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# Good Law Making Practice and Legislative Drafting Conforming to It in the Republic of Estonia

## 1. Regulatory practice and new legislation

Legislation is not conducted, nor laws created, merely for providing legislative institutions with work. Neither can legislation be aimed at a relatively narrow circle of society. Legislative work and the law have been and are almost the only means available to states through which the conduct of the major part of society can be regulated.<sup>\*1</sup> Such perception and recognition of the role of legislation in society requires that due regard be paid to several factors in legislative drafting in order to ensure quality. Most broadly, these factors can be divided into the technical (related to regulatory practice) and substantive (*ius est ars boni et aequi*).

The regulatory rules of legislative drafting comprise a set of measures and methods, justified on the basis of theory, used in preparing drafts of legislative acts. Regarded as such, regulatory measures form an inseparable part of the procedure of legislative drafting and help ensure the validity and effect of the legislative act adopted.<sup>\*2</sup> In the Estonian legal order, the regulatory issues have been considered so important that on 28

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<sup>1</sup> R. Narits, K. Merusk. Õiguse olemusest ja seaduse võimalustest (Nature of law and possibilities of legislation). – Riigikogu Toimetised 2000 (2), p. 100 (in Estonian).

<sup>2</sup> K. Tamm. Õigusloome, normitehnika olemus, probleemid (Legislative drafting, nature and problems of regulatory practice). – Riigikogu Toimetised 2000 (2), p. 148 (in Estonian). In legal writing, the teaching focusing on the manners of presentation of legal provisions is generally referred to by different terms: *seadustehnika* (technique of law); *normitehnika* (regulatory practice), *legislatiivtehnika* (legislative technique). See, e.g., H. Hill. Einführung in die Gesetzgebungslehre. Heidelberg 1981, p. 96; A.-T. Kliimann. Normitehnikast administratiivprotsessiõiguses. Kriitika ja interpretatsiooniküsimusi maksvast õigusest (Legislative drafting in administrative procedural law: Criticism and interpretation issues of applicable law). Tartu 1930, p. 3 (in Estonian); H. Schäffer. Gesetzgebungstechnik aus der Sicht und aus der praktischen Erfahrung westlicher Demokratien. – Gesetzgebung in Ost- und Südeuropa. J. Slavinski, M. Geistlinger (Hrsg.). Wien, München 1991, p. 19. For further information about the notion, objective, and general principles of legislative drafting, see K. Merusk *et al.* Õigusriigi printsiip ja normitehnika (Principle of State Based on Rule of Law and Regulatory Practice). Tallinn 1999, pp. 9–19 (in Estonian).

September 1999, the government adopted Regulation 279, ‘Regulatory rules of draft legislative acts’<sup>3</sup>, which entered into force on 1 January 2000.<sup>4</sup> The objective of the regulation was to guarantee a certain uniformity and quality of draft legislative acts through establishing the principal regulatory rules. The regulation was amended on 20 November 2001. The regulation has not been amended further thereafter, and hence to date, we may speak about a certain developed practice as regards preparation of legislative acts. This concerns the main requirements for draft legislation, the main requirements for amending or repealing legislation, and requirements for the explanatory memoranda to be appended to drafts. In addition, the rules provide requirements for the regulations of the Government of the Republic and the various ministries.

Yet it is clear that a legislative act can be used for providing general requirements. The author of the foreword to the recently published ‘Handbook of Regulatory Practice’, the present Minister of Justice, correctly says: ‘Real life is much more varied, and while implementing general provisions we may still face the fact that problems cannot be solved merely by legislative acts.’<sup>5</sup>

## 2. Good law making practice

Here we have to ask whether, besides the obviously necessary but general regulatory provisions and rules of practice, more detailed regulations that thus have a more substantive and concrete effect on drafting are required. Or would it be more reasonable to establish general rules for the substantive aspect of regulatory practice to accompany the general rules for legislative drafting? The logic behind the latter idea is that legislative drafting would be organised by a set of general rules covering both general regulatory and substantive elements.

More precisely, the question concerns good law making practice or rules characterised by a certain level of quality.<sup>6</sup> Rules for good law making practice are aimed at obtaining the maximum benefit from legal regulations. Almost all rules of good law making practice are related to various aspects of analysis of the impact of a legislative act.<sup>7</sup> As regards terminology, this may also be implied through ‘analysis of the impact accompanying regulation’ or ‘analysis of the impacts of regulation’. The latter primarily derives from English sources, which use ‘regulatory impact analysis’. The paper by OECD understands regulation as highly varied legal instruments from constitutions to guidelines and instructions.<sup>8</sup>

At the same time, the problem lies in the fact that at times, the constitutive aspect of the Continental European legal culture — legal positivism — restricts comprehension of the set of rules of good law making practice or the use thereof. However, we must agree with the present-day position: ‘The number of cultural, social, legal, economic, communicative, and other subdisciplines that are associated with law is constantly increasing, and a postmodern approach has been frequently applied to interdisciplinary treatments. (In Estonia, the trends of social and legal studies have developed only recently, and several areas have not been covered yet) [...] [T]he formal and legal positivist approach to law and legislative drafting is starting to wane as a result of the influence of widespread social research, development of interdisciplinary approaches,

<sup>3</sup> Õigustloovate aktide eelnõude normitehniline eeskiri (Regulatory rules of draft legislative acts). – RT I 1999, 73, 695; 2004, 10, 61 (in Estonian). Available in English at: <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022> (28.05.2004).

