Francesca Ruggieri *Editor*

Criminal Proceedings, Languages and the European Union

Linguistic and Legal Issues

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Introduction

Francesca Ruggieri

It is not usual juxtapose criminal justice law and linguistics. The study of the rules of legal process has traditionally been limited to matters of positive law: rarely does it become interdisciplinary and spill over into other realms of knowledge. But as the European Union devotes closer attention to criminal law procedures, it has become necessary to revisit the traditional categories and take a fresh look at certain areas of research that are usually overlooked.

The increase of international crimes is a serious problem, and the consequent efforts of the EU to counter it through judicial cooperation and mutual assistance have obliged criminal law scholars to enlarge their horizons beyond national borders. Knowledge of other countries' legal systems has therefore become an essential qualification. Scholars need to familiarise themselves with foreign legal systems for the practical purpose of optimising the flow of information to repress crime. Similarly, in the framing of Community laws, broad-based knowledge is also necessary for the sake of harmonising legal traditions that are very different from one another.

Legal scholars are used to studying specialised terms and interpreting texts, but in recent times they have also had to strive towards achieving "equivalence" among concepts and institutions that belong to different jurisdictions. The reason for the study of heterogeneous systems is not to discover procedural models that can be used to improve domestic legislation; rather, it is a preliminary, necessary phase to the joint research work that needs to be done into the many different legal systems that will eventually have to coexist in same "area of justice".

The studies collected here are part of the biennial research project "Training action for legal practitioners: fundamental rights, European Union and judicial cooperation in criminal matters through law and language", funded by the European Commission and developed in a series of seminars in Italy and abroad, with the

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participation of representatives from throughout the legal world, linguists, and translators, all of whom are working towards giving some preliminary answers to these developments.

The skill sets of magistrates (GAETA, SPIEZIA), EU officials (GUGGEIS), linguists (GRASSO), academic experts, including scholars of comparative law (BELFIORE, CAMALDO, IORIATTI, DI PAOLO, JACOMETTI, MARCOLINI, MAURO, PERINI, POZZO, RUGGERI, RUGGIERI, TIBERI), persons with training as lawyers (MARCOLINI, RUGGIERI), and others with particular areas of specialisation such as civil law (IORIATTI, POZZO, JACOMETTI) have thus been brought together to create a methodologically sound and comprehensive publication.

The legal framework delineated in the Lisbon Treaty is explored by TIBERI, who looks at the environment in which new European legal scholars will have to operate, including in the area of criminal law. The linguist's (GRASSO's) perspective gives an insight into the difficulties involved in determining a specialist terminology that best serves the purpose of transmitting an accurate understanding of the discrete legal concepts used by different operators in multiple legal systems.

In an analysis of what is in many respects unprecedented legal-linguistic work for the preparation of Community provisions, GUGGEIS explores the complexities of translating texts that, as a rule, have been drafted in English, by now the "lingua franca" of the EU, into different languages, each one of which carries equal weight. An expert in civil law (IORATTI) examines the longer tradition of Community legislation in the area of private law and traces the steps that still need to be taken in the journey towards a common EU terminology of criminal law.

The intricacies and implications of interpreting the different language versions (Italian, English, French, German and Spanish) of the provisions in the Lisbon Treaty dealing with the European Public Prosecutor's Office are explicated by MARCOLINI, MAURO and RUGGIERI, while DI PAOLO and BELFIORE examine the Community laws on personal data. GAETA writes on the issue of EU Directive for the protection of victims of crime; CAMALDO considers the European Investigation Order; RUGGERI contributes again with an essay on the protection of individuals and coercive measures. In a review of Eurojust, SPIEZIA considers the conceptual and practical difficulties of coordinating the activities that Eurojust might have to carry out some day with the European Public Prosecutor's Office.

Civil law experts JACOMETTI and POZZO and the scholar of criminal law, PERINI, examine Community environment provisions, using them as a springboard for reflecting on "the ascending and descending circulation of polysemantic words" and the new importance thereof in the field of criminal law and, consequently, also in the implementing acts of Member States.

Milan, Italy — Francesca Ruggieri
28 November 2012

Part I
The Lisbon Treaty, Mutual Legal Assistance and Judicial Cooperation

Multilingualism and Legal Translation of the Sources of Law of the European Union: The Implications for Criminal Law of the New Post-Lisbon Treaty Area of Freedom Security and Justice

Giulia Tiberi

Abstract This essay looks at the new institutional developments put in place by the Treaty of Lisbon with particular regard to the new-look Area of Freedom, Security and Justice (FSJ) and the legislative powers assigned to the European Union. The essay examines the major challenges posed by multilingualism and the legal translation of regulatory instruments and considers how they affect not just national lawmakers but also national courts as the new sources of law in the Area of FSJ gain the typical effects of direct applicability, direct effect, and the precedence of European Union law over national law, as demonstrated in the "El Dridi" case.

Abbreviations

ECJ	European Court of Justice
EU	European Union
FSJ Area	Freedom, Security and Justice Area
TEC	Treaty on European Community
TEU	Treaty on European Union

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1 Introduction: The Importance of the Issue

An examination of the developments in the Area of Freedom, Security and Justice (FSJ) following the Treaty of Lisbon, with particular regard to the new provisions for judicial and police cooperation in criminal matters, provides us with an excellent opportunity to look at the challenges posed by multilingualism in the European Union.

Firstly, the Treaty of Lisbon attributes an unprecedented level of importance, including at a symbolic level, to the FSJ Area. If we look at the objectives of the European Union as set forth in the new article 3 of the Treaty on European Union (TEU), the Area of FSJ is listed in the second place, well above the objective of a common market, which has hitherto been the primary driving force behind European integration. This new pre-eminent position in the Treaty, along with the recognition of the legal force of the European Union Charter of Rights, would appear to confirm the intuition of those commentators who have been arguing for some time, particularly since the approval of the Charter of Fundamental Rights in 2000, that European integration is now following a new and more ambitious course that carries risks and the potential for unexpected and unwanted outcomes. The final destination is now a form of political integration that is qualitatively on a different scale from the narrower and less "passionate" (so to speak) goal of economic integration.[1] The pride of place given to the European Area of FSJ in the set of European Union objectives naturally has institutional ramifications within the EU itself, as well as in the relations between Member States and on an international scale. The formation of an Area of FSJ is now a key political priority for the European Union.[2]

Secondly, it is clear that with the coming into force of the Treaty of Lisbon, the Area of FSJ has undergone more substantial and procedural changes than any other part of the EU (see Chapter V of the TFEU). We can reasonably say that the FSJ Area, especially in matters of judicial and police cooperation in criminal matters, is an unexplored territory, with new judicial landmarks, new sources of law, new decision-making processes, and new institutional bodies (I refer here to the measures in the TEU that recognise the jurisdiction of Eurojust and Europol). The Treaty of Lisbon, which came into force on 1 December 2009, marks an important watershed in the operations of European institutions in this area of law.[3]

It is a new "frontier" of increasing interest to the European Union and destined to become the object of ever more comprehensive legislative action (a process that will, moreover, be facilitated by the removal of the requirement for unanimous voting in the Council). This tendency clearly emerges in the Stockholm Programme approved by the European Council in May 2010, a 5-year programme of priority policy actions to be implemented by the EU for the FSJ Area until 2014. An even

[1] See, in particular, von Bogdandy (2000), p. 1308; id. (2001), p. 849 ff.

[2] See Baquias (2008).

[3] See Guild and Carrera (2010), p. 3.

more detailed programme is set out in the "Action Plan Implementing the Stockholm Programme".[4]

Thirdly, the European area of FSJ implies regulatory action in areas of law that are "sensitive" in that they refer to deeply rooted and traditional elements of Member States' sovereignty (judicial cooperation in criminal matters, immigration, asylum and visas, border control, family law with transnational effects). In these areas and, especially, in the areas of criminal law and criminal proceedings, the various Member States of the European Union have their own very particular judicial institutions, which are expressions of fundamental principles enshrined in their national constitutions. Examples of discrete national doctrines could include the differing notions of legality between one country and another, issues relating to statutory construction and the precedence of legislation, the principle of mandatory judicial enquiry that obtains in some countries as opposed to the principle of discretion that is applied in others, or the diverse functions of public prosecutors in different EU states. These differences make the "circulation" of judicial concepts defined in European Union legislation a difficult task, which is made all the more difficult by the plethora of national judicial traditions that are conveyed by Members of the European Parliament elected in their respective countries, as well as by the members and representatives of the various national governments who sit in the European Council and, together, jointly decide on the legislative instruments of the EU.

Finally, multilingualism and legal translation are of fundamental importance to the construction of a European Area of FSJ, which depends on a new form of cooperation between the courts and police forces of Member States, one that is no longer based on intergovernmental agreements but rather on a direct relationship between judicial authorities. This new state of affairs is explored in the essay by Filippo Spiezia, which is included in the present collection. In a context of direct cooperation among judicial authorities, the linguistic regime (the set of rules governing language arrangements) acquires a practical importance and becomes crucial to the effective implementation of EU policies. The linguistic regime relates not only to the instruments that the European Union has approved for "horizontal" and direct cooperation among the judicial and police authorities of Member States (such as the European Arrest Warrant and Joint Investigative Teams) but also to the specific areas of criminal justice cooperation and the sharing of police intelligence, for which the European Union has organised "joint administrative systems" of a transnational nature, which are managed by European bodies such as Eurojust and Europol (which are now directly set out in the founding Treaty), which have a specific linguistic regime[5] different from the general rules governing the languages

[4] European Council, *Stockholm Programme—An open and secure Europe serving and protecting citizens* (2010/C 115/01); European Commission, Communication *Delivering an area of freedom, security and justice for Europe's citizens—Action Plan Implementing the Stockholm Programme*, 20 April 2010 [COM(2010) 171 def].

[5] See Chiti and Gualdo (2008), in particular Chapter IV, referring to the Europol linguistic regime.

of these institutions, which are specifically set out in article 342 of the TFEU and in Regulation 1 of 1958.

As to the repercussions of multilingualism on the EU and issues of legal translation, I would argue that judicial cooperation in criminal matters is currently the most important of the various competences now included in the Area of FSJ since the adoption of the Treaty of Lisbon. Multilingualism and the associated problems of translation impinge, above all, upon national legislators in light of the expansion of the powers of the European Union in the areas of criminal law and criminal proceedings (as provided for by articles 82, 83, and 86 TFEU). That said, the scope of these powers has not been fully elucidated from a linguistic-juridical prospective that considers and compares the various language versions of the Treaty on the Functioning of the European Union.[6] This is a major problem with potentially extensive consequences because when it comes to the enactment of secondary EU laws in which the judicial principles of the Treaty are put into effect, certain Member States might decide to contest them before the Court of Justice on the grounds that the European Union was acting beyond the scope of its proper authority and that the legislation was therefore adopted *ultra vires*.

Any inaccurate or inadequate translation of judicial concepts contained in EU legislative acts could severely prejudice the fundamental rights of European citizens, with particular regard to personal freedom, and have repercussions on actual decisions taken by courts. With the adoption of the Treaty of Lisbon, the legislative sources of the former third pillar were replaced by traditional community sources whose characteristics they therefore share (direct applicability and direct effect). Although the Treaty of Lisbon provided for the harmonisation within the EU of criminal procedural law, to be implemented for the most part through directives rather than regulations (directives are sources that require the prior scrutiny of national legislators), in view of the diversity of the judicial traditions of the different Member States in this area, to ensure that the European directives can be applied to the different judicial systems without too many problems, it is reasonable to expect that in an increasing number of cases the rules as set forth in a directive (which national courts may have referred to the Court of Justice for a preliminary ruling) will specify the sanctions for an offence rather than leaving it to the discretion of national law. That is to say, it should be possible to apply the directive without the national legislator having to intervene during its transposition into national law to ensure that the various judicial provisions originating from EU sources are compatible with local statutes.

This line of development was epitomised in the recent *El Dridi* case, in which the Court of Justice considered the conflict between Italian criminal laws designed to counter irregular migration and the European Directive (the "Returns Directive") relating to the repatriation of citizens of third countries. We shall examine the case in Sect. 2 below. Consequently, national courts are the first institutions to encounter problems arising from the official legal translation of an EU regulatory act relating

[6] See Mauro (2013) and Marcolini (2013).

to criminal affairs or proceedings, and Parliament and government, at the national level, become involved only at a later stage when they are called upon to transpose the EU regulation into national law.

2 The Increasing Impact on the National Legal System of the European Union sources of Law in the Area of Judicial Cooperation in Criminal Affairs: Reflections from the "El Dridi" Case

All new sources of law approved in the area of criminal justice cooperation subsequent to the coming into force of the Lisbon Treaty are endowed with the potency of effect that has always characterised European Community sources (i.e. the precedence of European law, direct applicability, direct effect). The new sources will therefore have a greater impact than in the past on its recipients, as well as on the courts that are expected to apply new laws.

In particular, as a consequence of the principle of the precedence of European Union law, directives for the harmonisation of criminal law and regulations for the unification of European criminal offences (the latter regarding the criminal law protection of the Community's financial interests and the European public prosecutor) shall have precedence over any conflicting national law and cannot be quashed with reference to national law (except in the event of the activation of the constitutional "counter-limits" designed to maintain the inviolability of the supreme principles of the Italian Constitution and the essential body of inalienable rights guaranteed by the same), thus determining the overcoming of the indirect effect of interpreting national laws in line with European sources, as in the case of framework decisions.

To my mind, however, the real quantum leap in the use of the new sources of law for the Area of FSJ has come with the application of the "*Foto-Frost doctrine*", i.e. the extension of the Court of Justice's monopoly of interpretation, by which it became the "natural judge", being the only legitimate body with the jurisdiction to give authoritative interpretation of a law or to void it (Court of Justice, Sentence October 22, 1987, case C-314/85).

Further, in extending the monopoly of the Court to interpret law, the new Treaty has also removed all the limits that the former article 35 TEU used to impose on the "à la carte" preliminary rulings of the Court of Justice in this area, as well as the limits formerly applied to the first pillar (by Title IV TEC) for rulings pertaining to asylum, visas, and immigration, where only the courts of last resort used to be able to refer cases to the Court of Justice. Under the new institutional arrangements, the Court's authority for preliminary rulings is both general and mandatory. Accordingly, any judge in any Member State court, including a lower one, may initiate an immediate dialogue with the Court of Justice, which has the additional advantage of

fostering the circulation of judicial concepts and encourages the "legal transplant" of diverse judicial traditions.

This important change, which is applicable only for sources approved after the Lisbon Treaty and for old sources of the Third Pillar for a period of transition lasting until 1 December 2014, comes on top of the important shift brought about by the "communitarisation" of policies, i.e. the extension of the principle of pre-emption in the exercise of competing competence, a principle now expressly enshrined by the Treaty (article 4(2j) TEU) according to which the European Union shall exercise its competence and prevent national legislators from legislating in the Area of FSJ. The result of this is to crystallise the penalties decided at a supranational level. The regulatory decisions are binding on national legislators and, particularly, on national parliaments and therefore do not admit that a national legislator may impose alternative penalties or successively opt to void the penalties for a given type of conduct and thereby reduce the range of activities considered relevant for the purposes of criminal law. This is the crux of the matter and the defining element of the European obligations in relation to criminal laws: national parliaments are debarred from voiding penalties for criminal offences once European obligations have been adopted.[7]

This points to an important conclusion: with the adoption of the Lisbon Treaty, it has become crucially important to deal with any difficulties relating to terminology and translation when referring to certain judicial institutions and concepts in the preliminary phase of the process for the approval of EU legislation because once the legislation is passed, Member States will lose their jurisdiction in the area concerned.

An examination of the *El Dridi* case[8] allows us to make some conjectures about the impact that new post-Lisbon Treaty directives will have on the legal systems of Member States. We can also consider the indirect influences that the directives are already having on criminal law and criminal law procedures in those areas where EU regulations, including those adopted before the Treaty came into force, touch upon the various aspects of the Area of FSJ. In the *El Dridi* case, the Court of Justice was asked to provide an interpretation of an EU directive, specifically Directive 2008/115/EC (the so-called Returns Directive), relating to the repatriation of third-country nations whose presence in the EU Member State is illegal.

The judgement handed down by the Court of Justice was important, not only because of the principles that it affirmed but also because it was preceded by a wide-ranging and animated debate here in Italy involving judges, public prosecutors, and criminal law jurists whose exchange of strongly held views perfectly exemplified how the concept of the "interference" of the EU in national criminal law is perceived.

[7] See Sotis (2002), p. 171 ff and (2010), p. 339 ff.

[8] European Court of Justice, judgement 28 April 2011, case C-61/11/PPU. For comments, see Viganò and Masera (2011), Cossiri (2011).

In the *El Dridi* case, the Court of Justice was asked by the Appeals Court of Turin to issue a preliminary ruling on the interpretation of some of the measures contained in the "Returns Directive" with respect to criminal proceedings against a foreign national held in preventative custody in the territory of a Member State (Italy) on charges of illegal residency, the party in question having violated an order to quit Italian territory within 5 days. The party was therefore in breach of an expulsion order, as provided for by article 14(5b) of the Consolidated Law on Immigration as amended by Law 94/2009.

The application for a preliminary judgement was an occasion for measuring the European Directive, which had lapsed by several months without being transposed into Italian law, against Italian national laws on immigration. Specifically, the issue at stake was a key element of the more recent Italian law that sought to control irregular migration by providing for the use of criminal penalties for non-compliance with an expulsion order. The law, moreover, had already been the subject of a ruling by the Constitutional Court (Sentences 249 and 259 of 2010) and had already been declared as being in conflict with the European Returns Directive.[9]

One of the most evident points of legislative conflict had to do with the question of detention pending expulsion. The Directive contained several clear and unconditional measures relating to guarantees and terms of detention, and these measures were deemed to have the force of "direct effect" at the deadline date for the implementation of the directive in Italian law. That is to say, the Directive could be invoked against the application of any domestic legislation that was entirely incompatible with it.[10] Yet there was also a controversial basic element that left room for doubt in interpretation and opened up issues of contradictory jurisdiction in relation to the offence in question.

The essence of the controversy arose from the fact that the Directive, seeking to define "an effective removal and repatriation policy, based on common standards" while balancing the need for an effective returns mechanism respectful of the fundamental rights of "irregular" migrants, says nothing that confirms or limits the power of Member States to use instruments of criminal law to render the repatriation procedures effective. Indeed, some argued that the competence of the domestic legislator in criminal law matters should be considered as unaffected by the Directive, and the fact that some of its measures had a direct effect should not be considered as relevant. Some parties suggested that the Returns Directive left a wide margin of discretion for the national legislator in regard to many of its measures, especially in regard to its scope of application. They argued that it authorised derogations and exceptions even to the extent of the non-applicability of the Directive itself to foreign nationals sentenced to repatriation by way of a sanction for a criminal offence or whose repatriation was the result of the application of a criminal penalty decided by the State (as provided for by Article 2 of the

[9] See Pugiotto (2010), p. 333 ff.

[10] Viganò and Masera (2010), p. 560 ff.

Directive). Further, since the Directive acknowledged (in article 8) the right of States to "*take all necessary measures to enforce the return decision*", it was argued that the State could in any case treat failure to respect the orders of administrative authorities as a criminal offence. Finally, it was also claimed that even if the Directive did have the force of direct effect, it still could not dictate in matters of criminal law because it had been adopted before the coming into force of the Treaty of Lisbon and therefore predated the attribution of legislative powers in criminal affairs to the EU.

These arguments led some Italian judges to rule that sanctions as defined in national law remained valid, even after the deadline for the domestic implementation of the Directive had passed. On these grounds, some courts upheld the sentence passed on foreign nationals for failure to comply with the expulsion order issued by the Office of the Questore (police), and public prosecutors appealed against acquittals. Others decided that in the absence of EU laws with direct effect, the matter should be resolved by the Constitutional Court, the only authority deemed capable of preventing the application of a domestic law that had been labelled unconstitutional for being in conflict with a prior piece of legislation having precedence over it, namely the Directive. On these grounds of precedence, then, the national law was impugned with reference to articles 11 and 117 of the Italian Constitution.

Meanwhile, Italian judges who accepted that certain measures of the Directive relating to the detention of persons were to be considered as having direct effect, notably articles 15 and 16, ruled to acquit defendants, albeit on differing grounds. Some resolved that the expulsion orders themselves were now illegitimate and therefore acquitted the defendants on the ground that there was no case to answer (there being no legal grounds for formulating a charge), while others resolved that as the national law conflicted with the direct effect of the Directive, the charge itself needed to be abolished, and they therefore acquitted the defendants on the ground that their action could no longer be regarded as an offence.

