An Analysis of *Technical Rules for Legislation* of the European Union and the Republic of Estonia

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According to Article 1, Subsection 1 of *Technical Rules for Draft Legislation of the Republic of Estonia,* draft legislation has to be consistent with generally recognised principles and rules of international law, the constitution, international agreements that have entered into force with respect to Estonia and the law of the European Union (1999). The specific character of the technical rules of European Union law arise from the joint practical guidelines for drafting legislation compiled by the European Parliament, Council and the Commission of the European Communities (The Joint Practical Guidelines, 2000) (hereinafter referred to as "the Guidelines"), which should meet the requirements of the standard structure of generally applicable legislation. Having analyzed the elements of legislation in the Guidelines, the author was able to compile the following table 1, which reflects the standard structure of the legislation.

Table 1. The Standard Structure of Legislation Pursuant to the Guidelines

1. Title, Preamble

1.1. **title,** full title, abbreviated title, reference to the type of legislation

1.2. **technical data** (reference to the authentic language, the number of the legislation, the year), abbreviation of the relevant union, name of the institution that passed the legislation, the date it was passed

1.3. **preamble,** official statements, requests, expressions of will, declarations

1.4. **legal basis,** competence to pass legislation, powers, general principle, consequence, observation, conformity, the main steps of the previous proceeding; obligatory propositions, recommendations, initiatives, drafts, applications, opinions; publication citation, note

1.5. **definitions,** definitions of concepts, definitions of terms

1.6. **basic principles,** general principles of law, principle of subsidiarity, principle of proportionality, the principles of general comprehensibility, legal certainty, transparency; general situation that led to passing the legislation, historical background, grounds of choosing the legal basis and type of the legislation, standards, basic rules.

2. **Conditions** of **Enacting Legislation. Informative and Non-informative Provisions. General Provisions**
   - **2.1.** The scope of application, types of legal and factual matters; persons to whom the legislation applies, relevant field
   - 2.2. defini tion of substance, main topic, regulatory topic
   - 2.3. objectives, requirements, relevant aspects, necessity
   - **2.4.** statements of grounds, real reasons of actions taken, compendious clarifications of relevant facts and legal problems, conclusion of the necessity and relevancy of the action provided in the regulatory part; grounds of the main provisions of the requirements of enactment: explanation of the meaning; grounds of existence of a few provisions, the meaning of which differs from the general meaning; justification of exemptions or the provisions that damage the interests of the relevant persons, complicated aspects
   - **2.5. procedural provisions, type of the procedure used**
   - **2.6. applicability** in the European Economic Area, application

3. **Regulatory Part, Normative Provisions, Provisions, Part of General Application**
   - **3.1. description of matters of fact**
   - **3.2. in the event of...**
   - **3.3. rights and obligations** , restrictions, prohibitions, requirements of removal
   - **3.4. otherwise...,** the penalties, legal consequences, sanctions, holding liable
   - **3.5. procedural acts,** relevant actions for restricting and banning, procedures, formalities
   - **3.6. application of penalties**

4. **Provisions Including Implementing Powers, methods of implementation, methods of application**
   - **4.1.** creation of the **regulatory committee,** stipulated authority, competent authority that executes supervision, responsible persons
   - **4.2. committee procedure,** execution of supervision, execution of control, measures, supervisory procedure
   - **4.3. injunctions**
   - **4.4. information,** submission of information, delivery
   - **4.5. legal remedies,** complaints
   - **4.6. financial provisions,** financial framework, financial provisions, financial reference amount

5. **Transitional and Final Provisions**
   - **5.1. entry into force,** effective standards, taking effect, urgency, entry into force on the day of publication
   - **5.2. declaration of invalidity** of the previous legislation, declaration of invalidity of the obsolete legislation and provisions
   - **5.3. alteration** of previous legislation: substitution, reinforcement, supplementations, deletion, paraphrasing, restructuring, codification
   - **5.4. transitional provisions from the old system to new, effect in the current situation**
   - **5.5. application period,** passing of the provisions relevant to observe, application date, suspended implementation, time limits for incorporation into national law, time limits for incorporation into law of the member states; temporary implementation, expiry date
   - **5.6. exemption in respect to the general provision, provisions with retroactive effect**

