

EUROPEAN EXTERNAL ACTION SERVICE



Civilian Planning and Conduct Capability – CPCC

Guidelines of the European External Action Service

of 09/02/2017

EEAS Reference	EEAS(2017)189
Distribution marking	<i>Limited</i>
To	Civilian CSDP Missions
Subject	CIVILIAN OPERATIONS COMMANDER OPERATIONAL GUIDELINES ON LEGISLATIVE DRAFTING
[Ref. prev. doc.]	n/a

Made public
4/3/2020

EEAS(2017)189
~~Limited~~ PUBLIC

**CIVILIAN OPERATIONS COMMANDER OPERATIONAL GUIDELINES ON
LEGISLATIVE DRAFTING**

Table of content

A. Purpose	3
B. Scope	3
C. Rationale	4
D. The Guidelines	4
D.1 Generic Principles (applicable to all Civilian Operations Commander Operational Guidelines)	4
D.2 Key steps in the legislative reform process in developed states	5
D.3 Mission objectives and key activities for Mission personnel in the context of the legislative reform process	7
D.4 Phase 1 - Initial preparation	9
D.5 Phase 2A - Support to development and implementation of specific laws, pre-drafting phase	12
D.6 Phase 2B - Support to the development and implementation of specific laws, drafting phase	18
D.7 Phase 2C - Support to the development and implementation of specific laws, implementation of the new laws	24
D.8 Phase 3 - Capacity building	25
E. Further Reading	27
ANNEX A: Examples of legislative drafting supported by Civilian CSDP Missions	29

EEAS(2017)189
~~*Limited*~~ PUBLIC

A. PURPOSE

1. The overall purpose of these Guidelines is to provide advice to Mission personnel on how best to provide support to host State authorities in terms of legislative processes (and input thereto) in the theatre of operations of the Mission for which they are working.

B. SCOPE

2. The Guidelines begin with an outline of the key steps in the legislative reform process in developed States so as to give a point of reference in terms of advice provided by Mission personnel to counterparts in the various theatres of operations. Consideration is also given to ensuring that activities which are carried out in terms of legislative reform are in line with Mission objectives. Finally, the Guidelines divide possible support by the Mission into three "phases" which are graphically represented at Section D.3 of these Guidelines. These "phases" (initial preparation, support to the development and implementation of specific laws and capacity building) are outlined in more detail in Sections D.4 - D.8 of these Guidelines. A reading list is also provided so as to direct Mission personnel to more extensive information on particular subjects within the field of legislative drafting, should the need arise (Section E).
3. Since the establishment of the first civilian CSDP Mission in 2002, many of the civilian CSDP Missions have provided advice on draft legislation and have also provided support to legislative processes. The expectation in the future is that previous experiences can be drawn upon in order to influence future input to legislation, both in Missions which are currently operating and in Missions which have yet to be established. Accordingly, a list of the legislative initiatives in which civilian CSDP Missions have played a role thus far has been produced (**Annex A**). For future legislative initiatives in which a civilian CSDP Mission will have a role, it will be possible to draw on the text of a legislative initiative advised upon in another theatre of operations. A compilation of the legislative initiatives will be maintained by the Civilian Planning and Conduct Capability (CPCC).
4. The political, historical and legal landscape in which each of the civilian CSDP Missions operates is distinct and the Guidelines need to be understood within the overall context of each Mission. The manner in which input to legislation is provided differs across the various theatres in which the Missions operate and the difficulties which are encountered also vary. Notwithstanding this, there are key principles which need to be taken into account in relation to legislative reform and drafting and these are tackled in the Guidelines.
5. These Guidelines focus on the development of primary legislation (rather than secondary legislation, such as, regulations, rules and by - laws) and focus on legislative reforms which originate from the executive wing of government (in particular, government ministries).

EEAS(2017)189

~~Limited~~ PUBLIC

6. In order to develop these Guidelines the Civilian Operations Commander, with the support of the CPCC has consulted with all the current civilian CSDP Missions which have a mandate with respect to justice sector reform namely, EUPOL COPPS (established 2006), EUPOL Afghanistan (established 2007), EULEX Kosovo (established 2008), EUCAP Nestor (established 2012), EUCAP Sahel Niger (established 2012), EUCAP Sahel Mali (established 2014) and EUAM Ukraine (established 2014). A number of these Missions have operational sections which are specifically dedicated to supporting justice sector institutions (EUPOL COPPS, EULEX Kosovo, EUPOL Afghanistan and EUAM Ukraine).

C. RATIONALE

7. The expected reader of these Guidelines is a person, either in theatre or in the CPCC, who may be called upon to plan or manage Mission contribution to a legislative reform process/programme/initiative. Legislative reform is a specialist area of legal work and the Guidelines will also be of assistance to Mission personnel working on specific legislative reform processes/programmes/initiatives. Therefore the Guidelines are aimed at both management and operational levels in the Mission so as, *inter alia*, to enhance the understanding of the importance of input to legislative reform initiatives across all levels of the Mission and, consequently, to optimise support to the host State authorities.

D. GUIDELINES

D.1 GENERIC PRINCIPLES (applicable to all Civilian Operations Commander Operational Guidelines)

- **Awareness and understanding of the local context:** A thorough assessment (baseline study) of the local context as well as the political, legal and administrative framework should be conducted as a pre - requisite, which should ideally be endorsed by the host State authorities.
- **Adoption of global intervention logic:** The intervention logic should ideally not be limited to a single sector but encompass the wider security and rule of law reform process (comprehensive approach). Nevertheless, the mandate of the Mission should prevail.
- **Engagement of all host State stakeholders and adherence to local ownership:** To ensure buy - in and cross - societal consensus, the entire society should be engaged in the reform process. Host State authorities/institutions should be in the lead while the wider population should also be targeted in large communication/outreach activities, notably through civil society organisations and non - state actors.
- **Adoption of a clearly structured phased approach:** Such an approach should be agreed with host State authorities for the Mission's activities, ideally through technical and/or political level jointly agreed documents.
- **Incorporation of sustainability goals:** Sustainability should be integrated into every stage of any civilian CSDP Mission's task/activity planning, implementation and monitoring/evaluation.
- **Adherence to European values, international standards and benchmarks:** Adherence to these standards is paramount while respect and understanding of the cultural context, as well

as flexibility, should also always guide the action.

- **Promotion of integrity, accountability, transparency and equitable representation:** These key principles are critical in terms of raising legitimacy in the eyes of the public and ensuring long - term sustainable effects, with the possible establishment of oversight structures to that end.
- **Respect for and protection of human rights, minorities and vulnerable groups:** Any civilian CSDP action should promote the participation of all groups at the various decision - making levels, while the outcome sought should ensure human rights protection.
- **Mainstreaming of gender equality:** The participation of men and women should be guaranteed at all levels through the adoption of gender policy documents, statements or codes of conduct.
- **Coordination with the EU family and other international donors:** Regular coordination with the EUSR office's activities, the EU Delegation programming, Member States bilateral projects and other international donors' activities should be pursued to avoid overlap/duplication, ensure complementarity, explore possibilities of support and ensure sustainability. Possible projects to be conducted under the Mission's Project Cell or under the CBSD (Capacity - Building in support of Security and Development) should also be identified.
- **Overall,** while promoting European values and international standards, local ownership and the **local context** should always be kept in mind at every stage of any civilian CSDP Mission's task/activity in order to have longer term and sustainable effects enabled through the buy - in from both the host State authorities and the population more widely.

In this context, Mission personnel involved in drafting legislation should bear in mind in particular: (a) constitutional compliance and harmonisation with existing legislation (linked to awareness and understanding of the local context); (b) drafting defensively against corruption (linked to promoting integrity and accountability); and (c) quality in legislative reform and drafting (linked to sustainability and implementation). All of these issues are discussed in more detail later in these Guidelines.

