 2013: 6). So, conveying the regulatory rationale in EU legislative texts can render EU citizens participants (rather than suffering pawns) to the regulatory process. It can create collective ownership of the regulatory aims. If these aims continue to be acceptable and shared between the EU and its membership, they can enhance loyalty to the EU as an ideal and as a union. And if the regulatory aims continue to be achieved, they can also enhance trust to the EU as an organisation capable of delivering the common aims to which EU citizens and EU Member States are now loyal (see HARARI 2014).

2 Legislative reform in the EU: a methodological roadmap

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The road map to establishing trust and loyalty to the EU and its regulatory interventions via a reform of the EU's legislative communication can be based on the existing methodology of regulatory reform expressed in the EU's own Better Regulation Agenda, which has yet to be applied to the EU's own legislative policy (XANTHAKI 2019: 7-20).

2.1 STEP 1: Identifying the users of EU legislation⁵

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The first step of the roadmap must be to establish which are the current legislative audiences of EU legislation. If EU citizens already read EU legislation, then the channel of communication is already established, and what remains is the attribution of directness to the regulatory message. If legislation is not currently read by EU citizens, then the EU has to establish the channel of communication first, and then proceed with changes in the regulatory message.

Establishing the legislative audiences has surfaced as a crucial set of empirical data in modern legislative research after the 2013 Good Law initiative led by the UK's National Archives in cooperation with the UK's Office of Parliamentary Counsel, the Sir William Dale

3 For support to the argument that alerting EU citizens to their personal benefit from the EU can change attitudes and trust, see BAKARDJEVA ENGELBREKT/BREMBERG/MICHALSKI/OXELHEIM (2019: 1, 19).

4 On trust and legislation, see DE BENEDETTO (2020).

5 For the generic doctrine on this topic, which is here applied specifically to the EU, see XANTHAKI (2018a: 153-172).

Centre for Legislative Studies, and the University of Cambridge. The project was amongst the first to offer validated empirical data on the real users of UK legislation, their profiles, and their usages of legislative texts. A survey of 2,000,000 users of legislation in the UK over a period of one month led to the identification of the three main categories of legislative audiences. These are lay persons reading the legislation to make it work for them, sophisticated non-lawyers using the law in the process of their professional activities, and lawyers and judges. In more detail, in the UK there are three categories of users of legislation:

- a. Lay persons, without legal or topical sophistication, who seek answers to questions related to their personal or familial situation; the 'Heather Cole' persona represents about 20% of users of legislation (User Group 1);
- b. Non-lawyers, without legal but with topical sophistication, who use legislation in the performance of their professional tasks (for example, law enforcers, human resources professionals, or local council officials); the 'Mark Green' persona of the survey represents about 60% of users of legislation (User Group 2); and
- c. Lawyers, judges, and senior law librarians, with both legal and topical sophistication; the 'Jane Booker' persona represents about 20% of users of legislation (User Group 3).

The significance of the survey cannot be understated. It provides, for the first time in European legislative research and practice, rich empirical evidence from the huge sample of 2,000,000 monthly visitors of www.legislation.gov.uk who answered questions in this regard. The survey destroys the myth of the past that legislation is allegedly only used by legal professionals. In fact, legal professionals are very much in the minority of users, although admittedly their precise percentage may be underrepresented in this survey of the free electronic database of UK legislation, since legal professionals would be expected to use richly annotated and currently updated subscription databases rather than the free government database surveyed by the project. Whatever the exact percentages of each category are, there is now significant empirical evidence that legislation speaks to three distinct groups of users with diverse legal and topical awareness and with diverse interest in the precise regulatory messages included in legislative texts. Each legislative audience seeks different usages in legislation, as it requires answers to different sets of questions. Moreover, each legislative audience has different capacity to understand the topic/subject of the legislative text and the workings of the law and its texts.⁶

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Of course, application of these conclusions to the EU cannot be automatic. Ideally, a similar survey would provide accurate data on the EU legislative audiences, their needs, and their levels of topical and legal sophistication. But there is no relevant study applied to EU legislation. And so application can only be undertaken via qualitative methods. Historically, EU legislation has been labelled as a diplomatic law, addressed to Member States. This was an accurate classification of EU legislation in the early stages of European legislative history. However, the establishment and further development of the principle of direct applicability

6 For an analysis of the survey and the application of its findings in legislative drafting in general, see XANTHAKI (2014).

and direct effect of EU legislation question the accuracy of the assumption that EU legislation continues to be addressed solely to Member States. As EU citizens may, and quite often do, rely directly on EU legislative texts to exercise their EU derived rights and invoke them before their national courts, EU legislative texts are now directly addressed to EU citizens as much as to the Member States. Moreover, the prevalence of copying the text of EU legislation *verbatim* as a method of transposition of EU legislation into national law (STEUNENBERG/VOERMANS 2006; RAMSEY 1996: 218) means that the EU legislative text is not only one of the sources of legislative communication but, *de facto*, the only source of legislative communication to EU citizens. Let us explore these statements further (see XANTHAKI 2012: 536-550).