6. /Regularisation/

6.1. coherence

6.2. direct and indirect **references,** permanent references, changing references, cross-references, serial references, references to the appendices (including the enclosed legal instruments with technical details and non-independent legal instruments, list, schedule, plan, drawing, form, etc.) or to the practice; short reference, general reference

6.3. competence

6.4. powers

6.5. subsidiarity

6.6. ***sui generis*** decision

The Necessity for Repetitive Searching and Classification

The elements have been referred to with different emphases in the joint practical guidelines for drafting legislation. That aspect had to be taken into account. The text has been analyzed several times. **The first time, 26 different elements that were directly pointed out in the text** were classified, many of them with synonyms and variations. These are underlined in the table. There were also problems with the titles of the general elements, which were too general (2-5. *the provisions of enactment)* or were non-existent (6. *the regularisation).* The classification and reason why the specific element was settled in a specific suitable place is explained in the example of clause 1.5, *the definition of concepts:*

1. If the concepts used in the legislation are not univocal then, pursuant to guideline nr. 14, they have to be determined in one and the same article in the beginning of the legislation.

For the sake of legal clarity it is logically necessary that the concepts be clear and already defined before mentioning the scope of application and the statement of grounds because both of them may include some ambiguous term or a term with a narrower/wider meaning. The definition of concepts should be logically situated after 1.4, *the legal basis,* and before 1.6, *the statement ofgrounds.*

1. The determination of concept is the easiest regulatory possibility, where according to some program (so. 5) (one of many meanings is chosen, a narrower/wider meaning is attributed, etc.) a public domain term is affirmed. Therefore, it could be a fifth form of the first regulative degree or regulation type 1.5.

Therefore, while classifying these 26 elements the direct **reference of the guidelines** ("at the beginning of the legislation"), **structural-logical analysis and the determination** of **the regulatory** type of the element (regulation type 1.5) is used.

While the first measures are well known, the determination of regulatory type and its use in classification is a new measure in law. In determining the element's regulatory type it is possible to sort the types according to the degree of efficiency starting from the least effective: 1. **"yes-no" type, 2. range or rheostat type, 3. direct link type, 4. feedback type, 5. program-based or inclining the feedback intentionally, 6. homostatic or self-regulating parallel regulation.** A characteristic of this conclusive ordered line is that every next level enables better regulation, whereby the regulator shall have all the regulative possibilities of the previous levels. As inside of every type there is a fractal or self-like sub-line, these elements are suitable for compiling a 6x6 matrix table in two fractal levels, where every regulatory element has a certain suitable place according to the regulatory type used.

However, compared to the ideal matrix **10 elements fell short,** because they were not directly findable. In the second analysis a somewhat different tactic was used. If we are guided by the point of view that the text is sort of a reflection or a regulatory impression of reality, it is possible to research that reality through the text, although some regulatory elements from that reality are not brought out. **The text of the practical guidelines** is **a corrective reflection of the current practice of drafting legislation and therefore includes many things that its compilers have intentionally or knowingly not included.** As the purpose of the classifying analysis was first and foremost to find the structure of the elements used in reality, it was justified to use all the references in the guidelines that indicate the existence and usage of these elements in legislation. Through this approach and use of all types of the so-called ideal matrix (see table 3) that consists of key terms of the regulatory elements, it was possible to find some missing regulatory elements from the many examples in respect to the possible formulation of different legislation brought on in the guidelines.