D.2 KEY STEPS IN THE LEGISLATIVE REFORM PROCESS IN DEVELOPED STATES

8. Below an outline of the legislative reform process in developed States is provided to assist readers who are unfamiliar with it and as a framework for possible Mission intervention/support. The process includes the development, drafting, adoption and implementation of new laws (including amendments to existing legislation).
9. Each State has its own process for legislative reform and law drafting. These may be set out in constitutional provisions, laws on normative acts, interpretation acts, parliamentary rules, internal government rules/regulations or procedures or other rules/regulations or otherwise. Alternatively, States may have unwritten but established practices. There are also differences in the way in which the legislation is drafted, with some States relying more on teams to draft, and other States using teams for policy development and consultation with the drafting being undertaken by one or two drafters. Despite the

EEAS(2017)189

~~Limited~~ PUBLIC

differences, there are a number of key steps which will normally be undertaken (although perhaps in a different order). In very broad terms, these steps include the following:

- Initial policy development and research (may include consultation, financial and regulatory reviews)
 - Government (executive) decision to draft legislation
 - Further policy development, preparation of draft legislation, consultation
 - Drafting legislation and checking prior to formal consideration by cabinet/council of ministers
 - Decision to send draft legislation to the legislature (time - tabling of "legislative time" may take place at this stage, or earlier)
 - Legislature considers draft legislation, may conduct public consultations and/or amend
 - Signature by head of state, publication, entry into force
 - Implementation, including through the adoption of secondary legislation and review
10. In addition, translation and/or multi - lingual drafting are an important stage of the process in countries with more than one official language and such countries will normally have established procedures.
11. Information about the processes used in different countries is widely available; for example Finland,¹ the UK² and Spain³ and in respect of Central and Eastern Europe, the Organisation for Economic Co - operation and Development (OECD) has produced guidance on key points to check during the process of developing, drafting and publishing legislation.⁴ As one example of a review of an entire process, the graph below outlines the process in Finland. The process can be explored further at <http://lainvalmistelu.finlex.fi/en/>.

¹ See <http://lainvalmistelu.finlex.fi/en/?print>

² An outline of the UK process can be found at <https://www.gov.uk/guidance/legislative-process-taking-a-bill-through-parliament>

³ For discussion of some elements of the Spanish system see Martin - Casals, Miquel, *Lights and Shadows in Spanish Legislative Drafting and Planning*, 13 December 2006 available online at <http://www.federalismi.it/document/12122006105615.pdf>

⁴ OECD (1997), *Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe*, Sigma Paper No. 15, OECD Publishing



D.3 MISSION OBJECTIVES AND KEY ACTIVITIES FOR MISSION PERSONNEL IN THE CONTEXT OF LEGISLATIVE REFORM PROCESSES

12. Civilian CSDP Missions operate in a very broad array of different locations, including in States with relatively developed systems of legislative reform (such as Ukraine) and others with less - well developed systems (such as Somalia and Mali). Additionally, each civilian CSDP Mission has a particular mandate and objectives. Both will determine which activities a Mission should undertake in relation to the legislative reform process. Mission objectives and/or activities may, for example, include:

- Enactment and implementation of specific laws (e.g. a law on police, a law on courts, a criminal procedure code, a criminal code)
- Specific policy objectives in relation to the content of laws to be enacted or implemented, such as compliance with EU law or with human rights principles, improved coordination between police and prosecution or more effective functioning of courts
- Capacity building in relation to the legislative reform process at ministry level, for example introducing or improving consultation processes, enhancing skills in drafting policy documents, improving legislative drafting skills and/or enhancing systems for drafting legislation
- Capacity building in relation to the legislative reform process at other levels (e.g. Council of Ministers/Cabinet, legislature)
- Capacity building or specific improvements to the overall legislative reform system, for example, increased transparency of the law and/or legislative reform process, increased involvement of civil society, improving coordination between the executive and the legislature to ensure more effective consideration of draft legislation, improvement in efficiency or improvements to quality of legislation.

EEAS(2017)189
~~Limited~~ PUBLIC

13. Accordingly, depending on the Mission mandate and objectives, Mission personnel may be asked to focus on the quality of legislative drafting, the content of the draft legislation, the process of legislative drafting or the legislative system itself. Depending on Mission mandate and objectives (together with both legislative reform procedures within the host State and arrangements with the host State) input may be provided in different ways such as, for example:

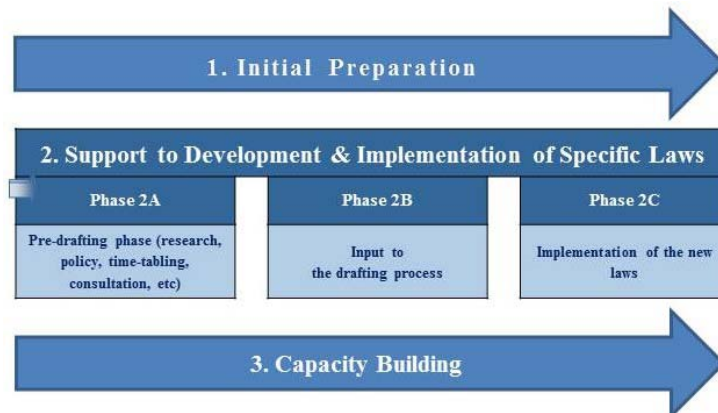
- Mentoring/advising key individuals responsible for the drafting process within the executive
- Participating in or facilitating working groups tasked with drafting legislation within the executive
- Participating, mentoring, advising legislative committees; and/or
- Mentoring of stakeholders participating in the drafting process (for example, supporting them to provide input to consultation processes)

14. Key activities for Mission personnel in relation to legislative reform need to be determined by Mission objectives and the nature, strengths, weaknesses and needs of the host State legislative system in relation to Mission objectives. The graph below sets out the phases in the process to be considered by the Mission. It should be noted that the phases (or certain tasks associated with a particular phase) can be carried out in parallel depending on the legislative initiative being considered, the Mission mandate and the political and legal context of the theatre of operations.

Phase 1: Initial preparation which will need to be done, *inter alia*, in order to have an awareness and understanding of the local context;

Phase 2: Support to the development of specific laws and mentoring and advising during the process of developing and drafting individual laws (including strategies and policies which give rise to the laws);

Phase 3: Specific capacity building activities to address identified weaknesses and/or needs.



D.4 PHASE 1 – INITIAL PREPARATION

Checklist:

Irrespective of the exact activities which the Mission mandate allows/requires, a number of initial preparatory steps will need to be taken:

- *Learn the system through, inter alia, identifying and, as appropriate, mapping the legislative process (executive, legislature, head of state, publication).*
- *Consider the key persons, institutions involved and the role they play.*
- *Consider the relationship, roles and importance of formal legislation and the non - state system in relation to the Mission mandate.*
- *Agree with host State authorities with respect to Mission involvement.*
- *Develop coordination within the Mission and between the Mission and the international community.*

15. **Learn the system through, inter alia, identifying and, as appropriate, mapping the legislative process (executive, legislature, head of state, publication):** Understanding the legislative process makes it possible to strategise with respect to the development/evolution of the process and the role of the Mission. It also allows strengths and weaknesses in the system to be identified. Finally, it permits a plan to be developed by the Mission as to how and where to play a role (bearing in mind mandate implementation) and facilitates overall Mission planning processes.
16. In some of the theatres of operations of civilian CSDP Missions there are clear procedures/requirements in place in terms of the legislative reform process and regulations in support of the process. For example, in Kosovo we know that there is a government regulation dictating the basic principles for drafting both primary and secondary legislation, and that there are rules and procedures of the parliament on how to comment on the draft laws produced by government. Mission personnel should obtain copies of relevant written procedures/requirements and, as necessary, translate them. Even if the host State does not have written requirements/procedures, there may be non - written established practices or nascent practices and the Mission should endeavour to inform itself about these.
17. Even where a host State has formal requirements/procedures, there may be shortcomings to some. These shortcomings should be identified and factored into the support provided by the Mission. For example, in Kosovo it has been remarked that the ministries do not always follow their own regulations and instructions. Also EUPOL Afghanistan has remarked that there is a clear process in place and, yet, in practice there is less than optimum cooperation in terms of inter - ministerial co - ordination. Therefore, when, for example, the Law on Passports was being drafted, three separate drafts by three separate ministries (Ministry of Interior, Ministry of Foreign Affairs and the Ministry of Finance) were submitted to the Department of Legislative Drafting of the Ministry of Justice. Mission personnel can factor such shortcomings into their planning processes in terms of Mission support to the host State.

