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für die legistische Arbeit

When the unification becomes a focal point of misunderstanding

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Although the acceleration of digitalisation is increasing the pressure to speed up and simplify procedures and adapt legislative drafting and decision making models, changes need to be approached gradually and thoughtfully. The methods of shaping the content of regulations or the basic concepts of how regulations are written have remained essentially the same for a long time. One should approach any changes to legal concepts carefully and look critically at the existing legislative procedure. The shorter life-cycle of legislation and improved technical possibilities tend to make changes to the traditional legislative drafting methods even where there is no need to do so. One should always ask themselves the following questions: can the legislative process be accelerated, and perhaps even more importantly – can it be improved?

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1 Introduction

<1>

Member States of the European Union (EU) live two parallel legal systems at the same time, one purely national and the other related to the EU legislation. Throughout the years of membership they have developed methods and manners how to implement and transpose the legal acts of the EU, respectively. Each time new approaches at the EU level arise they undoubtedly affect the said methods and manners. Does EU care? Are Member States consulted when this happens or are they just informed of the changes?

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At the beginning a concept starts to form in the mind of an individual. This concept needs words in order to be communicated to the readers or listeners with the aim to generate that same concept in the minds of the latter. Having a family of 27 means that perception of the concept struggles really hard to be understood everywhere. Here comes translation and culture, many of them. Each reader or listener starts from themselves and it is only when in doubt or a problem arises in the interpretation that we turn to other language versions.

This procedure needs to ensure that everything works effectively from the spark of an idea to its implementation. Different experts cooperate, but right before the addressee of a legal act gets the information on what their future rights and obligations are the participation of legislative drafters needs to detect linguistic issues and resolve them in an effective manner. It is a well-known fact that legislative drafters often use a different kind of language from policy makers, a so-called legal language. This involvement of legislative drafters should iron out any interpretative doubt triggered by the difference that lies between literary and legal language.

2 Interoperability of the decision making process at the EU level

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Apparently already in 2016, the three institutions of the European Union (the European Parliament, the European Commission and the Council) have agreed to work towards full interoperability of the decision making process and in particular to develop jointly common structured drafting editors to support it (hereinafter referred to as »LEOS«).¹ The aim is to achieve automatic processing and interoperability between IT systems of the institutions. The intention is to use the “XML editor” tool, which is to be used in the revision of the EU legislation. In order to profit from its advantages, some standardization linked to automation is a prerequisite. The descending order of references in all languages is also part of this joint common effort. This might look like a natural step towards a comprehensible legislation and

1 The European Commission believes that drafting of new legislation can be made easier with LEOS, a free tool that facilitates the editing/reviewing of legislative texts and generates legislation produced in a format supporting interoperability between European institutions (more on https://ec.europa.eu/isa2/solutions/leos_en).

in accordance with the Interinstitutional Style Guide² (viz. 3.2.3 of the Interinstitutional Style Guide states that “the various parts of a reference, if numbered, are cited in descending order”). However, there might be reasons against such a solution.

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The reference in a legal text demands the reader to search for the content of the text to which a certain norm refers (within the same or some other act). It is not just a technique that should be recognized by a technical (IT) tool and be automatically redirected to the norm without knowing the context the norm belongs to, it is about the comprehensibility of the whole context.

Legal order exists in order to familiarize the addressees with the rights and obligations as a whole and not as disseminated fragments. The reader still “reads” the regulations; most importantly they should read them without additional tools that alone would offer them the text that is hidden in the reference (such as searching for the meaning or translation of an individual word in the e-book).

3 Language specificities

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At first glance the planned descending order of references in all languages of the EU legislation gives the impression that its introduction should help towards a better orientation in the regulation. It should immediately lead the addressees of the legal act towards those parts where the content is regulated (usually the role of the reference is not to repeat the content of some other legal act but rather just lead to it). The Slovene language remains one of the four languages (the other three being English, Irish and Maltese) that have a different style of making references in place.

The new approach envisages a record from the largest to the smallest structural unit (“Article 299, fourth paragraph, TFEU”) (descending order). In the Slovenian language versions of EU legislation that would make a shift from the existing

(1) a. *v skladu s četrtem odstavkom člena 299 PDEU*
in accordance with fourth(INS) paragraph(INS) article (GEN) 299 TFEU

with the preposition *s* ‘with’ grammatically demanding instrumental case and the part-of-relation between ‘paragraph’ and ‘article’ demanding the genitive case of ‘article’, to

(1) b. *v skladu s členom 299, četrto odstavek, PDEU*
in accordance with article (INS) 299 fourth(NOM) paragraph(NOM) TFEU

where the relation between the article and the paragraph cannot be grammatically expressed, which is unidiomatic and disrupts reading fluency, and from the existing

2 <https://op.europa.eu/en/publication-detail/-/publication/23f24b31-41da-11ec-89db-01aa75ed71a>.

(2) a. *iz točke (a) prvega odstavka člena 1*
 referred.to.in point(GEN) (a) first(GEN) paragraph(GEN) article(GEN) 1

tega protokola
 this(GEN) protocol(GEN)

to

(2) b. *iz člena 1, prvi odstavek, točka (a),*
 referred.to.in article(GEN) 1 first(NOM) paragraph(NOM) point(NOM) (a)

tega protokola
 this(GEN) protocol(GEN)

for analogous reasons. It does not merely mean a shift from the ascending to the descending order; it also contradicts grammar, syntax and relational specificities of the language as it discards the declension of words.

However, the new approach still places the act itself at the end of a reference. If the addressee of the regulation is to orient themselves in the seemingly borderless space of the legal order, it would make sense to place them in the regulation first and then narrow their focus more and more (“TFEU, Article 299, fourth paragraph”).

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Even though Slovene is a language belonging to the Slavic languages, when it comes to the construction of sentences, the order of words, their declension as well as the legislative drafting conventions, it has its specificities that make it distinct from the others. For the purpose of this paper one of them is that the various elements of a reference are cited in ascending order. It is the smallest part that interests us first. When it comes to the structure of EU legal acts in Slovene, at least when we talk about the parts that are of importance to legislative drafters, it is significantly different from the structure and structural parts of the legal acts written and adopted by the national legislators.

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Without going into the reasons for this suffice it to say that national legislative drafters already fight many battles before a directive transposed into the national legislation becomes comprehensible. Without such “adjustment” one would not read “My name is Jane Doe” but rather “Name Jane my is Doe”.

4 Multilingualism and legislative drafting skills v. digitalisation

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The EU legislation consists of numerous legal acts that are not written in the form envisaged. From a certain point in time, if the intention is completed, there will coexist texts using different orders within references (on top of already plenty of variants to this end) before

they all reach the same footing. For now the only explanation as to why this is needed is the smooth operation of daily decision making between the institutions of the EU.

We celebrate our diversity and multilingualism and yet it seems that we should sacrifice them both (along with the use of clear language, comprehensible norms, eliminating elements that are prone to error) for the technological support of policy making. And it is exactly that what is wrong with the approach – we should bear in mind that legislative drafting is so much more than policy making.

5 Instead of a conclusion

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The process of normative activity, including the legislative drafting, should not be underestimated. It is an extremely important, complex and demanding process. The effects of legislation have far-reaching consequences for society, so they should be well considered and carefully justified before they actually occur, which can only happen if the process follows well-known rules and established practices, involving writing down norms in a clear and unambiguous way.

6 Abbreviations

GEN	genitive case
INS	instrumental case
NOM	nominative case

7 References

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