<sup>4</sup> Before the Republic of Estonia was occupied by the Soviet Union in 1940, an act titled ‘Seaduste kokkuseadmise juhtnõõrid’ (Instructions for compiling legislative acts) was applied in Estonia, approved by a decision of the Government of the Republic on 26 November 1928. The act stipulated that legislative acts were divided into sections, sections could be combined into chapters, chapters into parts, etc. The act also provided for the means of and procedure for repealing legislative acts. After Estonia re-established its independence (1991), the issues of legislative drafting were governed by the regulatory rules approved by the Board of the Riigikogu in 1993. The Board of the Riigikogu approved these rules on the basis of the provision delegating authority, contained in the Riigikogu rules of procedure. These rules set out the substantive and formal requirements for draft legislative acts submitted to the Riigikogu. They also provide for the existence of instructions concerning the wording of legislative acts and presentation of references as well as provisions delegating authority. The regulatory rules established the principles for structuring legislative acts.

<sup>5</sup> Normitehnika käsiraamat (Handbook of Regulatory Practice). Koost. R. Sõlg jt. Tallinn 2003, p. 3 (in Estonian).

<sup>6</sup> The rules of good law making practice derive from the decision of the Council of the OECD of 1995. The OECD has invested much energy in consideration of regulatory methods in order to improve the quality of regulations and increase their efficiency.

<sup>7</sup> Estonia does not have an appropriate tradition and system for performing regulatory impact analyses. However, since 1995, which perhaps accidentally coincides with the year from which the rules of good law making practice date, the Economic and Social Information Department (ESID) of the Chancellery of the Riigikogu has performed social and economic surveys of legislative drafting on both the theoretical and practical level. This also includes a survey of the explanatory memoranda of draft acts, initiated by the Chancellery of the Riigikogu; a study conducted by the ESID and the Tartu Society of Legal Psychologists and Sociologists on the use of social information in law-making; surveys by the social and market survey company SaarPoll; the relevant work performed in the Ministry of Justice; and also the works of the Institute of Law of the University of Tartu and the Faculty of Law of the University of Tartu.

<sup>8</sup> K. Liiva. Seadusandlusega kaasnevate mõjude analüüsimisest (On Analysis of Impacts Arising from Legislation). Õigusinstituut 1998, p. 5 (in Estonian).

and new media networks as well as networks in civil society, and hence the legal systems and constitutional institutions based on modernist values are searching for new theoretical points of equilibrium in the globalising world.<sup>9</sup>

### 3. Increase of political decisiveness in the context of regulatory impact analysis

The conventions of good law making practice as a set of rules include an increase of political decisiveness and a more extensive use of regulatory impact analysis in policy planning, discussion, and evaluation; sharing of liability for the implementation of the regulatory impact analysis programmes; provision of training to experts; a systematised and flexible use of the methods of regulatory impact analysis; development and implementation of data collection strategies; guiding of the regulatory impact analysis in the right direction; integration of the regulatory impact analysis into the process of policy-making at the earliest stage possible; notification of stakeholders concerning the results of the regulatory impact analysis, which also serves as a precondition for a dialogue; a consistent and appropriate approach to the public; determined and timely consulting with the interest groups; and the use of regulatory impact analysis methods for assessing the impact of both already applicable (*ex post*) and new (*ex ante*) legislation.

The space available does not allow for discussion of all the rules related to good law making practice. Therefore, we will focus in greater detail on the requirement for increased political decisiveness, the rule that demands broader use of regulatory impact analysis. This is caused, above all, by the fact that Estonia's membership in the European Union poses new challenges for legislative drafting, which require a broader vision of legislative drafting and a systematised perception of its new dimensions.

The requirement to **increase political decisiveness** and make more extensive use of regulatory impact analysis for that purpose is the first rule of good law making practice. Regulatory impact analysis must be used more widely than before in planning, discussing, and evaluating matters of politics. In the spring of 2001, the editorial board of the *Journal of the Estonian Parliament*<sup>10</sup> developed the idea of investigating whether and to what extent Estonian governmental authorities engage in ordering draft legislative acts and applied research, including the proportion of the surveys that are related to legislative drafting. The initial issues were as follows:

1. Estonian legislation reveals problems related to the concordance between the European Union and Estonian national legal order and related to the analysis of the social, economic, and budgetary impact of legislation.
2. The political choices provided in draft legislative acts are not based on the analysis of Estonian society.
3. Information on budgetary surveys is not communicated between state agencies and is not available on the Internet either.
4. The theoretical point of departure of a parliamentary survey is the concept of moral and responsible politics, which presume an analysis of the social impacts and risks of draft legislation.

Unless the social facts (including public opinion, state budget, etc.) support the legal provisions of a new legislative act, this may entail political, legal, and economic problems. The better the legislators are able to analyse and consider the budgetary, economic, social, and administrative impacts accompanying the implementation of a legislative act, the better the act fulfils the social objectives inherent therein.<sup>11</sup> Of the results of the survey, in the context of good law making practice, of considerable interest are those characterising political choices, the implementation of which presumes a sufficient political will to improve public law and administration.