EEAS(2017)189
~~Limited~~ PUBLIC

18. The legislative process in other theatres of operations of civilian CSDP Missions may not be entirely clear in that procedures may be nascent and/or *ad hoc*. This can make the role of the Mission much more complicated and difficult and may mean that separate mapping processes may have to be conducted for each individual legislative initiative, although obviously lessons can be learned in terms of Mission involvement in previous *ad hoc* processes in the same theatre of operations. For example, in Palestine the legislative process was managed by the Legislative Council until 2007 when the Legislative Council became inactive due to politically complex circumstances. Since then, the legislative process is managed by the Council of Ministers through the legislative national plan which produces a less than optimum legislative process with unclear steps and procedures.
19. Care must also be taken to ensure that nascent procedures are supported (provided this has been ascertained as being within the Mission mandate and as one of its objectives). For example, EUCAP Nestor reports that in Somalia at the Federal Government level processes are nascent with a law drafting unit having only recently been established. It has very limited resources and its role is not well known or always respected. Progress with respect to particular legislative initiatives may, therefore, be difficult to achieve and various conclusions may also be drawn about expectations in terms of quality of legislative initiatives which are produced.
20. Mapping should not be confined to the process of developing draft legislation in the executive. The legislature may play a vital role in the review, amendment and adoption of draft legislation and may also be responsible for holding public consultation. Political or other issues in the legislature may affect whether draft legislation becomes law. Mission personnel will need to determine whether it is desirable or possible to engage (either generally or on an *ad hoc* basis) with the legislative authorities. The decision will depend on a number of factors, including the particular role of the legislature in reform processes in the host State, the Mission objectives and mandate and security factors. For example EULEX Kosovo and EUAM Ukraine interact regularly with the legislature and parliamentary committees. EUAM Ukraine is in close contact with parliamentary committees so as to be in a position to be able to consider relevant drafts of legislation. However, on the other hand, EUPOL Afghanistan has very limited or no access at all to the Parliament, due mainly to security reasons.
21. **Consider the key persons, institutions involved and the role they play:** It will also be necessary for Mission personnel to identify the key persons, institutions and organisations involved and the role which they play in the legislative process. Such interlocutors may include host State authorities, the international community and civil society. Such information is necessary in order to determine who best to mentor, advise and support in order to meet Mission objectives. Obtaining such information during the initial stages may be difficult but a Mission's knowledge is likely to grow over time. For example, for EUCAP Nestor one of the difficulties in terms of providing advice on specific legislative

EEAS(2017)189
~~Limited~~ PUBLIC

reforms in the Federal Republic of Somalia was with identifying the appropriate personnel within the Federal authorities with whom to work. In such circumstances, it may be necessary to seek guidance from senior Mission management, the EU family in theatre and others within the international community.

22. **Consider the relationship, roles and importance of formal legislation and the non - State justice system in relation to the Mission mandate:** Although the mandate of the Mission will nearly inevitably be limited to formal processes and the state justice system, in many States other sources of law (apart from written legislation) may have an important role. This can include case law (written or unwritten), the non - state legal/justice system, customary and/or religious law. For example in Mali it has been reported that 80% of the population relies exclusively on informal systems, have no trust in the formal system and do not have the capacity (e.g. language barriers) or resources to access it. Where the host State has multiple legal systems or sources of law, the Mission will need to consider to what extent these are relevant to the Mission mandate and also to what extent they would impact upon the planning and conduct of Mission activities.
23. **Agree with the host State authorities with respect to Mission involvement:** On the basis of the above, informed decisions should be made as to the most appropriate means and level of involvement in the field of legislative reform/particular legislative reform initiatives. The "means of involvement" may include embedding of experts in relevant bodies to mentoring on legislative reform on a regular basis (discussed in more detail at Section D.8 of these Guidelines). In terms of the "level of involvement", depending on the Mission's objectives, this may include ministries/Council of Ministers/Cabinet/the President's Office/legislature.
24. In some Missions, procedures may already have been agreed with the host State authorities in relation to Mission participation in the field of legislative reform and Mission personnel should acquaint themselves with these procedures and should participate accordingly. For example EUPOL Afghanistan provided advice with respect to legislative reform in a well - established manner through working groups established by the Afghan counterparts. In this regard, in 2006 the Afghan Taqin (Legislation) Department of the Ministry of Justice established the Criminal Law Reform Working Group with permanent local and international members with the task of reforming both the Criminal Procedure Code and the Criminal Code and the Mission joined the working group in 2009. In contrast EUCAP Nestor has participated in a more *ad hoc* manner through getting involved in a range of initiatives, e.g. it has established good working relations at both federal and regional level, it has participated in groups established under the New Deal Agreement and has sought to support key Somali counterparts to develop their own draft legislation (including by working in partnership both with Somali experts and the international community).

EEAS(2017)189

~~Limited~~- PUBLIC

25. In the event that there is no formal agreement as to Mission involvement and if a significant number of legislative initiatives are being commented upon by the Mission, consideration might be given to establishing an agreement or mechanism with the host State authorities. For example there is an established mechanism for EULEX Kosovo (and the EU family more broadly) to provide input to legislative drafting processes in Kosovo. This is principally due to the size of the Mission and its rather significant role in providing advice with respect to legislative initiatives. The Legislative Review Mechanism was established in 2010 and is aimed at coordinating and consolidating "EU family" expertise so that the Kosovo government is provided with *acquis communautaire* standards applicable to the mandate of the Mission/standards in furtherance of EU interests. In 2014 the European Union Special Representative in Kosovo took the lead in the Legislative Review Mechanism. It is noteworthy that prior to considering the establishment of such a mechanism, this matter would need to be consulted with the Civilian Operations Commander and CPCC.
26. **Develop informal or formal coordination within the Mission and between the Mission and the international community:** Support to the legislative reform process and, in particular to the development or amendment of specific laws may best be provided by a number of different experts. This requires cooperation and coordination between relevant experts within the Mission and a cross - cutting approach. For example, development of a police law might be supported at ministerial and legislature level by a Mission legislative drafting expert (having taken any necessary advice from a Mission subject matter expert) while the police themselves could be mentored and supported by a police expert from the Mission so as to provide input on the draft law during the consultation process.
27. Mission experts should coordinate and cooperate with other international experts to avoid conflicts in different initiatives. For example, in Kosovo different international community actors supported laws in the Ministry of Justice and Ministry of Interior and the failure to be aware of work led by another international partner initially led to overlapping and conflicting draft laws. In many theatres of operations Mission personnel participate in a coordination mechanism so as to ensure alignment between international community activities (e.g. the Justice Sector Coordination Group in Palestine which is led by The Netherlands).

D.5 PHASE 2A – SUPPORT TO DEVELOPMENT AND IMPLEMENTATION OF SPECIFIC LAWS, PRE - DRAFTING PHASE

Checklist:

- *Assess whether there is an overall strategy in place into which the particular legislative initiative fits.*
- *Consider whether there are concept/policy notes in place which adequately explain the rationale behind the particular legislative initiative and, if not, whether this has been raised with the host State authorities.*
- *Assess whether there is an action plan in place which sets out the steps to be taken to develop and implement legislation.*

EEAS(2017)189
~~Limited~~- PUBLIC

- *Assess whether consultation has taken place.*
- *Consider the review of the applicable legislation which has been completed (if this is the case).*
- *Consider the issue of primary/secondary legislation.*
- *Review local legislation for compliance with relevant international and regional human rights and gender laws and standards.*
- *Consider whether there are timetables in place between the executive and the legislature.*

28. **Assess whether there is an overall strategy in place into which the particular legislative initiative fits:** Mission personnel should check whether there are any relevant host State sectoral strategies and understand where the legislative initiative, which is being worked on by the Mission, fits into that overall strategy. Ideally, where the development of legislation is part of reform of a sector (e.g. justice or security sector) a sectoral strategy should identify the vision for reform and the coordination plan and include an analysis of relevant existing law and the need to review, amend or draft legislation. It should also identify time lines for action. In the strategy, a body to monitor and coordinate reforms is normally designated. Frequently there is a lack of such a strategy in the theatres of operations of civilian CSDP Missions.
29. It should also be noted that "strategy documents" in existence may lack political backing and this should be factored into the equation by Mission personnel. For example, in Somalia strategy documents are often in evidence, but may lack political endorsement or may form part of competing political agendas of different politicians or institutions. Thus it is important to check whether such a strategy is in existence and, subsequently, to ensure that the strategy/policy framework has the appropriate/necessary political backing. For instance, it may need to be approved by the Cabinet or by another inter - ministerial body that deals with the subject matter area.
30. Without a strategy, specific legislative reform efforts may be *ad hoc* which can result in conflicting and overlapping new laws and a failure to initiate real reform in a holistic manner. In Mali for instance, the Ministry of Justice reacted to the threat of organised crime and terrorism by developing a number of specialised laws and the creation of specialised entities in charge of investigation and prosecution. Coordination among the specialised bodies and/or with the overall system was unclear and, so far, the achievements are arguably relatively modest. Also in Afghanistan, for example, following the 2015 legislative agenda, the law on police had to be amended, but the review of the law focused on some specific provisions only and was not always aligned with priorities of the Ministry of the Interior such as those mentioned in the "*Ministry of the Interior Ten - Years Vision for the Afghan National Police*".
31. Where such a sectoral strategy is needed, and is lacking, the advice of senior management in the Mission should be sought. If the Mission does not have a mandate to address the issue of putting in place an overall strategy with the host State authorities it may be appropriate to liaise closely and encourage other appropriate international organisations

EEAS(2017)189
~~Limited~~ PUBLIC

with the requisite mandate to take the necessary steps to support the development of such a strategy. For example, in relation to Somalia, there is coordination within the international community in relation to the adoption of a maritime security strategy. If there is no political will in the host State, depending on the Mission mandate, consideration might be given to working with civil society or liaising with international partners including those who work with civil society.

