OUTLINE FOR AN INTERINSTITUTIONAL AGREEMENT ON EU REGULATION

The Commission has made a proposal for an Interinstitutional Agreement on Better Regulation (COM(2015)216). It is suggested that instead of yet another text on just one part of the EU's approach to regulation the European Parliament, the Council and the Commission should adopt a comprehensive Interinstitutional Agreement on EU regulation covering all aspects of the approach to regulation and of legislation from cradle to grave.

The scope of such an agreement is so broad that this outline merely sets out the main headings and gives some indication of material that could be incorporated. It is far from exhaustive but serves to illustrate the approach to such a comprehensive agreement ("the Agreement").

Preamble

The preamble to the Agreement should be kept short and the present content of the recitals in COM(2015)216 should be moved to the appropriate chapter of the Agreement.

The preamble should stress the need for a clear and coherent comprehensive framework for EU regulation and set out the reasons for that need. Those reasons should include, in particular:

> so that EU rules can be better applied and complied with and understood by business sector and the general public; and
>
> because a sound regulatory policy and framework is a basis for a fair and competitive Union.

The EU institutions may draw on the work of the OECD, in particular the Recommendation of the Council on Regulatory Policy and Governance of 2012 ("2012 OECD Recommendation"), which recommends that Members:

"Commit at the highest political level to an explicit whole-of-government policy for regulatory quality".[1]

The Agreement should reflect the provisions of the rules of procedure of the three institutions.[2]

The institutions will certainly draw inspiration from the Commission's Better Regulation Guidelines published as a Staff Working Document[3] and from other Commission papers but the three institutions should agree all the basic ground rules, rather than leaving matters to the Commission.

The institutions should specify whether the Agreement is of a binding nature under Article 295 TFEU. They should consider whether it would be possible to have all the

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[1] See the Annex, point 1: www.oecd.org/gov/regulatory-policy/49990817.pdf

[2] EP: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20100705+0+DOC+PDF+V0//EN&language=EN
Council: OJ L 285, 16.10.2006, p. 47;
Commission: OJ L55, 5.3.2010, p.60.

[3] SWD(2015) 111 of 19.5.2015:
http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf

core ground rules in the body of the Agreement which should be binding and to place all the more detailed technical rules and guidance in annexes which need not be binding.

Chapter 1. General principles of regulation

The Agreement should lay down the general principles of EU regulation such as transparency, democratic legitimacy, legal certainty, subsidiarity and proportionality and so forth (ex-recitals 1, 2 and 5 COM(2015)216). It should clearly identify its scope and the aims unlike the Commission's proposal for an IIA on better regulation (COM(2015)216) which does not specify what "better regulation" is.

Chapter 1 should include in particular provisions on the following:

Alternatives to regulation

Light touch, self regulation, co-regulation (see point 3.1 COM(2015)215)

See the principles for better self- and co-regulation and the Community practice thereof: http://ec.europa.eu/digital-agenda/en/communities/better-self-and-co-regulation

Choice of type of act: principles (Koopmans Report)

Evidence based

Accessibility:

Refer to Regulation (EC) No 1049/2001 of the European Parliament and of the Council.[4]

Language: Language of legislation to be as plain and simple as possible.[5]

Linguists should be involved in the process of drafting.

Explanatory materials to be in plain language.[6]

Chapter 2. Preparatory work: Programming, planning, consultation, impact assessment

Chapter 2 should include in particular provisions on the following:

Programming and planning

Basic principles of programming (see points 2 to 6 COM(2015)216)

Planning of legislation and planning of review and evaluation

Citizens' Initiatives.[7]

Consultation

[4] OJ L 145, 31.5.2001, p. 43. In 2008 the Commission submitted a proposal for a new regulation (COM (2008) 229).

[5] 2012 OECD Recommendation, Annex point 2.6.

[6] Declaration on Parliamentary Openness, point 32: http://www.openingparliament.org/declaration

[7] See Article 11(4) TEU.

Refer to Article 11(3) TEU: 'The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's activities are coherent and transparent'.