Analysis of content was also helpful as it enabled one to distinguish regulations without **referring to them expressly.** These regulators were previously mentioned in the guidelines but their designation was for some reason not brought on as a well-known one or was mentioned as **an organizational form of performance of the regulation or as a way of performance.** In this case the designation mentioned in the text was used to refer to the element (3.2. *in the event of,* 3.4. *otherwise;* 4. as specific forms of the methods of implementation 4.1. *the regulatory committee* and 4.2. *the committee procedure).*

The elements 6.1. *the coherence,* 6.5. *the subsidiarity* and 6.6. *the* sui generis were **the most difficult.** The latter was repeatedly mentioned in the text but with the regulatory element it seems to remain distant at first. It would be all right, if some of the possible elements **were not mentioned at all** in the guidelines (The guidance advises for any gaps in law to be overcome by interpretation), but as interesting as it is it **was possible to fulfil all the spaces in the table with suitable elements.** *The coherence* is an analogue to 6.1. *the conflict of law* i.e. in both cases the validity of the law arises from some external yes/no type regulator. As in cases of the conflict of law the law either applies or not; it is the same in cases of coherence or non-coherence. Therefore, it could be classified as the regulator of 6.1. On the other hand, 6.5. *the subsidiarity* makes it possible to make 6.5. *the decisions of discretion* because the representatives of authority closest to the citizen are the most suitable to apply the local regulation.

The course of analysis in respect to 6.6. *sui generis:*

1. The regulative element is searched for that in its nature does not execute regulation just by existing in the legislation but does it in some external way through existent legislation or legislative drafting (6. parallel regulation). Several of its different types were already found - 6.2. the references, 6.3. the powers.

2. Different types of elements can put this kind of regulation into practice. The most desirable type executes the regulation not with a parallel law or action but uses processes that take place in general legal practice. These may be, for example, regulations based on court rulings and different regulations that are considered reasonable. By including these regulations into the law, the most flexible ways of regulation are enabled. This is because the use of a more inflexible regulator would either not be possible or as efficient, due to the little legal practice or being in the initial stages of development. That type 6.6 regulatory element executes regulation according to the unique situation, which makes the regulation one of a kind of its nature. Often there is basically no chance to use this regulatory solution more widely without supplementary adjustment because of the uniqueness of the circumstances connected to it.

3. Since now the field searched for is restricted as to some extent and there is a classifying instrument to help sort out which element is not suitable, they could be tested one by one in order to find the potential candidates. In this case there were some terms the meaning of which was not entirely clear and these were the ones to begin with. Several times *sui generis* decisions were referred to. The translation of the phrase "sui generis" would be "one of a kind", "unique".

4. If and what kind of regulatory type of decision would *sui generis* be? Would the hypothesis that the *sui generis* type of regulation is a suitable form of expression of the 6.6. type of regulator be possible? *The sui generis* decision seems to be suitable to be the 6.6. type regulator because in the right context *the sui generis* decisions may execute the 6.6. type regulation.

At first there is a **description of the main** (the type 6 of the general degree) **regulatory features of the missing searchable elements** executed based on the synergy of the classification table. Then using the synergy or the prognosis-like feature **the description of regulatory features** of the sub-degree type 6 of **the regulator** was found. Some of the terms for **exclusive checks** were chosen using the forecasting descriptions. The check of the *sui generis* decision enables one to conclude that it may be the type 6.6. regulator.

Different tactics of searching elements **based on the definition of their regulatory type** may be compared.

1. It is the easiest to find the element, if it is expressly presented in the text showing the regulatory place or type.

2. The next would be a search based on structural compatibility where, for example, it would be functionally logical for it to be situated between the two other elements (with designated types).

3. If the element has certain regulatory features that the elements on a lower level do not have then based on this hierarchical ground it is possible to designate its type.

4. If the designation of the potential element or its synonym is unclear but its outputs and tasks are known, it is possible having analyzed the latter ones to designate and categorize the analyzable element as a specific element.

5. If the known outputs cannot be analyzed, it could be helpful to create a profile based on a program or the description of the principal features. Usually there are few elements that have the same kind of features or they have to be found in the theoretical literature or practical use and have their compatibility tested.