32. **Consider whether there are concept/policy notes in place which adequately explain the rationale behind the particular legislative initiative and, if not, whether this has been raised with the host State authorities:** Irrespective of whether there is a sectoral strategy (and not every legislative reform will be part of a reform process of an entire sector), prior to commencing to draft legislation it is necessary to understand why the legislation is being developed, what the objectives are and how they are to be achieved (including costs and implementation). Policy development should include consideration of what, why and how a particular change is to be introduced and who it will affect (including different government institutions).
33. In different States different procedures will exist for the development of such policy and different documents produced - possibly a series of documents at different times (e.g. white papers, green papers, briefing notes, consultation documents, instructions for parliamentary counsel, research papers, regulatory assessments, budgetary impact statements, implementation action plans). Consideration will also need to be given as to how the legislation will sit within and be harmonised with the existing legal frameworks (see below at paragraph 41).
34. In certain theatres of operations these issues are not always adequately addressed. In many of the theatres of operations of the current civilian CSDP Missions (e.g. Afghanistan, Kosovo) legal policy and concept notes are developed, even when such policy documents are developed. However they may be formulaic and lack the necessary thought, research, consultation and content.
35. If there is no system for development of legislative policy and for encapsulating decisions made in a concept/other document, the Mission should consider encouraging the host State authorities to produce such documents. The Mission can then provide advice and support, for example, through legal analysis and comparative research. As a minimum, it is necessary, before the Mission provides input to a particular legislative initiative, to ensure that the motivation or rationale behind the legislative initiative is understood by the host State authorities/the Mission and is committed to paper.
36. **Assess whether there is an action plan in place which sets out the steps to be taken to develop and implement new legislation:** The steps/actions to be undertaken in a legislative reform initiative should ideally be planned in some form of action plan. These should include the activities which need to take place: a) for the legislative reform; and b) in order to implement the law if adopted. Such an action plan should include details of the

additional legislative acts/resources which will be needed in order to implement a new law and the necessary steps (with timelines attached) which need to be taken into account in order to ensure implementation. Mission personnel should be aware, at the preparatory phase, that it is important to communicate to counterparts the value of an action plan. Host State authorities should be encouraged to put in place such a plan, notwithstanding the fact that there might be certain "unknowns" because of the nature of the theatre of operations/environment.

37. Development of policy documents and an action plan will enable risks to be highlighted and options for mitigation identified. Mission personnel may mentor and advise on these. As an example, of difficulties which may result, in Mali, the law on decentralisation entered into force in 2012 but the law has still not been fully implemented, because neither the budget nor the institutional and personal capacity is available. The law foresees *inter alia* the creation of a municipal police, which has not yet been created in any province.
38. **Assess whether consultation has taken place:** Mission personnel should seek to ensure that the process of legislative reform is inclusive and that, depending on the nature of the reform, it includes widespread participation: “*effective policy making – which results in law - making is normally based on some form of social discourse between the government and numerous interest groups, which leads to selection of appropriate tools to accomplish the agreed changes.... Simply reforming the tools, absent underlying policy dialogues and processes, is insufficient.*”⁵ Consultation for the purposes of policy development prior to starting to draft legislation will enable the responsible ministry(ies) to become aware of issues which may impact on the successful adoption of draft legislation by the legislature as well as issues which will affect implementation⁶. Missions should therefore encourage host State authorities to consult broadly with stakeholders in order to ensure that different views are considered in developing policy and that practical implementation issues are borne in mind. Depending on the nature of the legislative initiative, stakeholders may include other government ministries, courts, prosecutors, police, civil society groups, community leadership and vulnerable and marginalised groups. NGOs, policy and research institutes may also have an important contribution. For this reason, EUCAP Nestor, for example, found that an important first step was to map the relevant institutions so as to ensure that it was able to assess whether sufficient consultation had, in fact, taken place with respect to specific legislative initiatives.

⁵ Wade Channell, *Lessons Not Learned: Problems with Western Aid for Law Reform in Post-Communist Countries*, Carnegie Papers, Number 57, May 2005

⁶ For discussion of role and importance of public participation including European standards and practices see OSCE, MCIC and ECNL, *Transparency and Public Participation in Law Making Processes, Comparative overview and assessment of the situation in Macedonia*, 2010

EEAS(2017)189
~~Limited~~ PUBLIC

39. There are multiple ways of engaging in public consultations including public hearings, consultation forums, publication of discussions papers, requests for written submissions, consultations through the media, surveys and public opinion polls. The OECD Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe, OECD, Sigma Papers No. 15, page 15 is useful in terms of the development of robust consultation processes. States or international organisations may also produce consultation guidelines, e.g. Finland⁷, UK⁸, the EU⁹.
40. In certain theatres of operations of civilian CSDP Missions the consultation process has been less than optimum. In Palestine, for example, because of the current key role of the President in the legislative process, some heads of institutions have drafted legislation with little or no consultation process and have simply submitted it to the President for signature. This has led to significant issues, both in terms of relationships between the relevant host State authorities and in terms of implementation, which has at times been very difficult. In Niger, to a certain extent this was the case also with the Law on Smuggling of Migrants which was a near copy of the legislative guidelines published by UNODC. The law itself was perceived as a tool to “please” Western countries in general and Europe in particular.
41. **Consider the review of the applicable legislation which has been completed (if this is the case):** As part of the development of policy and strategy the existing legal framework must be analysed in order to identify what the current law is, and what legislation (if any) needs to be developed and/or repealed in order to give effect to policy objectives. Thus, prior to providing input with respect to a particular legislative initiative, a review should have been undertaken of the applicable law in the relevant subject matter area. For example, in Mali, in the process of the Security Sector Reform, the Comité Sectoriel de la RSS (a unit within the Ministry of Internal Affairs, mainly supported by Geneva Centre for the Democratic Control of Armed Forces (DCAF)) has started a legal review process of key legislation of the security forces. A second step is to set up a working group to support the review and drafting process although the operationalisation of the process, especially the involvement of other ministries, has proven difficult. Obtaining, translating and reviewing existing law is a necessary pre - requisite to successful Mission involvement throughout the legislative reform and drafting process. Where a review of the legislation is undertaken by the Mission, it should be shared with and discussed with the

⁷ Available online at the following:
http://oikeusministerio.fi/material/attachments/om/toiminta/laitjalainvalmistelunkehittaminen/6HByRRRhv/Consultation_in_legislative_drafting_guidelines.pdf

⁸ Available online at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf

⁹ For a review of European level guidance on consultation and public participation see International Centre for Not-For-Profit Law, *Comparative Overview of European Standards and Practices in Regulating Public Participation*, 2010 <http://www.icnl.org/research/resources/ngogovcoop/compoover.pdf>.

EEAS(2017)189
~~Limited~~ PUBLIC

host State authorities so as to ensure shared understanding of the existing law. Depending on the subject area Mission experts may also need to take account of unwritten laws or other law applied in the State.