1. In order to regulate the institutional system of Estonian government agencies and orders for applied research, first of all, a detailed inventory should be conducted concerning previous practice

<sup>9</sup> A. Kasemets. Sotsiaalteaduste rakendusvõimalusi Eesti seadusloomes: teoreetilisi ja empiirilisi aspekte. Väitekirj magistrikraadi taotlemiseks (Opportunities for incorporating the social sciences into Estonian legislative drafting: theoretical and empirical issues. MA thesis). Tartu 2001, p. 80 (in Estonian).

<sup>10</sup> *Riigikogu Toimetised* is a periodical publication of the Chancellery of the Riigikogu. The aims of the *Riigikogu Toimetised* (in English the *Journal of the Estonian Parliament*) arise from the constitutional tasks of the Riigikogu creating a forum for politicians, teachers at universities, civil servants, and representatives of business and non-profit organisations (<http://www.riigikogu.ee/rva/toimetised.html>).

<sup>11</sup> A. Kasemets. Rakendusuringute ja analüüside tellimine valitsusasutustes 1999–2001: teel teadmistepõhisema poliitika, õigusloome ja avaliku halduse poole (Ordering of applied research and analyses in government agencies in 1999–2001: toward more knowledge-based politics, legislation, and public administration). – *Riigikogu Toimetised* 2002 (6), pp. 107–108 (in Estonian).

regarding survey orders and the existing intellectual and other means that could serve as the basis for improving the procedure for preserving and systematising relevant information and improving the procedure for ordering and evaluating surveys.

2. Estonia needs a government programme for promoting the principles of knowledge-based legislative drafting and public administration. In the case of a political agreement, the task of initiating the government programme may also be negotiated in the committees of the Estonian parliament (Riigikogu) and be formalised as a decision of the Riigikogu.
3. The alteration of the role of the national parliaments in the context of the globalising political landscape and economy and the information society requires firm establishment of mechanisms for notifying the representatives of the people and for parliamentary supervision. It is necessary to critically review and revise the submission of survey reports to the Riigikogu and compliance with the internal requirements imposed on legislative drafting by the Board of the Riigikogu, if development of informed representation of the public is considered one of the goals to be achieved.
4. Once every two years, the Ministry of Education and Research, which directs research on the level of the executive power together with the Research and Development Council, could provide the Riigikogu cultural committee responsible for research and educational affairs with an overview of the basic and applied research ordered using the state budget in order to discuss the problems and priorities of research as a national issue in the context of the changing needs of the state, society, and market.
5. The annual legislative drafting plans of the Government of the Republic of Estonia should include a list of prioritised research areas, accompanied by a relevant budget. The overall responsibility for the organisation and quality of legislative drafting lies with the Ministry of Justice. Both centralised and decentralised management models can be applied in organising the provision of surveys required for national legislative drafting and administration. Considering Estonia's limited human, time, and monetary resources; modest experience in interdisciplinary studies; etc., it would seem to be more expedient to organise national surveys and evaluate the level of research centrally in the coming years.\*<sup>12</sup>

## 4. Increase of political decisiveness and the European Union

If we presume that the OECD committee of ministers has not accidentally pointed out increased political decisiveness as the first feature characterising good law making practice and specified the principle by the requirement to integrate the process of shaping the politics of regulatory impact analysis in its earliest stage (including alternatives), how could such an important requirement for good law making practice be furnished with content under the conditions where Estonia is not only a sovereign republic but also a member state of the European Union as of 1 May 2004? It is generally known that the freedom of political will of a nation-state is already by definition a result of exercising the national right of self-determination. It is the nation-state that serves as the subject of will. At the same time, besides the right of self-determination, the political will of a nation-state also includes political decisions of lesser importance. Hence, if freedom is lost in small things, none of the bigger ones are left either. Thus, the freedom of political will of a nation-state serves as a security and indicator of national self-determination.\*<sup>13</sup> Consequently, it is a logical conclusion that Estonia's membership of the European Union and the EU constitution dialogue demand that the nation-states protect two interests at the same time, one of which is directly related to good law making practice. Namely, the cumulative effects of European integration should be used to increase the role of the particular state, and secondly — which is important with regard to the topic of this article — in order to preserve national self-determination, it is necessary to retain the freedom of political will of each member state of the European Union.\*<sup>14</sup>

However, there are problems, of which I will mostly discuss the legal one. As is widely known, the European Union is a judicial area that has gone beyond interstate relations, searching for an adequate institutional form for its political, economic, and legal reality. The European Union governs many not insignifi-

<sup>12</sup> *Ibid.*, pp. 112–114.

<sup>13</sup> M. Rosentau. Suveräänsus Euroopa Liidus (Sovereignty in the European Union). – Riigikogu Toimetised 2003 (8), p. 13 (in Estonian).