Accordingly, when the Appeals Court of Trento applied to the European Court of Justice (ECJ) for a preliminary judgement after the expiry of the deadline for the implementation of the Directive, in such extreme interpretative uncertainty there were high expectations towards the ECJ decision.

After referring to the content and aims of the Directive and acknowledging that it allowed for derogations, though only in a positive sense, by Member states, the ECJ proceeded with the examination of the issues raised by the referring court. However, the ECJ made no reference to the provisions limiting the power of intervention granted to the EU by the Lisbon Treaty and thereby implicitly rejected its relevance to the case. The Court unequivocally and immediately recognised the direct effect of the provision of the Directive relating to the detention of person (articles 15 and 16) with reference to traditional standards of legal interpretation (clear, precise, and unconditional obligations and the non-implementation of the Directive by the deadline date) and therefore ruled that individuals were within their rights to invoke the measures of the Directive in opposition to the State. The Court of Justice went still further. Decreeing that the right of derogation from the common rules as

provided for in the Directive in relation to foreigners sentenced to repatriation as a criminal penalty did "not relate to non-compliance with the period granted for voluntary departure", the Court dealt with the nub of the matter by ruling as inadmissible, in the light of Directive 2008/115/EC, the criminalisation of non-compliance with a repatriation order.

It is here that the judgement introduces arguments and solutions with many short- and long-term ramifications. The Court of Justice did not approach the matter from the perspective of the fundamental rights and individual freedoms of foreigners, even though this was one of the objectives of the Directive. Rather, it sought to strike a balance between, on the one hand, the competence of States to legislate in criminal matters and criminal procedures and, on the other, the need to ensure the "*effet utile*" of the primary objective of the directive, namely an effective returns policy for foreigners illegally residing in a country. In this way, the Court recognised that Member States, faced with a failure of coercive measures to repatriate irregular migrants, would "remain free to adopt measures, including criminal law measures" aimed at dissuading them from remaining illegally in their territory (para. 52). However, the Court also observed that while, in principle, criminal legislation and criminal procedural rules fall within the remit of Member States and that neither the rules of the TFEU relating to immigration (article 79(2c), TFUE) nor Directive 2008/115 rules out the competence of States in such matters, it was nonetheless true that EU law influenced the area of criminal law, and Member States should therefore respect the law of the EU and "not apply a law, even if it concerns criminal law that might jeopardise the achievement of the objectives pursued by the Directive, depriving it of its effectiveness".

The judgement is very clear about what a State may or may not do and concludes that a State may not impose a custodial sentence for breach of a repatriation order but must continue to work towards enforcing a repatriation order, which continues to produce its effects. It ruled that a custodial sentence, by delaying the implementation of the repatriation, risked jeopardising the attainment of the objective of the Directive, namely the establishment of an effective policy of repatriation.

The conclusion of the Court is firm, and its ramifications are wide-ranging. It establishes that the referring court is responsible for ensuring the non-enforcement not only of article 14(5b) of the Consolidated Legislative Decree on Immigration but also of "*any provision of Legislative Decree No 286/1998 which is contrary to the result of Directive 2008/115*" (paragraph 61, my italics).

Of further significance is the fact that the Court of Justice recognises the "ultra-retroactivity" of the measure that it identified as having direct effect, which would compel a national court to enforce the principle of the retroactive application of the more lenient punishment, because this "forms part of the constitutional traditions common to the Member States." This was by no means a new departure for the Court of Justice, which had already resolved on other occasions, especially in

judgements relating to administrative and civil matters,[11] that the "effectiveness of EU law would be impaired if the principle of *res judicata* deprived national courts not only of the possibility of reopening a final judicial decision made in breach of EU law, but also of rectifying that infringement in subsequent cases presenting the same fundamental issue".[12]

The salient point is that the Court now recognises the same principle in regard to the considerably more sensitive matter of criminal law and has thereby forced national courts to become more amenable to the demands of European Union law. This has other important consequences. If the efficacy of European Union law with direct effect as interpreted by the Court of Justice does not even touch the limit of the authority of the national criminal court whose decisions are in conflict with EU law, a subject sentenced under laws subsequently declared by the Court of Justice as being incompatible with EU law is entitled to have his or her sentence quashed and to seek the annulment of any consequences that entailed from the sentence. That may mean the annulment of the subject's criminal record, the non-enforcement of laws on repeat offenders, and the renewed application of rules on conditional suspension.[13]

The judgement is very interesting, not only for the concrete and (I believe) very positive solution it proposes for reducing the scope of applicability of criminal law. It is interesting also and especially for the legal reasoning behind it, all the more so if we consider it from the perspective of cooperation between different national legal systems. The decision may even mark the first flickering signs of life of a new species of jurisprudence, with the Court of Justice proposing itself as a particularly dynamic exponent in the area of judicial cooperation in criminal matters, much as it did with first-pillar affairs in pursuit of the objective of a common market. As has been noted several times in the past, the Court does not restrict itself to interpreting only the measures contained in the Directive, which was the specific object of the reference for a preliminary ruling, but extends its remit to directly reviewing Italian law, directly instructing the Italian courts on which rules to apply in a given case, culminating in "a form of covert scrutiny of national laws",[14] and providing firm indications both to national courts and to national legislators.

Most pertinent to our purpose here is that the *El Dridi* decision makes it patently clear that, in matters of criminal law, national courts are required to apply EU rules directly where the grounds exist for recognising direct effect.

From a linguistic-legal perspective, possible problems of translation inherent in a European Union directive might well have to be resolved directly by national courts

[11] European Court of Justice, judgement of 30 September 2003, case C-224/01, *Kobler;* judgement of 16 march 2006, case C-234/04, *Kapferer* ; judgement of 30 September 2009, case C-2/08, *Olimpiclub*.

[12] Craig and de Burca (2011), p. 265. See also Grousstot and Minsen (2007), p. 385 ff.; Caponi (2009).

[13] Barletta (2011), p. 40.

[14] See Cartabia (1995), p. 229; Calvano (2004), p. 244.

(with the assistance, where necessary, of the Court of Justice), without being pre-emptively resolved by national legislators when framing the implementation law.

The harmonisation directives as envisaged by articles 82 and 83 of the TFEU, with respect to the multifaceted notion, which is now encapsulated in the EU concept of direct effect, is now applied also to criminal law. Direct effect[15] can be understood as having both an "exclusion effect", which implies the non-enforcement of domestic laws that are in conflict with those of the EU and a "substitution effect," whereby the EU legislation becomes the *rule* that governs actual disputes by allowing individuals to associate their subjective position with that described in text of the regulation. Direct effect and the *effet utile* (efficaciousness) therefore guarantee the precedence of EU laws over "all incompatible national laws."

Accordingly, on the very day the *El Dridi* judgement was issued, the Court of Cassations (Appeals) of Italy put it into immediate effect and quashed without recourse the sentences imposing the sanction for the "offence" in question on the ground that it was no longer deemed an offence under the law (Court of Cassations, Section I, Criminal Law, 28 April 2011). In an analogous move, the Council of State determined that the repeal of the criminal offence also affected labour legislation in regard to the exclusion from a 2009 amnesty of foreign nationals who had been sentenced under the now-impugned law. This had a further knock-on effect on administrative measures relating to the declaration of irregular employment since the measures were based on the presumption of a conviction for a crime that is no longer considered such (Council of State, plenary meeting, Judgement no. 7, 7 May 2011).

If we consider the principles affirmed by the Court of Justice in the *El Dridi* case in the light of the extensive powers of harmonisation in criminal law matters directly assigned to the EU by the Treaty of Lisbon, we can see that the direct effect of EU law, in both its dimensions, has the potential to affect a very broad range of areas, as European lawmakers progressively transform the judicial bases laid down in the primary legislation of the TFEU into concrete legislative instruments referring, in particular, to the Area of FSJ.

The two dimensions of the direct effect are bound by an absolute limit, which is that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (Court of Justice, Sentence 3 May 2005, Joined Cases C-387/02, C-391/02, and C-403/02). The Italian Constitutional Court reached the same conclusion in sentence No. 28/2010 and revisited it in greater detail in sentence No. 227/2010 concerning the domestic legislation implementing the Framework Decision on European Arrest Warrant.

The implications for Italian lawmakers that flow from the legal reasoning in the El Dridi case are far-reaching. In keeping with the classic pre-emption principle that

[15] Prinsenn and Schauwen (2002).

governs matters of competing competence—the EU has exercised competence in these matters ever since the Directive was published in the Official Journal and came into force—the national legislators have lost their powers to make laws in these areas, and lost their power also to legislate pending the transposition of the Directive, and are bound to abstain from introducing new measures on the national statute books in the area of criminal law that are contrary to the spirit and letter of the Directive. When the national legislator is exercising its power to make laws, it is obliged to comply with the decisions made by the EU legislator for the purposes of implementing the Directive. This is simply a matter of course pursuant to article 288 of the TFEU (ex article 249 TEC), which specifies that "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed". However, in addition to this obligation, even when the national legislator is exercising its powers in matters of criminal law or criminal proceedings, it is still required to comply with the normative decisions taken by the supranational authority, in deference to the obligation to apply the "*effet utile*" (useful effect).

While the European Union can require Member States to impose penalties or, on the contrary, refrain from imposing penalties in order to safeguard the effectiveness of EU policies, Member States cannot make autonomous decisions for the imposition of penalties even in areas over which they have exclusive competence, if so doing would impede the attainment of the policy objective of the Union, as stated in its statutory instruments. The possibility of imposing penalties has therefore been increasingly abstracted to a supranational level. That Italian lawmakers have not fully grasped this fact is evident from Decree Law 89/2011, which came into force in 24 June 2011, implementing as a matter of urgency the Returns Directive. The Decree Law, however, defines a number of specific criminal offenses that ignore the *effet utile* of the Directive and will therefore be subject to "disapplication".[16]

In my view, the *El Dridi* judgement marks a further step forward by EU lawmakers towards what has been described as the "constitutionalisation" of the (ex) third pillar.[17] Going beyond a question of harmonised interpretation as envisaged in the framework decision adopted before the Lisbon Treaty took force, the direction of movement is clearly towards an "integrationalist" system in which the direct effect of the regulations of a directive, the *effet utile*, and the principle of pre-emption are combined to create an overwhelming legislative force that threatens to sweep away the fundamental assumption of the Italian Constitutional Court, which speaks of two "autonomous and distinct yet mutually coordinated" legal systems.

In brief, then, the message coming from the ECJ, which has taken its cue from previous cases such as *Pupino* (Court of Justice, 16 June 2005, Case C-105/03), appears to be that independently of the degree of integration established by the Treaty and independently of the areas that Member States agree to treat as matters of common policy (and therefore accept limitations on their sovereignty), the

[16] See Natale (2011).

[17] Martinico (2009).

overarching logic of the functioning of the European Union is one that commits Member States to guaranteeing the process of integration.

In practice, the recourse to the doctrine of useful effect voids the measures for restricting the exercise of competitive powers in the EU that are contained in the Treaty and in the Declaration appended thereto and are increasingly eroding the principle that a certain set of powers should be assigned to the Union and that it and Member States should divide others between them. This process has brought to the fore issues that are intrinsic to the Treaty[18] and may well lead one to wonder whether the normative action of the EU may not be sowing the seeds for the dematerialisation of national control over criminal law in a manner that far exceeds the boundaries envisaged in the Lisbon Treaty. These seeds of destruction of national powers seem destined to grow in the coming years as the EU starts approving harmonisation directives relating to criminal law and criminal procedures pursuant to articles 82 and 83 of the TFUE, regulations for the protection of the financial interests of the EU, and regulations relating to the European public prosecutor, pursuant to articles 86 and 325 of the TFEU.

It should also be noted that the developments refer not only to judicial cooperation in criminal affairs, police work, and immigration, which are the only fields belonging to the Area of FSJ, but also to the areas of family law and national legislation on civil status because the combined application of the useful effect doctrine and the principle of non-discrimination is blurring the line of demarcation that separated the legal competence of the EU from that of Member States.[19]

3 Final Remarks: What Remedy Can Be Made When Translations of European Union Laws Are Inadequate and Interfere with Domestic Criminal Law or Rules of Criminal Procedure?

The *El Dridi* judgement confirms once again that the principles of primacy and direct effect apply indiscriminately, even if they interfere with national criminal law. According to Article 11 of the Constitution, ordinary judges (and, as the Constitutional Court made clear with judgement no. 389/1989, any other public body, including public security authorities) are responsible for the disapplication of national laws that are in conflict with European law. The "interference" between Community law and criminal law (and the same can be said with respect to national rules of criminal procedure) can stem from many disparate sources because *any* EU provision, even if it does not refer to criminal law as such but simply to one of the areas that the Treaty of Lisbon now categorises as falling within the scope of

[18] Mangiameli (2008), p. 131 ss.

[19] See Ninatti (2010).

competence of the EU, has the potential, as long as it is directly applicable or has direct effect, to lead to the disapplication of domestic criminal law (except where direct effect is limited by the *in malam partem* principle). The number of such "interferences" is destined to grow as the EU acquires more extensive legislative powers, and the Area of FSJ is unquestionably the new frontier for supranational intervention.

The extension also to the area of judicial cooperation in criminal matters of traditional Community sources with direct applicability and direct effect makes it all the more important to address the question of what to do when, as a result of inadequate translation, the very same legal direct-effect provision ends up with an unequal scope of application or a different meaning in one EU country as opposed to another. Given that in many cases the national judge will be responsible for applying the European Union law, what can be done to make sure that the same provision does not lead to different conclusions by judges depending on the language version to which they refer?

As the reader will be aware, where doubts arise concerning the content of Community law, national judges have the right (or the obligation, in the case of judges of last instance) to refer for a preliminary ruling to the ECJ, so that it may provide a "reliable and trustworthy" interpretation for all Member States. In particular, where terminological divergences exist between the different language versions of the text, the ECJ has ruled that "*no legal consequences can be based on the terminology used*" and that it is therefore necessary to rely on a schematic and doctrinal interpretation: "*The different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part*" (Judgement of 27 October 1977, case C-30/77). The uniform interpretation of EU law advised by the Court of Justice should certainly be enough to prevent the uneven application of Community law in different Member States, but it effectively implies the invalidation of the EU principle that all language versions of the text are to be considered equally authentic. "Uniform interpretation" is a solution that obliges the Court of Justice to prefer certain languages over others, as has been demonstrated by the considerable number of cases in which the Court has ruled *against* the legislative formulas used in certain language versions of Community laws.[20]

It is easy to imagine how similar cases coul d lead to the complete denial of the legitimate right of citizens to trust in the version of a Community provision in their own language and how they might even be rendered incapable of anticipating the legal consequences of Community laws. At stake then is the very principle of legality in criminal justice. The situation is paradoxical: the "strong" multilingualism chosen by the European Union, which was supposed to give all European citizens full access to Community law and thereby guarantee them the same principle of legality enshrined in their national legal systems (which in the area

[20] See Schilling (2010), p. 47 ff., in particular p. 55; Vismara (2006), p. 61 ff.

of criminal law must be interpreted in particularly strict terms to ensure respect for the principle of certainty in criminal justice), can, it turns out, have precisely the opposite result of producing rather unpredictable legal outcomes.

It is not as if the "strong" multilingualism adopted by the European Union cannot be changed, but it is a very sensitive political issue that is associated with the ideal of equality between Member States. It is no coincidence that the process necessary for defining the language rules of the Union requires a decision from the Council acting unanimously by means of regulations (see Article 342 TFEU, which reproduces Article 290 TEC). Basic Council Regulation No. 1 of 1958 (successively amended several times as the Union was enlarged) sets out the general rules governing the languages of the Union and determines the number of official and working languages to be 23. The Regulation can be derogated by the Council by means of sector-specific regulations relating to particular fields. This is what happened recently, for example, with the creation of the single European patent, for which a three-language system of English, French, and German[21] was introduced and against which Italy and Spain have filed a suit at the Court of Justice. Further, the Council retains the power to repeal Regulation No. 1/1958 to introduce a general system of language rules based on an attenuated form of multilingualism. In consequence of the points just made, some have recently argued that the best (or least bad) solution to the not infrequent occurrence of inadequate translations of EU legislation would be a shift from strong to weak multilingualism through the amendment of Regulation No. 1/1958, so that the text of a legislative act of the Union would be written in a single official language and all other language versions would be deemed translations.[22] According to its proponent, such a solution would strike an ideal balance between respect for the principle of legality and the protection of legitimate expectations, on the one hand, and the principle of non-discrimination on grounds of language, on the other.

The proposal, though interesting, does not seem practicable from an institutional or political perspective, seeing as the issue of language rules for the preparation of EU acts is one of the most hotly debated in Brussels, as demonstrated once again in reference to the single European patent, as mentioned above. Against this background, it would therefore be both preferable and more realistic in the sensitive area of judicial cooperation in criminal affairs to begin serious work on standardising the terminology used in the Union's legislative acts and creating a common frame of reference on which to build a new common terminology of criminal law that can always be expressed in all the national languages of the EU. A step has already been taken in this direction in the field of European contract law, with a view to creating a common European legal culture in this area. In the field of criminal justice, the prospect remains remote, owing to considerable divergences in the criminal law

[21] See the decision of the Council of the European Union of 10 March 2011 authorising the institution, by means of enhanced cooperation among the 25 Member States, of a single European patent, and challenged by Italy and Spain before the European Court of Justice.

[22] For this proposal, see Schilling (2010), p. 64.

systems and, especially, in the criminal law procedures of the various Member States. Needless to say, a large and significant first step towards the creation of a common European legal culture in criminal matters would be the establishment of the European Public Prosecutor's Office as envisaged by Article 86 TFEU.

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Linguistic Regimes and Judicial Cooperation in the Eurojust's Perspective

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Abstract The paper analyses the theoretical and practical problems that multilingualism creates in the field of cooperation in criminal matters within the EU. It focuses then on the experience of the European arrest warrant and the functioning of Eurojust as two examples of how to solve those linguistic problems.

Abbreviations

EAW	European arrest warrant
EJN	European Judicial Network
EU	European Union
OCC	On-call Coordination
SIS	Schengen Information System
TEC	Treaty on European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 *Multilingualism* and Cultural Pluralism in EU: Legal Basis and Underlying Reasons

The EU pursues a policy for the protection and promotion of *multilingualism*. The term multilingualism requires some preliminary definitions as different connotations of the word may be taken into consideration and are relevant for our

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topic. Indeed, multilingualism surely means the *peculiar linguistic regime* of EU Member States and their inhabitants who speak different languages according to their idioms and national traditions: as such, it is part of the cultural diversity of the EU and considered one of the reasons of its richness. One the other hand, it may refer to the people's skill to use different languages.

The two concepts are closely related if we consider their possible inferences on our topic, concerning the judicial cooperation in criminal matter. To some extent, we can talk about their *circularity*: if we jump ahead, for a moment, to one of the conclusions of this essay, we might say that *multilingualism*, if understood in its first sense, as a multitude of different languages, can have a negative impact on the prevention and combating of all forms of cross-border crimes because it complicates the judicial cooperation process. From a practical perspective, the problem might be overcome by increasing *multilingualism*, though in this case, we are referring to the linguistic ability of the practitioners concerned (judges, prosecutors), who are tasked of giving effect to the European judicial area by enforcing the values and principles on which it is founded.

It is therefore important to bear in mind which of the definitions of *multilingualism* is being used in the framework of this essay.

Apart from recognising a higher number of languages (23 official languages) and redefining some of the arrangements for the transmission of draft legislative acts to national parliaments (as defined in protocol no. 1, article 4), the Treaty of Lisbon did not make any substantial changes to the language regime of the EU and, in reaffirming the principle of pluralism, enshrined respect for the cultural and linguistic differences of the EU Member States.

The key provision is to be found in Article 3(3) subsection 4 of the Treaty on European Union (TEU), which states that the EU "*shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced*."

This provision confirms *multilingualism* as one of the founding principles of the European Union and a central benchmark of its process of integration and enlargement as well. Each time a new state joins the EU, its language is incorporated into the languages of the EU.

The central importance of language identity is also stressed in the EU Charter of Fundamental Rights, whose article 21 prohibits any discrimination based on language.[1] Article 22 reiterates the point, declaring: "*The Union shall respect cultural, religious and linguistic diversity*."

The principle of cultural and linguistic diversity is also enshrined in the rules governing the *relations between European citizens and the institutions of the EU*. In the section devoted to non-discrimination and citizenship of the union (Part Two of

[1] Specifically, the article reads: any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

the Treaty on the Functioning of the European Union, TFEU), it is expressly stated in Article 20 (ex Article 17 TEC) that citizens of the European Union shall have the right to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

This right has a pivotal role on the functioning of the institutions of the EU concerning the language arrangements used in the ordinary work. From a formal prospective, the rules governing the languages of the institutions shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the EU, be determined by the Council, acting unanimously by means of regulations (Article 342 TFEU, ex art. 290 TEC).

The rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting unanimously (Protocol No 3, article 64).

From 1 January 2007, the European institutions have been operating in 23 official languages. The EU's commitment to *multilingualism* in its lawmaking and administrative procedures is unique in the world. Even compared with the Council of Europe, the difference is evident, considering that this latter has just two official languages: English and French.

In spite of the proclaimed *multilingualism,* in the current practice legal acts are generally originated in a single language (usually that of the country submitting the proposal) and are then elaborated and processed in English, French, and sometimes German. Only once the final text has been prepared will the work be entrusted to language experts, who are required to produce a literal translation as to verify the equivalence of judicial connotations.

The Union's linguistic diversity is epitomised in the procedural protocols of the European Parliament procedures in view of its solid undertaking to safeguard the use of all official languages. Smaller meetings aside, an interpretation service is available for plenary sessions, meetings of EU bodies, committees, and parliamentary groups. The Rules of Procedure of the European Parliament lay down the right of every Member to have all discussions interpreted into his or her native language and for all his or her interventions to be translated into other languages.

Linguistic pluralism even determines the knowability of the Treaty itself and the lawmaking process. Article 55 TEU (ex Art. 53 TEU, according to the former version) lists the language in which the Treaty itself is written and translated. Declaration 16, referring to Article 55(2) TEU, reads: "*The Conference considers that the possibility of producing translations of the Treaties in the languages mentioned in Article 55(2) contributes to fulfilling the objective of respecting the Union's rich cultural and linguistic diversity as set forth in the fourth subparagraph of Article 3(3). In this context, the Conference confirms the attachment of the Union to the cultural diversity of Europe and the special attention it will continue to pay to these and other languages.*"

Apart from the references in the founding Treaties, linguistic pluralism has also been the subject of *specific EU policies* aimed at promoting, teaching, and encouraging the learning of foreign languages in the EU, with a view to creating a linguistically friendly environment for all Member State languages. Title XII of

the TFEU, which is dedicated to Education, Vocational Training, Youth and Sport, contains the prescription "*The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity*" (Article 165 TFEU, ex Article 149 TEC).

The EU's policy objective in the area of education and vocational training is for all European citizens to have a command of two foreign languages in addition to their mother tongue. In order to achieve this goal, two foreign languages need to be taught to schoolchildren from the very earliest age (2005/C/141/04). For the period 2004–2009, the first ever Commissioner for promoting *multilingualism* in EU was appointed. In 2005, the Commission set out its new framework strategy for multilingualism, whose primary objectives included incentives for language learning process, promoting linguistic diversity and a multilingual economy, at the same time offering improved access to information relating to the EU institutions in the language of every citizen.

The theme of multilingual education also runs through several *other distinct Union policies*. For example, with respect to the common commercial policy, Article 206(4) of the TFEU (ex Article 131 TEC) specifies: "*The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity*".

We may wonder which are the *underlying reasons* for Europe's decision to embrace *multilingualism*.

In the first line, there are deep historical and cultural reasons. Multilingualism is part and parcel of the *cultural heritage of the European Union* and is a distinguishing feature of a *Community based on the ineluctable principles of diversity*. Europe is an old continent and a meeting point of many cultures and traditions whose coming together led to the birth of the European Union itself. The Union is not a fusion of cultures but rather a supranational community based on national identities and the diverse cultures of the individual peoples of which it is composed. The most direct expression of the culture of each people is own language. It is this, more than anything else, that makes them citizens and creates a sense of national identity. The 2004–2009 European Commissioner for multilingualism defined EU multilingualism as "*an ancient chessboard in which every piece moves according to different rules and has a different role, but all of which are equally important*". The metaphor perfectly captures the concept of unity in diversity and the ideal of citizen participation in the life of the EU, which is essential also for overcoming the so-called democratic deficit of the European Union.

In this sense, *multilingualism* favours transparency in institutional life not only because it gives each citizen the right to engage with the bodies of the EU in his or her mother tongue and to receive answers in the same [Article 55 (1)] but also because it gives each citizen the means to access the acts and institutions of the EU.

Multilingualism is therefore a necessary condition for the functioning of the European Union because it ensures that the juridical and legislative acts of the Union are known to its members and therefore understood and enforced. This is particularly important for those acts (such as regulations) that are meant to have an immediate effect upon national laws without the need for regulatory transposition.

Ever since the birth of the European Community, it has been clearly understood that languages have a great role to play in combating racism and xenophobia, and therefore constitute a *factor of integration*.

Finally, the plurality of languages within the institutions of the EU has served and continues to serve as a driver for the free circulation of goods, services, capital, and persons. Fundamentally, then, there are also solid mercantile reasons for *multilingualism*, and they are all the more important in this age of globalisation.

2 The Unwanted Effects of *Multilingualism*: An Opportunity for Organised Crime

While *multilingualism* is a founding value of the European Union that is based on solid grounds, it can have negative repercussions unless adequate policies are in place to promote knowledge of the languages of the various member states. *Multilingualism* may constitute an *obstacle to the dialogue* among national judicial and law enforcement authorities, resulting in delays and deficiencies in anti-criminal activities, especially when transnational cooperation is needed.

Investigators have found that one of the identifying characteristics of modern criminality is that it is becoming increasingly organised and international in nature. The international dimension is now a routine aspect of all forms of organised crime.[2] The "globalisation of crime" is the expression we use to refer to this spreading of criminal activities across national boundaries.

The political and institutional changes that have characterised European history, especially over the past 30 years, not only have undoubtedly brought economic and social progress to the citizens of the EU but also have proved to be an excellent opportunity for criminal organisations, which quickly learned how to generate profits from the liberalisation of markets and the free movement of persons, capital, and goods.

[2] Concerning the documents of European and international relevance, see the recent *Council Conclusions setting the Euro priorities for the fight against organised crime based on the 2011 OCTA* (organised crime threat assessment and the related action plan). The documents invite the Member States and the organisations created to fight against this kind of crime to consider the results of the analyses carried out by Europol and summarised in the OCTA 2011. One of the main conclusions of the Council is that fight against organised crime must be conducted, taking into account all the obstacles to its complete enforcement, primarily those arising from its international dimension. This dimension represents, for the criminal associations, a "facilitating factor".

The creation of an internal customs union not only favoured the free circulation of people but also created opportunities for criminals, especially organised groups, who are able to benefit from the elimination of border controls.

It has also been found that the language differences within the Union sometimes impede dialogue and undermine the efficiency of the cooperation between authorities dedicated to fighting crime. This has created favourable conditions to criminal activities, especially carried out by organised criminal group. It is necessary to bear this in mind when discussing *multilingualism* and its effects on judicial cooperation.

3 *Multilingualism* and Judicial Cooperation: Problems of Interpretation

Whereas *multilingualism* is, culturally speaking, a stimulating phenomenon that surely deserves a deeper and separate reflection, *juridical multilingualism* has its own connotations. The precise understanding of legal expressions requires a continuous approach in which the purely linguistic meanings of terms are combined with professional/legal interpretation. This in turn requires knowledge of the regulatory context into which the translated expressions must be placed.

Often there is no exact equivalence for a legal term in a given source language, and therefore no unequivocal translation of the term is available in the target language. This phenomenon is peculiar to the legal world. For example, translating the term "pubblico ministero" as meaning "prosecutor" gives but the vaguest idea of the functions of the pubblico ministero in the Italian system, owing to the conceptual, legal, and operational differences between the two. In the English-speaking world, a prosecutor is not a fully independent actor that is, rather, a sort of "legal adviser" for the police.

Just as the study of the language cannot be separated from the historical and cultural context to which he belongs, so the study of legal language cannot be divorced from the legal system to which it refers.

A legal translator therefore needs to look beyond literal translation to find the real meaning of an expression in the target language. The translator must find the *equivalent significance* in the vocabulary of the relevant legal system. *In this respect, the translator or interpreter is one whose job is very similar to that of the legal expert researching the significance of a law or deciding on its interpretation*. The job of a translator or interpreter is one that goes beyond linguistic interpretation. Indeed, a judge, acting with the necessary support of the relevant parties, has the task of explicating the meaning of a sequence of words, to which end he or she interprets the words with reference to their literal, historical, and

evolving sense and their systematic function. The judge seeks to reconstruct the true significance of the words, also in the light of the intentions of the legislator.[3]

The specific issue of *multilingualism in relationships of legal cooperation* can be said to form a subset of the broader issue of legal multilingualism.

We can approach it from two perspectives:

– The first refers to the practical and operational dimensions of judicial cooperation. That is to say, we can examine how the judicial authorities of different countries engage in dialogue with one another with the aim of providing mutual legal assistance. Here we can consider the notion of legal cooperation as a form of dialogue and as a form of "working together" (which is the literal meaning behind the Latin origins of the word "cooperate"). Our frame of reference is the first of the two definitions of *multilingualism* that we touched on at the beginning of the essay, namely *multilingualism* understood as the (variable) linguistic capacity of a given group of persons.
– The second perspective has to do with the regulatory and interpretive dimension. In other words, *multilingualism* can be considered as referring to the question of reading and interpreting the rules regulating legal cooperation, on which mutual legal assistance is based.

It needs to be pointed out that this distinction between the two forms of multilingualism has been made for the purposes of convenience. In fact, the two forms are closely interrelated in that legal cooperation (judiciaries working with one another) ultimately depends on the content of the laws to which the cooperation relates. Cooperation therefore presupposes a knowledge and understanding of laws that have often been written in a language different from that of the judicial authorities who are expected to enforce them. Even so, the distinction we have made is useful for the purposes of this essay, which mainly deals with the practical and operational repercussions of multilingualism in the field of legal cooperation.

The question of the *interpretation of the regulations governing relationships of legal cooperation* is complex and requires more space and an appropriate forum for discussion. For the purposes of this essay, we shall limit ourselves to only certain essential aspects.

The interpretation of judicial acts whose legal sources are supranational in nature, governing relationships of legal cooperation, is an area that focuses on regulations "originating elsewhere".[4] Even when laws have been transposed onto national statute, the interpreter still needs to look up the original text on which the laws are based and must be cognisant of the multi-tiered and multilingual regulatory context (national and supranational sources) to which the law refers.

[3] The topic has been extensively explored in literature, and several contributions have emphasised the parallelism between translation and interpretation. See, especially, Mazzarese (2007); Ricoeur (2000), pp. 1–15.

[4] On this point, see Selvaggi (2010).

In researching all relevant legal sources, the proper meaning of certain, sometimes obscure, expressions can be often found in the accompanying explanatory reports or in the preparatory documents for the piece of legislation. The Italian legal system is by now well aware of this, and sentences issued by telling courts will often make reference to "multilevel hermeneutics" (see, for example, Judgement of the Italian Supreme Court, Sezioni Unite, *Ramoci*, 30 January 2007, n. 4614). The example cited above brings us to another aspect, namely the relevance for the Italian system of law of national courts, which are essential reference points for the purposes of interpreting for legislation. In the aforementioned judgement, the Italian Supreme Court, in an effort to implement the European arrest warrant (EAW) in Italian law, refers to the jurisprudence of the European Court of Human Rights and the acts of the Council of Europe with regard to the question of periodical judicial reviews. On a more general level, in dealing with the problems of interpretation of legislation originating elsewhere, it is fundamentally important to avoid categories or arrangements that are typical of the national legal system. Rather, precisely the opposite course needs to be taken: it is above all necessary to determine the "voluntas" of the external legislator.[5]

With specific reference to the interpretation of EU law, the definitions and judicial principles originating in that supranational context must refer to *autonomous and uniform notions peculiar to the environment of the EU* since divergent interpretations among member states of common legal concepts cannot be contemplated. A good example is to be found in the judgement handed down by the Court of Justice of the European Union on 17 July 2008 in the *Kozlowski* case relating to the need to find a common interpretation of the expressions "staying" and "resident", which are contained in the framework decision on the EAW.

4 *Multilingualism* and Judicial Cooperation: Problems of Practical Implementation

The notion of legal cooperation[6] in the European Union has evolved to serve the common interests of member states in the fight against criminality. By examining supranational sources, we can pick out a pattern of evolution taking place within the framework of European community and European Union law, which progressively

[5] This method is derived from a famous Judgement of the Italian Supreme Court of 10 July 2008, Napoletano.

[6] On the topic of the judicial cooperation within the European Union, there is a wide bibliography. See Sicurella (1997), pp. 1307 ff.; Tizzano (1998), p. 57; Adam (1998), pp. 227 ff.; Lattanzi (2000); Selvaggi (2000), p. 1123; Pocar (2001); Cascone (2002); Salazar (2003), pp. 57 ff.; De Amicis and Iuzzolino (2004), p. 3067; Chiavario (2005), p. 974; Kalb (2005); Aprile (2007), p. 34; Spiezia (2006), pp. 47 ff.; Gandini et al. (2006); Grasso and Sicurella (2007); Salazar (2004), p. 3516; Aprile and Spiezia (2009); Klip (2009); Cherif Bassiouni et al. (2008); Vernimnen et al. (2009).

showed a more rational course than the occasionally chaotic and disorganised trend that characterised earlier attempts at judicial cooperation. The original forms of cooperation among the judiciaries of different countries were intergovernmental, based on international agreements in which a pre-eminent role was assigned to central government agencies. The basic principle underlying this earlier form of cooperation was the *request*, by which one state would ask another to lend it legal assistance, which gave rise to the use of international rogatory letters. This arrangement, which continues to prevail even under the Maastricht Treaty, was later complemented with and, to some extent, replaced by an intermediate solution based on the direct cooperation between the judicial authorities of different countries, the groundwork for which article 53 of the convention for the application of the Schengen treaty was laid down.

The next major change consisted in the affirmation of the principle of mutual recognition of the judgements made by the judicial authorities of other member states and by acknowledgement of the right of the requesting state to influence the legal process being conducted by the enforcing state.

The traditional concept of legal assistance was therefore progressively replaced by a new system based on *greater integration of jurisdictions*. The shift was considerable, and its effects have been particularly felt in the last decade, during which significant efforts have been made to harmonise diverse national laws and to streamline the procedures of legal assistance.

Within a matter of few years, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (the Brussels Convention) of 29 May 2000 and the successive Additional Protocol thereto, the Second Additional Protocol to the same Convention that was opened to signatures on 11 October 2011, the U.N.O. Palermo Convention on Transnational Organised Crime of December 2000, all rewrote and reconsidered the rules for international mutual judicial assistance. This set of agreements swept away some of the statutory impediments to cooperation and created new opportunities and possibilities for mutual assistance.

This process has been even more pronounced at the level of the European Union where the political-juridical arrangements are more homogenous. The affirmation of the principle of mutual recognition, first introduced in the conclusions of the European Council of Tampere and recently constitutionally enshrined in article 82 of the Treaty of Lisbon, is but the latest in a series of significant changes that are continuing to take place even now.

The most recent step towards new forms of cooperation that are still at the experimental stage and in some states, such as Italy, have yet to be put into practice consists in the participation of national law enforcement and judicial authorities in *a joint investigative project and the continuous exchange of information*. This arrangement marks a shift away from a passive approach towards cooperation based on the mere acceptance of requests from forum authorities to a proactive approach.

The arrangement was enshrined in several provisions contained in the Treaty of Lisbon. Generally, 2009 was an important year for judicial cooperation

in the European Union that saw the publication of the new Eurojust decision, n. 2009/ 426/JHA, and the adoption of the Stockholm Programme, approved by the European Council on 10–11 December 2009, which will guide European Union action in this area for the period 2010–2014. The year also saw further developments in the area of *freedom, security and justice*.

To match the developments in judicial cooperation described above, a fresh approach to the question of the linguistic regime and its practical and operational aspects is also called for.

Intuitively, we might agree upon the following conclusion: in a system based mainly on intergovernmental cooperation and on the presentation and acceptance of letters rogatory, the request for a common judicial language among legal actors of foreign states is less pressing. In such a context, the main need is for *the translation of requests into the relevant language in accordance with the individual agreements regulating the cooperation.* Usually the Treaties specify that requests must be translated into the language of the receiving state, unless the receiving state makes special provisions otherwise or explicitly that it is willing to accept requests written in a foreign language. This procedure is beset with particular difficulties because the translation cannot be merely mechanical but must also take account of the legal connotations of various expressions and institutional concepts. Under such a system, the costs of the *translation work* are usually borne by the requesting state. Under this previous system, *it seemed that the interpreter and his or her work bore responsibility for the difficulties of translation, though this was not the case*.

If we examine deeper the matter, we find that whether we consider the regulatory or the procedural aspects, a good command of one or more for languages is much to be preferred and is in any case the most reliable means of ensuring a favourable outcome to a process of judicial cooperation.

Knowledge of other languages and the language of the law is, above all, a means of ensuring that a judge, faced with a suspect or accused person who does not speak the local language, is able to guarantee that the suspects' rights to the translation of the judicial acts are being fulfilled (pursuant to articles 143–147 of Italian procedural criminal code). Whereas it is true that pursuant to article 143(3) of the same law an interpreter-translator shall be appointed even if the judge, the prosecuting magistrate, or an official in the office of prosecution has personal knowledge of the foreign language in question, the judicial authority is nonetheless duty-bound to verify the accuracy of the interpretation and translation, and a knowledge of foreign languages will therefore be useful to this end.

With respect to actual practice, the accumulated experience of many cooperative relationships based on the issuance of requests confirm that a broad-based linguistic approach by the judiciary is useful and, in some cases, necessary. If members of the judiciary are endowed with the appropriate linguistic capacities, they will be able to verify the quality of the translations of any requests they make to foreign authorities and make sure that the wording of the requests is not too difficult to understand or even unacceptable for the receiving party.

One of the recurring difficulties that occurs in cooperative relationships between judicial authorities, a difficulty that is highlighted in the annual reports of Eurojust

(which has a privileged perspective over these matters), is the *poor quality of the translations of international requests*.

This negative finding is repeated in other important European documents. A specific reference to the quality of the editing and translation of requests is to be found in *Opinion n. I(2007) of the Consultative Council of European Prosecutors on "Ways of improving international cooperation in the criminal field*." Not infrequently, requests sent in a foreign language are completely meaningless, owing to the translator's lack of expertise, which can then be compounded by the difficulties of conveying the notions behind legal concepts that do not have any precise equivalence in the target language.

When this happens, the poor quality of the request for international judicial assistance can cause long delays before the receiving authority can act; unless the receiving authority is strongly motivated to collaborate, it may neglect to communicate the need for a *re-translation* until long after the original request was made.

This language question, however, changes greatly when we move away from an intergovernmental form of judicial cooperation to one based on *a direct relationship between judicial authorities.* In this latter case, it becomes possible for a judicial authority to send requests directly to its counterpart in another country. While this alone would not bring about any great change, the important differences that it creates provide an opportunity for *direct and ongoing dialogue between the parties in a judicial case*, which can lead to a profitable and regular exchange of information facilitated by the tools of international cooperation.

In light of these developments, the inadequacies of the traditional mechanisms for submitting requests have persuaded judicial authorities to explore the practicalities of more rapid and direct means of cooperation as alternatives to the classic issuance of letters of request. Naturally, the judicial authorities remain respectful of local laws and depend on the consent of foreign states as they see new mechanisms. One example of a new mechanism is the use of spontaneous transmissions of information.[7]

It is useful to recall the well-known *Recommendation of the Council of Europe concerning guiding principles in the fight against organised crime of 19 September 2001*, which calls on member states to remove the impediments to effective cooperation among judicial authorities and law enforcement agencies. In particular, it recommends that member states (1) respond promptly to all requests of mutual legal assistance related to offences committed by organised crime groups, (2) ensure the direct transmission of requests for legal assistance in emergency cases or *for the purposes exchanging information*, (3) ensure coordination of police and judicial cooperation by establishing channels and methods of direct and swift international cooperation and intelligence exchange, (4) *ensure that the procedural requirements of the requesting state are taken into account when executing its request for mutual legal assistance, to enable it to make easier use of the evidence*

[7] On this point, see Calvanese (2003), pp. 458 ff.; Diotallevi (1998), p. 915.

collected on its behalf in criminal proceedings, (5) facilitate *joint* police and law enforcement operations with foreign liaison officers.[8]

Clearly, in this changed environment, knowledge of foreign languages by the *dialoguing parties* and exchange of information facilitate regular and useful updating of the criminal investigation and the criminal networks under investigation.

As regards current linguistic practice, the most common language used by the judicial authorities of the European Union is English. While the pronunciation of English may differ considerably from that of its native speakers, the language nonetheless functions successfully as a *lingua franca for judicial cooperation* and has made a considerable contribution to the evolution thereof.

Knowledge of a common working language is a very useful asset for investigators working in a group.