6. It is difficult but a sure way to invent the element involving something at the same time. It is sufficient if the fractal is developed to the first regulation of the field, to the next level of fractal where the elements do not have certain meanings yet. Another way in drafting terms is to try in certain conditions to implement, for example, a new foreign langua-

ge counterpart of the element or a synonym arising from the functionality of the element or the parallel designation that has the same meaning or the general term instead of a specific one, if the new term meets the conditions of the Estonian written language better and is univocal.

In the first three cases we have found the elements on our own and it is necessary to determine their type. In the last three cases we have searched for the elements from the open environment. Altogether they form a **search genesis.**

Analysis

Basically the constitution of the structural elements of legislation is an analogue of the ideal matrix of the structural elements of legislation (table 2) that has been compiled in correspondence with the author's research **(2004,2005).**

Table 2. The Regulative Structure of the Law as a Reduced Table

	1.	2.	3.	4.	5.	6.
1. Requisites	**Title**	**Signatories**	**Pronoun-cement**	**Basis**	**Definitions**	Principles
2. General provisions	**Area of regulation**	**Resources**	**Objectives**	**General requirements**	**Application of Proceedings**	Scope of application
3. Provisions	**Facts**	**Hypotheses**	**Dispositions**	**Sanctions**	**Procedural provision**	Execution
4. Legal headquarters	**Super-visors**	**Tasks**	**Reaction**	**Notification**	**Provisions of legal remedy**	Financing
5. Implementing provisions	**Effective standard**	**Void**	**Alterations**	**Transitional provisions**	**Alteration terms**	Differences of implementation
6. Regularisation	Provisions of conflict	Reference provisions	Competence provision	Provisions delegating authority	Provisions of discretion	Developing

The difference is in the designations of some elements: some elements have been mentioned more and more specifically; others, on the other hand, have been mentioned less and some of the designations are missing completely. **1.4.** *the legal basis,* **2.4.** *the statements of grounds* and **6.2.**

the references have been worked through in detail in the guidelines, 3. *the regulatory part* has received too little attention. It may be because of the fact that the guidelines are compiled to correct the weak or unclear parts of legislative drafting. In the complicated legal system of the European Union these are considered to be the legal basis, statements of grounds and references. That is the reason why in the guidelines only the troublesome or difficult elements of the present moment are mentioned. First and foremost they are still practical guidelines.

The problems that arose in classification were solved. When in some cases while analyzing the regulatory type it was impossible to designate the clear regulatory type because of the ambiguity or obscurity of the term, then the logical place for it is chosen. For example, the statements of grounds may be presented in respect to 1.4. *the legal basis,* 1.6. *the use ofprinciple of subsidiarity,* 2.4. the content of the legislation and the few differences that can be found in the whole text. It would be natural to give information in respect to the differences, relevant provisions, etc. in the 2nd part of regulation type feedback (2.4) that includes the structure. Therefore, it would be possible to distinguish 2.3. *the objectives* from 2.4. *the statements of grounds* as a difference based on respectively the direct link and feedback. The direct link does not enable controlling substantiation based on results or consequences but brings up the criteria arising from the inner relevance (hierarchy). The word *proceeding* (1.4. *the previous proceeding,* 2.5. *the procedural provisions,* 4.2. *committee procedure*) is also ambiguous as with the additive they express different regulations.

In some cases the element is contained in an example explaining the requirements of the guidelines, but has not been mentioned in the text of the guidelines (for example, 4.2. *the sanctions,* 4.2. *the supervision,* 6.3. *the competence*). Therefore, the existence and use of the regulatory element in the legislation is considered natural but for some reason it has not been brought on specifically.

The Evaluation

The analyzed joint practical guidelines of the European Parliament, Council and the Commission of the European Communities is definitely useful to those who deal with drafting legislation in the institutions of the European Union and is good didactically with a lot of useful clarifying examples and the drafting standard expressions used, but terminologically and in the respect to the logic of structure there is a long way to go.