42. In post - conflict States it can be difficult to even locate a full set of laws in the absence of adequate digital, or even comprehensive paper based, libraries. For example, this is the case in Libya, Somalia, Mali and Niger. EUCAP Sahel Mali has found it very difficult to put together all of the legislative instruments on justice and security which are applicable in Mali. New laws, as well as modifications to laws, are not always published and are rarely disseminated. A complete compilation of laws is not available, nor are previous laws revised which leads to legal uncertainties and contradictions in view of the applicable law. Searching for modifications is very time consuming and difficult and so is systematic review. The Ministry of Justice, supported by several technical partners and development cooperation programmes (including the UN and the EU Delegation), have compiled key legislation and are meant to publish it. Where there is no access to the written laws, this makes reform very difficult. Even more fundamentally it affects the application of those laws. Where people cannot access the laws, clearly there is little chance of them being applied.
43. In post - conflict States, there are often overlapping and conflicting laws from different ruling regimes operating under different constitutions. This is well illustrated in Palestine where a comprehensive overview of the legal framework in the justice/security sectors has been undertaken by EUPOL COPPS. Different authorities have ruled Palestine over time (i.e. Ottoman Empire, British mandate, Jordan, Egypt, Israel, Palestinian Authority). Accordingly, determining the applicable law in Palestine in a particular subject - matter area requires extensive research and analysis as many legislative instruments from previous ruling regimes are still in place and may be in conflict with other instruments. In Somalia and Kosovo similar issues arise.
44. **Consider the issue of primary/secondary legislation:** In many civilian CSDP theatres of operation it is difficult to locate copies of the law and rare that amendments are consolidated into existing legal texts. Secondary legislation may be even more difficult to locate. When taking a decision as to whether to draft amendments to existing legislation or whether to rewrite the existing legislation it is suggested that these issues should be considered and advice given which will promote transparency. Similarly, when deciding whether to include certain details in primary legislation or leave this to be regulated by secondary legislation, Mission personnel should consider whether that secondary legislation will be publically available and accessible.
45. **Review local legislation so as to ensure compliance with relevant international and regional human rights and gender laws and standards:** In accordance with the generic principles referred to at Section D.1 of these Guidelines Mission personnel should mentor and advise counterparts towards compliance with international human rights and gender standards. The review of the applicable law referred to at paragraph 41 above should

EEAS(2017)189

~~-Limited-~~ PUBLIC

reveal where laws are not in compliance with international human rights norms and also which standards apply to the theatre of operations (e.g. which treaties might have been ratified). In post conflict states attention should also be drawn to treaties to which the country expects or aspires to become a party. As appropriate, advice on human rights and gender aspects should be sought from Mission human rights and gender specialists although they need not necessarily participate in the entire legislative process supported by the Mission.

46. In this context it is also important to identify whether the legal system of the theatre of operations is monist or dualist or a combination of both. In general in monist legal systems international law will have domestic effect once the State has ratified the international treaty and in dualist states implementing legislation will be required in order for the treaty to have domestic effect. If a legal system is dualist, then international law will only apply within the State if specifically incorporated into domestic law (e.g. through legislation). Of course, it may be more complex than this as some States may have the concept of self - executing and non - self - executing treaties.
47. **Consider whether there are timetables in place between the executive and the legislature:** While in most civilian CSDP Mission theatres of operation, legislative reforms are initially developed and drafted within the executive wing of government, primary legislation will need to be debated and approved by the legislature prior to adoption and coming into force. An effective legislative process therefore includes timetabling between the executive and legislature as to when draft legislation will be presented to Parliament and when Parliament will consider it.
48. In many of the theatres of operations of the current civilian CSDP Missions (e.g. Palestine, Afghanistan, Kosovo, Ukraine) the host State authorities develop legislative programmes on an annual basis. However, in some theatres of operations, these legislative drafting programmes can be overly ambitious, and/or poorly planned. In Somalia, for example, the list of legislation to be adopted is very long and the Federal Parliament has less than optimum capacities to have legislation adopted. Depending on their mandate Missions may be able to provide technical support or mentoring with respect to the development of an annual legislative drafting programme. A Mission may face particular challenges if its mandate includes legislation which is not within the host State's legislative priorities. In such circumstances the matter is a political one, which should be addressed in discussion with the EU delegation/international partners.

D.6 PHASE 2B – SUPPORT TO DEVELOPMENT AND IMPLEMENTATION OF SPECIFIC LAWS, DRAFTING PHASE

Checklist:

- *Prepare a Mission strategy prior to participation in any working group which is formed to draft legislation.*
- *Identify the Mission personnel who should be part of the process.*
- *Identify the process which will be used in terms of "pooling" of experience by Mission*

EEAS(2017)189
~~Limited~~ PUBLIC

personnel, host State authorities and the international community.

- *Carefully consider the use of international/regional models for use as references.*
- *Seek to ensure quality in terms of the legislation which is finally produced.*
- *Bear in mind technical legislative drafting techniques (such as, entry into force provisions, staggered commencement clauses and repeal provisions).*
- *Consider harmonisation of laws and consequential provisions.*
- *Draft defensively against corruption.*

49. **Prepare a Mission strategy prior to participation in any working group which is formed to draft legislation:** It is advisable for Mission personnel to devise a strategy prior to participation in a working group tasked with drafting legislation. Where a Mission intends to comment on the content/substance of draft legislation a common Mission position should be agreed before the working group commences its work. Input should be characterised as either essential in terms of the Mission mandate or as more subsidiary. Mission personnel with different legal backgrounds will bring their own knowledge and experience to the process. This can be a strength given the increasing hybridisation of legal systems around the world. However, throughout the process, Mission personnel must recall that they are advising on legislation which must be practicable for the host State and, therefore, they must acquaint themselves fully with and work within its legal, social and political system.
50. Also liaison with international organisations which are involved in the working group drafting process should take place beforehand so as, if possible, to deliver consistent advice/support from the international community. Different views may be impossible to avoid and it may be beneficial for the host State authorities to receive different information, but where possible disagreements should be resolved prior to the working group sessions. For civilian CSDP Missions this is particularly true in terms of coordination within the "EU family". This is one of the reasons the Legislative Review Mechanism was created in Kosovo (discussed above at paragraph 25). Its role is to ensure that at a common agreed - on EU opinion is provided to host State authorities and it also ensures a forum for discussion, consensus, and coordination with international partners.
51. **Identify the Mission personnel who should be part of the process:** When identifying the Mission personnel who will be responsible for providing input to the legislative initiative it should be borne in mind that legislative drafting is a specialist and separate skill and not all lawyers or legal professionals will have experience in this area from their home States. If support is to be provided to drafting of legislation, Missions should consider identifying a legislative drafting expert as well as subject matter expert.
52. **Identify the process which will be used in terms of "pooling" of experience by Mission personnel, host State authorities and the international community:** In many theatres of operations legislation is drafted by working groups which include representatives from host State authorities and from international organisations. Working groups can be effective and have the benefit of enabling a participatory approach to legislative drafting which, in turn, may promote ownership by all stakeholders involved in

EEAS(2017)189
~~Limited~~ PUBLIC

the process. However the approach may also have shortcomings, such as, for example: (a) the groups may be too large and participants unprepared for detailed and careful legislative drafting work; (b) the appropriate "mix" of skills, knowledge and experience may not be represented on the working group, (c) working group participants may simply provide personal views and contributions rather than represent the considered views of a stakeholder group (especially where the policy objectives are unclear). Accordingly, the draft legislation may ultimately turn out to be a blend of the individual "experiences" represented around the table. In this context Mission personnel may consider advising that working group participants be invited as representatives of particular groups and be expected to present the views of, for example, the judiciary or the police service rather than their personal views.

53. Such working groups should, to the extent possible, be led by host State authorities in order to ensure local ownership. It may sometimes be appropriate for the Mission to be represented in working groups by a local staff member with support/advice from an international Mission member. Where such arrangements are not possible, Mission personnel should take care to ensure local ownership, by co - chairing or facilitating participants to draft their own legislation.
54. Where laws are drafted using the working group method, it may be preferable for them to be checked over by a single drafter or very small team to check for consistency in the text so as to eliminate/avoid obvious errors. In multi - lingual States, this checking should also ensure that the law is the same in both languages.
55. **Carefully consider the use of international/regional models for use as references:** In preparation for the drafting of legislation, Mission personnel should, of course, engage in comparative research and analysis of legislation from other countries/jurisdictions. In selecting which countries/jurisdictions to research, consideration should be given to legislation from countries with similar political and social systems, of similar size and level of economic and other development; this may be the legislation of countries in the region. In Palestine, usually, when drafting legislation, similar legislation from Arab neighboring countries is considered as well as international standards, e.g. when drafting the Police Law, the Jordanian and Egyptian laws in addition to the International Police Standards (the European Code of Police Ethics) were used. Model laws are instructive, informative and are a source of possible legislative solutions. Mission personnel may also encourage host State authorities to make use of such models (for example, EUPOL Afghanistan used the "Model Criminal Code" and "Model Criminal Procedure Code" as important tools to deliver technical legal drafting assistance). However caution should be exercised in terms of simply adapting legislation designed to address a different State with a different constitution, different implementing bodies, different society and different financial resources. This may result in legislation which cannot be implemented effectively or sustainably. In addition, Mission personnel should not simply rely on their experience of their own system and attempt to "crow - bar" it into the system in the theatre of operations. Considerable research exists with regard to the risks and benefits of

