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EU LEGISLATION

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1. It is often said that UK courts interpret legislation literally whereas the Community Courts interpret legislation purposively.
2. Perhaps the best-known expression of this is Lord Denning's judgment in *Bulmer v Bollinger* (the French Champagne case):²

... in very many cases the English Courts will interpret the Treaty themselves. They will not refer the question to the European Court at Luxembourg. What then are the principles of interpretation to be applied? Beyond doubt the English Courts must follow the same principles as the European Court. Otherwise there would be differences between the countries of the nine. That would never do. All the Courts of all nine countries should interpret the Treaty in the same way. They should all apply the same principles. It is enjoined on the English Courts by section 3 of the European Community Act, 1972, which I have read.

What a task is thus set before us! The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them.

They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved. In consequence, the Judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation – which was not foreseen – the Judges hold that they have no power to fill the gap. To do so would be a “naked usurpation of the legislative power”, see *Magor and St. Mellons R.D.C. v. Newport Borough Council* (1952) A.C. 189. The gap must remain open until Parliament finds time to fill it.

How different is this Treaty. It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the Judges, or by Regulations or Directives. It is the European way. That appears from the decision of the Hamburg Court in *Re Tax on Imported Lemons* (1968) 7 C.M.L.R. 1.

Likewise the Regulations and Directives. They are enacted by the Council sitting in Brussels for everyone to obey. They are quite unlike our statutory instruments. They have to give the reasons on which they are based (Article 190). So they start off with pages of preambles, “whereas” and “whereas” and “whereas”. These show the purpose and intent of the Regulations and Directives. Then follow the provisions which are to be obeyed. Here again words and phrases are used without defining their import. Such as “personal conduct” in the

¹ The views expressed are personal, and do not necessarily reflect the views of the government.

² [1974] Ch 401

Directive 64/221 EEC, which was considered by the Vice-Chancellor, Sir John Pennycuik in *Van Duyn v. Home Office* (14th February 1972). In case of difficulty, recourse is had to the preambles. These are useful to show the purpose and intent behind it all. But much is left to the Judges. The enactments give only an outline plan. The details are to be filled in by the Judges.

Seeing these differences, what are the English Courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. To quote the words of the European Court in the *Da Costa* case (1963) 2 C.M.L.R. at page 237, "they must deduce from the wording and the spirit of the Treaty the meaning of the Community rules." They must not confine themselves to the English text. They must consider, if need be, all the authentic texts, of which there are now eight, see *Sociale Verzekeringsbank* (1968) 7 C.M.L.R. 151. They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it. So we must do the same. Those are the principles, as I understand it, on which the European Court acts.

3. The European Court of Justice thinks the same. In *Commission v UK*,³ it said:

It is apparent from the legislative history of Directive 89/391, and in particular from the joint statement by the Council and the Commission recorded in the minutes of the Council meeting of 12 June 1989, that the insertion of such a clause was suggested in order to resolve the problems that formulating the employer's duty to ensure safety in absolute terms would have raised in the common-law systems, bearing in mind the obligation on the courts concerned to interpret written law literally.

4. But how true is it? Were the two methods of interpretation ever really so different, and are they now converging?

Textual analysis in the ECJ

5. With Community legislation as much as national legislation, the starting point is the language of the instrument in question. Only if it is ambiguous is it necessary to consider other methods of interpretation.

6. So in *Met-Trans*⁴ the Court said:

Whatever the reasons which might be put forward for requiring, as the French, Netherlands and Finnish Governments and the Commission have done, objective proof of the place where an offence was committed, the Court is not entitled to assume the role of the Community legislature and interpret a provision in a manner contrary to its express wording. It is for the Commission to submit proposals for appropriate legislative amendments to that end.

7. In *Schulte*,⁵ Advocate General Léger put it like this:

³ Case C-127/05, [2007] ECR I-4619, paragraph 44.

⁴ Cases C-310/98 and C-406/98, [2000] ECR I-1797, paragraph 32.

⁵ Case C-350/03, [2005] ECR I-9215, Advocate General's Opinion, paragraphs 84-94; judgment, paragraph 75: "the Directive expressly and unequivocally excludes contracts for the sale of immovable property from its scope." See also Case C-396/07 *Juuri* [2008] ECR I-0000, Opinion of Advocate

Careful examination of the case-law shows that purposive interpretation is used only where the provision in question is open to several interpretations. ... teleological interpretation is not used where, as in the present case, the text in question is absolutely clear and unambiguous. In that case, the provisions of Community law are sufficient in themselves....