<sup>14</sup> '[T]he rationale for the need involves the substantive fact that Europe is a multinational and multicultural union of democratic nation-states and that this status is considered to be worthy of preservation. This substantive reasoning is supported by a technical rationale asserting that integration need not necessarily mean the prevalence of common (integrated) units over the specific (differentiated) units constituting them.' *Ibid.*, p. 18.

cant aspects of the economic affairs of European countries and nations, where the European Union has replaced or is replacing nation-states. In legal terms, this implies the supranational nature of legislation issued by the European Union institutions in relation to the national law of the member states and is manifested in the direct applicability of such legislation to the territories of the European Union member states. It may be said that ‘The administrative space regulated by the numerous legislative acts of the European Union institutions leaves far behind the concept of a member state as a country subject only to international common law and contractual obligations assumed by itself. This gives rise to justified suspicion about the smooth coexistence of European Union law with the constitutional order of Estonia’.<sup>15</sup> How could we fulfil the requirement inherent in good law making practice to increase political decisiveness in a situation whose development we can objectively describe in such a fashion? It seems to me that in a European Union member state, the problem of the simultaneous application of the constitution of the country and European Union law is not related to the substantive content of these legal orders but to the goal, characteristic of both of them, of serving as the determining foundations of the organised operation of the important relationships of a society, where it is the uniformity of the goals that alleviates the conflict between the principles of the primacy of national and of European Union law. The principle of direct applicability of Community law was first stated in the *Van Gend en Loos case*<sup>16</sup> heard by the Court of Justice of the European Union: ‘The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore imposes obligations on individuals but is also intended to confer on them rights that become part of their legal heritage.’<sup>17</sup> The European Court of Justice has declared that the validity or effect of a European Union measure in a member state cannot be affected by allegations as if it were in conflict with the fundamental rights provided for in the constitution of the state or the principles of the constitutional structure of the country. ‘The Community legal system constitutes a new legal order of international law, the subjects of which comprise not only the Member States but also their nationals; it is a legal system in its own right which forms part of the legal system of the Member States and must be recognized by their courts. Community law is mandatory and absolute; this means that the competent national authorities are automatically forbidden to apply a national provision found to be incompatible with the Treaty, and must, where necessary, take all appropriate steps which help to ensure that Community law is given full force and effect. The rules of Community law must be automatically applied, at the same time and with identical effect throughout the entire territory of the Community. They must be accorded absolute precedence over the domestic law of Member States, even over a subsequent legislative measure; the Member States cannot argue that there are derogations from Community law which derive from their legislature or judicial systems, even if a constitutional system or provisions are concerned.’<sup>18</sup> In another case, the European Court of Justice declared: ‘The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.’<sup>19</sup>

This way or another, when interpreting existing national objective law, one should rather try to determine its level of compliance with European Union law in the situation that has developed.<sup>20</sup> In the case of a conflict between national and EU law, the persons implementing the law in a country are obliged not to apply national law but rather to apply European Union law. The member states of the European Union (including Estonia) must remove from national law the provisions that are in conflict with the directly applicable law.<sup>21</sup>

However, what creates special certainty about meeting an important requirement for good law making practice — to increase political decisiveness — as a member state of the European Union is the fact that member states issue the primary legislation in the European Union. Both the European Communities and the European Union have been established by treaties concluded between their member states. These treaties can be amended only by agreement of the member states at the intergovernmental conference level.<sup>22</sup>

<sup>15</sup> R. Narits. Eesti põhiseadus kestab ka uues Euroopas (Estonian Constitution will be preserved in new Europe). – Riigikogu Toimetised 2003 (7), p. 49 (in Estonian).

<sup>16</sup> The case of *Van Gend en Loos* rendered directly applicable only the provisions and acts of the primary law of the European Union; later, the Court of Justice extended such applicability to regulations and to a certain extent also to directives and decisions.

<sup>17</sup> Kohtuasi 26/62, *Van Gend & Loos* (Case 26/62, *Van Gend & Loos*). – Euroopa Kohtu lahendid (Rulings by the European Court of Justice). Koost. J. Laffranque. Tallinn 2001, p. 100 (in Estonian).

<sup>18</sup> Kohtuasi 106/77, *Simmenthal* (Case 106/77, *Simmenthal*). – Euroopa Kohtu lahendid (Note 17), p. 279.

<sup>19</sup> Kohtuasi 6/64, *Costa v. ENEL* (Case 6/64, *Costa v. ENEL*). – Euroopa Kohtu lahendid (Note 17), p. 111.

<sup>20</sup> The Finnish legal expert A. Aarnio has made a good point, comparing legislative provisions to a rubber band. The interpreter pulls or releases it depending on the situation. Only when a legislative act cannot be pulled any further — *i.e.*, when it has been extended to its very limits — is it time to solve the problem by issuing new legislative acts. – A. Aarnio. *Laintulkinnan teoria*. Porvoo, Helsinki, Juva 1988, p. 19.

<sup>21</sup> In order to put this requirement into practice, the Republic of Estonia’s Riigikogu adopted the Enforcement, Revocation, and Amendment of Acts and Their Provisions in Relation to the Accession of the Republic of Estonia to the European Union Act on 14.04.2004.

## 5. The Estonian government's position on the main values in European Union policy and the objectives set

By its cabinet decision of 4 March 2004, the national government released the draft 'Government's European Union Policy for 2004–2006' for public discussion.<sup>\*23</sup> Being a small country with limited resources, Estonia must make choices and select the areas in which our active participation is important for achieving our goals. By developing the main foundations for it, the government addressed one of its primary wishes, to initiate in Estonia a discussion about Estonia's objectives as a member of the European Union. Hence, this article also offers an opportunity to do this.