EEAS(2017)189
~~-Limited~~ PUBLIC

“transplanting law” from one country to another.¹⁰

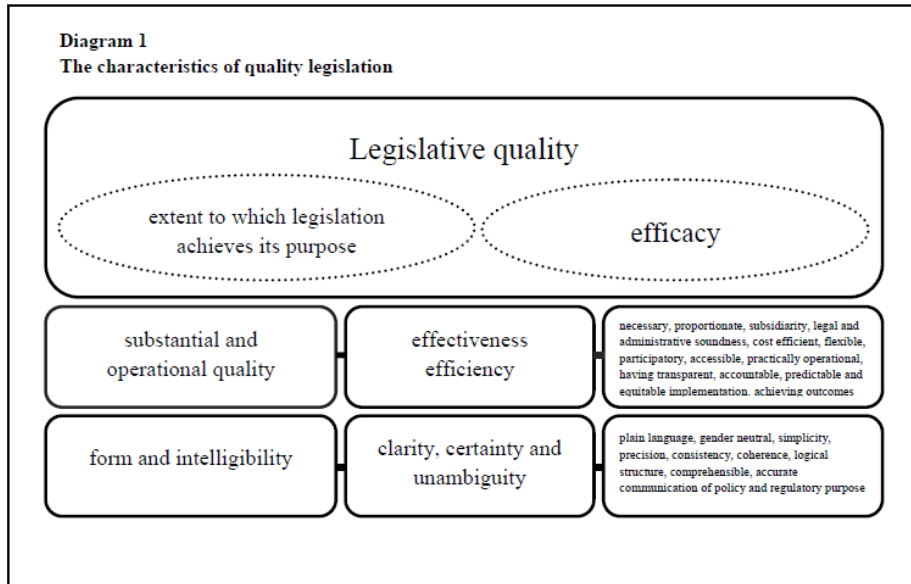
56. In this context Mission personnel should be aware that, in certain theatres of operation, the formal legal system may originate from its colonial past. In Mali for instance the legal framework is very close to the French system from the 1950s without the updates which France has developed in the meantime. The host State will need to consider to what extent it wishes to continue its approach (for example this may be the case in countries where lawyers continue to receive their education in the former colonial country).
57. Where the host State aspires to membership of the EU or the Council of Europe, reference should be made to European hard and soft law including EU directives and regulations, Council of Europe case law and guidance and the standards of European bodies such as the Venice Commission and the European Network of Councils for the Judiciary. In other cases it may be useful to refer to UN or regional standards.
58. **Seek to ensure quality in terms of the legislation which is finally produced:** In some theatres of operations there may be a tension between producing "ideal legislation" and legislation which will and can be adopted and implemented. In this regard, it is useful to set out what is meant by quality in legislative reform and drafting. The diagram below¹¹ outlines the characteristics of quality legislation and may be a helpful guide for Mission personnel as a reference point when providing input to a particular legislative drafting initiative. There has been much written on this topic which can be used in order to seek to ensure that the quality of the legislative drafting process is measured against objective criteria¹². Finally, there is also EU reference material which is helpful in this regard¹³.

¹⁰ One interesting paper on this topic examines the justification for employing legal transplants to develop new post - conflict criminal law by assessing their practical utility and the motivational rationale for employing them. The paper concludes by proposing an evaluative test for prior application of post - conflict criminal legal transplants to assess their prospects of success and to gauge the necessity for later change and adaptation. See, John Jupp, *Legal Transplants as Tools for Post - Conflict Criminal Law Reform: Justification and Evaluation*", Cambridge Journal of International and Comparative Law

¹¹ Victoria E Aitken, *An exposition of legislative quality and its relevance for effective development* (July 2013), at part 4. <http://www.luc.edu/media/lucedu/prolaw/documents/AITKEN%20FINAL%20ARTICLE.pdf>

¹² Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation*, Hart Publishing Ltd, 2014

¹³ European Council Resolution of 8 June 1993 on the Quality of Drafting of Community Legislation; Joint Practical Guide for Persons involved in the Drafting of European Union Legislation, December 2014 and Legislative Drafting, a Commission Manual



59. **Bear in mind all technical legislative drafting techniques:** It is beyond the remit of these Guidelines to provide specific guidance on the wide range of technical legislative drafting techniques, such as, advice on hierarchy of legal norms, plain language, grammar and style, structure of laws, types of provisions (legal definitions, substantive and regulatory provisions, enacting clauses, repeals provisions, entry into force provisions, transitional provisions, savings provisions) and amendments. However, guidance is given on a limited number of issues which have been problematic in some theatres of operation and which non - drafters may be unfamiliar with. Mission personnel involved in drafting, commenting, mentoring/advising on legislation should be aware of and refer to the many useful drafting manuals which exist (see further reading at Section E below for some examples). In the box below we provide a reminder of some of the issues which frequently arise:

Entry into Force Provisions: Consideration should be given to when the law should come into effect. It should be ensured that the period between the promulgation of the new law and its entry into force is adequate to allow for implementation. During this time new institutions may need to be established, old ones re - organised, new procedures established, buildings or equipment purchased or personnel recruited and trained. These factors all need to be considered in terms of providing advice on the "date of coming into effect of the new law".

Host States may, often in the Constitution, have a default date for when laws enter into force. The drafter(s) should actively consider whether it is appropriate for the draft legislation on which they are working to enter into force on the default date or whether a later, or a definite date, is appropriate.

Where complex legislative reform is being developed, it may be useful to provide for a law to come into force at a later date in order to allow for effective implementation. For example, in the case of a new criminal code or criminal procedure code, time will be needed for judges,

EEAS(2017)189
~~Limited~~- PUBLIC

prosecutors, police and others to be provided with copies of the new law, to be trained and possibly for new systems to be established. For example, in Kosovo a new criminal code and criminal procedure code were speedily introduced without appropriate time allowed for training prior to entry into force of the new codes; studies later showed that practitioners did not have a good understanding of the changes.

There may be other situations where it is preferable to use a specific entry into force date; for example where a new institution is being set up and persons need to know the date on which it will start operating, or where two or more pieces of linked legislation need to come into force on the same date (for example a new prosecutors' office structure and a new court structure).

Staggered Commencement Clause: *A staggered commencement clause brings draft legislation into force in stages. This can be useful where, for example, a new institution is being established and needs to recruit staff and establish internal regulations before it is able to operate. In this case the provisions of the law establishing the institution, giving it legal personality and setting out provisions relating to staff could be commenced first. Staggered commencement clauses can also be useful in relation to a significant reform where the intention is to bring an institution into operation in some areas before others¹⁴.*

Repeal Provisions: *As noted, a key difficulty in some post - conflict States is the complexity and lack of certainty regarding which laws are applicable. In some States, as a result, when enacting new laws there is a tendency to seek to repeal existing laws by a "catch - all" provision, such as, "All laws which are in contradiction with this Law are hereby repealed".*

This type of clause does not add to clarity in the law. If it is difficult for the drafters to identify what law exists and needs to be repealed, it may be even more difficult for lawyers, judges and the general public. If appropriate legal research has been conducted prior to the drafting process the drafters should be aware of the laws/legal provisions which will need to be repealed and should specifically repeal them.

60. **Consider the harmonisation of laws and consequential provisions:** Mission personnel who are involved in the drafting process should think, not only about the particular law being drafted, but also about its interaction with existing laws (and new laws being developed). No one piece of legislation exists in a vacuum and every time a new law is introduced or a law is amended, other relevant laws will be affected. Harmonisation refers to steps to ensure the draft legislation fits and works with other legislation in force or being developed. Lack of harmonisation can result in the overall legal framework being uncertain and difficulties in application and implementation. Failure to harmonise different pieces of legislation can have serious impacts, e.g. in Kosovo failure to effectively coordinate legislation on civil servants pay and legislation relating to forensic medical experts resulted in disagreement in payment of fees for forensic medical reports which, in turn, had negative effects on criminal prosecutions. In a federal State, such as Somalia, there may be a need also to harmonise legislation between different levels of government to prevent conflict in the legislation.