8. Indeed, in *Feinchemie Schwabda*⁶ the Court said the principle of legal certainty required that clear legislation should be given its plain meaning:

However, although... Article 4(1) of Directive 2002/37 has the effect of curtailing the period during which data is protected..., that situation arises as a direct result of the way in which Article 4(1) of Directive 2002/37 is drafted. Given that the wording of Article 4(1) of Directive 2002/37 is clear and unambiguous, the interpretation according to which the holder of an existing authorisation is not required, under that provision, to submit an Annex II dossier during the review phase is the only interpretation that is compatible with the principle of legal certainty, in accordance with which Community legislation must enable those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them.

9. There are certainly times where the Court appears to interpret legislation in a way that does violence to its wording.
 - In *Davidoff*,⁷ Advocate General Jacobs said: “it seems clear that the legislature meant precisely, and no more than, what it said. Only a particularly powerful argument may in my view justify any interpretation at odds both with that intention and with the clear terms of the legislation.”

But the Court seemed to decide that purpose trumped language:

24. The Court observes that Article 5(2) of the Directive must not be interpreted solely on the basis of its wording, but also in the light of the overall scheme and objectives of the system of which it is a part.

25. Having regard to the latter aspects, that article cannot be given an interpretation which would lead to marks with a reputation having less protection where a sign is used for identical or similar goods or services than where a sign is used for non-similar goods or services.

- Something similar happened in *Schilling*.⁸ Advocate General Léger said:

General Colomer, paragraph 44: “Philological interpretation is frequently not the lawyer’s best tool, but it is always the first step on the road to be travelled. Community law, a legal order which is drafted in wide range of languages, all of them official, finds powerful arguments in the literal meaning of its provisions. Sometimes this can be a double-edged sword, adding confusion when it comes to deciding which rules are applicable to a particular case.”

⁶ Case C-361/06, [2008] ECR I-0000, paragraph 50. See also Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paragraphs 36 and 38. Other cases where the Court has accepted a literal interpretation of a measure include Case C-336/03 *easyCar v OFT* [2005] ECR I-1947, paragraph 24; Case C-298/07 *Deutsche Internet Versicherung* [2008] ECR I-0000, paragraphs 17-18; Case C-313/07 *Kitruna* [2008] ECR I-0000, paragraph 44.

⁷ Case C-292/00, [2003] ECR I-389, Advocate General’s Opinion, paragraph 37. See also Case C-303/04 *Lidl Italia* [2005] ECR I-7865, paragraph 23

⁸ Case C-63/00 *Schilling* [2002] ECR I-4483, Advocate General’s Opinion, paragraph 24. Advocate General Léger refers to this Opinion in *Schulte*.

24. Provisions of Community law that are free from ambiguity are sufficient in themselves. Any interpretation by this Court owes at least as much to their wording as to the purpose pursued by the legislation of which they are a part. Why interpret a text which is both clear and precise by giving it a meaning which it clearly cannot have?

32. We should therefore prefer the interpretation that is most consistent with the principle of legal certainty, that is, the interpretation required by the actual wording of [the provision]: the meaning which is clear from reading that provision should be upheld, even if it is not the most favourable to the interests of the Community.

But the Court reached the opposite conclusion: the interpretation favoured by the Advocate General “would be contrary both to the wording of the provisions of Regulation No 3887/92 concerning the submission of aid applications by farmers and to the aims of the Community regulations on the integrated system”.⁹

10. But in other cases, the Court has made it clear that ‘purposive interpretation’ does not mean Community legislation can mean whatever you want. Recently, in *Commission v France*,¹⁰ it said:

This finding is not undermined by the Member State’s argument to the effect that a more dynamic and purposive approach to interpreting the directive would enable a more rapid development of technologies to take place.