The issues arising from a differentiated set of language arrangements among EU states *carry particular weight when applied to instruments of cooperation that are based on the principle of mutual recognition*.

Here it is worthwhile returning to the distinction between multilingualism in the sense of the capacity of judicial officials to express themselves in foreign languages and multilingualism in the sense of a differentiated set of language arrangements that reflect the particular national identities of different states, for the two definitions have very different implications.

5 *Multilingualism*, Judicial Cooperation, and Instruments Based on the Principle of Mutual Recognition: The EAW

Legal instruments based on the principle of mutual recognition are not only characterised by the directors of the relationship between the judicial authorities that is intrinsic to them but also have led to a reduction in the number of cases in which execution is refused. They have also helped to eliminate *political discrimination regarding their execution* and have transcended the principle of double indemnity.

The practical operation of this principle, which now has a specific legal basis in the form of article 82 of the Lisbon Treaty, depends on the mutual trust of judicial authorities and national legal systems, which have agreed to allow judicial authorities to issue decisions to be executed in foreign jurisdictions as if they were acting on their own home soil. This mutual trust is rooted in a set of values that different legal systems share and understand in common. To foster this trust, the divergences that undeniably still exist need to be reduced by means of appropriate policies of regulatory harmonisation.

[8] The text of the Recommendation can be read in *Dir. pen. e proc.,* 2001, p. 1575.

Multilingualism, understood as the language skills of individual magistrates, has an important function to play here in that it can contribute to the inculcation of a European judicial culture, which is a necessary preliminary to the building of mutual trust among the judiciaries of different nation states.

Judicial *multilingualism* is therefore conducive to the proper functioning of the instruments that rely on mutual recognition of judicial powers and has a positive impact on the *practicability* of the system.

On the other hand, if we consider *multilingualism* in its other sense as referring to differentiated language regimes, we can see that *multilingualism* can have a negative impact on the instruments of cooperation.

Let us look at the EAW. The rules governing the surrender of persons to a jurisdiction are set out in Decision 584 of 13 June 2002.

The above-mentioned decision introduces an important innovation in the systemic language of the law in the form of 32 offences that give rise to surrender pursuant to a EAW without any need to verify the double criminality of the act. In doing so, the framework decision on the EAW gives priority to the *nomen iuris*, that is to say, to the linguistic definition of the offences, regardless of whether they fully correspond to specifically recognised criminal acts in the national legislation.

The recourse to a common *nomen iuris* is based on the understanding that the criminal categories as set out in article 2(2) in the Decision in any case referred to legal concepts already known to supranational law and that, for the most part, had already been subject to harmonisation on national statute books. Further, some countries, Italy among them, implemented the framework decision by aligning specific elements of domestic law with the indications set forth in the decision, where this method of transposition was justified by the need to ensure close adherence to the principle of legality and mandatory nature of the provisions.

This led to a first practical problem, which was that the Italian judiciary then had to verify whether the specific case indicated in an arrest warrant issued abroad could be referred to one of the categories of offence transposed into Italian national law. This practical issue was not particularly problematic, thanks also to the interpretation provided by the European Court of Justice regarding the position of the states affected by the framework decision in regard to the specific legal requirements foreseen by national law.

The repercussions of the differentiated language arrangements on the task of drafting the EAW were more far-reaching. To begin with, we need to consider the specification of article 8 of the framework decision, which states that the EAW must be translated into the official language or one of the official languages of the executing member state (in the case where more than one official languages have been used). Yet each member state at the moment of adopting the framework decision into national law, or at a later date, made it clear that it would accept a translation in one or more other official languages of the European community.

In the section dedicated to this issue, the European Handbook on EAW describes the language arrangements accepted by the member states. The picture is extremely confused and suggests a lack of common purpose or, at least, an agreed approach. The situation is as follows:

Certain states (Bulgaria, France, Greece, Italy, Poland, Portugal, Ireland, United Kingdom) accept the EAW in *just one language*: their own;

Others (Austria, Germany) accept the EAW in a language other than their own, subject to reciprocity (i.e. as long as the warrant is issued by the court of a state that agrees to accept from the executing state communications in the latter's language);

Then there are those states that accept the EAW in more than one language: Belgium (French, German, Dutch), Cyprus (Greek, Turkish, English), Denmark (Danish, English, Swedish), Estonia (Estonian or English), Latvia (Latvian, English), Lithuania (Lithuanian, English), Malta (Maltese, English), Netherlands (Dutch, English, or other official EU languages if accompanied by a translation into English), Romania (Romanian, French, English), Slovenia (Slovenian, English), Sweden (Swedish, Danish, Norwegian, English);

Still other states accept the EAW in a language other than national if there are bilateral treaties with the country from which the request was made: namely, the Czech Republic and Slovakia, which have a bilateral treaty between them, as well as a bilateral treaty with Austria, and therefore also accept the EAW in the national languages of those countries;

Certain states accept the EAW in their national language or else in French, English, and German only, but provided that the counterparty state is not one such as Hungary, which accepts the EAW only if drafted in its national language (Hungarian);

And, finally, there are states, such as Spain, that accept the EAW in their national language only but will undertake to translate the EAW from a different language if advised in advance by means of an alert from the Schengen Information System (SIS).

The highly diversified language regime described above has caused quite a few practical problems, delaying and sometimes compromising the success of the surrender procedures. The problem is replicated and compounded by the additional information often requested by the receiving authority, a fact that is not even taken into consideration by the Framework Decision.

The point has been remarked on in evaluation reports by the Member States on the functioning of instruments for fighting organised crime (the fourth round of mutual evaluations focused on the EAW). At point 3.5 of the final report of 21 April 2009 (Document 8302/09), the Council of the European Union makes some interesting comments on the impact of the diversified language regime on the operational effectiveness of the EAW.

In particular, the report observed that the effective functioning of the instrument has been compromised by the scarcity of translation capacity in some Member States, the costs of translation, difficulties in translation into some of the less common languages, especially when translation has to be provided in a short period of time. The problem derives from the fact that a transmission for the purposes of delivering an arrest warrant must be preceded by the entry of the A+M forms into the SIS and the subsequent detention of the suspect by the authorities

of the state in which the suspect is to be found, which must then be followed by the transmission of the EAW within the time frame allowed, which varies from state to state but may be as short as 48 h.

However, the various reports also found that some national authorities would accept EAWs in a foreign language, especially in cases of emergency or for the purposes of receiving the transmission of additional information.

For these reasons, the final report on the fourth round of mutual evaluations includes a specific Recommendation (no. 5) for Member States, encouraging those that have not yet done so to adopt a flexible approach to language requirements in the light of Article 8(2) of the Framework Decision so that the EAW and additional information in languages other than the Member State's own are accepted.

In conclusion, in the light of the procedures involving Eurojust, the command of one or more foreign languages by the judicial operators working in the area of judicial cooperation is an ambition to be nurtured. It is also an ambition that is far from being realised, especially among Italian members of the Italian judiciary. The historical backwardness of Italy in this respect reflects the more general problem of poor standards of language teaching in the country, and the many training initiatives promoted by the Consiglio Superiore della Magistratura (the Italian magistrates' Council) have proved only a partial remedy. The road ahead is still long.

Pending better language training at a more general level, which is what the European Judicial Training Network is trying to do by means of various projects that also involve Italian educational establishments, the EU has many other instruments available to facilitate and support national judicial authorities.

6 The Eurojust's Perspective: Coordination of Investigations, Problems of *Multilingualism*, and Opportunities for National Authorities

The organisation and the internationalisation of crime has triggered the adoption of a model of cooperation that transcends traditional arrangements and prioritises judicial coordination, which has become a key part of the fight against transnational organised crime, and complements the system of police coordination that is the remit of Europol.

Eurojust was set up by Decision No. 187/2002 of the Council as a facilitating body for the various national judicial authorities, with the primary objective of promoting "cooperation between the competent authorities of the Member States, in particular on the basis of Europol's analysis".

Its purpose is to overcome the intelligence and strategic asymmetries that render it difficult for national authorities to combat cross-border crime. The competent judicial authorities of the member countries may attend coordination meetings to discuss issues and compare notes. These meetings are the heart of Eurojust's work because it is there that the essential judicial and material elements are determined

and clarified so that the national authorities may then pool their information and agree operational strategies for individual cases. Eurojust is the forum at which problems relating to the enduring divergences in the Member States' criminal and legal systems—which are built on a dispersive principle of territorial competence and remain insufficiently harmonised—are tackled and, often, resolved.

Even with the limitations that are natural to an organisation that came into existence so recently and is still trying to find the right balance between its judicial and the administrative/management wings, Eurojust stands out above previous institutions (which relied on liaison magistrates and on EJN, a network of contact points) for the way in which it has effectively marshalled and coordinated a series of operational protocols for the management of cases presented to it by national authorities.

Its formation marked the first-ever supranational European body capable not only of expediting the execution of letters rogatory (and thereby improving judicial cooperation in its traditional sense) but also, and above all, of carrying out its activities autonomously, unlike the previous manifestations of judicial coordination mentioned above. Eurojust is the first body that has created the conditions conducive to the "verticalising tendency" that is now part of investigative activities to combat transnational crime, and it has done so by means of a "light-touch centralisation" of judicial powers and functions in a supranational body.

Also from a structural point of view, the change has been the radical. Eurojust is a body with branches among the individual national authorities, and in this it resembles the European Judicial Network (EJN), but unlike the EJN, it has a central headquarters (in The Hague), to which representatives of 27 Member States of the Union are posted.

One of the main problems of Eurojust is its lack of binding powers in respect of national authorities for the purposes of enforcing necessary coordination. Decision 426 of 2009, which made several amendments to the previous Decision 187, was adopted in response to the need to enhance and strengthen the operational capacity of Eurojust. All in all, however, the new regulatory framework cannot be judged an unmitigated success. Indeed, while the relationship between national delegates at Eurojust and their own national judicial authorities was considerably strengthened, the powers of the national members and of the college remained essentially unchanged. Eurojust remains a *mediator*, and although its ability to mediate encompasses several forms of intervention, it still has no mandatory powers.

The regulatory tendency is towards the granting of such prerogatives to Eurojust, also in the light of Article 85 TFEU, which envisages the assignment of binding powers to the organisation so that it may fulfil its coordination function and, particularly, intervene with authority to resolve conflicts of jurisdiction.

The working language of Eurojust: The language issue at Eurojust needs to be addressed from three perspectives—analysis of the regulatory framework that governs Eurojust, operational relations between national members and permanent Eurojust staff, and relations with national authorities as mediated by Eurojust.

With regard to the first perspective, we can observe that the official EU language arrangements are applicable also to Eurojust (Article 31 of the Council Decision of 28 February 2002). This means that the external and official acts of Eurojust destined for national authorities are translated into all the official languages of the member states.

English tends to be the language of official correspondence between Eurojust and other agencies (OLAF and Europol) and bodies such as the Council, the Commission, and Parliament and is also used in relations between the various national members.

As for relations with national authorities, it goes without saying that each Eurojust representative expresses himself or herself in his or her own language when communicating with his or her national judicial authorities and vice versa. In the communications in question, consideration also needs to be given to the impact of institution of the on-call coordination (OCC) system, as defined in Article 5a) of the new Decision (Council Decision 426 of 16 December 2008).

In application of the *OCC*, a caller can get in touch with his or her own national member in Eurojust and may also request a phone connection to the national member of another country, with which the caller wishes to execute a letter rogatory—or execute any other instrument based on mutual recognition. In these cases, the conversation shall be conducted (and recorded) in English.

When national judicial authorities meet at Eurojust for coordination meetings, they may use their own national language and avail of *simultaneous interpretation services*, which undoubtedly represents an important additional resource at the disposition for European judiciary.

It should be emphasised, however, that, as indicated earlier, the real value added of Eurojust as a coordinating body is that it serves as a means for various national representatives to engage in dialogue, including through electronic communication, using a single working language: English. The direct observation and perceptions of those who work within the body is that the use of a single language helps remove the barriers between states, improves mutual understanding, and facilitates problem-solving that might otherwise have taken longer. In practice, national members often act as *supranational offshoots* of their national authorities. This gives practical effect to the ideal of a direct relationship between judicial authorities in which national representatives act as envoys.

Their role is destined to become even more important once article 13 of Decision 426 of 2009 is put into practice. The Article in question requires national authorities to increase the flow of information that, apart from letters rogatory, needs to be communicated and transmitted to their national representatives for the purposes of analysis, identification of useful links between investigations pending at a European level, and therefore supranational coordination of investigations.

In the drafting of reports, in the conduct of judicial cooperation, and in the life of the organisation, English is effectively the *only real lingua franca*. If we look for the reasons for the success of English in the area of judicial cooperation, we find that it can be attributed to eminently practical reasons to do with the simplicity and broad dissemination of language, especially among the newest member states of the EU.

Another no less important reason is cultural: the Anglo-Saxon world has proved itself exceptionally capable of exporting English on a global scale in many other sectors besides the law (e.g. art, music, etc.), and this has favoured the spread of language.

7 *Multilingualism* and the *European Space* for Freedom, Security, and Justice: A Need for Specialist Approach in the Judicial Training

The study of foreign languages is not a regular part of the culture of magistrates or of other professionals working in the legal sector. As has been acutely observed,[9] the study of languages would form the basis for the full implementation of Article 12 of the preliminary provisions to the Italian Civil Code 12, which distinguishes between the literal meaning of words as "signifiers that are part of a set that derives its meaning from a linguistic structure"; the content of the words, which belongs to the domain of concepts (the logical interpretation); and, above all, the value or intention of the words (i.e. the changing historical context in which they are interpreted).

Multilingualism is a necessary professional tool for a European magistrate or judge. To ensure that the European judicial area is not merely a name without meaning, it is increasingly necessary for the magistrates and judges of different countries to talk to each other so that they can understand each other's legal reasoning in the light of their different legal systems. Without this, all efforts at harmonisation are bound to fail.

A Europe-wide system of justice cannot exist until an authentically "European" judicial figure is created. The increased role of the judiciary suggests that special attention should be given to the vocational training of legal operatives, central to which must be knowledge, including of a practical nature, of supranational law. This is one of the necessary conditions for the creation of a European area of justice.

The *European Gaius* project recently approved by the *Consiglio Superiore della Magistratura* is but the latest initiative—though a very ambitious one—for the formation of common European legal culture and the dissemination of an authentically European judicial culture among the magistrates and judges of Italy.

The issue of multilingualism has an important bearing on the vocational training of the judiciary and requires fresh *educational approaches* that take into account the constant shift of reference towards non-Italian legal sources and the increasing focus on European jurisdictions.

The steps set out above, which some of the more observant commentators have been urging for some time, have now become fundamental to the completion of the task of building a European area of freedom, security, and justice as envisaged in

[9] See D'Alterio (2010).

the Lisbon Treaty. In fact, Article 82(2d) of the Lisbon Treaty specifies that the European Parliament and Council, following ordinary procedures, shall adopt measures to support, inter alia, the training of judges and judicial staff in general.

Language training for the judiciary forms an essential and indispensable part of a common legal curriculum that has the broader objective of engendering a European legal culture among members of the Italian judiciary.

The importance of judicial training was reaffirmed in the 2010 Communication of the European Commission for the implementation of the Stockholm Programme. The Communication noted that the multi-annual programme needed, *inter alia*, to pursue the objective of ensuring *systematic* training in European legal affairs for all new judges and prosecutors.

In 2011, the Commission also presented a new Communication on a renewed action plan on European education, to support all legal professions and foster pilot projects as part of the general framework of exchange programmes.

The question of judicial training in a European context has therefore been explicitly linked to the question of the language training of legal practitioners on the grounds that linguistic skills are essential for direct access to international and European legal texts and useful also for the purpose of enhancing direct dialogue between judicial authorities, the end goal of which is to build and develop a network of relations based on mutual trust among different national legal systems.

The consolidation of the *confiance mutuelle* (mutual trust) based on mutual recognition necessarily implies the construction of a common cultural base among the different national authorities, and common language training is a cornerstone of this process.

For this reason, we fully agree with the conclusions of the Resolution of the European Parliament of 23 November 2010, which states at *point* I: "*Whereas the co-existence of different legal systems within the Union should be seen as a strength which has served as an inspiration for legal systems all over the world; however, divergences between legal systems should not constitute a barrier to the further development of European law; whereas the explicit and conceptual divergence between legal systems is not in itself problematic; whereas, however, it is necessary to address the adverse legal consequences for citizens arising from this divergence; whereas the concept of regulatory emulation, or a "bottom up" approach to convergence, should be applied through the encouragement of economic and intellectual communication between different legal systems; whereas the ability to comprehend and manage the differences between our legal systems can only come from a European judicial culture which needs to be nurtured through the sharing of knowledge and communication, the study of comparative law and a radical shift in the way law is taught in the universities and judges participate in training and professional development, as explained in Parliament's resolution of 17 June 2010,including additional efforts to overcome linguistic barrier*".

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Part II
Multilingualism and Legal Acts

Multilingualism in the European Union Decision-Making Process

Manuela Guggeis*

Abstract Multilingualism constitutes an organizational challenge in the European Union not only in terms of human resources but also in terms of working methods that have to be adapted to the particularly complex decision-making procedures involving a multiplicity of actors and conducted to a strict timetable. This is illustrated by means of the Directive of the European Parliament and of the Council on the Right to Information in Criminal Proceedings, which also serves as an example of the difficulties encountered and the criteria used in the choice of EU legal terminology.

Abbreviations

COREPER	Comité de représentants permanents
EU	European Union
MEPs	Members of the European Parliament
OJ	Official Journal
TFEU	Treaty on the Functioning of the European Union

1 Introduction

The European Union (EU) is the only international organization in the world that recognizes all the official languages of its Member States as authentic and provides the administrative and organizational structure for implementing a comprehensive multilingual regime. But multilingualism in the European Union cannot be reduced

*The Views expressed are those of the author and do not necessarily reflect the official opinion of the Council.

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simply to an impressive effort of organization; it can be fully understood only if it is put in context in the decision-making process of this international organization.

In other words, it is necessary to have an overview of this context (in particular, the nature of the EU institutions and the interlocking roles they play in EU decision making) in order to really grasp the challenges faced every day by the European Union in guaranteeing multilingualism.

Furthermore, the very notion of multilingualism acquires a specific meaning in this context and encompasses not only the use of more than one language but also the creation of a new language, which expresses concepts peculiar to the European Union, and is then translated into all other languages. Multilingualism in the European Union means the use of (for the moment) 23 official national languages[1] expressing concepts that are peculiar to the European Union (known as "autonomous concepts") and may possibly be different from the national concepts evoked by the same words.

2 Complexity of the EU Decision-Making Procedure

Jacques Delors once jokingly described the European Community, the forerunner of the European Union, as an "opni", that is, an "objet politique non identifié" (an unidentified political object),[2] a kind of political alien or Martian. Indeed, the European Union has unique features among international organizations, including the fact that it is neither a federal State nor a confederation of States and confers the power of taking decisions that directly impact the national legal orders of all its Member States on very different actors, namely the European Commission, the representatives of the Member States meeting in the Council, and the European Parliament.

Almost all legislative procedures are initiated by the European Commission, which is composed of 27 Commissioners, one from each Member State, who are appointed for 5 years. Its mission is to defend the interests of the European Union as a whole.

There are currently 27 Member States, but the number will increase following future accessions, with Croatia scheduled to join in 2013. They differ greatly from each other in size, population, geography, and economic structure (for example, some are heavily industrialized, while others are largely agricultural). They have very different constitutional forms (whether monarchy, republic, or federation), and their administrations range from the highly centralized to the largely decentralized.

[1] Croatian will become the 24th official language in 2013.

[2] In French, "ovni" means an "objet volant non identifié", that is, an "unidentified flying object" or "UFO".

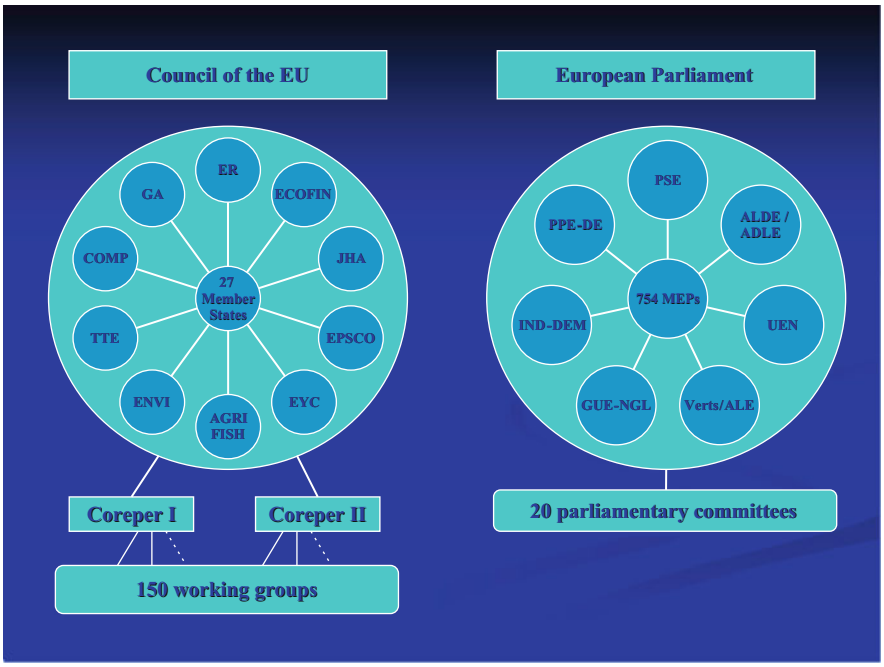

Fig. 1 Configurations of the Council and political groups in the European Parliament

Their legal systems are also very different, with the most striking difference between common law systems and civil law systems.