It seems highly relevant that the government feels that our participation in the European Union's decision-making process must be as active and broad as possible in order to achieve our objectives. The government will base participation in European Union decision-making processes on particular values.<sup>\*24</sup> Such values include equal opportunities, clarity and citizen-friendliness, welfare and initiative, and exactingness.

**The equal opportunities** concept means, among other things, that the European Union must ensure equal opportunities also for the new member states and guarantee equal treatment. To achieve this, it is necessary for the new member states to become integrated in all the policy areas and into the decision-making process of the European Union as quickly as possible, while the decision-making process should take account of the individual circumstances of the member states and not hinder the competitiveness of the countries. Equal opportunities as values should definitely include promotion of the free movement of the citizens of the new member states and the new member states' prompt joining of the Schengen area. **Clarity and citizen-friendliness** means for Estonia that the European Union is a union of countries that is open and democratic. The European Union must deserve the trust of citizens in the common European ideas and values. The new Europe will mean a union of countries where extensive consultations are carried out with citizens and their associations. The problem is that involvement of interest groups that stand outside state agencies in legislative drafting is increasingly recommended for updating legislation<sup>\*25</sup>, and this would be founded on the dialogue between various interest groups in society. A dialogue between citizens and the state, in any state, is made possible by law, an inherent feature of which is communication (as law functions in part as a communication system).<sup>\*26</sup> 'The only regulations and measures that may appeal to legitimacy are those to which everyone affected could consent during a rational discourse', says Habermas.<sup>\*27</sup> Democracy is based on a method seeking solutions through open and involving debate, as there is no absolute truth or opinion and the central features of democracy are hence intersubjectness and process.<sup>\*28</sup> There is some way to go yet, at least in Estonia. This concerns increasing of citizens' trust in the administration of the state and development of the decision-makers' understanding of liability — that it is impossible to mimic participatory democracy: it either exists or it does not.<sup>\*29</sup> **Welfare and initiative** are such values in the government's vision, which serve as a key to European success. For improving welfare, the European Union must create possibilities above all for small and medium-sized enterprises to increase their competitiveness and pay considerably more attention to the promotion of education, research and innovation, and introduction of scientific achievements in practical economics. The development of Europe must be sustainable and take account of

<sup>22</sup> All the institutions of the Union, as necessary, participate in creating the secondary Community legislation. Secondary law is created only in the cases prescribed by primary law. The main decision-maker and body adopting legislation is the Council. According to the core rule of legislative drafting, the Commission makes a proposal, whilst the Council regulates or enacts. The Council may deviate from the Commission's proposal only by a unanimous decision.

<sup>23</sup> In the minutes of sessions of the government, the item has been worded as 'Prime Minister's presentation in discussing a matter of significant national importance, the Government's European Union Policy 2004–2006', in the Riigikogu. Available at: [www.riik.ee/brf?id=1152](http://www.riik.ee/brf?id=1152) (26.03.2004) (in Estonian).

<sup>24</sup> However, it is true that when making a presentation during discussion of this matter of significant national importance, entitled 'The Government's European Union Policy 2004–2006', in the Riigikogu on 6 April 2004, Prime Minister Parts referred to the values specified in the document as regards principles: "When acting in the European Union, the government will proceed from four principles". Available at: [www.riigikogu.ee/ems/stenogramm/2004/04/t04040](http://www.riigikogu.ee/ems/stenogramm/2004/04/t04040) (30.03.2004) (in Estonian).

<sup>25</sup> M. Lagerspitz jt. Olelemisest osalemiseni? Eesti kodanikulagatuse hetkeseis ja arenguvõimalused (From existence to participation? Current situation concerning civil initiative in Estonia and its development potential). – *Akadeemia* 2000/2, p. 271 (in Estonian).

<sup>26</sup> R. Narits, K. Merusk (Note 1), p. 101.

<sup>27</sup> J. Habermas. *Postscript to Faktizität und Geltung*, 20 *Philosophy and Social Criticism*. 1994, p. 137 (reference in A.-K. Lindblom. *The Legal Status of Non-Governmental Organisations in International Law*. Uppsala 2001, p. 28).

<sup>28</sup> *Ibid.*

<sup>29</sup> K. Mänd. *Mittetulundusühingute kommentaarid koostöömemorandumile* (Comments of non-profit associations on co-operation memorandum). – *Riigikogu Toimetised* 2000 (2), p. 239 (in Estonian).

the needs of both the weaker members of society and the environment. **Exactingness** as a value means that Estonia's European policy places high demands on both ourselves and our partners. The achievement of goals based on common European interests presumes that all the member states fulfil the obligations assumed exactly and in due course. Only exactingness in pursuing the established goals can lead to success. Estonia promises to perform the tasks assumed and expects the same of others.

Considering the values described above and shaping its policy in line with them, Estonia hopes to make a positive and constructive contribution to the development of Europe. Just as each nation-state can act and operate in a legal environment, so can the European Union as an association of states function on the basis of legal rules. By setting out its main values in the document describing the Estonian government's policy concerning the European Union in the near future, Estonia specifies the guiding principles from which it proceeds in increasing political decisiveness as a European Union member state.