11. And in interpreting Community legislation, the Court often uses techniques that are familiar to domestic lawyers.
12. For instance – and contrary to what is sometimes said – the Court is often prepared to draw conclusions from what legislation does *not* say, relying on a *contrario* reasoning.
- *Teckal*:¹¹ “...Directive 93/36 does not contain any provision comparable to Article 6 of Directive 92/50, which excludes from its scope public contracts awarded, under certain conditions, to contracting authorities....”
 - *Vedial*:¹² “...contrary to the ordinary rule in regard to intervention set out in Article 116(4)(a) of the Rules of Procedure, Article 134(3) thereof provides that ‘an intervener... may, in his response..., seek an order annulling or altering the decision of the Board of Appeal on a point not raised in the application’. By dint of a contrario reasoning under the latter provision OHIM is not entitled, for its part, to formulate such forms of order.”
 - *C*:¹³ “The term ‘civil matters’ must be interpreted as capable of extending to measures which, from the point of view of the legal system of a Member State, fall under public law. That interpretation is, moreover, supported by Recital 10 in the preamble to Regulation No 2201/2003, according to which that regulation is not intended to apply ‘to matters relating to social security, public measures of a general nature in matters of education or health ...’ Those exceptions confirm that the Community legislature did not intend to exclude all measures falling under public law from the scope of the regulation.”

⁹ Paragraph 29.

¹⁰ Case C-227/07, [2008] ECR I-0000, paragraph 45

¹¹ Case C-107/98, [1999] ECR I-8121, paragraphs 43-44.

¹² Case C-106/03 P, [2004] ECR I-9573, paragraph 34.

¹³ Case C-435/06, [2007] ECR I-10141, paragraphs 51-52.

- *Schulte*:¹⁴ “While other Community directives intended to protect the interests of consumers, inter alia Directive 87/102, contain rules concerning connected contracts, the Directive contains no rule of that type and provides no basis for an assumption that such rules are implied.”

13. The Court will also use the *ejusdem generis* rule. E.g. *easyCar*:¹⁵

So far as the term ‘transport services’ is concerned, it must be held that it represents, like each of the other categories of services listed, a sectoral exemption and that it therefore relates generally to services in the transport sector.

14. And, perhaps most pleasingly to a common lawyer, *Dega*:¹⁶

... it is apparent from the French, Danish, English, German and Dutch language versions of the Directive that the expression ‘established within the Community’ applies only to the seller. In the French, Danish and English versions, the position of the comma serves to separate the seller from the other two traders. Furthermore, that separation is reinforced in the English version by the fact that the word ‘seller’ is preceded by the indefinite article ‘a’, whilst the words ‘manufacturer’ and ‘packager’ are preceded by the definite article ‘the’. Finally, the nature of German and Dutch syntax makes it even more clear that the expression ‘established within the Community’ applies only to the seller (‘den Namen oder die Firma und die Anschrift des Herstellers, des Verpackers oder eines in der Gemeinschaft niedergelassenen Verkäufers’, ‘de naam of de handelsnaam en het adres van de fabrikant of van de verpakker of van een in de Gemeenschap gevestigde verkoper’).

Fundamental constitutional principles

15. But the Court will be less concerned about precise wording when it is interpreting the Treaties themselves, or where general principles of Community law are involved.¹⁷

16. For instance, famously, the old Article 173 of the EC Treaty (now Article 230 EC) made no provision for the Parliament to challenge the lawfulness of Community legislation. The Court was not prepared to read this possibility in.¹⁸ But it subsequently held that the Parliament implicitly had standing to apply to the Court to annul a Community act in order to protect its prerogatives.¹⁹

¹⁴ Case C-350/03, [2005] ECR I-9215, paragraph 76.

¹⁵ Case C-336/03, [2005] ECR I-1947, paragraph 22.

¹⁶ Case C-83/96, [1997] ECR I-5001, paragraph 13

¹⁷ This might once have seemed strange to UK lawyers. But the idea that different rules of interpretation apply to ‘constitutional’ texts has become familiar from the Human Rights Act 1998 and the ECHR. Indeed, so comfortable have UK public lawyers become with the idea that the ECHR should be interpreted as a living instrument, that it seems odd to us for the US Supreme Court to spend time trying to work out what the original Framers of the Constitution intended. E.g. *District of Columbia v Heller* (554) US ___ (where the Supreme Court looked at sources such as the 1773 edition of Samuel Johnson’s dictionary to interpret what was meant by the right to bear arms).

¹⁸ Case 302/87 *Parliament v Council* [1988] ECR 5615, paragraph 27.