The Member States must, of course, defend their own national interests. They are represented by Ministers or by the Heads of State or government. The Ministers meet in the Council in ten possible configurations depending on the subject matter (see Fig. 1), and they each defend their own national interests. Each Member State has its own political and electoral life, with the result that the position taken by a Member State on a particular subject may change during the EU decision-making process because the government of a Member State has been replaced by another of a different political persuasion.

The number of votes each Member State can cast is fixed by the Treaties.[3] The Treaties also define the cases in which a simple majority, qualified majority, or unanimity is required.

[3] Since the entry into force of the Lisbon Treaty in 2009, the basic treaties have been the Treaty establishing the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

The work of the Council is prepared by the Ambassadors of each Member State in the body known as COREPER[4] and by national experts meeting regularly in working parties—for the moment, 150 are active in the Council.

The European Parliament—originally called the Assembly—is composed of 754 Members, elected by voters across the 27 Member States, and organized in 7 transnational political groups (see Fig. 1). They adopt the decisions during the Plenary sessions, the work of which is prepared by one or more of the 20 permanent specialized committees. Members of the European Parliament (MEPs) are elected every 5 years in elections held simultaneously in all the Member States.

The MEPs form political groups on the basis of political affinities, but it is no easy task for each political group to decide on one position and then to ensure that the position taken will be adhered to during the votes first in the relevant committee and then in the Plenary. The MEPs represent the interests of the European citizens.

Not only have the competences of the European Union constantly increased, but the decision-making procedures themselves have also evolved. The choice of which competence is conferred by the Member States on the European Union and under which procedure the relevant decisions will be taken is highly sensitive and constitutes a good indicator of the degree of integration at European level.

The sector of criminal law, for instance, was introduced only by the Maastricht Treaty and was governed by the rules of the "third pillar", which meant that decisions were taken by the Council alone, that is, the Member States. It was progressively transferred to the "first pillar" and made subject to the ordinary legislative procedure.

The Lisbon Treaty has simplified the decision-making procedures, which can now be divided into two main categories. The legislative procedure—under which decisions are taken by the Council, together with the European Parliament—or the non-legislative procedure—under which decisions are taken by the Council or, in particular in the case of delegated and implementing acts, by the Commission alone.

The legislative procedure, known also as "codecision", starts with a Commission proposal submitted at the same time to the Council and the European Parliament (see Fig. 2).

If the Council and the European Parliament agree quickly on the same text, a first-reading agreement is reached (see Fig. 3).

If the Council and European Parliament do not reach an agreement at that stage, the system provides for a second reading. If they still fail to agree, a third reading is possible, the so-called conciliation procedure.

After a difficult beginning, the codecision procedure has become an effective way of adopting legislative acts, thanks mainly to the informal meetings between representatives of the Council, the European Parliament, and the Commission,

[4] An acronym from the French "Comité de représentants permanents", the Committee of Permanent Representatives as the ambassadors are known.

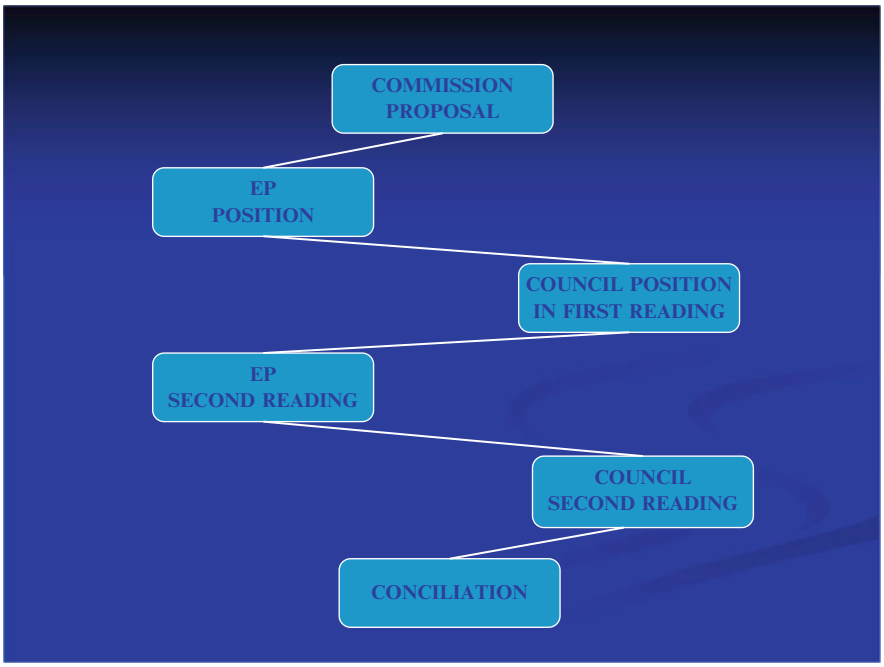

Fig. 2 Codecision procedure

known in the jargon as "trilogues", which have increased the rate of first-reading agreements to 80 %.

3 Implementing Multilingualism in the EU Decision-Making Procedures

It may be said that the complexity of procedures is common to all democracies and therefore not specific to the European Union. Nevertheless, there is one element that is unique to the European Union and that converts the usual democratic challenge into an exceptional one: multilingualism.

In order to implement Council Regulation No. 1/58 on the language regime of the European Union,[5] a complex organization has been put in place in each

[5] OJ 17, 6.10.1958, 385.

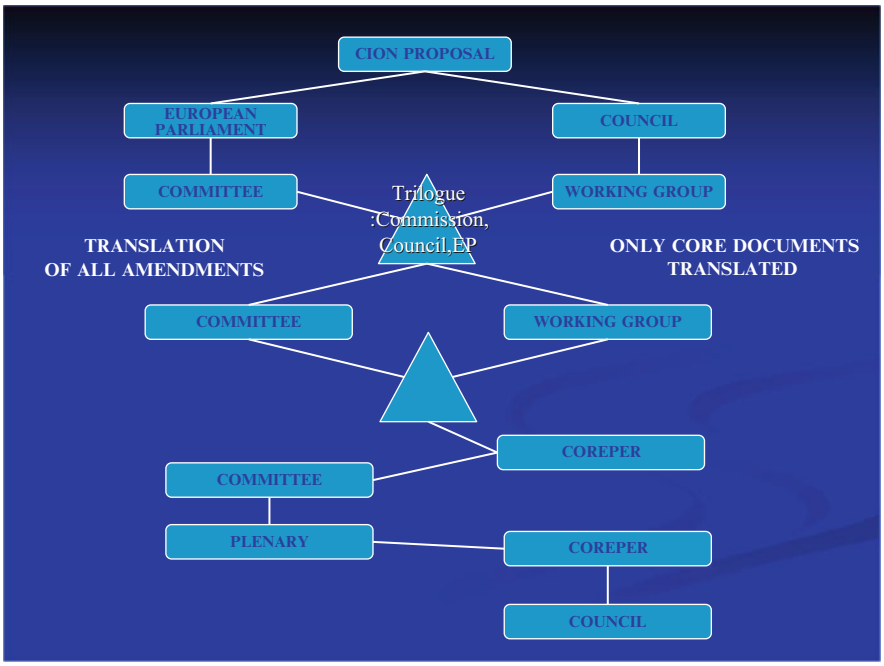

Fig. 3 Codecision procedure: agreement at first reading, Article 294(4) TFUE

institution comprising three main components: translation, interpretation, and legal-linguistic revision.[6]

Since it is clearly not possible to draft texts in 23 languages at the same time, the usual practice is first to write and negotiate the base text in one language and then to

[6] The impact of multilingualism on the organization of the EU institutions is manifested by the following key figures showing the number of staff involved in linguistic matters in the Commission, the Council, and the European Parliament:

- Commission:
  - 2,500 translators;
  - 600 staff interpreters + 3,000 freelance interpreters providing interpretation also for the Council, the European Economic and Social Committee, and the Committee of the Regions;
  - +/− 60 legal revisers;
- Council:
  - 600 translators;
  - 90 lawyer linguists;
- European Parliament:
  - 700 translators;
  - 430 staff interpreters + 2,500 freelance interpreters;
  - 70 lawyer linguists.

translate the result of the discussions in the other languages. This procedure does, of course, give an advantage to the language chosen for the base text and to the persons who have the best knowledge of that language.

The system does, however, incorporate some guarantees in order to preserve the equal status of all the official languages. The first is the fact that the text in the base language used during the negotiations can always be changed as a consequence of the observations made in the light of the translations, the process known as "retroaction". When the persons involved in the procedure have the possibility to examine the translation of the negotiated text, they may consider that problems arise not because the translation is incorrect but because of the way one element is expressed in the base language. In that case, they can, notably during the legal-linguistic revision and the lawyer-linguists expert meeting, ask for the base text to be changed.[7]

Furthermore, both the Commission and the Council provide an editing service for the desk officers who have to draft texts in a language that is not their mother tongue.

Due to time and budgetary constraints, relatively few working documents are translated into all languages. Within the European Commission, English, French, and German are generally regarded as procedural languages, with a clear predominance of French in the early years.

It is important to underline that at the Commission, in 2001, almost 50 % of the texts were drafted in French and then translated into English and German. Today, 95 % of texts in the Commission are written in English, even if only 13 % of the drafters are of English mother tongue, since the EU civil servants are recruited from all the Member States. The situation in the other institutions is similar.

In order to better explain the procedure, we can take as example the Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings.[8]

The Proposal was drafted in English by the relevant department of the Commission, with the assistance of the legal revisers.[9] It was adopted by the Commissioners (Viviane Reding was at the time the Commissioner responsible for Justice and Home Affairs) and then forwarded on 22 July 2010 to the Council and the European Parliament in 22 language versions.[10]

Each institution then started its discussion of the text.

The cost of interpretation for the EU institutions corresponds to 0.26 euro for each European citizen each year.

[7] For further details on the legal-linguistic revision process in the Council and the European Parliament, see Guggeis and Robinson (2012), pp. 51–81, and Robinson (2010), pp. 129–155.

[8] The Commission's proposal is available in EUR-Lex under the reference COM (2010) 392.

[9] The legal revisers of the Commission verify compliance with the formal and substantive drafting rules in order to improve the draft proposal prepared by the technical department competent for the field covered by the act. For further details on drafting in the Commission, see Robinson (2008).

[10] Irish was added to the list of official languages by Council Regulation (EC) No. 920/2005, but a transitional period of five years was laid down, which has been extended by five more years by

At the Council, it was submitted to the working group "on substantive criminal law", composed of experts—in this case, mostly judges—from the national administrations. The text was discussed in English, but full interpretation was provided.[11] However, translation of the amendments agreed by the working party was not provided because, for financial reasons, only "core documents" are translated into all languages, that is, essentially, when the text is submitted to the Council. In the case of the Proposal for a Directive, the text went three times to the Justice and Home Affairs Council before it was finally adopted (7 October 2010, 8 November 2010, 2 December 2010). A text has to be referred to the Council when in the working party, which normally deals with technical questions, a more political issue is raised. The Council has to be informed of the state of play and the outstanding issues so that it can decide the general approach; the position adopted by the Council constitutes the political mandate for the chairperson of the working party when negotiations start with the Commission and the European Parliament.

Within the European Parliament, the Directive was assigned to the Committee for Civil Members of the European Parliament (LIBE); the Legal Affairs Committee (JURI) gave its opinion. The member of the Committee for Civil Liberties, Justice and Home Affairs given responsibility for the file—the "rapporteur"—was Birgit Sippel (a German member of the socialist group, S&D).

The committee met four times. All meetings had interpretation, and all amendments were translated into all official languages. In the same way as in the Council, within the European Parliament to the mandate setting the scope for negotiation has to be given at the appropriate level (depending on the importance of the question, it may be the committee that endorses the rapporteur or the Plenary)

When the Council and the European Parliament have established their respective negotiating positions, they meet with the Commission to bargain and strike a deal. This happens in a restricted meeting called a trilogue. Trilogues are attended, in principle, by the rapporteur and shadow rapporteur (in the European Parliament, the member of the opposition with responsibility for the file), the chairperson of the Council's working party (in the case of very sensitive points, it could even be the ambassador of the country holding the 6-monthly presidency), and the desk officer (at the appropriate hierarchical level) of the Commission. Each of them may be accompanied by his own support staff (desk officers, legal service, lawyer linguists). Although the trilogues are without any doubt to be considered the secret of the success of codecision, and in particular of the first-reading stage, it has to be pointed out that in trilogues there are no interpreters and that the negotiations are conducted in just one language, generally English. Often the deal is reached on the

Council Regulation (EU) No. 1257/2010 (OJ L 343, 29.12.2010, p. 5). During that period, only regulations adopted jointly by the Parliament and the Council must be published in Irish.

[11] This is a rather exceptional situation since in the Council's working parties, interpretation is now provided only upon request of an individual Member State, which has to pay for it. For this purpose, Member States are allocated an annual amount; they can decide if they need interpretation or if they prefer to use (part of) this amount for covering the travel costs of their experts.

policy aspects, with the task of "translating" the compromise into appropriate drafting being left to the desk officers in a separate "drafting meeting". Sometimes lawyer linguists attend this meeting and can provide advice on the best way to formulate the legal text; however, it is not always the case that English native speakers are present.

The final text of the political agreement has to be validated by COREPER and revised by the lawyer linguists.

The legal-linguistic revision represents the third part of the multilingual organization of the European Union.

In each of the three institutions, there are teams of lawyer linguists for all 23 official languages whose task is twofold: to ensure, firstly, that the legal texts are in conformity with the formal and substantial rules of legal drafting and, secondly, that all linguistic versions have the same legal content. For EU legislation that is drafted in 22 or 23 languages and produces legal effects in 27 Member States, the objective is for the message to be clear and, above all, identical for everybody in the European Union. If the contribution of translators and interpreters to that goal is considerable, the ultimate responsibility and last word are for the lawyer linguists.

The following elements of the work of the lawyer linguists should be noted.

The lawyer linguists are independent and not subject to national governments or political parties.

At the Council and European Parliament, they intervene, in the codecision procedure, at two different stages: firstly, during the negotiation leading to the political agreement and, secondly, after the political agreement.

During the first stage, only one lawyer linguist in each institution is in charge of the file (if necessary, with the help of a lawyer linguist who is a native speaker of the language concerned).

At the Council, the lawyer linguist responsible is called "quality adviser" and cooperates with the competent legal adviser of the Council Legal Service. The lawyer linguists attend working parties, trilogies, and COREPER and assist the national experts. The lawyer linguists' opinion, expressed in a text with tracked changes, is not binding; their proposals can never alter the political substance of the text; lawyer linguists submit to the legislator their suggestions in order to improve the readability of the text, but the final decision belongs to the legislator.

The same applies to the European Parliament lawyer linguists: from the outset, one lawyer linguist (called the "file coordinator") assists the rapporteur and the committee in the drafting of the amendments, but the lawyer linguist's suggestions have to be validated by the politicians.

When the political agreement is reached, the second stage of the legal-linguistic procedure begins: together, the quality adviser from the Council and the file coordinator from the European Parliament finalize the text of the political agreement, which is then distributed in each institution to a team composed of one lawyer linguist for each language. Each lawyer linguist verifies his own linguistic version in comparison with the base text and has to agree with the counterpart from the other institution on the final text. It can be said that this process of legal-linguistic revision follows the concept of codecision: the European Parliament and the

Council have to reach an agreement on one text, and contacts and negotiations have to be held.

In the case of the Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, the lawyer linguists intervened after the Plenary had voted (13 December 2011) but before the Council adopted the text (26 April 2012).

An experts meeting was held on 27 February 2012, with the participation of the national experts, assisted by the respective lawyer linguists. The meeting was attended by the European Parliament file coordinator and the desk officers from the Council, the European Parliament, and the Commission. At that meeting, only the English text was discussed. That meeting was the last opportunity to intervene on the text before it became final; during the meeting, each participant could ask for amendments to be considered and, if accepted, introduced in the base text. The Directive was finally adopted on 22 May 2012.[12]

It has to be pointed out that before the Lisbon Treaty, the legal-linguistic finalization of a first-reading agreement took place after the vote in the Plenary of the European Parliament and before the vote in Council. The consequence was that the text voted by the Council was different from the text voted by the European Parliament because of the changes made by the lawyer linguists. Since the entry into force of the Lisbon Treaty, Article 294(4) TFEU provides that the text approved by the European Parliament has to be adopted by the Council in the wording that corresponds to the position of the European Parliament. That has obliged the European Parliament and the Council to change completely their working methods in order to bring forward the legal-linguistic revision before the vote in Plenary. An enormous effort has been made in order to speed up the revision work and make it more effective. As a general rule, it has been agreed between the two institutions that once a political agreement has been reached, the text is to be translated by the European Parliament or by the Council (on the basis of a common decision on sharing the translation workload). The institution that is responsible for the translation also starts the legal-linguistic finalization and transmits the first set of suggestions on the text to the lawyer linguists of other institution. The latter can accept the suggestions or reject them, but in the latter case they have to explain their reasons. The experts meeting is always held at the Council. The average duration of legal-linguistic revision should be 6 weeks.

If it is not possible to revise the text before the Plenary, the old procedure applies (legal-linguistic finalization after the Plenary and before adoption by the Council), but the Parliament has to validate the changes made by the lawyer linguists by means of a "corrigendum" to be voted during a Plenary sitting. Only then can the Council adopt the text.

[12] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).

4 The Problem of Legal Terminology

Multilingualism is a challenge not only in terms of organization but also in terms of the language to be used. The various actors involved in the complex procedure have to find a compromise not only on the substance but also on the words expressing the substance; in doing so, most of them, as explained above, have to work in a foreign language. Finding a solution that suits 27 Member States, 754 MEPs, and the Commission is a major achievement, which is sometimes possible only by using a creative or even ambiguous wording. The same creativity or ambiguity then has to be rendered in all linguistic versions.

The biggest difficulty relates to the legal terminology: The EU legal order is autonomous and has its own terminology. As the Court of Justice stated in the *CILFIT* case, "it must also be borne in mind ... that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States".[13]

Even if the terms used in EU legal acts sometimes coincide with the national terms, a particular effort of interpretation is necessary in order to ascertain whether the EU term and the national term have the same meaning.

That has been clearly explained by the Court of Justice in the case in the *Kozłowski* case,[14] where the scope of the terms "resident" and "staying" contained in Article 4(6) of the Framework Decision on the European arrest warrant[15] had to be determined. Some Member States argued that the two concepts should have been interpreted in accordance with national law. The Court of Justice rejected that argument and stated: "It follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question".

The same principle was confirmed in the *Mantello* case[16] with regard to the words "same acts" in Article 3(2) of the Framework Decision: "the concept of 'same acts' in Article 3(2) of the Framework Decision cannot be left to the discretion of the judicial authorities of each Member State on the basis of their national law. It follows from the need for uniform application of European Union law that, since that provision makes no reference to the law of the Member States

[13] Case 283/81 *CILFIT and Lanificio di Gavardo v Ministry of Health* [1982] ECR 3415, at paragraph 19.

[14] Case C-66/08 *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski* [2008] ECR I-6041; see, in particular, paragraph 42.

[15] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1.

[16] Case C-261/09 *Gaetano Mantello* [2010] ECR I-0000; see, in particular, paragraph 38.

with regard to that concept, the latter must be given an autonomous and uniform interpretation throughout the European Union (. . .)".

In order to avoid confusion with national terminology, lawyer linguists try to avoid national terms by creating neologisms. If this is not possible, they can suggest the introduction in the legal acts of definitions, which clarify the content of a concept and avoid misunderstandings.

5 Conclusions

In the European Union, multilingualism constitutes an organizational challenge not only in terms of human resources but also in terms of working methods that have to adapt to the particularly complex decision-making procedures involving a multiplicity of actors and conducted to a strict timetable.