The Estonian government's policy in the European Union, which has been founded on certain underlying values, attempts to promote the common interest through pursuing five objectives. These are: Europe must be competitive and open; Europe must follow efficient economic and budgetary policy; European development must be economical and sustainable and ensure balanced and coherent development in the economic, social, and environmental realms; Europe must come closer to its citizens and ensure their safety and security; in order to safeguard the interests of its member states, Europe must contribute to ensuring democracy, human rights, security, and well-being throughout the world; a broader Europe must be a stronger Europe.

## 6. Analysis as an essential predecessor to legal policy choices

Legal policy choices cannot be made, nor political decisiveness characteristic of good law making practice increased, figuratively speaking, in a vacuum. Such choices can be made only based on extensive background knowledge. In 2001, the Chancellery of the Riigikogu organised an ECPRD<sup>30</sup> seminar titled 'Regulatory Impact Assessment in Legislation' in Estonia. It should be noted that participants arrived from 26 European countries. Co-operation with the ECPRD network is highly important, as the main goal of the co-operation network is to supply the members of both the European Parliament and other parliaments with the necessary data, comparative surveys, and documents necessary for our/their increasingly international work. The first seminar, dedicated specifically to the problems related to the analysis of legal policy choices, was held in 2002 and was titled 'How to Make Good Laws?'. Its aim was to notify the members of the Riigikogu of the arrangements concerning the regulatory impact analysis of the European Union and OECD countries in shaping knowledge-based regulatory legal policy and to initiate the relevant discussion in Estonia. The committees of the 10<sup>th</sup> composition of the Riigikogu, which co-ordinate the Estonian legal order (Constitutional and Legal Affairs Committees), decided to organise a parliamentary hearing in November 2003. The circle of people preparing the issues to be discussed was expanded in January 2004, and letters were sent to the Prime Minister and other ministers of the Estonian government as well as the Legal Chancellor, Auditor General, Chief Justice of the Supreme Court; the rectors of four public universities; and the directors of five research centres.<sup>31</sup> Although the parliamentary hearing had not yet taken place at the time the article was written (May 2004), some general conclusions can nonetheless be drawn on the material collected.

Below, we would like to discuss the replies submitted by the ministries. The first reason for this is that the length of the article does not allow for the examination of the responses of all the institutions, and the second is that the bulk of the regulatory work is carried out by the ministries. Thus, the replies submitted by the ministries specify the areas in which and the research units from which surveys, analyses, and expert assessments have been ordered over the last few years. The variation in the different legal, social, humanitarian, natural, and technical sciences and in the connections between these disciplines give some sense of the complicated nature of compilation of the rules for regulatory impact analysis — to which we have already referred — even though the compilation process itself is determined by the regulatory methods and is relatively universal.<sup>32</sup> It was heartening to learn that units engaged in addressing the social and economic

<sup>30</sup> European Centre for Parliamentary Research and Documentation. For further information about the information and analysis services of the parliaments, see A. Kasemets. *Parlamentide info- ja koostöövõrgud (Information and co-operation networks of parliaments)*. – Riigikogu Toimetised 2003 (7), pp. 181–188 (in Estonian).

<sup>31</sup> The working papers related to the preparation for the parliamentary hearing have been published on the Riigikogu Web site. Available at: <http://www.riigikogu.ee/?id=10986> (28.04.2004) (in Estonian).

<sup>32</sup> For example, most ministries do not have a structure for co-ordinating the *ex ante* and *ex post* regulatory impact analysis and monitoring the trends in European Union issues. Nevertheless, all the ministries employ officials responsible for compliance with the rules for drafting legislation of general application.

impact of policies/legislation exist in the Ministry of Social Affairs, of Economic Affairs and Communications, of Finance, of Agriculture, and of Education and Research, which are best prepared for conducting the *ad hoc* regulatory impact assessment and ordering of surveys.<sup>\*33</sup>

In relation to the preparation for the hearing to be arranged in the Riigikogu, all the ministries were requested to present an example, of their choosing, of the process used for preparation, processing, and implementation of a legislative act of significant social and economic impact that was adopted in the Riigikogu. On the basis of an example of one legal act, it was possible to obtain a brief but key overview of the situation of the analytical support system of regulatory analysis and the methods of regulatory impact analysis that are applied. The example regulatory descriptions selected by the ministries may be examined in the context of good law making practice as relevant examples or experience. The letters sent to the ministries included six questions: 1. Were any institutional or international guidelines used for the analysis of the social and economic, budgetary, demographic, environmental, and other impact of the legislative act? 2. What were the composition and qualification of the working group preparing the legislative act? 3. What kind of databases, preliminary surveys, expert assessment, and other tools were used? 4. What regulatory impact analysis methods were applied? 5. What kind of agencies, research centres, and citizens' associations were notified and involved? 6. How will the *ex post* regulatory impact analysis be carried out, and what is the method for providing feedback?<sup>\*34</sup>

If we try to form generalisations about the most important answers to the first question, we may note that depending on the legislative acts analysed by the ministries, the list of regulatory documentation and methodological instructions indicated in the responses was impressively lengthy. Thus, we may find from among the instructions the 'Regulatory rules of draft legislative acts' document issued by the Estonian government as well as questionnaires used in the OECD, NATO, and European Union institutions. The proposal received from the Ministry of Justice to add instructions for regulatory impact analysis to the regulations in the 'Regulatory rules of draft legislative acts' was highly relevant.