¹⁹ Case C-70/88 *Parliament v Council* [1990] ECR I-2041, paragraphs 26-27 (and see also Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077, paragraph 41). The Maastricht Treaty amended Article 173 of the EC Treaty to give the Parliament the same standing as other institutions.

Ambiguous legislation

17. Where the language of the legislation is not certain, the Court will seek to give effect to the general purpose expressed in the legislation.
 - *Hönig*:²⁰ “...it is necessary in interpreting a provision of Community law to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part....”
 - *easyCar*:²¹ “...the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part....”
18. That may involve different techniques, because Community legislation includes interpretative tools (such as legal basis and recitals) that have no direct equivalent in UK legislation.²² And of course there are not the same problems with different language versions.
19. But the Court is prepared to apply these principle strictly. For instance, it is not normally prepared to give effect to recitals that are drafted in normative terms.
20. Of course, recitals can help to establish the purpose of a provision.²³ But they cannot take precedence over those substantive provisions.
 - *Casa Fleischhandels*:²⁴ “Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.”
 - *Nilsson*:²⁵ “the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the

²⁰ Case C-128/94, [1995] ECR I-3389, paragraph 9.

²¹ Case C-336/03, [2005] ECR I-1947, paragraph 21. For a recent example of purposive interpretation, see Case C-173/07 *Emirates Airlines* [2008] ECR I-0000, paragraph 35: “to regard a ‘flight’ within the meaning of Article 3(1)(a) of Regulation No 261/2004 as an outward and return journey would in fact have the effect of reducing the protection to be given to passengers under the regulation, which would be contrary to its objective of ensuring a high level of protection for passengers”.

²² But compare use of travaux préparatoires to use of Hansard. Both are subject to limits. The Court will look at public stages in negotiation of Community legislation (e.g. Case C-133/00 *Bowden* [2001] ECR I-7031, paragraphs 35 and 42). But it will not look at political statements during negotiations, which may in any event be confidential (e.g. Case C-74/99 *Imperial Tobacco* [2000] ECR I-8419, Advocate General’s Opinion, paragraph 75). It will generally not take account of declarations made in the Council if the measure itself does not refer to them (Case C-292/89 *Antonissen* [1991] ECR I-745, paragraphs 17-19; Case C-329/95 *VAG Sverige* [1997] ECR I-2675, paragraph 23; Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 42; Case C-404/06 *Quelle* [2008] ECR I-0000, paragraph 32). But in Case C-368/96 *Generics* [1998] ECR I-7967, paragraphs 26-28, it relied on a declaration in the minutes of the Council “to clarify a general concept”; see also Case C-127/05 *Commission v UK* [2007] ECR I-4619, paragraph 44, cited in paragraph 3 above.

²³ See Article 253 EC. For an example, see Case C-173/99 *BECTU* [2001] ECR I-4881, paragraphs 37-39.

²⁴ Case 215/88 *Casa Fleischhandels* [1989] ECR 2789, paragraph 31.

²⁵ Case C-162/97 *Nilsson* [1998] ECR I-7477, paragraph 54. See also Case C-412/93 *Edouard Leclerc-Siplec* [1995] ECR I-179, paragraph 47; Case C-308/97 *Manfredi* [1998] ECR I-7685, paragraph 30; Case C-136/04 *Deutsches Milch-Kontor* [2005] ECR I-10095, paragraph 32; Case C-110/05 *Commission v Italy* [2008] ECR I-0000, first Advocate General’s Opinion, paragraphs 64-65, and second Advocate General’s Opinion, paragraphs 174-175. See also Case C-110/03 *Commission*

act in question or for interpreting those provisions in a manner clearly contrary to their wording...”

21. It follows that if a recital is irredeemably inconsistent with the substantive text then the Court will ignore the recital and give effect to the text of the substantive provisions.²⁶

22. This point was at its starkest in a series of cases about the meaning of Directive 2000/78/EC, that includes a number of ‘normative’ recitals with no corresponding substantive provisions:

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

23. There was some suggestion that these recitals should effectively be given normative effect. E.g. *Amicus*.²⁷

158. The troubling feature about recital (22) is that it is only a recital and (if I am right that it is not limited to State benefits to which article 3(3) applies, and that it does not reflect a limitation on Community competence to which article 3(1) refers) it has no parallel in the substantive provisions of the Directive. Although it is common ground that recitals can assist in the interpretation of the substantive provisions of a directive, it is a different matter to rely on a recital alone as establishing an important limitation on the scope of a directive. I was not directed to any authority that assists on this point....