In addition to the problems outlined in the abovementioned analysis, the guideline recommends mentioning different types of regulations (i.e. content and scope of application) in one and the same article of the legislation. In the guidelines it is considered necessary to distinguish the different types of regulation but the process of distinction obviously continues, wherein the elements during their elaboration diverge even more after which they will be someday dealt with in separate articles. Then the requirement mentioned in the same guidelines that an article should connect several ideas that are logically connected to one another is going to be implemented. If elements as relatively autonomous bodies can be permanently distinguished, and if for every one of them several logically connected ideas can be found, then the ideas for different elements would probably not be recommended to be illogically included in one article.

By comparing the elements underlying the compilation of European Union law with the classification table of elements of law compiled earlier their significant similarity and concurrency can be established. To try to evaluate the situation of Estonian technical rules, the same kind of table of elements has to be compiled and the results have to be compared.

The Structure of *Technical Rules of Draft Legislation*

To find out how the elements of technical rules are mentioned in the Estonian Technical Rules for Draft Legislation, the respective analysis was conducted, and the results are referred to in Table 3.

Table 3. Regulative Structure of the Legislative Draft

1. **Requisites**
   - 1.1. **title,** type of legislation
   - 1.2. names and official titles of the **signatories,** number of the legislation, date, place and language of the passing, constitution
   - 1.3. person who submits the draft, date of the submission, number of the letter of submission
   - 1.4. **basis,** conformity to European Union law, publication notation
   - 1.5. **definition of concept,** definitions of terms, foreign words, interpretation
   - 1.6.

2. **General Provisions**
   - 2.1. **scope of application,** object of regulation, relevant legal institutes, regulated field
   - 2.2. content, necessity
   - 2.3. objectives, legal relevance
   - 2.4. **general provisions of** the relevant legal institutes
   - 2.5. application of proceedings
   - 2.6.

3. The Provisions

3.1.

3.2.

3.3.

3.4.

3.5.

3.6.

4. ***The Legal Headquarters***

4.1.

4.2.

4.3.

4.4.

4.5.

4.6. the necessary expenses, alleged income

5. Implementing Provisions

5.1. **effective standard:** pursuant to the general procedure, if different to the general procedure

5.2. declarations of **invalidity,** provision of repeal

5.3. **alterations** in laws, amending provision, provision of alteration, replacements, additives, supplements, rewording, new reduction

5.4. **the transitional provisions**

5.5.

5.6. **the implementation differences** and elaborations, retroactive implementation

6. ***Regularisation***

6.1. the drafting note; consistency with the constitution, law of the European Union, international agreements; condition of admissibility of contradiction

6.2. **the reference provisions,** including to the appendices (table, form, sample, map, plan, scheme, etc."). direct and indirect reference

6.3.

6.4. provisions delegating authority

6.5.

6.6.

The first analysis of the technical rules of the draft legislation had only half of the direct legal regulators (underlined). The elements of provision and legal headquarters were not directly mentioned. The second analysis added the regulators consisting of the law, which could be connected to the regulation and that were mentioned in the rule. Notwithstanding that the indirectly mentioned regulators were added and that there were a few additions to the table, there were still a lot

of regulators missing or not mentioned in the table. Compared to the standard structure of the generally implemented legislation of the European Union, there are a lot less drafting elements mentioned in the technical rules of draft legislation of the Estonian Republic. Unlike in the guidelines of the European Union, not many of them were found in the supplementary second analysis of the text either. That does not mean that the laws are different in regulation because of the differences in the technical rules. While analyzing the laws passed in the Republic of Estonia, different types of regulative elements can be found. Unfortunately, these examples do not fit in this article.

Compared to the standard structure of the generally implemented legislation, **the reason** for mentioning so few elements of structure may be the fact that unlike the guidelines of the European Union, there is no **extensive use of examples.** That may be the reason why in the guidelines there were a lot more drafting elements that were mentioned indirectly because in spite of the theoretical knowledge of the possible composition of the elements, in real life they are used in practice and therefore, dealing with the practical problems brings them inevitably into the guidelines.

The other reason may be considered to be **the composition of the drafters,** who while creating the guidelines of the European Union could be pieced out from the specialists of many fields of practical drafting that try to avoid the problems arising from the practical drafting and have included their knowledge in the guidelines.