There is no doubt that Member States and the national authorities remain a solid user group of EU legislation. They are entrusted and burdened with the task of providing the administrative framework for the application of EU legislation at the national level. The officers of national authorities as individuals and representatives of their organisations may not necessarily have legal training, but they certainly have great sophistication both in the subject matter and in handling EU legislation. On that basis, they would be classified as members of User Group 2.

Lawyers and judges are equally certainly users of EU legislation. They are entrusted and burdened with the task of interpreting and applying EU legislation before the national and European courts. They have expert topical and legal sophistication in EU legislation. On that basis, they would be classified as members of User Group 3.

The question is whether EU legislation is actually used by lay users. In other words, is there a User Group 1 for EU legislation? The answer can only be affirmative. As stated above, the principles of direct applicability and direct effect have led to the *de facto* creation of direct reliance of EU citizens to EU legislative texts. In turn, this has led to the *de facto* creation of a User Group 1. A counterargument here could be that, although the principles have indeed led to reliance on EU texts before the national authorities and the national courts, this is in practice led or undertaken by legal representatives of EU citizens. Perhaps it is User Group 3 that puts the principles to effect by advising EU citizens and invoking EU legislation in cases before the national courts. Even if this position is accepted, the reality of transposition via copying the EU legislative text *verbatim* has inevitably led to the usage of national legislation with EU legislative provisions by Group 1 users. In others words, even if there are no Group 1 users of the EU legislative texts in their original format, there are definitely Group 1 users of the copies of EU legislative texts in the national transposition format. And, although in the past the EU could be forgiven for relying on Member States to bring the text to its national users creatively, there is now enough evidence to pull that safety net under the feet of EU institutions altogether. On that basis, there is little doubt that EU legislation already has a group of lay users that read EU legislative texts (as they stand or as copied when transposed) in order to understand what rights the new legislation is offering them or what obligations it is imposing to them.

This is precisely the already established channel of direct communication with EU citizens that the EU can use in order to regain the ground now occupied by populist regulatory

rhetoric. EU legislation already speaks to EU citizens. By reforming the legislative texts, the EU can convey the EU regulatory messages accurately, without allowing space to populist anti-EU narratives. What is required is a text that talks to EU citizens directly. A user-friendly text with a language that EU citizens understand can entice the attention of those of its citizens that currently resist EU legislative texts.

2.2 STEP 2: Setting the pitch of EU legislative texts

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Currently EU legislation, as a diplomatic law, is designed and expressed as a set of instructions to national authorities on legislative reform and on the method to put that to effect. In that sense, current EU legislative expression is no longer fit for purpose. To speak to its three User Groups, and most crucially to User Group 1 of EU citizens, EU legislative language requires radical reform. This is even more crucial in legislative documents that are not consumed in mere technical details, and are there to convey a regulatory message to EU citizens.

The EU has participated in the plain language movement for a number of years, starting with the SLIM initiative (Simpler Legislation for the Internal Market) and through repeated confirmation of simplicity as one of the cornerstones of EU legislative drafting in all of its Inter-Institutional Guides for legislative drafting. Indeed, taking the English language as an example, the application of plain language, a movement that prevailed in legislative theory and practice over the last fifty years, has produced results also in EU legislation. However, it has now been abandoned and evolved onto an easification movement. Easified language, introduced by BHATIA (1983) in the early 1980s, is language led by and adapted to the relative sophistication of the specific user groups to which the specific text is intended to speak. Easified language applies and nurtures the diversity of topical and legal sophistication amongst the three main legislative audiences identified in the Good Law initiative. Plain language texts are merely bi-dimensional: the text can be either plain or complex. In contrast, easified language adds the dimension of relativity in the understandability requirement of a plain language text. Plain for whom? This leads to a multifaceted language that communicates the relevant regulatory messages to each User Group in the language that its particular level of topical and legal sophistication permits.

These innovations in linguistic expression seem to be ignored at the EU level. Instead of reaching over to the language of the specific User Group, the EU has resorted to the introduction of an EU specific language, which is twice removed from its users (namely “Brussels Eurolects” on top of the national legal languages).

It would not be unfair to say that current EU legislative language is not fit for purpose. Effective communication of the EU regulatory message to all three User Groups of EU legislation requires relativity of the EU legislative expression that must be pitched to the level of topical and legal sophistication of each User Group. Effective communication of the EU regulatory message as a vehicle of instilling trust to the EU demands easification.