159. The conclusion I have reached is that the Secretary of State's submissions concerning the scope of the Directive should prevail. To hold otherwise would be to frustrate the legislative intention as it appears in recital (22). What makes me particularly cautious in that respect is that this is an area of considerable sensitivity in social and financial terms, as explained below when considering the alternative submissions on objective justification (though my conclusion that regulation 25 would in any event be lawful on that alternative basis may be thought to weaken the force of this consideration).

And the Advocate General's Opinion in *Palacios de la Villa*:²⁸

65. I take the view that the Community legislature was aware of these problems and that it inserted the 14th recital in the preamble of Directive 2000/78 in order to make clear that it did not intend the scope of that directive to extend to rules setting retirement ages.

66. Lastly, I am unconvinced by the argument of the Commission that the 14th recital may refer not to the scope of the Directive but to the grounds of justification provided for in Article 6 of the directive. A possibility of justifying national provisions under a directive is quite different from a directive being

v Belgium [2005] ECR I-2801, Advocate General's Opinion, paragraph 34: "Legislative provisions describe facts, situations or circumstances and attribute certain consequences to them. The factual situation and the legal result are therefore the two essential elements of a legal rule. But the statement of legal grounds, preamble or introductory recitals, which merely seek to illustrate, give a basis for or explain, do not form part of these essential elements, since, although they accompany, and usually precede, the enacting terms of the measure, forming a physical part of it, they have no binding force, notwithstanding their usefulness as criteria for interpretation."

²⁶ *BRAC Rent-a-car* [2003] EWHC Ch 128, paragraph 26.

²⁷ *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC Admin 860

²⁸ Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531

'without prejudice' to such provisions. Moreover, paragraph 2 of Article 6 of the directive refers only to the fixing of ages for occupational social security schemes: it does not refer, as the 14th recital does, to provisions laying down retirement ages in general.

24. But the Court was having none of it. In *Tadao Maruko*²⁹ it said:

58. As regards the significance of Recital 22 of the preamble to Directive 2000/78, that recital states that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

59. Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination....

60. Since survivor's benefit such as that at issue in the main proceedings has been identified as 'pay' within the meaning of Article 141 EC and falls within the scope of Directive 2000/78, for the reasons set out in paragraphs 49 to 57 of this judgment, Recital 22 of the preamble to Directive 2000/78 cannot affect the application of the Directive.

How Community legislation is drafted

25. If there is a difference, it perhaps derives less from any difference in principle between methods of interpreting Community and domestic law, than from the way Community legislation is drafted.
26. Community law is the result of international negotiations, which results in language that is often (and sometimes deliberately) ambiguous. There are also practical difficulties in producing legislation that has to take effect in multiple languages (now 23), and that has to apply in many legal systems, each with its own legal concepts and assumptions.
27. Compromises are inevitable in negotiated texts, where deals are done at 2 a.m. The initial proposal is drafted by a Commission official (not necessarily a lawyer) and torn apart in negotiations, whereas in the UK there is one drafter: Parliamentary Counsel or a Departmental lawyer.
28. But there are some institutional controls. The Commission Legal Service scrutinises all legislative proposals before they are adopted by the Commission, although it may not be so closely involved once negotiations are under way in Council working groups. The Council Legal Service also tries to promote better drafting, and sometimes makes interventions in the legislative process of its own motion.
29. And at least in principle, Community legislation can be no less clear and precise than domestic legislation. Community legislation may often be drafted in imprecise terms;³⁰ and

²⁹ Case C-267/06 *Tadao Maruko* [2008] ECR I-0000. See also the Advocate General's Opinion, paragraph 76, and Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 44: "It is true that, according to recital 14 in its preamble, Directive 2000/78 is to be without prejudice to national provisions laying down retirement ages. However, that recital merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached."

of course it is in the nature of directives to be less specific, because they leave it to individual States to fill in the details. But regulations will contain extremely precise provisions.³¹

30. There are plenty of documents that set out the principles for Community legislation to follow.
31. In 1998, the Council, Commission and EP adopted an Inter-Institutional Agreement on Common Guidelines for the quality of drafting of Community Legislation. The Agreement provides for Community legislative acts to be drafted “clearly, simply and precisely” and that “unnecessarily convoluted wording” is to be avoided.
32. Extracts from the Inter-Institutional Agreement:
 1. Community legislative acts shall be drafted clearly, simply and precisely.
 3. The drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect.
 4. Provisions of acts shall be concise and their content should be as homogeneous as possible. Overly long articles and sentences, unnecessarily convoluted wording and excessive use of abbreviations should be avoided.
 6. The terminology used in a given act shall be consistent both internally and with acts already in force, especially in the same field.