Furthermore, multilingualism does not mean simply that there are 23 linguistic versions having the same legal content but also that this legal content is conceptually and linguistically new. It is the result of a fusion of 27 legal orders and cultures, a kind of legal, genetically modified organism containing in its DNA the code of the original systems but having its own identity. The final product of the EU decision-making procedures is an autonomous legal order that has to be expressed by means of autonomous concepts. If the terms used in EU legislation coincide with terms in national law, they have to be interpreted in their context in the EU legal order.

This is the explanation for the particular nature of EU jargon, which is often misunderstood and gives rise to criticism of "bad quality legislation". The reality is that, given the difficulties of the decision-making process in the European Union, it is almost a "miracle" that any EU legislation is adopted at all. The particular language used is the price to be paid for having more European integration. And nobody doubts that it is a price worth paying.

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Translation and Interpretation of EU Multilingual Legal Acts: The Viewpoint of a Comparative Private Lawyer

Legal Translation and European Legal Discourse: Some Peculiarities of European Private Law Terminology

Elena Ioriatti Ferrari

Abstract The paper underlines some specific aspects of EU act and case law legal terminology. From a semantic point of view, some peculiarities of the EU's legal terms depend on the methodology adopted by the drafters, which is based more on linguistic coherence than on legal equivalence. However, EU acts and case law also contain implicit national legal models, that is to say, rules that have the same legal effects at the national and EU levels—and are clearly the product of the circulation of pre-existent national legal models—but lack any corresponding conceptual denomination. The article states that these aspects of EU legal discourse should not be ignored by the drafters of the new European legal instruments, particularly the "Common European Sales Law".

Abbreviations

CFR	Common Frame of Reference
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
MEPs	Members of the European Parliament
OJ	Official Journal
TEU	Treaty on European Union
VAT	Value added tax

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1 The European Union's Legal Drafting Process

One of the most challenging aspects of the European Union's institutional framework, albeit an aspect that has, until recently, been little known outside specialist linguistic and legal circles, is the relationship between law and language in the process of EU lawmaking.

This relationship is central to the harmonisation and unification of the law in Europe. Given that language is the means through which the law is expressed,[1] the EU's policy of multilingualism[2] means that any attempt at harmonisation inevitably involves a translation process.

In this regard, the European Union has operated as a sophisticated workshop of multilingual legal drafting and has become an important reference point in scholarly debate.[3] Among the institutions that have become highly specialised in the techniques of multilingual drafting, the European Union is the *ne plus ultra* practitioner of normative multilingualism.[4]

Partly as a result of the principle of multilingualism, the process for making European law is rather complex, being regulated more by praxis rather than by written sources and involving many actors: translators, desk officers, national delegates, MEPs, ambassadors, jurist-linguists, each influencing the final "product".[5]

In drafting its legal texts, the EU has never relied on any pre-existing legal lexicon and could never refer to a single legal culture capable of rendering the same legal concepts in all the languages of the Union. Instead, EU legal terminology is coined day by day, contemporaneously with the drafting of the normative text.

One consequence of this is that legal terms are not simply translated, but created *ad hoc*, in all the official languages. The creation of new EU legal terms is based on calques of words and their reproduction in all the official languages (e.g. "internal market", *mercato interno*). Similarly, words are often created through a semantic mechanism. In this case, a word is transferred formally from one legal language to all the European legal languages: from a semantic point of view, the word remains

[1] Sacco (2001), p. 34; Sacco (2005), p. 1 ss.; Endicott (2002).

[2] The policy of multilingualism (Article 217 of the E.C. Treaty: "*The rules governing the languages of the institutions of the Community shall* ....[omissis]. . .*be determined by the Council, acting unanimously*.") was laid down for the first time in the first Regulation adopted by the Council after the entry into force of the Treaty of Rome on 1 January 1958. The Regulation still constitutes the legal basis for multilingualism within the EU and has never been changed, but simply being updated every time a new Member State joins. According to the Regulation, all the official and working languages of the institutions are placed on an equal footing. The Regulation distinguishes between working and official languages, without giving any definition of the two categories, and prescribes (Article 4) that regulations and other documents of general application shall be drafted in all the official languages.

[3] Boulouis (1991).

[4] See, for all, Šarčević (2000).

[5] Raworth (1993) and Wainwright (1996).

the same, but it acquires a different connotation in the EU context (e.g. the word "directive", *direttiva*). Taken together, these form a series of neologisms and make up the legal terminology of the European Union.

According to the European Court of Justice,[6] this terminology is autonomous and independent from that used by Member States and should therefore be interpreted as belonging to a new legal language.

This drafting technique has been used by the European Community from the very beginning. In the 1950s, the European Community lawmakers focused their harmonisation efforts on technical sectors. The creation of a new legal terminology in areas such as agriculture and food accustomed the EC to legislating without the support and experience of legal scholars. The creation of a European legal terminology became almost automatic and drew on already existing core of legal terms that were simply extended to the languages of the new Member states.

Later, as the European Community turned to the harmonisation of some areas of private law,[7] the same technique was reprised, with the result that the EU applied to the field of private law a terminology that was not based on an established set of concepts or organised into accepted legal categories.[8]

The result of this drafting process is that EU legislation, particularly in the area of private law, gives rise to two different phenomena:

1. EU words may derive from a non-legal context. As European private law has not been organised into a coherent system, the determining factor in the terminological choices of the European legislator is semantic coherence[9] rather than legal categories or general legal principles. As the choice of a legal term is based on the semantic—not legal—equivalence of all the linguistic versions of a European legal concept, the drafter of EU law may be compelled to use a term that already exists in the corpus of European legislation without realising that a different context gives the term a different legal meaning.

   This phenomenon has been called "linguistic precedent"[10] and gives rise to "nomadisms of meaning": identical words are contained in different EU acts, but have different aims and sometimes lack any real underlying legal significance—or, on the contrary, having a precise legal meaning that changes according to context. As we shall see, the Court of Justice is sometimes called upon to reconfigure terminology and the legal meaning of words so that they may be used in contexts other than those in which they were originally formulated and may therefore acquire a new conceptual meaning.
2. As an EU legal text is structured primarily on a linguistic basis and its drafting is the result of the interaction of many actors—the majority of whom are not

[6] See Case 283/81, Judgement of the Court of 6 October 1982, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health.

[7] Gambaro (2004), p. 287.

[8] Gambaro (1988), p. 1010.

[9] Mateo (2006), p. 162.

[10] Ioriatti Ferrari (2009).

jurists—a rule contained in a directive or in a regulation may happen to coincide with a legal concept that is specific to a (or more than one) national system, without the national conceptual denomination appearing in the EU act.

2 First Phenomenon: Words Without Law. Two Examples

As noted above, an EU text is structured primarily on a linguistic basis, and its drafting is based on precise rules that have been set out in instruction manuals adopted in Brussels that seek to ensure semantic and linguistic coherence above all. According to the Joint Practical Guide[11] and the Manual of Precedents,[12] "terminology coherence—mostly intended as the use of the same legal concepts - has to be ensured inside the same act, as well as among the acts already enacted". Linguistic consistency is the touchstone for the European drafter, who is expected to use the same legal terms, particularly in areas where some core of standard terminology already exists (e.g. consumer contract law).

As noted above, linguistic coherence may lead the EU drafter to use a legal term from an existing EU act, even if, depending on context, its legal effect may be very different.

Habitual residence and *free movement of services* are two examples of "semantic nomadism" in the terminology of EU private law.

In 2009, the European Court of Justice had to provide new definitions and determine the different legal effects of the terms with reference to context.[13]

Regarding the term "habitual residence", the ECJ specified that "The case-law of the Court relating to the concept of *habitual residence* in other areas of European Union law[14] cannot be directly transposed in the context of the assessment of the *habitual residence* for the purposes of Article 8(1) of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility".

A second example is "provision of services", which occurs in the primary legislation and is subsequently "reused" in the VAT Directive and, finally, in

[11] Joint Practical Guide of the European Parliament, the Council, and the Commission for persons involved in the drafting of legislation within the community institutions (Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C 73, 17.3.1999, p. 1).

[12] Manual of Precedents for acts established within the Council of the European Union, Secretariat General European Union Council (legal-linguistic experts), July 2002.

[13] See, for further details, Ioriatti Ferrari (2009).

[14] See, in particular, Case C-452/93 P *Magdalena Fernández* v *Commission* [1994] ECR I-4295, paragraph 22; Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 37; and Case C-66/08 *Kozłowski* [2008] ECR I-0000.

Regulation 44/2001 on the jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels I).[15]

In a decision dated 23 April 2009,[16] the Court of Justice declared the expression to be distinct from the same phrase when used in other EU contexts and specified:

(a) "Freedom to provide services" under Article 50 TEU was a broad concept, whose purpose was to ensure that the maximum number of economic activities, not falling within the ambit of the free circulation of goods, capital and persons should not be excluded from the application of the EEC Treaty;
(b) "Freedom to provide services" as adopted in the Community VAT Directives was, however, a negative definition, since the concept of "provision of services" is defined as any transaction which does not constitute a supply of goods.

It is clear from the Court's decision that in the context of Article 1(a) of Regulation 44/2001, "provision of services" relates to the place where the service is performed and serves to settle the question of jurisdiction, in which sense it is contrasted with the word "sale".

These two examples demonstrate that the EU Court of Justice, in the absence of a theoretical framework in which to place EU legal terms, has proved efficient not only at addressing the problems raised by nomadic meanings but also at constructing definitions, concepts, and legal categories.[17] The Court of Justice thus assures terminological clarity for the concepts that make up the EU taxonomy of laws.

This role of the Court of Justice is particularly important for the harmonisation of the law in Europe as national courts must apply a European law as it is expressed in the official legal language, which forms the reference text for the interpretive process.[18] As far as the national courts are concerned, the language of the law is usually viewed in isolation, with the result that judges have to take a leap in the dark, so to speak, since it lacks contextual referents.[19] The text is inserted into a nexus of national references and referents, which are recognisable by the relevant legal community.[20]

The legal lexis of the European Union is still inchoate and unconsolidated. It is within this new linguistic[21] and legal[22] space that the European Union is building a

[15] Commission Regulation (EC) No. 280/2009 of 6 April 2009 amending Annexes I, II, III, and IV to Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

[16] C-533/07, European Court of Justice, 23 April 2009. Falco Privatstiftung e Thomas Rabitsch against Gisela Weller-Lindhorst (Oberster Gerichtshof—Austria).

[17] Sacco (1991), p. 217.

[18] Hirsch Ballin and Senden (2005).

[19] Derlén (2007).

[20] See Ajani and Rossi (2006), p. 132.

[21] Cosmai (2007), p. 28.

[22] Ferrarese (2008), p. 13 ff.; Belvedere (1994), p. 21.

new specialised legal metalanguage, which is not the expression of a pre-existing common European legal culture. Not being able to refer to an established legal culture, national courts will tend to refer to their own national context instead. The nature of the national legal languages in which the European concepts produce legal effects does not always make it possible for national courts "to be ventriloquists for lawmakers who have concealed, or do not even possess, a line of reasoning".[23]

The example of a case recently heard in Italy seems relevant here; a decision of a court of first instance (Tribunale) reveals how the clearer definition of the term "provision of services" offered by the EU Court of Justice would have helped guide a national judge towards an appropriate decision in a case concerning jurisdiction.[24]

An Italian firm with registered offices in Trapani sued a British firm with registered offices in London for breach of contract. According to the contract, the British firm was obliged to produce items of clothing in accordance with the Italian firm's instructions and the Italian firm was obliged to purchase the clothing.

Owing to the transnational nature of the contract, jurisdiction was determined pursuant to the EC Council Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.[25]

According to Article 5(b) of the Regulation, the competent court is determined according to the place of performance of the obligation, which may vary according to whether the contract is justified as a "sale" or a "provision of services".[26]

Here, the plaintiff maintained that the agreement amounted to a contract of sale. The British firm was sued in Italy, as Trapani was the place of performance of the obligation to deliver the good.

The plaintiff did not accept that a British court was competent to decide the case on the ground that the agreement referred to a "provision of services".

In deciding the issue, the Italian court—wrongly—chose to maintain jurisdiction and based its decision on the case law of the Italian Supreme Court (Corte di Cassazione). According to the Supreme Court, for the purpose of qualifying the disputed agreement, it was necessary to consider the characteristic obligation

[23] Sacco (2003), p. 88.

[24] Tribunale Trapani, 9 June 2010.

[25] Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

[26] 1. A person domiciled in a Member State may, in another Member State, be sued:

(a) In matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) For the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- In the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
- In the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.

of the contract itself. An agreement whose primary purpose is to define the terms for the supply of a good, the court decided, will be classified as a contract for the "sale of goods", and an agreement whose primary purpose is to define the terms for a provision of services is a "provision of services" contract. By following case law, the Italian Court of Trapani came to the conclusion that the legal relationship at issue was a contract of sale.

However, the European Court of Justice too intervened to reconfigure the terminological and legal significance of the two terms at issue.

Like the Italian Supreme Court, for the purposes of classification, the Court of Justice considered the characteristic obligation of the contract, but in a more detailed and precise way. In particular, the Court of Justice examined the issue of the supplier's responsibility with reference to the interpretation of Article 5(1b) of Regulation No 44/2001. According to the EU Court:

> *If the seller is responsible for the quality of the goods—the result of its activity—and their compliance with the contract, that responsibility will tip the balance in favour of a classification as a 'contract for the sale of goods'. On the other hand, if the seller is responsible only for correct implementation in accordance with the purchaser's instructions, that fact indicates rather that the contract should be classified as a 'provision of services'.*[27]

This distinction has a direct bearing on the qualification of the contract because the British firm was producing items of clothing in accordance with the Italian firm's instructions. In the light of the definition elaborated by the European Court, the contract concluded between the Italian and the British firms was therefore a "provision of services".

The Italian court's ignorance of EU terminology prevented the effective application of Article 5(1b) of Regulation No 44/2001, the primary intent of which is to consolidate the rules of jurisdiction and ensure they are predictably applied at the European level.

3 Second Phenomenon: Law Without Words. Two Examples

For centuries, law has been expressed principally through words and, more specifically, through concepts. Concepts condition those using them. Sacco has shown on a number of occasions how conceptual differences correspond to similarities among

[27] Case C-381/08, Judgement of the Court (Fourth Chamber) of 25 February 2010, Car Trim GmbH v KeySafety Systems Srl. Reference for a preliminary ruling: Bundesgerichtshof (Germany). The referring court is asking the Court of Justice, in essence, how "contracts for the sale of goods" are to be distinguished from "contracts for the provision of services", within the meaning of Article 5(1)(b) of Regulation No. 44/2001.

operative rules but that unless questions of interpretation are approached from the perspective of comparative law, asymmetries will go unnoticed by jurists.[28]

The use of concepts leads us to forget that people have always created law simply by executing rules, without recourse to words or legal concepts.[29]

EU law is full of implicit national legal models, rules that have the same legal effects at the national and the EU levels, and are clearly the product of the circulation of pre-existent national legal models, but lack any corresponding conceptual denomination.

An example of this phenomenon is the category of *Vertragsverletzungen/obbligations de sécurité/obblighi di protezione*, a legal concept that has undoubtedly spread implicitly from national legal structures into the EU legal system.

The notion *Vertragsverletzungen/obbligations de sécurité* arose almost simultaneously in German and French laws and was associated in both legal systems with the need to give legal recognition to the principle that someone who suffers damage during the fulfilment of a contract has a right to compensation, whether or not the person was party to the contract.

In Germany, following Staub's[30] formulation of the category of *Vertragsverletzungen*, Stoll[31] created a new structure for the implicit "obligations" of a contract that includes the main performance obligation plus a set of subsidiary obligations: among them, the duty to protect any person, even if not part of the contract but somehow connected to it. The legal basis lies in the principle of *bona fide*.

At almost the same time, the *obbligation de sécurité* was formulated in France,[32] in which the subsidiary obligations referred to the goods and person of the other counterparty. In some contracts, such as those involving transport these obligations coexisted with the principal performance.

This model has been imitated in a number of other legal systems, including Italy's, albeit with considerable variations from the French and German systems.[33]

In these legal systems, the *Vertragsverletzungen/obbligations de sécurité/obblighi di protezione* arises from the rigid limits of the sphere of application of the category of "contractual liability" and that of "no-contractual liability". In some cases, it is not clear "whether the protection given to the contracting parties during the execution of the contract coincides with, or diverges from, the protection given by a contracting party to a third party who has sustained damages to his person or property in the execution of the contract".[34] However, as the action in tort is more flexible as in the continental legal systems, in the English legal system the need of a

[28] Sacco (1992), p. 43 ff.

[29] Sacco (2007).

[30] Staub (1902), p. 93.

[31] Stoll (1932), p. 257.

[32] Savatier (1951), p. 168; Rabut (1948), p. 72.

[33] Canaris (1983), p. 822; Benatti (1991), p. 221 ff.; Benatti (1960), p. 1342; Castronovo (1977), p. 123 ff; more recently, Varanese (2005), Lambo (2005).

[34] Carai (2010).

tertium genus was less urgent than in Italy, France, or Germany. As a consequence in England, this new concept is included in the "duty of care" and has not being clearly defined by scholars or by court decisions.[35]

This national concept has not officially entered the terminology of the European Union; however, a deeper analysis that goes beyond solely terminological considerations reveals that EU law has in fact, on at least two occasions, had recourse to these originally German and French models, with corresponding legal consequences, yet without explicit reference to the concept of *Vertragsverletzungen/obbligations de sécurité*.

The first example is that of the Proposal for a Council Directive on the liability of suppliers of services.[36]

The Proposal for a Directive on the liability of suppliers of services was intended to create, in combination with the Directive on product liability, a harmonious and comprehensive system for subsidiary service sectors.

The central idea in the EU act is that the injured party shall have the right to compensation for any damages sustained.

According to the Proposal, not only the recipient of the service but also any "bystanders" are considered to be injured parties, as are parties who happen by chance to be in the building where the service is being rendered or, in general, anybody who has been injured as a consequence of the service.

Italian legal scholars consider relationships between suppliers of services and injured parties as *obligations de sécurité/obblighi di protezione*, the breach of which gives grounds for contractual liability.[37]

The second example is a decision of the Civil Service Tribunal of the European Union.[38]

The case concerns an EU official, Alessandro Missir Mamachi, assigned to the Commission's delegation in Rabat as head of its political and economic section, who was murdered with his wife on the night of September 17th 2006 by a robber who had gained entrance to the house by slipping through the bars on a ground floor window.

In 2011, the victim's father, acting both on his own behalf and as the legal representative of the victim's legal heirs, sued the European Commission for damages, claiming that the Commission had a *duty to protect* its staff. The claimant noted that the Commission had not fulfilled its obligation as an employer in that it had not taken adequate measures to protect the building that it had provided for its

[35] Lambo (2005), p. 174. The Nord American system has solved this problem by creating a hybrid model—between "contractual liability" and "no-contractual liability"—the *tortiuos breach of contract* that contains elements of both liabilities: Carai (2010).

[36] Proposal for a Council Directive on the liability of suppliers of services, COM (90) 482 final, 20 December 1990.

[37] Castronovo (1994), p. 273 ff.

[38] Case F-50/09, Judgement of the Civil Service Tribunal (First Chamber) of 12 May 2011, Livio Missir Mamachi di Lusignano v European Commission, Public service—Officials—Action for damages.

employee. The English version of the court opinion[39] stated that the commission failed to fulfil its "*duty to protect*" and as a consequence it had a duty to pay compensation for the injury suffered by its employee living in a third country, which should also cover his family members.[40]

Reading the German, Italian, and French translations, both the claimant's and the Civil Service Tribunal's appeals to the category of *Vertragsverletzungen/ obbligations de sécurité/obblighi di protezione* are clear[41]*:* the circulation of the national model is unmistakable, although not explicit.

4 European Private Law Discourse: The Way Forward

Over time, the perceived legitimacy of the EU in the area of law has increased, while its social function has become ever more complex, and this is inevitably reflected in the area of private law. The widening of the scope of the EU's legal competence means that as new situations arise, they have to be legally enshrined in the EU, thus prolonging the process of harmonisation.

The European Commission itself warned, in a 2001 Communication,[42] that the instruments hitherto used by the EU—regulations and directives—are inadequate to the task of harmonising the laws of the various Member States. These instruments

[39] The Civil Service Tribunal dismissed the action on the grounds that the Union is obliged to protect its officials only against actions by third parties that the officials suffer by virtue of their position or duties. According to the Court, the applicant's son was not murdered for reasons connected with his position and duties: "*He was the target of a common criminal, who attacked him, his wife and his possessions without any knowledge of the victim's position as an official of the Union or of the nature of his duties. The criminal probably thought that the occupants of the villa where he committed his crimes had a higher standard of living than the average inhabitant of Rabat, but neither that circumstance nor the posting of the applicant's son to Morocco nor the occupancy of accommodation chosen by the Commission establish that the official was targeted because of that position and by reason of his duties*". Decision, p. 224.