But easification does not apply exclusively to the legislative expression. Simply changing the choice of words used in the text does not guarantee receipt of the communication by User Groups, and most significantly by the target User Group 1 of EU citizens. For effective easification, the structure of the legislative text plays as significant a role as legislative expression.

2.3 STEP 3: A better structure for EU legislation

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Easification of the EU legislative text involves the pitching of each regulatory message to the level of topical and legal sophistication commanded by each of the three User Groups of EU legislation, namely lay EU citizens, national authorities, and EU legal professionals.

But each User Group has a diverse level of such sophistication. Could that lead to the need to introduce three versions of the same legislative text, structured and expressed for the purposes of communicating with Group 1 or Group 2 or Group 3? This would be a recipe for disaster, on moral, ethical, constitutional, and practical grounds. But remaining with a single text can be impractical in legislative practice.

Not all legislative user Groups seek answers to the same questions when reading legislation. Each user group has its individual requirements for legislative information that are distinct from those of the other user groups. Identifying the needs for legislative information for each User Group at a legislative provision (Article), rather than a legislative text (Directive or Regulation), would allow EU drafters to imitate oral communication, and pitch the EU legislative text to the specific abilities and requirements of the User Group to which the provision is speaking.

The layered approach to structure⁷ promotes the division of legislation into three parts, corresponding to each of the three profiles of legislative users. Part 1 can speak to lay persons: the content is limited to the main regulatory messages, thus conveying the essence of law reform attempted by the legislation, focusing gravely on the information that lay persons need in order to become aware of a new regulation, to comply with new obligations, or to enjoy new rights. Part 2 can speak to non-legally trained professionals who use the legislation in the course of their employment. Here one can see scope for further detail in the regulatory messages introduced, and for language that is balanced [technical, yet approachable to the professionals in question]. Part 3 of the legislation can then deal with issues of legislative interpretation, issues of procedure, and issues of application, in a language that is complex but not quite legalese, as there is nothing to prevent all groups from reading all parts (see XANTHAKI 2018a: 153-172).

Having established that EU legislation is addressed to three User Groups, the layered division of EU legislation becomes much more visible. In fact, it tends to fall clearly in the lap of EU drafters. In application to the layered division presented above, Part 1, addressed to

⁷ See XANTHAKI (2014: 77-79). It must be noted that the term, and to a certain extent, the concept is attributed to John Witing, Tax Director at the Tax Simplification Office. I am very grateful to John for his inspiration and the generosity with which he has shared it with me.

Group 1 lay users, can contain the main regulatory messages, namely, a. why legislate, b. how this benefits citizens and enterprises, and c. what are the awarded rights and imposed obligations. These must be expressed concretely, simply, and accurately. For example, Regulation (EU) 2017/920 can start with “This Regulation relieves EU citizens from charges when phoning abroad within the EU”. The rather unfortunately named “bent bananas” EC Commission Regulation No 2257/94 (now repealed) could start with “1. This Regulation prohibits the cultivation of those species of bananas that are prone to disease. 2. The objectives of this Law are: a. to enhance the income of banana farmers by 20% over a period of 3 years; and b. to protect crops from disease, thus saving the economy 2,000,000 Euros per year.”. Placing these crucial regulatory messages in the very beginning of the text, when the attention span of lay users is in its prime time (think advertising) would promote awareness of EU citizens on what the EU is offering them, short or longer term, why legislation is necessary, and what the new provisions are about. One final point for Part 1 could be the inclusion of the effect of the EU text on EU citizens. This would require the identification of the date of entry into force, and an explanation of direct applicability and direct effect in lay terms. For example, “This Regulation is the law in all EU Member States after 31 December 2019, even without further national implementation”. Or “This Directive is the law in all Member States after 31 December 2019, and EU citizens can rely on it before the national courts even if their state has not legislated any further”. Or “Articles 1, 3, 5, and 10 of this Directive are the law in all EU Member States after 31 December 2019, and EU citizens can rely on these provisions before the national courts even if their state has not legislated any further. Articles 2, 4, and 5 of this Directive are the law in the EU but EU citizens cannot rely on them before their national courts without further legislation in the Member State”.