The ground rules for consultations should be laid down in the IIA, not in various Commission texts (see details of the present position in point 2.1 COM(2015)215).

Stakeholder consultation (see point 14 COM(2015)216)

Stakeholders to be able to provide feedback at any time (point 2.3 COM(2015)215).

Public consultation

Impact assessment

IIA should specify what impacts are to be assessed and other basics (see points 7 to 13 of COM(2015)216).

Ground rules of impact assessments should be in the IIA, not left to the Commission.

Impact assessments are to serve as the basis for ex-post evaluation

Further details can then be set out in Joint Guidelines based on the Commission's present text.

Chapter 3. Legislative procedure

Chapter 3 should incorporate the revised text of the Joint Declaration of 13 June 2007 on practical arrangements for the co-decision procedure[8] and also set out in particular provisions on the following:

Choice of act

Criteria for choice, explanation of choice, ... (see point 20 of COM(2015)216).

Delegated or implementing acts

Ex-points 21 to 23 of COM(2015)216 and the draft Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts in the annexes to COM(2015)216.

Proposal

Commission to give serious consideration to request for action from EP or Council, ... (ex-point 4 of COM(2015)216).

What must be in a proposal: draft text of act, explanatory memorandum, content of memorandum, ...

All suggestions for changes to the Commission proposal to be in the form of text to be inserted in the proposal.[9]

Withdrawal of proposals

Draw lessons from Case C-409/13 *Council v Commission*.

Procedure for taking account of views on the proposal

[8] OJ C 145, 30.6.2007, p. 5.

[9] EP Rules of Procedure, Rule 156 and Rules of Procedure of the Council, Annex V, Point 15.

National parliaments

Stakeholders (see point 15 COM(2015)216).

European Economic and Social Committee and Committee of the Regions

Coordination (see points 24 to 29 COM(2015)216)

Trilogues (see Joint Declaration on practical arrangements for the codecision procedure).[10]

Finalisation - Role of lawyer-linguists

See Case 131/86, *UK v Council* [1988] ECR 905, points 35 to 39.

Signature

EP Rules of Procedure, rule 78

Chapter 4. Drafting

Chapter 4 should:

1. Set out a clear and strong commitment to drafting quality;

2. Establish basic principles for drafting EU acts;

3. Incorporate a complete rethink of the way that an EU act is presented to make it accessible to modern readers, in particular on the internet;

4. Set out in an annex comprehensive rules relating to parts of an act and points of legislative technique.

The guidelines set out in the 1998 IIA[11] need to be thoroughly revised. The text of those guidelines has already been changed, in some cases substantially (for example, Guideline 1 has been changed from "Community legislative acts shall be drafted clearly, simply and precisely" to "Legal acts of the Union shall be drafted clearly, simply and precisely").[12]

A new text of the guidelines should be drawn up and the opportunity should be taken to correct drafting mistakes. For example, even though the guidelines are expressly stated to be non-binding, most are expressed with the word "shall" (contrary to point 2.3.3 of the Joint Practical Guide itself). Any material that is obsolete should be deleted. For example Guideline 11 saying: "Each recital shall be numbered" was important at the time to change the institutions' practice but may now be regarded as self-evident (since there is no guideline saying that each article must be numbered).

Many more drafting guidelines should be added, not least to reflect new standards for drafting set out COM(2015)216 (see points 4.2 and 4.4 below).

The institutions should consult the Member States and legislative drafting experts before drawing up a new, more comprehensive set of guidelines to be incorporated in

[10] OJ C 102E, 24.4.2008, p. 111.

[11] Interinstitutional Agreement on common guidelines for the quality of drafting Community legislation (OJ C 73, 17.3.1999, p. 1).

[12] See the revised text of the Joint Practical Guide for persons involved in the drafting of European Union legislation: http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf

the Agreement (the Netherlands drafting guidelines, which were the inspiration for the EU guidelines, have grown from just sixteen in the 1990s to several hundred today). There are two reasons for making the drafting guidelines comprehensive: to give guidance to the numerous officials in the EU institutions and from the Member States who contribute to the process of drafting EU legislation and to provide the fullest possible information about EU drafting practices to users of EU legislation and EU citizens generally.