[40] In support of his case, the claimant cited a leading precedent from the European Court of Justice, in which an employee of the European Commission claimed compensation for failure to guarantee a healthy work environment, Case C-181/03 Albert Nardone v. European Commission. The circulation of the model is quite evident in the appeal to precedent; the category "*obblighi di protezione*" was also accepted implicitly in Italy for the first time in a case concerning damages resulting from a tenant's use of an unhealthy habitation, Court of Appeal, Rome, 30 March 1971. The case involved the damage done to the health of the wife and daughters of a tenant due to the unhealthiness of their accommodation. The claims, rejected by the lower court (Tribunale Roma), were accepted by the Court of Appeal in Rome, which, although did not explicitly make reference to the violation of an "*obbligo di protezione*", nevertheless recognised the wife's and daughter's right to compensation.

[41] Italian version: *obblighi di protezione*. French version: *obbligations de sécurité*. German version: *Verplifchtung zum Schutz*.

[42] Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11.07.2001, COM(2001) 398 final.

have achieved only a minimum level of harmonisation and do not guarantee that EU law will be interpreted and applied uniformly across the EU. The terminology used is very abstract and is open to different interpretation by different European national legal systems.

Subsequent Communications from the Commission (2003, 2004, 2010[43]) have shown that while, on the one hand, EU interventions are constantly moving in the direction of maximum harmonisation—the Directive on Consumer Rights,[44] for instance—on the other, it is clear that this growing complexity requires the adoption of new legal instruments in order to construct a real system for private law, one that transcends national borders and can become a permanent benchmark for legal categories and concepts. Since the 2003 Communication,[45] the Commission has mapped the route to be taken in the Common Frame of Reference (CFR) for the issuing of directives, regulations, and national laws enforcing EU acts.

At the same time, the CFR will be the basis for the drawing up of a "Common European Sales Law"[46] (the former so-called Optional instrument), a European set of rules that can be chosen by the parties of a sales contract, as applicable law, in case of dispute.

The effect of these EU initiatives has been that, although private EU law continues to be an indirect instrument for the completion of the Internal Market, *ad hoc* interventions—the issuing of single directives or regulations, for example—are no longer the only way in which European action can be expressed.

What emerges clearly from the Commission's choices is that the EU can no longer ignore the need for a frame of reference upon which its actions are based; this framework is to be understood as both a "system of private law" and as a common language—a shared "lexicon of European law" expressed in all the languages of the EU.

Thus, the question of the legal language of Europe must now be considered an important, and perhaps even necessary, subject for all jurists.[47]

In this context, private law scholars are living through a historically significant period, in which the Draft Common Frame of Reference is being translated into all the official languages of the EU. This official document is both the point of departure and the point of arrival for the harmonisation not only of private European law but also of European legal language.

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[43] See http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

[44] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

[45] Communication from the Commission to the European Parliament and the Council. A more coherent European contract law. An action plan. Brussels, 12.2.2003 COM(2003) 68 final.

[46] Proposal for a regulation of the European Parliament and the Council on a Common European Sale Law, Brussels, 11.10.2011, COM(2011) 635 final, 2011/0284 (COD).

[47] Examples of the problems raised by the EU terminology in the area of criminal procedure in Di Paolo (2013), p. 161 ff.

It is evident that a language of EU private law will emerge during the drawing up of substantive rules. Indeed, the harmonisation of EU private law and the harmonisation of the language of European law are two sides of the same coin.

As has been said, this language must meet the needs of an institutionalised multiculturalism in the field of law while also serving as a permanent point of reference for legal concepts that will be used both at the national level and EU level.[48]

5 Conclusions

While making no claims to be comprehensive, this paper seek to draw attention to certain peculiarities of EU terminology.

This is not the place to confront the vast topic of the relationship between law and language,[49] even just at the European level[50]; this is chiefly a cultural problem, whose solution is to be found elsewhere and will require, first and foremost, the development by European legal scholars of transnational concepts and legal categories.[51]

Legal Science must undoubtedly take account of the differences that exist in European legal discourse and recognise that these differences not only condition lawmakers but also affect the terminology of the European Court of Justice and of the Civil Service Tribunal.

As a consequence, consolidated terms and definitions elaborated by EU case law—Court of Justice and EU Tribunals—should be included in the new European instruments: Draft Common Frame of Reference, Common European Sales Law, as well as new act of maximum harmonisation.[52]

The above-mentioned examples also show that, despite the lack of a common European legal terminology, a further task for legal science will be to discover the operative rules[53] that correspond to pre-existing, well-established, and familiar national legal models inherent implicitly in EU law (e.g. category of *Vertragsverletzungen/obbligations de sécurité/obblighi di protezione)*.

Finding these hidden—but familiar and common—national models in EU law is becoming even more important very important nowadays, given the drafting of the "Common European Sales Law". As stated above, this new European legal instrument will probably be the first EU private law set of European optional rules to regulate sale contracts concluded by parties belonging to different EU Member states.

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[48] Meli (2011).

[49] Mellinkoff (1963).

[50] See Heddinger et al. (1988); Creech (2004); de Witte (2004).

[51] Sacco (2005), p. 21.

[52] See further details in Ioriatti Ferrari (2011), p. 329 ff.

[53] Sacco (1992).

It is therefore important that—beyond differences in legal categories and concepts—the Common European Sales Law will be composed of operative legal solutions, which are shared and well established in the different European legal traditions.

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Legal Translation and the EU Terminological Resources: An Imperfect Match

Arianna Grasso

Abstract English to Italian legal translators are often faced with a dual challenge: the legal and linguistic skills they are supposed to acquire during their education and training and the substantial differences between common law and civil law. These professionals usually have important conceptual and terminological gaps to fill and need specialised and reliable resources that are poor both on an Italian level and an EU level. The offline sources are still quite limited and force legal translators to turn to the web, where they can hardly find quick and correct translations for most of the terms they look up.

The two main European online sources usually consulted by legal translators are the IATE terminology database and the Eurlex website. They both have four important limits for Italian legal translators: a surprising amount of mistakes; the non-translation of the names of most judicial bodies, institutions, and agencies; more than one equivalent for the same entry (with the same meaning and context); and the topics of the texts from which the terms are extracted, all obviously referred to the main EU fields of activity.

The solution to the above problems would be to increase the number of entries and provide an online version of legal offline dictionaries. More checks should also be made on the accuracy of online legal glossaries and term bases, including the European ones. Assembling all the legal terminology available on the web and improving its reference methods would finally make legal translations quicker and more reliable.

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Abbreviations

DGT	Directorate-General for Translation
EU	European Union
IATE	Inter-Active Terminology for Europe
IMO	International Maritime Organization
Unidroit	International Institute for the Unification of Private Law

1 Introduction: The Requirements of English to Italian Legal Translators

English to Italian legal translators, like their Italian to English colleagues, are often faced with a dual challenge: the two professional skills—legal and linguistic—they are supposed to acquire during their education and training and the substantial differences between the two legal systems dealt with in the texts they translate, i.e. common law and civil law.

Legal translators usually specialise in language and translation studies and acquire some legal knowledge through their professional practice or sometimes through a special course of studies. On the other hand, there are quite a large number of lawyers who are faced with the translation of the texts they come across every day in their professional lives. They usually choose not to entrust it with legal translators because of financial reasons, extremely strict deadlines, or even lack of trust in the translators' ability to cope with such technical texts. Furthermore, the vocational training of many international law firms includes translation as an essential tool for studying and developing the concepts that this practice implies.

As confirmed by Rodolfo Sacco and Antonio Gambaro, comparative analysis is a very useful learning procedure:

> *La comparazione, scienza giuridica, porta la sua attenzione sulle regole appartenenti ai vari sistemi giuridici per stabilire in quale misura esse coincidano e in quale misura esse differiscano. [. . .] Questa analisi finirà poi per consentire una migliore conoscenza dei modelli studiati comparativamente.*[1]

Likewise, looking for the correct correspondence of legal concepts in another language, i.e. through another legal system, is actually one of the most effective methods for learning the differences between the source and target languages and legal systems.

[1] "Comparative law is a legal science which focuses on the rules of the various legal systems to highlight their points of contact and divergence. [. . .] This procedure inevitably leads to a better understanding of the systems thus analysed." In Gambaro and Sacco (2002), p. 2.

Furthermore, some lawyers change profession and turn to translation once they have completed their course of studies and sometimes after years of legal practice. They acquire a more or less thorough knowledge of languages and translation with the same methods through which translators specialising in languages acquire some legal knowledge.

There are very few "ideal" legal translators who complete both a legal and linguistic course of studies with the same level of specialisation. Therefore, these professionals usually have important gaps to fill and need very specialised and reliable resources to carry out their technical research work. This also makes it essential to arrange for the final legal editing of a text translated by a linguist expert and vice versa.

Unfortunately, legal translators can only rely on very few online and offline sources, both on Italian and EU levels. This shortage is particularly discouraging if we consider that legal translation has become increasingly important since the end of World War I, when legal scholars started to implement projects for creating uniform transnational law rules specifically designed for application to international commercial contracts. The ultimate expression of this process was the setting up of Unidroit (International Institute for the Unification of Private Law) in 1926, with the aim of adopting such uniform rules by the stipulation of international conventions.

The importance of legal translation has further increased over the last 50 years, owing to the growing number of international trade negotiations that rely on the translation of international contracts, corporate documents, and pleadings arising out of litigation between trading parties with different national origins.

At the same time, there has been an increasing demand for translation of the documents issued by the various international and EU agencies and institutions. Today, the EU has 23 official languages, and more will be added with the joining of other countries. This will inevitably lead to more translation workload within the EU institutions.

Moreover, during the last few years, efforts have been made to build a European private law system,[2] and this has given a boost to legal translation studies. In 2000, Rodolfo Sacco commented this progress as follows:

> *Attualmente si ha l'impressione che nei prossimi 20 anni i problemi di traduzione diventeranno il capitolo più promettente della comparazione giuridica.*[3]

We are now going to analyse the reasons why these new translation needs have not yet been met by suitable terminological resources and suggest some possible solutions to this problem.

[2] The European Contract Law Common Frame of Reference is the highest expression of this process.

[3] "Translation looks very likely to become the most promising issue of comparative law in the next 20 years". Sacco (2000), p. 723.

2 Bilingual Offline Terminological Resources

Until June 2012, i.e. before the publication of a new dictionary that I am going to analyse below, the only English to Italian and Italian to English legal dictionary worthy of note was Francesco De Franchis,[4] Dizionario Giuridico Italiano–Inglese, Inglese–Italiano, with a first edition published by Giuffrè in 1984. De Franchis' dictionary is an exceptional and extremely meticulous analysis of the differences between common law and civil law aimed at the translation of the main civil, criminal, administrative, and commercial legal concepts.

However, the outcome of this analysis is often, in practice, a non-translation. Throughout his masterpiece, De Franchis is often forced to admit that the discrepancies between common and civil laws make it impossible, in Eco's words, to "say almost the same thing".[5] In doing so, he gives readers long explanations of the legal differences that make such translation impossible. When he accepts to provide the translation for single entries, De Franchis usually suggests a high number of equivalents, which are sometimes difficult to be selected without any translation context. Furthermore, this dictionary is almost only made up of nouns and some adjectives+nouns.

Unfortunately, legal translators always look for rapid and effective answers to their legal and translation queries. The frantic working rhythms of their main clients—business lawyers—make their deadlines very strict in spite of the time they have to devote to their translation researches and the accuracy they are always asked to ensure. Therefore, a dictionary like De Franchis, which has never been and will not be revised (at least by the author himself), is extremely useful for the comparative analysis and translation of the institutions that have not changed over the last 30 years. The remaining information has to be contextualised and checked out for any legal and terminological updates.

Furthermore, De Franchis' dictionary is only partially useful to tackle the main texts that Italian legal translators are faced with every day, i.e. international contracts and corporate documents, because it provides only a limited coverage of these topics.

The answer to the above needs came in June 2012 with the publication of a new legal dictionary with an innovative approach[6] consisting of more than 1,400 terms and expressions and original samples of contractual clauses, extracts from corporate documents, judgments, and judicial documents translated into Italian. This dictionary provides rapid and effective answers to legal translators' queries with a reasonable quantity of details about the differences between common law and civil law.

[4] De Franchis (1984) was an Italian outstanding comparative law scholar. From 1970 to 1985, he was legal officer and later assistant director at IMO in London. He published many essays and articles on comparative law and taught Common Law in Trento, Salerno, and Rome.

[5] Eco (2003).

[6] De Palma et al. (2012).

However, although it is going to be broadened shortly with new terms relating to the various fields of law (and possibly an online version), the scope of this new dictionary is currently quite limited.

3 General Online Terminological Resources

All the above gaps often force Italian legal translators to turn to the web. The advent of the Internet should have revolutionised translation, particularly the legal one. The web should allow for quicker and simpler reference with respect to offline resources. Most of all, it should be a precious tool for sharing legal and terminological information and identifying or creating the equivalents of complex legal concepts.

However, these targets are still far from being met. The Internet is a highly contradictory tool that has so far expressed only a very limited part of its potential. Legal translators thought that the web would have allowed them to better meet their strict deadlines, but this has quickly turned out to be an illusion. The solution of a single terminological problem may take very long researches, especially owing to the extremely vast overview of online resources (not all reliable) that need to be selected. Moreover, clients, including those who have personally engaged in legal translation, tend to underestimate the complexity of these researches and continue to be very demanding with respect to delivery times, often to beat competition.

Furthermore, there is still a remarkable gap between the quality of offline and online sources. The former tend to be very accurate and reliable, whereas the editing of online material for mistakes is still limited, including in official and institutional websites, as we will see below. This is a very serious limit for legal translators, who might also be liable in case of poor performance.

Besides having the above limits, the web hardly ever provides legal translators with ready-made answers to their queries. Except for IATE, the EU's multilingual term base that I am going to analyse below, there exists no online English–Italian/Italian–English legal dictionary. As specified above, legal translators often deal with texts that draw on the numerous fields of the legal sector (corporate, contract, litigation, succession law, just to name the main ones), and this conceptual and terminological variety makes their task even harder.

Since they cannot rely on online legal dictionaries and even less on online specialised technical term bases, our professionals usually turn to glossaries or discussion groups. The web offers an extremely wide variety of legal glossaries, but listing them for reference purposes is neither easy nor advisable. Firstly, it is impossible to stay up to date on their continuous URL address changes. Secondly, establishing the effective usefulness and quality of the information provided by a specific glossary is only possible with constant and professional use.

Discussion groups are very useful in case of legal terminology researches. They are a sort of "last resort" for translators who post their queries in these websites for their colleagues' expert advice and often find correct solutions or useful suggestions

for further researches. They also allow translators to emerge from their usual state of professional isolation.

When they cannot find the translation for their terms by using all the above sources, legal translators have to create it starting from their English definition, which can be found in the numerous British and American law online resources. This activity is challenging but very time-consuming, and only few translators take the time to note the outcome of this research process in some personal glossary for future reference.

4 European Terminological Resources

The EU's 23 official languages all enjoy equal status, which explains the very huge number of translators employed by the numerous European institutions.[7] These translators are divided into professionals who carry out the so-called low-level legal translation—the translation of documents dealing not only with legal issues but also with political, administrative, and information matters—and "lawyers-linguists", who work at the European Court of Justice, the Court of First Instance, and the Civil Service Tribunal and must have a double (legal and language) university education. The latter are also the final editors for translations with legislative contents and are therefore qualified as professionals carrying out the so-called high-level legal translation, which usually deals with comparative law.

One-fourth of the translations issued by the DGT (Directorate-General for Translation), the in-house translation service of the European Commission,[8] are now outsourced. In 2010, the volume of this outsourcing amounted to 500,000 pages, for a value of translation work equal to Euro 15 million and an increase by 16 % with respect to 2009.[9] Although its role as EU *lingua franca* is increasingly being challenged,[10] English concerned most of these translations.

Therefore, the volume of in-house and outsourced EU translations is extremely high. This huge output is made available on the EU websites, especially in the IATE term base and in the Eurlex portal, the two main European online sources usually consulted by legal translators.

IATE stands for Inter-Active Terminology for Europe. It is the EU inter-institutional terminology database and has been used by the EU institutions and agencies since 2004 for collecting and sharing all EU terminology. It embodies all

[7] About 3,500 in 2010.

[8] Other EU institutions and bodies (Parliament, Court of Justice, Council, Economic and Social Committee, etc.) have their own translations departments. The translation of the texts issued by all the EU agencies is carried out by a special translation centre based in Luxembourg.

[9] http://ec.europa.eu/dgs/translation/indexen.htm.

[10] See, in particular, Phillipson (2003); Phillipson (2007), pp. 65–82, as well as related articles that can be downloaded from the website www.cbs.dk/staff/phillipson.

the existing terminology databases of all EU's translation services, which have been imported into IATE for a total of 1.4 million multilingual entries as at September 2011.[11] It not only can be consulted as any online dictionary but also provides definitions and other useful reference information.

Eurlex includes the whole corpus of EU law and other public documents in its official languages and is therefore a goldmine for legal translators.[12] In this website, most texts can be analysed through a multilingual display system that makes it possible to place the source text next to the target translation in all the combinations offered by the EU official languages. Some EU linguists regularly go through the huge volume of translations published in Eurlex in order to extract individual terms that are subsequently made available on the IATE term base, after being checked and provided with their definition and other reference information. The volume of translated texts available on the Eurlex website being extremely high, the extraction of all the terms to be checked and loaded onto the IATE database is a very time-consuming process. This implies that most of the terms that we find in the Eurlex portal may be unavailable in IATE, and referring directly to the Eurlex texts is therefore the most effective method to identify the equivalents of legal translations.

However, both Eurlex and IATE have four important limits for Italian legal translators: a surprising amount of mistakes; the non-translation of the names of most judicial bodies, institutions and agencies; more than one equivalent for the same entry (with the same meaning and context); and the topics of the texts from which the terms are extracted, all obviously referred to the main EU fields of activity.[13] The vocabulary related to these topics is only partially useful to tackle the main texts that Italian legal translators are faced with every day (as specified above with respect to De Franchis' dictionary).

The high number of mistakes found in EU translations is astonishing if we consider the very selective process of EU in-house and freelance translators and, most of all, the extremely accurate final editing of their translations by EU linguists and legal experts. EU accuracy requirements are so strict as to provide for the fining of translators who fail to identify the most suitable terminological equivalents or do not make use of the resources or texts suggested by the EU in order to carry out a correct and terminologically consistent translation. Penalties are especially levied on translators who do not refer to the texts of previous translations recommended by the EU for uniformity purposes.

IATE and Eurlex contain various kinds of mistakes, especially lexical-conceptual and collocational. Some of these errors are due to non-compliance with previous official translations of the same terms.

[11] http://Iate.europa.eu/iatediff/aboutIATE.html.

[12] The site (http://eur-lex.europa.eu/it/index.htm) includes some 2,815,000 documents with texts dating back to 1951. The database is updated every day, with about 12,000 yearly additions.

[13] Politics, international relations, law, economics, trade, finance, education, science, transport, agriculture, environment, etc.

Let's consider, for example, the following clause of Protocol 15 on transitional periods on the free movement of persons (Switzerland and Liechtenstein) found in the Eurlex website:

Article 2

1. Notwithstanding the provisions of Article 4,[14] *Switzerland, on the one hand, and EC Member States and other EFTA States, on the other hand, may maintain in force until 1 January 1998 with regard to nationals from EC Member States and other EFTA States and to nationals of Switzerland, respectively, national provisions submitting to prior authorization entry, residence and employment.*

This paragraph was translated as follows:

Articolo 2

1. Fatte salve le disposizioni dell'articolo 4 la Svizzera, da un lato, e gli Stati membri della Comunità e gli altri Stati AELS (EFTA), dall'altro, possono mantenere in vigore fino al 1° gennaio 1998, per quanto concerne rispettivamente i cittadini di Stati membri della Comunità e di altri Stati AELS (EFTA), e i cittadini svizzeri, disposizioni nazionali che subordinino ad autorizzazione preventiva l'ingresso, la residenza e l'occupazione.

"Notwithstanding" should be translated in Italian as "fatto salvo" or "fermo restando" whenever it is used as a synonym for "without prejudice to" or "subject to" (or similar phrases) in sentences such as the following[15]:

5. Notwithstanding the integration into this Agreement of the Community legislation concerning BSE and awaiting the outcome of ongoing discussions aimed at arriving, as soon as possible, at an overall agreement related to the application by the EFTA States of this legislation, the EFTA States may apply their national rules. (. . .)