Part 2, addressed to Member States and national authorities, can include the detailed list of regulatory messages. The content, and even language, here would not change from the existing EU legislation. Perhaps it would make sense to divide in separate lists the duties of Member States and their powers: Member States **must**, as opposed to Member States **may**. This will facilitate complete transposition, by identifying in a clear list the obligations of Member States. This is where national authorities can focus, and these can be replicated in correlation tables like the one currently used by the Commission. Duties could be enhanced by including specific national implementation action, such as the identification of an agency to administer the law, the provision of enforcement mechanisms, and any monitoring requirements. This would promote effective implementation of the EU legislation at the national level and effective monitoring of implementation at the EU level. Of course, as duties are necessary elements for the completion of the regulatory package, duties must come with a clear deadline. This is already provided for as the transposition deadline. But taking it away from the variety of dates at the end of the EU text would both draw Member States’ attention to what they are expected to do by that time, and it would alleviate the confusion of lay users on the date of entry into force of the EU legislative text. Powers of Member States, namely transposition options, could be a new element in EU legislation. They are currently found in Transposition Guidance. The advantage of placing them in the text of the legislation would be that the choices of Member States would be limited to the

ones included in the legislation. This could dramatically prevent gold-plating, and would enhance a level of harmonisation by steering Member States to manageable groups of trends in legislation and practice.

Part 3, addressed to EU and national lawyers and judges, can include everything that is left outside of Parts 1 and 2. Recitals, definitions, legal issues, issues of interpretation, reviews and sunset clauses can be collected in Part 3. This would involve simply transferring these types of provisions from the beginning of the EU texts to the bottom. This is the part of the legislation, where drafters can use expert terminology freely provided that the rule of law is still served.

Applying the layered approach to EU texts may seem a daunting task. But in practice, it proves to involve a rather minor tweak in the current structure of EU legislative texts. It involves creating a new Article 1 with the three regulatory messages requested by Group 1 lay users: why, how, and what, in concrete terms. Then dividing current content into duties and powers for Member States and authorities. And transferring recitals, definitions, and interpretation from the start of the text, and bundling them to the bottom along with the rest of final provisions. Not a bad price for enhanced effectiveness, in delivery of Better Regulation.

3 Comprehensibility of EU legislation as a tool for sustainable integration

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EU legislative language and structure are no longer fit for purpose. And this is further exasperated by the frequent transposition via copying the EU text. Can we change that? Much along the lines of NICOLAÏDIS's paradigm of sustainable integration (see NICOLAÏDIS 2010a, 2010b, 2010c:21), we must view legislation as a method of communication with EU citizens directly. We can share the long term vision of the regulators, explain in concrete how this legislation contributes to the achievement of the regulatory vision, and ask EU citizens to change their behaviour in an admittedly inconvenient yet worthy, in the long term, effort to achieve OUR common super goal. This will enhance implementation of EU law. But it goes even further.

Legislation in that sense can re-establish the lost channel of communication between EU citizens and the EU, and can render EU citizens participants to EU regulation and ultimately to the EU's long-term vision. I believe that by sharing the EU's legislative vision in this way, we can silence populist arguments, and we can enhance legitimacy (see BLACK 2008: 137; also MURPHY/TYLER/CURTIS 2009: 1) and *demoicracy* (NICOLAÏDIS 2010b) in the EU. Implementation of EU law will be a conscious citizens choice (to the degree that legislation can be that) for the long-term benefit of the EU and its peoples.

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In the history of polity and policy of the EU and its predecessors, the friction was traditionally between those who sought wider versus deeper integration (see JACOBS 2018: 9).⁸ However, there is a third option that simply transfers the strategic tools for the future of the EU to a different basis. So, instead of focusing on the microcosm of the strategic means by which flourishing of the EU can be achieved (wide versus deep integration), perhaps it is time to take a step back, and look at the goal itself, by agreeing what exactly this flourishing future can be. The EU, as a union of states and peoples, and of course as an organisation, can only aim to achieve its longevity and its sustainability. In other words, the EU's measure of future success can only really be whether it survives the constant change of international and national environments within which it is placed, and whether it sustains its political, social, and economic following. And here lies the answer to the eternal question of wide versus deep integration: it does not matter! What matters is whether the strategic means selected will actually bring success with sustainability and longevity (see NICOLAÏDIS 2010a, 2010b, 2010c: 21). Whether this can be achieved via actions that widen the EU's regulatory coverage or deepen its regulatory grasp is really neither here nor there. In fact, there is no reason to promote, or indeed to exclude, either of the two. Functional regulation uses the most appropriate means to achieve the regulatory super goal: and for the EU, as indeed every union and organisation, the super goal is survival and prosperity for the ideal that it represents, for the states and peoples that are its members, and for the organisation that administers the ideal and serves the membership.

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From this analysis it is now obvious that EU legislation can become a powerful tool for the enhancement of loyalty and trust to a sustainable EU ideal and membership, as well as for the enhancement of the EU's regulatory aims through which the EU ideal is fed and nourished. There is little doubt that an EU legislative reform can be painful and, at times, radical. But, provided that the tools for its achievement remain feasible, the justification for its pursuit seems to be loud and clear. And the main tool for that achievement remains the instillation of comprehensibility in EU legislation.

8 On that point, see BRAITHWAITE/MAKKAI (1994: 1); BRAITHWAITE/LEVI (1998); and TYLER (2001: 361).

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