Identical concepts shall be expressed in the same terms, as far as possible without departing from their meaning in ordinary, legal or technical language.
 14. Where the terms used in the act are not unambiguous, they should be defined together in a single article at the beginning of the act. The definitions shall not contain autonomous normative provisions.
 21. Obsolete act and provisions shall be expressly repealed. The adoption of a new act should result in the express repeal of any act or provision rendered inapplicable or redundant by virtue of the new act.
33. In 2003 the Legal Services of the three institutions also produced a detailed Joint Practical Guide, which includes examples of best practice and drafting to be avoided, particularly given the risks of mistranslation.³² Some extracts:
 - 1.1 The drafting of a legislative act must be:
 - clear, easy to understand and unambiguous;
 - simple, concise, containing no unnecessary elements;
 - precise, leaving no uncertainty in the mind of the reader.
 - 1.2.2. The aim in applying this principle is twofold: first, to render Community legislation more comprehensible; second, to avoid disputes resulting from poor drafting.

³⁰ See the distinction between ‘fuzzy’ and ‘fussy’ drafting discussed in Francis Jacobs, *A True European: Essays for Judge David Edward*, Hart Publishing, 2003.

³¹ E.g. Article 227(2) of the Community Customs Code (Regulation 2913/92, as amended): “Where the number of days in the periods referred to in paragraph 1 (b) and (c) is an odd number, the number of days to be deducted from the 30-day period pursuant to paragraph 1 (b) and (c) shall be equal to half the next lowest even number.” Compare s.1(1) of the Climate Change Act 2008: “It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline.”

³² See also the Manual of precedents for acts established within the Council of the European Union (4th edition, 2002).

1.4 There may obviously be a conflict between the requirement of simplicity and that of precision. Simplification is often achieved at the expense of precision and vice versa. In practice, a balance must be struck so that the provision is as precise as possible, without becoming too difficult to understand. That balance may vary according to the addressees of the provision....

1.4.1. The author should attempt to reduce the legislative intention to simple terms, in order to be able to express it simply. In so far as possible, everyday language should be used. Where necessary, clarity of expression should take precedence over felicity of style. For example, the use of synonyms and different expressions to convey the same idea should be avoided.

1.4.2. Drafting which is grammatically correct and respects the rules of punctuation makes it easier to understand the text properly in the drafting language as well as to translate it into the other languages....

2.2.1. Since regulations have direct application and are binding in their entirety, their provisions should be drafted in such a way that the addressees have no doubts as to the rights and obligations resulting from them....

4.1. The characteristic of good legislative style is the succinct expression of the key ideas of the text. Illustrative clauses, intended to make the text clearer for the reader, may give rise to problems in interpretation.

4.2. The text should be internally consistent.

34. The Court has endorsed these documents. In *Alliance for Natural Health*³³ it said:

Those statements [in recitals], which are closely related to the concrete expression of those criteria through the positive lists in the body of Directive 2002/46 and which should ideally have been included in the actual provisions of the directive (see, to that effect the Inter-Institutional Agreement of the European Parliament, of the Council and of the Commission of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ 1999 C 73, p. 1)), limit the Commission's power to modify the lists through their reference to objective criteria connected exclusively with public health.

Advocate General Geelhoed said:³⁴

The mutual obligations which the institutions entered into in respect of the quality of drafting of Community legislation are not intended primarily to achieve the linguistic aestheticism dear to legislative draftsmen. In a Community of law, such as the European Union, which is governed by the principles of the Rechtsstaat, there are two aspects to a legislative act as an expression of the legislature's will. On the one hand, it is an instrument for pursuing and, if possible, achieving justified objectives of public interest. On the other hand, it constitutes a guarantee of citizens' rights in their dealings with public authority. Qualitatively adequate legislation is characterised by a balance between both aspects. The wording and the structure of the legislative act must strike an acceptable balance between the powers granted to the implementing authorities and the guarantees granted to citizens.