The third reason may be in the differences of the objectives set forth in compiling the documents. In the first case there are joint practical guidelines to the drafters from states with different traditions of drafting and in the second case there is a more restricted and stricter technical rule for drafts that should not guide people to solve the problems arising from the drafting of legislation.

Specifically, the analysis of many structures of laws made it possible to compile a unified table of the widely used regulatory elements for compiling the ideal structures, because neither the guidelines of the European Union nor Estonia, many of the practically used elements of law have not been mentioned. The latter is not an accusation, but arises from limited theoretical knowledge. **If there is no ground for systematising different elements then there is no reason or possibility to check whether all the possible elements are mentioned in the rules or guidelines.**

If some of the elements of law in the technical rules have not been observed, it does not mean that they are not used in practice. The most important thing in drafting laws is practice which,

regardless of the fact that the theory cannot yet distinguish some of the elements, still implements them. In theory so far there has not been a methodological possibility or an instrument to distinguish and classify all the elements of law with sufficient clarity and classifying perfection. Although theory does not distinguish some of the elements, they are mostly existent in laws. The word "mostly" here is relevant **because there is no possibility to check whether all the elements are existent.** If the existence and essence of some of the elements is known in technical rules, it is possible to check their existence and implementation. But if some of the elements are missing from the theory and technical rules then this is no longer a direct possibility. They can be checked through less-acknowledged types of cognition like intuition, cognition of composition or practical experience but the possibility of conscious control with feedback arising from technical rules or the verification of elements arising from understanding systematic constitution of law is impossible in these cases.

Additionally, if the system of regulatory elements of the law is not understood then there is no possibility for **the verification of the regulatory conformity** of the elements known in technical rules. The element may be mentioned in the text of the law but the regulatory possibilities created for it may not be in conformity with what is needed, so the regulatory element cannot fulfil its regulatory tasks. It may be badly constructed because the requirements of construction of a certain regulatory type were not kept in mind. At this moment the possibility for **preventive control** of this deficiency **is missing.**

It seems paradoxical that up until now the regulatory elements of a certain type have been constructed without explaining their regulatory type. The differences of regulatory types known in cybernetics for a long time have not yet made it to technical rules. The reason, among others, may be that in cybernetics itself it has not been found necessary to emphasise the differences of regulatory types.

Observations

The definition of concept in the Technical Rules for Drafts of Legislation of General Application has been considered to belong to the 2. *the general provisions* of law but it fits better under *1. the requisites.* The designation "requisites" is linguistically imprecise, but there is no better term in use for 1. *the general element* and that is probably why it is located under general provisions in the technical rules. The definition of concept should logically and functionally be located **before *the general provisions*** because in every element of the latter they may have to be used, including in 2.1. *the scope of application,* 2.2. *the resources,* 2.3. *the objectives,* 2.4. *the*

general requirements, etc. However, it is prevented because the scope of the application is mentioned in the first article of the draft as is requested in Article 12, Subsection 2 of the Technical Rules for Drafts of Legislation of General Application.

The definition of concept is 1. A.k.a. a yes-no type of regulation, where it is determined what the meaning of a specific term is in the constitution of law. Every term is a constructive element of law. 2. *general provisions,* on the other hand already consists of the elements that consist of certain wider consistency or structure, for example 2.2. *resources,* 2.3. *objectives*, etc. If there are several resources and objectives, then they should, unlike the concepts, be observed together and bound. *The definition of concept* type 5 sub-regulation arises from a certain meaning given to one term by the drafters that may differ from the traditional meaning of the term or have several meanings, several interpretations or not be well known.

In Conclusion

The main conclusion is that the analysis of the technical rules of the European Union and the Estonian Republic is usable if one uses the classifying method. It became clear that a large part of the regulative elements is used in practice in both cases in spite of the fact that their existence in laws, the functional need and the logical place in legal theory has not yet been acknowledged. The theoretical solution of this problem is a challenge that can also be dealt with in Estonia at the University Nord.

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