At the same time the practical measures called for in the 1998 IIA to ensure that the guidelines were actually implemented should be updated (for example the Joint Practical Guide was duly drawn up by the March 2000 deadline but needs to be expanded and kept updated and the promised regular reports on implementation of the 1998 IIA have never appeared).

4.1. Commitment to drafting quality

The institutions should adopt a basic commitment to drafting quality which should be binding and guide the work of all those contributing to the drafting of EU acts. It should replace the present Guideline 1 and should cover clarity and intelligibility, precision and consistency. It might read, for example:

> "EU legislation must be clear and understandable, consistent and precise".

It could also incorporate the requirement of foreseeability or predictability often referred to by the Court of Justice of the EU.[13]

4.2. Basic principles for drafting EU acts

The basic principles could be based on Guidelines 1 to 6 in the 1998 IIA but those guidelines should be thoroughly revised and expanded. They must of course be closely linked to the basic principles for interpreting EU legislation as established by the Court of Justice of the EU.

The basic principles should obviously take account of requirements which have been identified in COM(2015)215 but were not included in the 1998 IIA such as:

"it is so important that every single measure in the EU's rulebook is fit for purpose, modern, effective, proportionate, operational and as simple as possible. Legislation should do what it is intended to do, it should be easy to implement, provide certainty and predictability and it should avoid any unnecessary burden. Sensible, realistic rules, properly implemented and enforced across the EU. Rules that do their job to meet our common objectives - no more, no less" (point 1); and

"legislation should be comprehensible and clear, allow parties to easily understand their rights and obligations include appropriate reporting, monitoring and evaluation requirements, avoid disproportionate costs, and be practical to implement" and "Commit to better legal drafting so that EU laws are correct, comprehensible, clear, and consistent - so that everyone understands their rights and obligations easily and with certainty" (point 3.3).

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[13] See, for one example among many, Case C-201/08 *Plantanol* [2009] ECR I-8343, paragraph 46.

The institutions should agree on the type of language that should be used in EU acts and explain the impacts on legislative drafting of their policy on clear writing[14] and gender neutrality.[15]

4.3. Rethink of the way that an EU act is presented

The institutions should take account of modern realities and make their acts accessible to modern users. EU legislation is no longer just a matter for lawyers and technical specialists. It is easily accessible to all on the internet and is consulted by millions of users each month. The approach to drafting should be adapted accordingly.

Titles

Titles of EU acts are at present often made cumbersome by references to all acts which are amended or repealed.[16] It has been suggested that the requirement to include those references was introduced solely to make sure that the Publications Office was alerted to the need to review its treatment of those other acts. Such references are no longer necessary with modern technology and they should be omitted to make titles shorter.

The institutions should be more aware of the world outside and its needs. The treatment of short titles in the guidelines and Joint Practical Guide and the institutions' practice illustrates the problem. Guideline 8 states "Where appropriate, the full title of the act may be followed by a short title" but point 8.4 of the Joint Practical Guide discourages use of short titles by suggesting that numbers are the best solution for referring to EU acts.

The institutions should realise that numbers are uninformative and elitist, favouring insiders over the general user. In practice most legislative acts are known by short titles and it is clearly preferable for the act itself to designate its short title at the outset, rather than leave it to users to coin their own later. There is perhaps a gulf between the legislative drafters and the other staff of the institutions since the Commission's own Communication on Better Regulation for better results refers to four acts, three of them just by short titles and one by a short title followed by a number in brackets (COM(2015)215, point 4.2).

Enacting formula

An EU act at present consists of a single sentence, introduced by the enacting formula which is split into two parts, the first consisting of the name of the adopting authority and second referring to the type of act adopted, as in the following example:

> "THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION," ...