And in *Glencore Grain Rotterdam*,³⁵ Advocate General Sharpston criticised the Commission for failing to respect the principles in the Inter-Institutional Agreement:

³³ Cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, paragraph 92.

³⁴ Paragraph 88. See also Case C-345/06 *Heinrich*, Advocate General's Opinion, footnote 44; Case C-63/00 *Schilling* [2002] ECR I-4483, Advocate General's Opinion, paragraph 44.

³⁵ Case C-391/07 [2008] ECR I-0000, paragraphs 74-76

74. The legislation in issue is – understandably, given the subject-matter – complex and technical. It is also, however, flawed by a considerable lack of clarity in detail and a significant inconsistency between the reasons given for one provision and the content of other, simultaneously applicable, provisions.

75. I would remind the Commission of the agreement on drafting which it adopted jointly with the Parliament and the Council....

76. It seems to me that those principles have not been fully respected in the legislation in issue in the present case.

Purposive interpretation of UK legislation?

35. Has there been any influence the other way? Have national courts become more ready to interpret domestic legislation purposively?

36. Here is Lord Steyn in *Quintavalle*.³⁶

21. In reaching a conclusion that cell nuclear replacement is a process covered by section 1(1) of the Human Fertilisation and Embryology Act 1990 the Court of Appeal adopted a purposive approach: para 27. The extensive interpretation adopted by the Court of Appeal could only be justified by a purposive approach. It was a necessary step in the reasoning of the Court of Appeal but not a sufficient one. The Court of Appeal found the basis for such an approach in the fact that the Human Rights Act 1998 extended “the boundaries of purposive interpretation...where needs must”. Given that the 1998 Act is not applicable in the present case I would accept the submission of counsel for the appellant that this approach is not appropriate. On the other hand, the adoption of a purposive approach to construction of statutes generally, and the 1990 Act in particular, is amply justified on wider grounds. In *Cabell v Markham* (1945) 148 F 2d 737 Justice Learned Hand explained the merits of purposive interpretation, at p 739:

“Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”

The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763. In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, e.g. social welfare legislation and tax statutes may have to be approached somewhat differently. For these slightly different reasons I agree with the conclusion of the Court of Appeal that section 1(1) of the 1990 Act must be construed in a purposive way.

37. But of course there are still limits, just as there are with European legislation. In *Scottish & Newcastle v Raguz*³⁷ Lord Hoffmann said:

³⁶ *R v Secretary of State for Health ex p Quintavalle* [2003] UKHL 13

12. [The proposed interpretation] faces, however, what seems to me the insuperable difficulty that such a meaning cannot be derived from even the most purposive construction of the language of the statute. In section 17(2), the words “becomes due” mean either “becomes payable” or “is deemed to have accrued”. They cannot have some intermediate or contingent meaning. If they means “becomes payable”, the subsection cannot apply to a future increase on determination of a rent review. If they mean “is deemed to have accrued”, the increase in rent will be deemed to have accrued whether the tenant was at the time otherwise in default or not. I do not see how the words can mean “ ‘deemed to have accrued’ if there was a default, but ‘becomes payable’ if there was not.”

13. My Lords, the inescapable conclusion is that the draftsman of the Act had not thought through the consequences of the scheme he had adopted. In these circumstances, I think that the most orthodox approach, which is least likely to produce anomalies and injustice, is to stick to the interpretation of section 17(2) which it appeared on first reading to have been intended to bear. The consequence is that section 17(4) will largely have misfired; it is hard to think of cases in which a fixed charge within the meaning of the Act will have become actually payable without its amount having been determined. It means that Note 4 to the notice regulations, saying that it was applicable to the case of an outstanding review, was a mistake. But that consequence is better than requiring landlords to serve regular notices on former tenants saying that nothing is owing but there is a possibility that something may become owing in the future.

³⁷ [2008] UKHL 65. Compare cases like *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586 and *Confederation of Passenger Transport v Humber Bridge Board* [2003] EWCA Civ 1842, paragraphs 53 and 65-66, where courts have been prepared to rectify obvious mistakes in drafting.