¹⁴ For further information on and examples of commencement clauses see, for example, Seidman et al, *Legislative Drafting for Social Democratic Change* at pages 323 – 324

EEAS(2017)189

~~Limited~~- PUBLIC

61. "Consequential amendments" to existing legislation are a method of harmonising legislation by altering the provisions of existing laws to ensure that they are harmonised with the new draft legislation¹⁵.
62. **Drafting defensively against corruption:** Corruption is a concern in many civilian CSDP theatres of operation. Accordingly, in drafting procedures (and developing relevant legislative policy) Mission personnel should encourage drafting of provisions which are robust against corruption.¹⁶ This may include simple and transparent procedures, which limit official's discretion, but are adequately flexible.

D.7 PHASE 2C – SUPPORT TO DEVELOPMENT AND IMPLEMENTATION OF SPECIFIC LAWS, IMPLEMENTATION OF THE NEW LAWS

63. **Implementation of new laws:** As mentioned in paragraphs 36 - 37 of these Guidelines, Mission personnel should seek to ensure that a plan of action for implementation is prepared by the host State authorities at the outset which includes details of the additional legislative acts (including secondary legislation) and all other actions which will be needed in order to implement the new law (together with a timetable). Implementation of new legislation will be facilitated if planned for during policy development and taken into consideration during the drafting of the legislation. Some steps may need to be taken before the draft legislation is adopted or comes into force. It may have been appropriate to outline these steps (or some of them) in the draft legislation and possibly to have brought these steps into force at an earlier date than the rest of the legislation through, for example, a staggered commencement clause.
64. Ideally the action plan should be discussed with the host State authorities to monitor whether certain milestones are achieved and provide support, as appropriate, within the Mission mandate. Once the legislation has been adopted the process should continue to be followed by Mission personnel so as to ensure that the earmarked funds are actually committed and so as to ensure that the necessary secondary legislation is put in place. Mission personnel may also be invited to participate in the process of developing any secondary legislation required and this should also be factored into Mission planning.
65. **Assess implementation on an on - going basis:** Mission personnel should seek to ensure that there is sufficient follow - up and monitoring of the implementation of new laws by the Mission and by the host State authorities. Sustainability is important in terms of Mission follow - up and Mission personnel should assess the following: (a) whether the

¹⁵ For further information on harmonisation and consequential amendments see Thornton's on *Legislative Drafting* at para 18.49 - 18.52 and Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* at chapters 9 and 12

¹⁶ See further, for example, Seidman et al, *Legislative Drafting for Social Democratic Change*, at chapter 14 and Nzerem, R at Chapter 10 of Stefanou, C and Xanthaki H, eds, *Drafting Legislation, A modern approach*, Ashgate Publishing Limited, 2008

EEAS(2017)189

~~Limited~~- PUBLIC

draft law to which the Mission has provided input has been adopted and, if not, why not, (b) whether the necessary secondary legislation was identified, drafted and implemented, (c) whether any new institutions contemplated in the legislation were established/re-structured, and (d) whether the necessary follow-up training was provided. Follow-up can illustrate a number of shortcomings. For example, in Kosovo, primary legislation sometimes provides that secondary legislation must be developed within a set period of time; in practice such secondary legislation may sometimes either not be developed or may not be developed during the stated time period (which could raise questions as to whether the secondary legislation is lawful). Such issues should also be considered by Mission personnel.

66. Mission personnel should have developed indicators at the beginning of the process so to be able to assess whether the legislative initiative has been successfully implemented and host State authorities should have been advised to do likewise by Mission personnel. The exercise by the Mission may need to be carried out with other international organisations which were involved in the process. Depending on the Mission mandate, the host State authorities may be encouraged to themselves assess whether a law has been successfully implemented in order to take further steps to implement, to learn lessons and, if issues in the law mean it cannot be implemented, to amend the law to enable implementation. Mission personnel may also be invited to support the development of any new institution which has been established or may also be involved in the training initiatives which are necessary and, again, these issues should be factored into Mission planning.

D.8 PHASE 3 - CAPACITY BUILDING

Checklist:

- *Consideration to be given to the type of capacity building to be provided;*
- *Determining whether capacity building is within the Mission mandate and, if so, to what extent and when;*
- *Embedding Mission personnel in host State authority institutions.*

67. **Consideration to be given to the type of capacity building to be provided:** Depending on the needs of the host State authorities, it will be necessary to identify the exact methods of capacity building which need to be provided. If appropriate, these capacity building activities can be provided by the Mission (either alone, in cooperation with other stakeholders or in cooperation with the host State authorities). Capacity building can be provided in a range of forms. For example, in theatres of operation where it is difficult to locate copies of legislation, Missions may consider assisting the host State authorities in the creation of a sustainable on-line library which would assist legislative drafting in the future and increase transparency.
68. An extensive range of capacity building initiatives with respect to legislative drafting have been undertaken by civilian CSDP Missions since they were first established. Detailed guidance on capacity building is, however, outside the remit of these Guidelines.

EEAS(2017)189
~~*Limited*~~ PUBLIC

Notwithstanding this, there are a number of innovative capacity building initiatives which have recently been provided in civilian CSDP Missions on substantive legislative matters which illustrate the diversity of such initiatives. For example in Somalia drafting capacities are very limited and, accordingly, EUCAP Nestor promoted the exchange of law drafting capacities by bringing inexperienced Somali law drafters together with experienced drafters from the region to undertake practical training by working together on legal policy and drafting exercises. In Kosovo the Mission led mentoring workshops for legal drafters on how to research European law as this was critical for Kosovo and it lacked the internal capacities.

69. **Determining whether capacity building is within the Mission mandate and, if so, to what extent and when:** Participation throughout the process of developing strategies/legislative policies and drafting and implementation of legislation allows an opportunity for capacity building through mentoring and advice. However, where weaknesses are identified, specific capacity building activities should be considered, if within the Mission mandate (see Section D.3 above). In many theatres of operation it will not be within the Mission mandate to provide capacity building on the legislative system itself. This can be difficult when systems have significant shortcomings and when the Mission is called upon to participate in specific legislative drafting initiatives.
70. **Embedding Mission personnel in host State authority institutions:** The choice of whether and where to embed experts should be determined by, among other things, the Mission objectives and the needs of the legislative reform system in the relevant theatre of operations. This has also been discussed at paragraph 23 above. Mission personnel are (and have been) embedded in host State authorities from a number of civilian CSDP Missions. For example, EULEX Kosovo had advisers embedded within the Ministry of Justice and currently has advisers embedded with the Kosovo Judicial Council and the Kosovo Prosecutorial Council as well as within the Ministry of Interior, the Police, Customs and the correctional authorities. EUPOL COPPS also has advisers embedded at the Ministry of the Interior. Finally, EUCAP Nestor had a legal expert embedded at the Djiboutian Ministry of Justice and a legislative drafter embedded at the Office of the Attorney General of the Seychelles. In the event that Mission advisers are not embedded with the host State authorities, consideration might be given to discussing this issue with them (provided it is within the Mission mandate and has been agreed with the Civilian Operations Commander/CPCC).

E. FURTHER READING

- Aitken, Victoria. "An exposition of legislative quality and its relevance for effective development", July 2013
- Berkowitz, N and Sirakov Y, "Legal Policy and Legislation in the Ministry of Justice Kosovo; a Monitoring, Mentoring and Advising Report" 24 January 2011
- Bertlin, Alison, "What works best for the reader? A study on drafting and presenting legislation" in Commonwealth Association of Legislative Council Journal, The Loophole, Issue No. 2 of 2014, May 2014
- Channell, Wade, "Lessons Not Learned about Legal Reform in Promoting the Rule of Law Abroad", ed. Thomas Carothers (Washington DC: Carnegie Endowment for International Peace, 2006)
- European Parliament, the Council and Commission, "Joint Practical Guide for persons involved in the drafting of European Union Legislation", December 2014
- European Parliament, Council, Commission, "Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation", (1999/C 73/01)
- FAO, "Legislative Drafting Guide, a practitioner's view" <http://www.fao.org/3/a-bb097e.pdf>
- International Centre for Not - For - Profit Law "Comparative Overview of European Standards and Practices in Regulating Public Participation", 2010 <http://www.icnl.org/research/resources/ngogovcoop/compovert.pdf>
- Jupp, John, "Legal Transplants as Tools for Post - Conflict Criminal Law Reform: Justification and Evaluation", Cambridge Journal of International and Comparative Law, Volume 3, pp 381 - 406
- Martin - Casais, Miquel, "Lights and Shadows in Spanish Legislative Drafting and Planning" 13 December 2006 available online at <http://www.federalismi.it/document/12122006105615.pdf>
- OECD, "Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe", (SIGMA Papers, No. 15), OECD Publishing
- Organisation for Economic Co - operation and Development (OECD), 1997, "Law Drafting and Regulatory Management in Central and Eastern Europe" (SIGMA Papers, No. 18), OECD publishing
- OSCE, MCIC and ECNL, "Transparency And Public Participation in Law Making Processes, Comparative overview and assessment of the situation in Macedonia", 2010
- Sannerholm, Richard, "Legal, Judicial and Administrative Reforms in Post - Conflict Societies: Beyond the Rule of Law Template" in Journal of Conflict and Security Law (2007), Vol. 12 No 1, 65 - 94
- Sannerholm, Richard Zajac "Cut - and - paste"? Rule of law promotion and legal transplants in war to peace transitions" in Antonina Bakardjieva Engelbrekt and Joakim Nergelius eds, New Directions in Comparative Law, Edward Elgar Publishing Limited 2009