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[14] See the Commission's Clear Writing Campaign: http://ec.europa.eu/translation/writing/clear_writing/how_to_write_clearly_en.pdf

[15] See the Guidelines on Gender-Neutral Language in the European Parliament: http://www.europarl.europa.eu/RegData/publications/2009/0001/P6_PUB(2009)0001_EN.pdf

[16] A classic example is the regulation establishing the European Chemicals Agency:
Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1).

"HAVE ADOPTED THIS REGULATION:"

That fact is grasped by very few readers, partly because the two parts are separated by the citations and the recitals, which may cover many pages. The enacting formula should not be separated in this way.

It is time to reconsider whether an EU act should be presented as a single sentence.

Citations

The citations are not clearly understood. That is because they perform two different functions, neither of which is clear from their wording (most citations begin with the opaque formula "having regard to ...").

The first citation of a legislative act sets out the legal basis while the subsequent citations set out the mandatory procedural steps that have been complied with. A simpler and more transparent presentation would be to have two distinct headings for those two types of citations as follows:

"Legal basis"

"Procedural steps".

Recitals

The word "whereas" preceding the recitals is meaningless and archaic. It should be replaced by the simple and transparent heading "Statement of reasons".

The recitals are becoming ever longer and harder to navigate. They should be given a structure and grouped in sections each of which should have a heading such as:

Introduction,

Reasons for the provisions,

Acts which are repealed or amended,

Formal matters (covering compliance with principles such as proportionality, subsidiarity, fundamental rights, ...),

Date of application (covering such matters as entry into force or taking effect, transposition, start of application, period of validity, ...).

It is time to consider whether it is confusing to place the lengthy articles before the articles. Could the recitals be put after the articles?

Articles

In practice EU acts often begin with articles setting out purpose clauses even though no guidance is given on such clauses; explicit guidance on them would be useful.

See further point 4.4 below.

4.4. Comprehensive rules relating to parts of an act and points of legislative technique

Guidance should be given on all the recurring types of provisions in the enacting terms; the present guidance in the Joint Practical Guide does not cover the drafting of provisions on:

implementing and delegated acts;

transitional measures;

reporting obligations and monitoring and evaluation (see the reference to "the use of review clauses" in COM(2015)216, point 19); there is considerable scope for standardisation; drafters should be reminded of the need for the obligations to be effective and realistic; the legislative act itself should specify what matters are to be reported on and the format of the reports;

start of validity (see COM(2015)216, point 30); no retroactivity; need to respect principles of legal certainty and legitimate expectations; the Better Regulation Guidelines (SWD (2015)111) say that the Commission is committed to "common commencement dates"; if that commitment is accepted by the other institutions, it should be referred to in the drafting guidelines (although the term "commencement" is not used in EU law but is specific to UK and Irish law and therefore contrary to Guideline 5).

transposition (see COM(2015)216, point 30);

the end of validity of an act (see the reference to use of "sunset clauses" in COM(2015)216, point 19).[17]

Chapter 5. Publication

Chapter 5 should set out the basic rules on publication of EU legislation and information about EU law to provide all users with transparency about the publication process and the responsibilities of the Publications Office of the European Union.

Since the Publications Office is an interinstitutional office serving all the institutions of the European Union (under Decision 2009/496/EC, Euratom) it should be the primary source of objective information from the EU about EU law, under the authority of the legislative authority. The websites of the Commission, invaluable though they are, should be clearly distinguished as representing the views just of the Commission.

The Agreement should set out rules covering (and making a clear distinction between):

1. formal publication in the Official Journal and on EUR-Lex of the official texts of the Treaties and of the Official Journal;[18]

2. provision of information about EU law, such as databases, summaries and consolidated texts of amended acts.

It is time to rethink the whole approach to publication of EU legislation to move it into the 21st century. Millions of ordinary EU citizens access EUR-Lex each month. Small businesses now want to consult the EU rules for themselves rather than using the intermediary of an expensive lawyer every time. The approach to publishing EU law and legislation must be updated accordingly to make it readily accessible to and intelligible to users without specific legal expertise.

[17] The term "sunset clause" is jargon contrary to point 5.2.4 of the Joint Practical Guide itself.