The practical reason for asking the second question lies in the interdisciplinary nature of regulatory impact analysis, which cannot be adequately covered by working groups consisting solely of lawyers or experts in the field in question.<sup>\*35</sup> On the basis of the replies, it may be said that the minimum ideal has been achieved as regards lawyers and experts. Future prospects allow for optimism here, as the replies of several public universities reveal that they have started to teach assessment of policy/regulatory impact.

The significance of the third question is rooted in the fact that the quality of both the *ex ante* impact analysis in preparing legislative acts and the *ex post* impact analysis of legislation depends on the relevant surveys or the use of surveys already completed. The summary survey conducted on the basis of the enquiries of members of the previous (9<sup>th</sup>) Riigikogu A. Liiv and I. Tallo indicated that about a third of the surveys and analyses ordered by the ministries in 1999–2001 were in some manner related to legislative drafting and only 3% were spent on behavioural surveys.<sup>\*36</sup>

The feedback to the fourth question revealed that the ministries' descriptions of the legislative examples rather seldom included references to the classical methods of regulatory impact analysis<sup>\*37</sup>. However, it must be added that according to the current coalition agreement, government priorities in the area of regulatory impact analysis include the formation of an integrated analysis system for determining the enterprise impact (objective: economic growth) and social and demographic impact (objective: increase in population growth and decrease of the average age) of legislation.

<sup>33</sup> Proceeding from the provisions of the current coalition agreement (*Res Publica*, Reform Party, People's Union) concerning the revision of the system for surveys ordered by the state, the possibilities for combining the information needs of state surveys and regulatory impact analysis should be considered. As we noted above, the human and financial resources of Estonia tend to be rather limited.

<sup>34</sup> For example, the Ministry of Social Affairs chose to analyse the State Pension Insurance Act Amendment Act, the Ministry of Economic Affairs and Communications examined the Register of Economic Activities Act, the Ministry of Finance chose the Income Tax Act Amendment Act, the Ministry of Internal Affairs used the Security Service Act as an example, the Ministry of Education and Research chose the Study Allowances and Study Loans Act, the Ministry of the Environment examined the Waste Act, the Ministry of Foreign Affairs used the Consular Act, the Ministry of Defence examined the Wartime National Defence Act, the Ministry of Agriculture chose the Multiannual Financing Agreement of the Special Accession Programme for Agriculture and Rural Development in the Republic of Estonia Ratification Act (the agreement being concluded between the Commission of the European Communities and the Republic of Estonia), and the Ministry of Justice examined the Bankruptcy Act.

<sup>35</sup> The relevant minimum ideal would be as follows: each working group preparing a legislative act should include a lawyer, expert in the field, and linguist. – R. Narits. Seadusloome õigusliku ja regulatiivse mõju hindamine (Legal and regulatory impact analysis for legislative drafting). – Riigikogu Toimetised 2001 (4), pp. 97–101 (in Estonian).

<sup>36</sup> A. Kasemets (Note 11), pp. 107–117.

<sup>37</sup> The main methods of regulatory impact analysis are cost-benefit analysis, cost-effectiveness analysis, implementation cost analysis, business impact assessment, fiscal or budgetary analysis, risk assessment and risk-risk analysis, environmental impact analysis, social impact analysis, and multi-criterion analysis methods.



The replies to the fifth question indicated that most of the working groups on legislative drafting working in conjunction with the ministries have notified and involved various stakeholders.<sup>\*38</sup> The steps taken by the Ministry of Justice in preparing the Bankruptcy Act are useful. Namely, they consulted professional, informed stakeholders (the Chamber of Notaries, Chamber of Commerce and Industry, etc.), which was a rather practical and affordable option for spotting the interests of the target groups. The consulting principle works well provided that the target group has a sufficient amount of objective information about the possible gains and losses of various target groups and also sufficient resources for preliminary assessment of the regulatory impact.

The feedback to the sixth question proved the clear existence of a plan for *ex post* impact analysis or ordering of a survey following the implementation of the legislation.<sup>\*39</sup>

## 7. Problems to be solved

Finally, let us examine the proposals of the ministries for organising the system of regulatory impact analysis, intended to ensure the quality of legislative drafting, parliamentary discussion of draft legislative acts, and implementation of law.<sup>\*40</sup> In general, the essence of regulatory impact analysis has not been yet fully acknowledged in Estonia. Such an observation was made in the replies of as many as seven ministries. As long as this situation prevails, it is impossible for good law making practice to be applied in its modern sense. We can see from the table included in the footnotes what specific proposals the ministries have made. I would like to highlight some observations I consider fundamental.

The Ministry of Justice, of Social Affairs, and of Education and Research consider it necessary to establish a centre for co-ordinating regulatory impact assessment. The role of such an institution would be to harmonise the existing regulatory impact analysis practice, provision of guidance, and supervision of the development of regulatory impact analysis. It is their firm position that it would not be expedient on the state level for

<sup>38</sup> An analysis of the explanatory memoranda of draft legislative acts with a significant social impact that were submitted to the Riigikogu for consideration indicates that the rate of compliance with clause 53 of the regulatory rules of the Riigikogu, which sets forth the requirements for information and involvement of the target groups appropriate for the scope of application of the legislative act and for the presentation of the processing results is only 23%.