EEAS(2017)189

~~Limited~~ PUBLIC

- Siedman, Ann & Robert B and Albeysekere, Nalin, "*Legislative Drafting for Social Democratic Change*", Kluwer Law International, 2001
 - Stefanou, C and Xanthaki H, eds, "*Drafting Legislation, A modern approach*", Ashgate Publishing Limited, 2008
 - Thornton's Legislative Drafting, 5th Edition, Bloomsbury Professional
 - United National Office on Drugs and Crime (UNODC) and United States Institute for Peace, 2011, "*Criminal Justice Reform in Post - Conflict States; A guide for practitioners*", https://www.unodc.org/documents/justice-and-prison-reform/11-83015_Ebook.pdf
 - Xanthaki, Helen, "*Drafting Legislation; Art and Technology of Rules for Regulation*", Hart Publishing Ltd, 2014
-

1. EUPOL COPPS

Justice related legislation

- Draft Criminal Code
- Draft Law on the Protection of Families from Violence
- Draft Law on Legal Aid
- Draft Law on Forensics
- Draft Laws on Public Prosecution
- Amendments to the Law on Corrections and Rehabilitations
- Amendments to the Law on Anti-Corruption
- Amendments to the Criminal Procedure Code
- Amendments to the Law on the High Constitutional Court

Security related legislation

- Draft Law on Police

2. EUPOL Afghanistan

Justice related legislation

- Criminal Procedure Code (came into force in 2014)
- Criminal Code (to be adopted by end 2015)
- Law on the Elimination of Violence Against Women (rejected by the parliament and subsequently introduced as a presidential decree)
- Interpretative Guidelines on the Criminal Procedure Code (ongoing)
- Law on Anti-Corruption
- Law on Money Laundering
- Law on Prison and Detention Centres
- Law on Abduction and Human Trafficking
- Law on Forensics

Security related legislation

- Law on Police
- Internal Regulation on Discipline of Police
- Law on Inherent Police
- Law on Passports

3. EULEX Kosovo

Justice related legislation

- Law on Courts
- Law on State Prosecutor

EEAS(2017)189
~~*Limited*~~ PUBLIC

- Law on Kosovo Judicial Council
- Law on Kosovo Prosecutorial Council
- Law on Special Prosecution Office
- Law on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters
- Law on Free Legal Aid
- Law on Ombudsperson
- Criminal Code
- Criminal Procedure Code
- Juvenile Justice Code
- Law on Minor Offences
- Law on Witness Protection
- Law on Execution of Penal Sanctions
- Law on Forensic Medicine
- Law on the Establishment of the Department of Forensic Medicine
- Law on Missing Persons
- Law on Amnesty
- Law on Preventing and Combatting Trafficking in Human Beings and Protected Victims of Trafficking
- Law on Interception of Telecommunications
- Law on Electronic Monitoring of Persons whose Movement is Limited by Decision of a Court or the Conditional Release Panel
- Law on Pardon
- Law on the Establishment of the Criteria and Procedure for Granting Pardon to Convicted Persons
- Law on International Legal Cooperation in Criminal Matters
- Law on Crime Victim Compensation
- Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offences
- Law on Legal Persons Criminal Offences
- Law on Cooperation of Authorities involved in Integrated Border Management related to the Justice System
- Law on Agency for Management of Sequestered and Confiscated Assets
- Law on Prevention of Money Laundering and Terrorist Financing
- Law on Extended Power of Confiscation
- Law on Forensic Agency
- Law on Asylum

Security related legislation

- Law on Police
- Law on Police Inspectorate
- Law on Police Pension
- Law on Classification of Information and Security Clearances
- Draft Law on Emergency Management Agency

EEAS(2017)189
~~Limited~~ PUBLIC

- Law on Weapons, Ammunition and Relevant Equipment for Authorised State Security Institutions
- Law on the Prohibition on Joining the Armed conflicts outside State Territory
- Law on Weapons
- Law on Civil Use of Explosives
- Law on Private Security Services
- Law on Protection against Natural and Other Disasters
- Law on Fire Protection
- Law on Public Peace and Order
- Law on firefighting and Rescue
- Law on State Border Control and Surveillance
- Law on Public Gathering
- Law on Road Traffic Safety

Anti-corruption legislation

- Law on Kosovo Anti-Corruption Legislation
- Law on Prevention of Conflict of Interest
- Law on Declaration of Assets of Senior Public Officials
- Law on Amending and Supplementing the Law on the Prevention of Conflict of Interest in Discharge of Public Functions
- Law on Amending and Supplementing the Law on Declaration, Origin and Control of Property of Senior Public Officials
- Law on Protection of Informants
- Law on Agency for Management of Sequestered and Confiscated Assets
- Law on Extended Powers of Confiscation
- Law on Prevention of Money Laundering and Terrorist Financing

Civil law legislation

- Law on Obligations
- Law on Contested Procedure
- Law on Executive Procedure
- Law on Privatization Agency of Kosovo
- Law on Kosovo Property Comparison and Verification Agency
- Law on Normative Acts
- Law on Gender Equality
- Law on Protection from Discrimination
- Law on Civil Registration Agency
- Law on Civil Status
- Law on Readmissions

Other

- Law on the Protection of Journalist Sources
- Law on Civil Service

EEAS(2017)189
***Limited*- PUBLIC**

- Law on Banks, Microfinance Institutions and Non–Bank Financial Institutions
- Law on Treatment of Construction without a Permit
- Law on Financing of Political Parties
- Law on Dwelling and Emplacement
- Law on Amending and Supplementing the Law on Travel Documents
- Law on Amending and supplementing the Law on Citizenship of Kosovo
- Law on Hunting
- Law on Transport of Dangerous Goods
- Law on Personal Name
- Law on Population and Housing Census
- Law on Protection of Personal Data
- Law on Address System
- Law on Trade of Strategic Goods
- Law on Foreigners

4. EUCAP Nestor

- Draft Somaliland Law on the Coastguard
- Draft Federal Law on the Coastguard
- Somaliland Law on the Coastguard
- Amendment to the Puntland Law on Piracy

5. EUCAP Sahel Niger

- Chapter XIV of the Criminal Code on "Procedures concerning the seizure, confiscation and recovery of assets"
- Law on the "Lutte contre la Traite des personnes"

6. EUCAP Sahel Mali

None as of yet

7. EUAM Ukraine

- Law on ensuring Right to a Fair Trial (12 February 2015)
- Law on National Police (2 July 2015)
- Law on Introducing Changes to some Legislative Acts on Improvement of Regulation of Relations in the Sphere of Ensuring Road Traffic Safety (8 August 2015)
- Law on the bodies of Internal Affairs (8 August 2015)
- Law on State Bureau of Investigations (15 July 2015)
- Law on Services and Service Centres of the Ministry of Internal Affairs of Ukraine (14 July 2015)

EEAS(2017)189
~~Limited~~- PUBLIC

- Draft Law on Amendments to the Law on Pre-Trial Detention Concerning Implementing of some Standards of the Council of Europe
- Draft Law on Amendments to the Code of Criminal Procedure Regarding Improving Guarantees of Prisoners' Access to Court
- Draft Law on Amendments to the Penitentiary (Criminal Execution) Code concerning the Place of Imprisonment of Inmates