[18] See Council Regulation (EU) No 216/2013 (OJ L 69, 13.3.2013, p. 1).

In addition to the formal Official Journal publication of all acts there should be an internet version of all major legislative acts assisting the user with more explanation and clearer internet-based presentation making full use of hyperlinks.[19]

It would also be helpful to users if a Word version of acts was made available in addition to the PDF and HTML versions currently available.

EUR-Lex should give more prominence to better explanatory material on the nature of the different types of texts published in the Official Journal and the bodies competent to adopt them and on the structure of an EU act. The latter could be based on what is currently given in the Publications Office's Interinstitutional Style Guide.[20]

EUR-Lex should include databases of definitions and abbreviations in EU legislation and terms that have been interpreted by the Court of Justice of the EU. Such databases would not only assist external users but would enable drafters to maintain consistency of terminology and avoid duplication of definitions or indeed inconsistent definitions of terms.

The Agreement should set out rules on correction of EU legal texts,[21] including the distinction between correcting acts and corrigenda, and on the status of corrigenda, large numbers of which appear without explanation in the Official Journal and are a cause for grave concern.22

The Agreement should set out rules on the treatment of confidential texts.[23]

A more coherent approach to explanatory material on EU legislation should be taken.

Rules should be laid down on publication of Citizens summaries.

The explanatory memorandum is at present a useful guide to the content of the Commission's proposal but it does not take account of any amendments to the text in the course of the legislative procedure. It should be updated at the end of the legislative procedure so that it accurately reflects the content of the legislative act and then issued in the name of the legislative authority.

All amending acts should be accompanied at the time of adoption by a consolidated text showing what the text will be once the amendments are incorporated. That would assist the legislative authority and make the content comprehensible to all readers.

All recast acts should be accompanied at the time of adoption by a text showing clearly what is old and what is new.

Chapter 6. Implementation, application and evaluation after adoption

Chapter 6 should include in particular provisions on the following:

Implementation and application: Member States to apply EU acts swiftly and correctly and give citizens appropriate information, in particular what measures are the

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19 For example hyperlinks within the text of an act to the explanatory memorandum point corresponding to each provision and for defined terms, references to other acts, and for annexes

20 http://publications.europa.eu/code/en/en-000100.htm

21 See EP Rules of Procedure, Rule 216.

22 Rules should be set out on when mistakes may be corrected by corrigenda and when it must be done by a correcting act. Guidance should be given on the different types of correction, such as: mistakes in the original texts as agreed by the legislative authority, mistakes arising from translation, mistakes arising from the publication process.

23 See EP Rules of Procedure, Annex VIII

consequences of the EU rules and what measures have been added (see points 30 and 31 COM(2015)216)[24]

See the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents (and the case-law referred to therein) and the Joint Political Declaration of 27 October 2011 of the European Parliament, the Council and the Commission on explanatory documents[25]

Clear, correct and timely transposition; see point 4.2 of COM(2015)215 under the heading "Improving implementation"

Member States to report on application of EU legislation (see point 32 COM(2015)216)

Evaluation: Ex-post evaluation (see points 16 to 19 COM(2015)216)

Member States to provide data (see point 33 COM(2015)216)

See the 2012 OECD Recommendation, point 1.1 of the Annex: Members should "Adopt a continuous policy cycle for regulatory decision-making, from identifying policy objectives to regulatory design to evaluation".

See Case C-427/07 *Commission v Ireland*, point 107 and Case C-456/03 *Commission v Italy*, paragraph 27.

Chapter 7. Law reform: consolidation, codification and recasting, repeal

Law reform is vitally important since 30-40% of EU acts adopted each year are amending acts.

The Communication on codification (COM(2001)645) stated that about 10% of EU acts had never been amended, which suggests that some 90% of acts have been amended.

Chapter 7 should include in particular provisions on the following:

Consolidation (overlap with Chapter 5 on Publication)

It is the main tool for making EU legislation that has been amended more accessible and it is the basis for work on codification and recasting and so it needs to be made as reliable, fast and user-friendly as possible.