<sup>39</sup> The Ministry of Social Affairs uses a survey by Praxis, the Ministry of Finance employs monthly state budget revenue monitoring, the Ministry of Education and Research uses a survey by the Federation of Estonian Student Unions, the Ministry of Agriculture complies with the obligation to assess results as laid out in the European Union SAPARD programme, and the Ministry of Justice performs analysis of judicial practice and monitoring of registers.

<sup>40</sup> Main categories of proposals and intersection of the replies of the ministries.

Ministry/minister of													
	Justice	Social Affairs	Econ. Affairs and Comm.	Finance	Internal Affairs	Education and Research	the Environment	Culture	Foreign Affairs	Agriculture	Defence	Population	
Proposal													
1. The need and requirements for regulatory impact analysis (RIA) need further clarification and specification	+	+	+			+			+	+	+		
2. It is necessary to establish a unit co-ordinating RIA training and counselling	+	+				+							
3. Co-ordination by the State Chancellery		+											
4. Co-ordination by the Ministry of Justice			+	+									
5. The need for standardising RIA, including the processing of national and EU legislation	+	+	+			+				+			
6. Inclusion of instructions on RIA in the annex to the regulatory rules	+												
7. Joint training sessions on RIA	+								+		+		
8. Co-operation with other EU and OECD countries in RIA training <i>etc.</i>	+		+			+							
9. Each ministry may have its own RIA system, suitable for its field		+	+							+	+		
10. A more RIA-centred approach is required in legislative drafting						+							
11. Association between orders for state surveys and RIA needs						+							
13. Other proposals	+	+				+							

each ministry to handle the issues of regulatory impact analysis separately.<sup>\*41</sup> The Ministry of Economic Affairs and Communications noted that the regulatory drafting tasks of recent years have been mainly related to harmonisation of European Union legislation. This situation has meant that the provisions to be transposed have been ‘prescribed’ and there is either no opportunity or no need for conducting surveys and analyses. However, we have to note that in comparison to national legal orders, the European Union aims in its legislation at unifying legal systems, harmonising legal systems, or co-ordinating legal systems.<sup>\*42</sup> We can speak about prescription only in relation to the regulations that unify legal systems — that is, in the cases where European Union law replaces national legislation. The Ministry of Education and Research considers it necessary to agree on the common methods of regulatory impact analysis and to map the agencies and institutions that are competent in such impact analyses. It is implied that, to date, Estonia has lacked a clear and uniform practice for involving research potential in preparation of legislation and the ordering of relevant surveys. The Ministry of Justice points out that impact analysis is necessary in the context of European Union law at two moments: in participating in the decision-making procedure and upon harmonisation of Estonian law with European Union directives. Such impact analysis is above all in Estonia’s interests. If we respond in due course and in a justified manner, we may be able to affect the development of European Union law. When harmonising the European Union directives with Estonian law, we have to look beyond the text of the directives. It is important to analyse the background of adoption of the legislative acts, and also why and how the other European Union member states have harmonised these acts. We have to take into account that each member state of the European Union has to assess for itself the consequences of one or another legislative act for the state and draw attention to this, if necessary — as a rule, no other member state assesses the impact from an Estonian perspective. The Ministry of Justice also finds that the regulatory impact analysis system should be applied to both national and European Union legislation.

In summary, we may say that it is highly necessary to know the rules of good law making practice today. As legislative drafting as a process is initiated through policy choices and the first rule of good law making practice demands increasing of political decisiveness, taking regulatory impact analysis as the basis for political decisions, Estonian regulatory impact analysis should be revised. We obviously need a central and at the same time balancing institution that would ensue a uniformly high quality of analysis. Methods of regulatory impact analysis should receive more attention.<sup>\*43</sup> The regulatory impact analysis preceding the preparation of a draft legislative act helps improve the quality of legislative drafting and its outcome — the legislative act. It is no coincidence that regulatory problems can be solved mainly through lawyers’ efforts. However, the substantive part of legislative drafting and particularly what concerns modern good regulatory practice as a set of measures and methods definitely requires that the circle of subjects engaging in legislative drafting be expanded. Lawyers alone are not competent to conduct the regulatory impact analysis that is such an integral and increasingly important factor in good regulatory practice.

<sup>41</sup> The Ministry of Justice has attempted to fill the gap to a certain extent by organising roundtable discussions: ‘Regulatory Impact Analysis — How to Continue’ on 4.11.2003; a roundtable discussion dedicated to issues of better regulation on 8.01.2004. The aim of the discussions was to discuss the necessity of regulatory impact analysis, to point out relevant problems, and to determine how to develop the area of regulatory impact analysis in Estonia in the future.

<sup>42</sup> N. Jääskinen. *Kohanemine Euroopaliku seadusandlusega. Üldisi tähelepanekuid ja Soome kogemusi* (Adaptation to European legislation. General observations and Finnish experience). Helsinki 1996, pp. 11-13 (in Estonian).

<sup>43</sup> The Ministry of Justice draws attention to one of the recent excellent regulatory documents: ‘Interinstitutional agreement on better law-making’. — Official Journal of the European Union. — 2003/c 321/01.