One weakness is that it does not include recitals.

Codification

The 1994 Agreement on official codification should be scrapped as being no longer fit for purpose. The very term "official codification" has long been superseded by "codification". In fact, though, it should now be plain that the technique of

[24] See also B. Steunenberg and W. Voermans, *The Transposition of EU Directives* (Leiden University, 2006); and the UK Government's *Transposition Guidance: How to implement European Directives effectively*, April 2013:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf

[25] Respectively OJ C 369, 17.12.2011, p.14 and OJ C 369, 17.12.2011, p.15.

codification in the EU sense is of little use, since it does not allow any new changes to be made to an old act. Few old acts were drawn up in accordance with modern standards. There cannot be many cases where it is worth the trouble of readopting without change a series of provisions from an old act and all its amendments. The burden on the three institutions of the codification process far outweighs the marginal benefit for users of access to a single new text since users already have access to the Publications Office's consolidated text of the articles together with any amendments.

Recasting

In fact appropriate use of the recast technique should make codification redundant since if, each time that an act is to be amended, due consideration is given to whether the amendment should be made by means of a recast (see point 3.3 of COM(2015)215), legislation should always remain adequately accessible. The 2001 Agreement on recasts[26] should, however, be carefully reviewed. In particular more thought should be given to cases where the Commission proposes changes limited to just certain parts and the legislative authority wishes to reopen discussions on other parts. In addition provision should be made for users of legislation to be given information on precisely which parts of a recast act are unchanged and which parts are new (perhaps by giving users access to the marked up versions used by the institutions in the adoption process). The revised provisions on recasts should be incorporated in the Agreement.

Repeal

The Agreement should set out a basic commitment to repealing obsolete acts.

The legislative authority should establish ground rules for repeals and agree with Commission any programme for screening the acquis for acts to be repealed.

The Agreement should state formally what are the consequences of "declarations of obsolescence".[27]

Simplification

The Agreement should set out a basic commitment by the three institutions to simplify the acquis.

The legislative authority should establish ground rules for simplifying the acquis and agree with Commission any programme for screening the acquis for acts to be repealed. They should not simply agree to take the Commission programme as a basis (see point 34 COM(2015)216).

Chapter 8. Interpretation

Chapter 8 should include in particular guidance on the interpretation of EU legislation taking account of the principles developed by the Court of Justice (which are also

[26] OJ C 77, 28.3.2002, p. 1.

[27] See SEC(2003) 1085, point 2.3 and footnote 22.

linked to the basic principles for drafting EU legislation).[28] Matters that might be covered include:

the status of the various language versions;

the status of components of EU acts such as titles, recitals, headings to articles, annexes;

the status of statements in minutes or declarations relating to acts;

the use of definitions and the role of definitions in other EU acts;

references to other acts (static and dynamic references);

basic concepts such as penalties and sanctions, entry into force and application, transposition and implementation, repeal and withdrawal, and so forth;

effect on legal acts of rulings of the Court of Justice;

publication and consequences of failure to publish;

consequences of repeal of an act (for example on other acts based on the repealed act).

Chapter 9. Reporting on the Agreement and review

A specific reporting and review procedure should be established unlike the weak monitoring in the Commission's proposal (see points 35 and 36 COM(2015)216).

The Commission should draw up an annual report on regulation in the EU to be completed by a set date (perhaps end of February). It should be sent to the national parliaments as well as the EP and Council.[29]

The report should be drawn up according to a prescribed format with a section corresponding to each chapter of the Agreement. It should be accompanied by detailed statistics according to a standard schema.

The other institutions and the Publications Office should also submit reports on their related activities by the same deadline.

28 The only act at present giving guidance on interpretation is a 1971 Regulation on how time-limits are to be calculated, Council Regulation No 1182/71 (OJ L124, 8.6.1971, p. 1).

29 See the IALS Think Tank on Law Reform: Robinson Report 2015, point 2. http://ials.sas.ac.uk/news/IALS_Think_Tank_Robinson_Report.htm