This clause has been correctly translated as follows:

5. Fatta salva l'integrazione nel presente accordo della normativa comunitaria in materia di BSE (encefalopatia spongiforme dei bovini) e in attesa dei risultati delle discussioni in corso intese a pervenire, quanto prima, ad un accordo generale sull'applicazione di tale normativa da parte degli Stati AELS (EFTA), questi ultimi possono applicare le rispettive normative nazionali. (. . .)

[14] Article 4 reads:
Switzerland may maintain in force until:

- 1 January 1996 national provisions requiring a worker who, while having his residence in a territory other than that of Switzerland, is employed in the territory of Switzerland (frontier worker) to return each day to the territory of his residence;
- 1 January 1998 national provisions requiring a worker who, while having his residence in a territory other than that of Switzerland, is employed in the territory of Switzerland (frontier worker) to return each week to the territory of his residence;
- 1 January 1997 national provisions concerning the limitation of employment of frontier workers within defined frontier zones;
- 1 January 1995 national provisions submitting to prior authorization employment undertaken by frontier workers in Switzerland.

[15] Annex I (Veterinary and phytosanitary matters) to the EEA Agreement, found at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:192:0063:01:EN:HTML.

On the contrary, when it is used with reference to another contract clause or law provisions, it establishes a hierarchy of these clauses or provisions and should therefore be translated as "in deroga a". Therefore, in our first example, the correct translation of notwithstanding was "in deroga a" and not "fatte salve".

The mistakes contained in the Eurlex pages may also be conceptual[16]:

Sixth plea in law alleging abuse of process and infringement of Article 7 of Regulation (EC) No 659/1999 in so far as the Commission, at the end of the formal investigation procedure, adopted a conditional decision, even though not only had its doubts as regards the compatibility of the aid scheme not been removed but it was also satisfied that the scheme was incompatible.

The Italian text for this section reads:

Sesto motivo, vertente sullo sviamento di procedimento e sulla violazione dell'art. 7 del regolamento (CE) n. 659/1999, in quanto la Commissione, al termine del procedimento di indagine formale, avrebbe reso una decisione condizionata, mentre non solo i suoi dubbi in merito alla compatibilità del regime di aiuti non erano stati dissipati, ma inoltre la Commissione avrebbe acquisito la convinzione che il regime fosse incompatibile.

"Abuse of process"[17] may be translated as "mala fede processuale" or "abuso processuale". The phrase "sviamento di procedimento" is unacceptable for conveying such a technical concept. Furthermore, "decisione condizionata" is the wrong translation for "decisione condizionale", i.e. the official Italian translation for "conditional decision", as found in Council Regulation (EC) No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty and in the IATE website. In this case, the translator also failed to observe the EU requirement of language uniformity with respect to previous translations of the same term.

Finally, mistakes found in the Eurlex website may be due to the translator's failure to identify the correct Italian collocation for an English phrase. This kind of mistakes is both lexical and conceptual, as shown in the following example taken from the translation of Commission decision dated 7 March 2007[18]:

(74) The next steps were that in mid-January 2007 a Special Resolution for the Reduction of the share capital was approved by a 75 % majority of the shareholders preset (sic) at an extraordinary general meeting. Such a resolution would then have to be ratified by the District Court in Cyprus and registered with the Registrar of Companies. The whole of this procedure is expected to take 6–7 months (allowing a 3 month period for the Court).

[16] Action brought on 30 May 2011—Régie Networks and NRJ Global v Commission (Case T-273/11) (2011/C 226/55), Official Journal of the European Union, C226, 30 July 2011, found at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:226:FULL:en:PDF and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:226:FULL:it:PDF.

[17] It is a wrong committed during the course of litigation. It is a perversion of lawfully issued process and is different from malicious prosecution, a lawsuit started without any reasonable cause (http://legal-dictionary.thefreedictionary.com/Abuse+of+Process).

[18] http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,it&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=465247:cs&page=.

which has been translated as follows:

(74) Il passo successivo è stata l'approvazione, a metà gennaio 2007, con una maggioranza del 75 % degli azionisti riuniti in assemblea straordinaria, della risoluzione speciale per la riduzione del capitale azionario. Tale risoluzione dovrà poi essere ratificata dal tribunale distrettuale di Cipro e registrata presso il registro delle società. L'intera procedura dovrebbe richiedere 6 o 7 mesi (considerando un periodo di tre mesi per il tribunale).

Besides the typo "preset" instead of "present", this translation contains a wrong collocation with respect to the phrase "risoluzione speciale". In the English text, this expression was referred to the special resolution approved by the shareholders of an airline company during its extraordinary general meeting. The word "resolution", when used in legal or corporate contexts, may actually be translated as "risoluzione", "decisione", "deliberazione", or "delibera". However, the first of these terms only indicates the official expression of the opinion or will of a legislative body or international institution (for example, "Parliament resolution": "Risoluzione parlamentare" and "UN resolution": "Risoluzione dell'ONU"). When the word "resolution" points at the determination of policy of a company by the vote of its board of directors or other meetings, its only possible translation in Italian is "delibera" or its less common (and more formal) synonym "deliberazione". Therefore, the correct translation for "special resolution" in this case was "delibera di assemblea straordinaria".

5 Conclusions

How can offline and online resources for legal translation be made more efficient and easier to refer?

The new offline dictionary analysed above should have a much higher number of entries and an online version to prevent translators from spending hours in extensive web searches.

As concerns online resources, more checks should be made on the accuracy of legal glossaries and term bases, including EU, to avoid the above gross mistakes. The state of legal terminology available on the web is currently very fragmentary. Assembling all this information with a special uniformity process and improving its reference methods would be a perfect starting point to quickly identify the most suitable translations.[19] New methods for developing and exploiting the synergy between legal translators should also be devised.[20]

[19] A good example of this kind of process is the website http://www.term-minator.it/. Term-minator is an advanced browser for terminologists, translators, editors, and linguists, operating through automatic search filters that combine operators and key words to direct the research to pages, term bases, portals, and any other useful translation or terminological sources. It has some coverage of legal resources.

[20] A website like Reterei (http://ec.europa.eu/dgs/translation/rei/), which provides terminological and documentary resources for translators or writers of institutional texts in Italian, has understood the importance of broadening the nature of contributory sources of terminological units (in Reterei's case, European terminological units). It includes glossaries, single entries, and any kind of contribution by the network of professionals, students, and skills that it has created for that purpose.

Improving the efficacy of the above offline and online sources would lead to an increased quality of the legal translations found on the market. This would in turn change the attitude of most lawyers, who would be more willing to outsource their firms' translation work and pay higher rates for this service.

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Part III
The Treaty of Lisbon: Constitutional Provisions with an Indefinite Content

The Lisbon Treaty: The French, English and Italian Versions of Articles 82–86 of the TFEU in Relation to Judicial Cooperation in Criminal Matters

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Abstract When combined with different legal systems, linguistic pluralism risks giving rise to many ambiguities and difficulties in the field of judicial cooperation in criminal matters. Article 82 TFEU, in its English, French, and Italian versions, illustrates the difficulties of reconciling different legal systems while respecting linguistic pluralism and refers to the difficulties in translating legal concepts. Article 86 TFEU, on the other hand, highlights how legal and linguistic pluralism can be used advantageously for the creation of new common institutions that take account of national traditions.

Abbreviations

ECHR	European Court of Human Rights
EU	European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

For criminal lawyers, the Lisbon Treaty is of considerable symbolic import because it gives effective judicial competence in criminal matters to the European Union and enshrines the principle of mutual recognition.

In a world in which the narrow interests of national sovereignty tend to reign supreme, several factors contributed to bringing about this major revolution. To begin with, the idea of a certain community of interests and values among the legal systems of EU Member States helped infuse the principle of mutual trust into the

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collective conscience of Europe. Indeed, in recent years, the jurisprudence of the European Court of Human Rights and the growing keenness for comparative law studies have been important factors in the approximation of the legal systems of Member States in criminal matters, including in criminal law. Thanks to this process of approximation (harmonisation), the barriers to judicial cooperation seem destined to come tumbling down.

This rather idyllic vision may well need to be qualified somewhat, given that the law enforcement systems of different EU nations have not become so deeply harmonised as to permit the renunciation of all traditional barriers to the automatic enforcement of foreign decisions in criminal matters. Two examples that are familiar to the French public serve to illustrate that the influence of the jurisprudence of the European Court of Human Rights on the approximation of national systems is by no means assured.

In the first place, although the European Court requires that a person convicted *in absentia* may have recourse to effective remedy, and in spite of the reform enacted after the *Krombach* case,[1] French lawmakers continue to make the purging of the criminal offence of failure to appear in court contingent on the person's being arrested or renouncing his or her freedom. In the second place, the French debate concerning the reform of police custody rules and the need for a defence lawyer to be present during the interrogation of a person held on suspicion of having committed a crime is proof that the guaranteed rights of the defendant are not understood and applied in the same way in all legal systems but, rather, will vary accordingly as the concepts of the criminal justice system are more or less contractual or authoritarian. In spite of some approximation, law enforcement systems in Member States are ultimately based on different cultures now as in the past. To place too much emphasis on approximation carries the risk of papering over the real differences that exist and attempting to base the European criminal justice area on a misunderstanding.

The use of multiple languages in the building of a European area of justice is likely to compound the misunderstanding. Being a very important consideration in the area of criminal justice in as much as it materially impinges upon the principle of legality and punishment, multilingualism is a necessary condition for the democratic functioning of the Union. In procedural law, the importance of multilingualism stems from the rationale that modern states attach to criminal punishment. To be accepted as legitimate and thus pursue the purposes of criminal law, aiming not only for rehabilitation and reformation but also for vengeance and retribution, the trial and sentencing must be comprehensible to the offender, the victim, and the general public. For an effective hearing and trial and a fair sentence within a reasonable time, the elements of a case must be readily understood by all participants in the proceedings. From this perspective, it is easy to see how, when multiple interests are involved, several different languages may be used in the

[1] See ECHR, 13 February 2001, *Krombach v. France*, no. 29731/96; ECHR, 31 March 2005, *Mariani v France*, no. 43640/98.

course of a single case: a single language for effective communication in the course of the investigation, several languages during the trial (the judge's language, that of the accused, and that of the victim of the crime).

However, when this is combined with discrete legal systems, linguistic pluralism risks giving rise to many ambiguities and difficulties. The ambiguities occur because different legal systems often use relatively similar terms to refer to dissimilar concepts, so that behind the same words lie discrete meanings, and behind institutions with like names lie solutions with different purposes. Difficulties also arise as a result of translations that are sometimes imprecise or simply wrong. The language reflects the law, and the problems of multilingualism are nothing other than the result of ambiguities in the construction of a common area of criminal law and can only be resolved by the intervention of a common organism that, in view of the differences between national legal systems, must succeed in capturing the concept and choosing terms best suited to the functioning of the European Union. A compromise between different legal cultures is therefore needed, and this will lead to the imposition of a common language and, consequently, a dominant legal system.

The analysis of the different versions of Articles 82 and 86 of the Treaty on the Functioning of the European Union (TFEU) serves to illustrate the ambiguities and difficulties surrounding European criminal law at two different levels. Article 82 effectively enshrines the principle of mutual recognition of judgments and judicial decisions and allows European institutions to apply ordinary legislative procedure to facilitate mutual assistance by, for instance, putting in place measures to prevent and resolve conflicts of jurisdiction between Member States. The same Article also declares that, to the extent necessary, judicial cooperation shall also facilitate mutual recognition, establish minimum rules, and harmonise Member States' rules in relation to, for example, the rights of crime victims. The Article also, however, invites the European institutions to account for differences between the legal traditions and systems of Member States. It calls for a compromise between different legal cultures and recognises that harmonisation is not yet sufficient to establish mutual trust.[2]

[2] On all the above-mentioned aspects, see the English version of Article 82: "1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

(a) Lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
(b) Prevent and settle conflicts of jurisdiction between Member States;
(c) Support the training of the judiciary and judicial staff;
(d) Facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Article 86 TFEU, moreover, provides for the creation of a new European institution, the European Prosecutor's Office, which is to be responsible for investigating crimes affecting the financial interests of the European Union. Here, the ambition is not to approximate existing systems but to create a completely new institution, though one based on familiar templates.[3] For the sake of setting up the Office, however, the EU must still use national prosecutors as models. In this

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:

(a) Mutual admissibility of evidence between Member States;
(b) The rights of individuals in criminal procedure;
(c) The rights of victims of crime;
(d) Any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within 4 months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply".

[3] See the English version of Article 86: "1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within 4 months of this suspension, refer the draft back to the Council for adoption.

Within the same time frame, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

process, the ambiguities are transformed into an extraordinary new tool of negotiation. In the end, the ambiguities can be resolved through the inception of newly and commonly accepted legal concepts.

Article 82 TFEU illustrates the difficulties of reconciling different legal systems while respecting linguistic pluralism and, especially, refers to the difficulties in translating legal concepts.[4]

Article 86 TFEU, on the other hand, highlights how legal and linguistic pluralism can be used advantageously for the creation of new common institutions that take account of national traditions.[5]

2 The Difficulties Arising from Linguistic Pluralism

The analysis of Article 82 TFEU in its English, French, and Italian versions (to follow alphabetical order) allows to consider three classical problems intrinsic to legal translation. The first difficulty consists in the risk of mistranslation; the second stems from the need to compromise between the various legal systems and procedural models and, consequently, between the different languages; the third arises from the risk that, by choosing a phrase that is sometimes untranslatable, European texts may fail to set a paradigm and end up exporting judicial concepts.

2.1 Mistranslation

A comparison of the three versions of Article 82 TFEU reveals the presence of some errors that will require the intervention of the Court of Justice. For example, paragraph 2b refers to "*the rights of individuals*", "*les droits des personne*", and "*i diritti della persona*".[6]

3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission".

[4] See below, Sect. 2.

[5] See below, Sect. 3.

[6] "To the extent necessary [. . .] directives [. . .] on: [. . .] b) the rights of individuals in criminal procedure".

The reference here is to harmonising the rights of the defence in criminal proceedings. Yet, when we consider the three legal systems, we find that the three versions of the text do not relate to the same domain of European law. In the English system, where corporations can be held criminally liable, the word *individual* is used exclusively in the sense of "individual person", while the word *person* is a broader term that refers both to natural persons (i.e. individuals) and legal persons (corporations). In the French system, ever since the coming into force of the reform of the Penal Code in 1994, the word *personne* includes both natural persons and legal persons (corporations) that can be held criminally liable. In the Italian system, however, in which legal persons (corporations) cannot be held criminally liable, the word *persona* refers exclusively to individuals. What, then, will the scope of application of European Directives be? Will future Directives be able to set down minimum rules relating to legal persons in the framework of criminal proceedings?

Taking a positive approach, we might suppose that the apparently clumsy translation is in reality a calculated act, a deliberate refusal to take sides on an issue as sensitive as the criminal liability of legal persons. The institutions of the EU, however, are encouraging an increasing number of Member States to introduce the principle of corporate liability, or, at least, to impose the equivalent of criminal sanctions on corporations that commit crimes. Moreover, the treatment of legal persons as being equivalent to individuals for the purposes of fair trial is a principle established some time ago: the European Court of Human Rights, which inspires the work of the Commission in the area of procedural rights, has ruled that the same procedural safeguards should be accorded to individuals and corporations that are subject to criminal charges. Given that this is the case, the ambiguity could have been avoided simply by using the word that refers both to natural and to legal persons in English and French, namely "*person*" and "*personne*".

2.2 The Search for Compromise

The second difficulty refers not merely to the translation from one language to another but more broadly to the translation from one system to another and to the related need to accommodate multiple differences in a single common area. The first paragraph of Article 82, for example, allows the European Parliament and Council "to adopt measures to: (b) prevent and settle conflicts of jurisdiction between Member States; [. . .] (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions." In the French version of the above, conflicts of jurisdiction and proceedings in criminal matters are rendered as "*conflits de compé tence*" and "*poursuites pénales*". In the Italian version, they become "*conflitti di giurisdizione*" and "*azione penale*". Again, apart from the stylistic demands of the French language, the three versions refer *a priori* to the same idea: the need to avoid a situation in which two national judges exercise their authority in the same case

and the need to foster judicial cooperation to enable the execution of criminal proceedings. Since this is so, why could the French version not have used the expressions "*conflits de juridictions*" and "*action publique*", which, being expressions that exist, would surely have removed ambiguity?

The answer is complex. Far from being purely stylistic, the choice of wording comes from the peculiarities of the French procedural system in which criminal proceedings [i.e. *action publique*] are discretionary and in which many alternatives to prosecution are available. Thus, under the French system, judicial cooperation, if it is to be effective, should be effected *before* prosecution, namely during the preliminary phase in which the pros and cons of proceeding with a prosecution are weighed up. The provision also needs to ensure that authority is not inappropriately assigned to the various authorities that, though responsible for this part of the investigation, do not necessarily have judicial powers. In Italy, criminal proceedings are mandatory: any judicial cooperation in the preliminary phase at which a decision is made whether to pursue the case further is less necessary. The Italian version of the text therefore limits the cooperation to the prosecution itself and deals only with the issue of conflicts of jurisdiction. The English version lies halfway between the two, though its position is by no means clear-cut. It focuses on conflicts of jurisdiction only, but extends cooperation also to criminal proceedings, because English law is based on the principle of discretionary prosecution and, like French law, admits of alternatives to pressing criminal charges.

The difficulties related to the coexistence and compatibility of systems subject to the principles of legality and appropriateness of prosecution are hardly unknown but have already led to important decisions by the Court of Justice of the European Union, which are now part of the Schengen *acquis*. In particular, in regard to the principle of *ne bis in idem*, the Court has specified that the decision of a Member State's public prosecutor to dismiss a case should debar the authorities of another Member State from prosecuting the same person on the same charges.[7] Combined with the terms of Article 82 TFEU, the jurisprudence of the Court of Justice of the European Union led to the conclusion that, whatever the powers are of the authorities in charge of the investigation, cooperation needed to be enhanced and shifted to an earlier phase of the process in order to avoid potential conflicts of jurisdiction during the later stage of enforcement.

2.3 The Export of a Legal Model

Finally, Article 82 TFEU also serves to demonstrate the difficulty that arises from the impossibility of translating defined concepts from a source language into a target language in which they do not exist. As noted above, paragraph 2 of Article 82 TFEU envisages the adoption of directives to bring about the approximation of

[7] Cf. the *Gözutök* and *Brügge* rulings, C-187/01 and C-385/01 (2003).

national legal systems in relation to what is called the "mutual admissibility of evidence", which appears in French as "*admissibilité mutuelle des preuves*" and in Italian as "*ammissibilità reciproca delle prove*". If the concept seems clear enough for English and Italian readers, the notion of admissibility of evidence sounds odd to anyone versed in French criminal procedure. The French Supreme Court recently attempted, without success, to introduce a conceptual difference between *nullité de l'acte* ["the revocation of the act"] and the inadmissibility of evidence. The Code of Criminal Procedure of France, meanwhile, continues to recognise only the concept of "nullité". The absence of the notion of inadmissibility also has important practical consequences in French law. If no move to exclude evidence is made within the time limit, the possibility of revocation is eliminated, after which the question may not be raised during the trial. So while evidence may be disqualified by the judges of British or Italian courts, the same evidence can be legitimately produced before a French court provided that no revocation of it has been made and the pre-trial phase has been completed. So what is going to happen if the EU issues a directive on the admissibility of evidence? A directive would imply the adoption of the same model based on the admissibility of evidence in the legal systems of Member States. Should we get upset or rejoice at the prospect? The main point, for our purposes here, is that linguistic ambiguities are sometimes used to mould European legal proceedings into an ideal shape, so that they can be deployed as vectors of harmonisation. In this respect at least, ambiguities can sometimes have their advantages.

3 The Benefits of Linguistic Pluralism

A comparative reading of three versions of Article 86 TFEU shows up several areas of doubtful interpretation but, above all, demonstrates the benefits to be had from linguistic pluralism, which can generate new common concepts. The doubts relate to the symbolically repressive functions of Article 86 TFEU, which, in its three versions, assigns to the European Public Prosecutor the power to send individuals to trial, whereas English law, for example, assigns the prosecutor the more extensive power to "prosecute a criminal case". Similarly, in three versions, the choice was made to use the word "combat" ("*combattre*", "*combattere*"), which is stronger than the word "fight" ("*lutter*", "*lottare*"), which is nevertheless commonly used in internal documents. Apart from these doubts, each version not only refers to concepts that are familiar to each national system but also introduces innovations, some of a controversial nature, others less so. The reaction to the project therefore depends on the reader. Depending on which language he or she speaks, the reader will ask different questions and imagine different solutions. Without going into all the judicial and policy issues that this project implies, and at the risk of being a bit rough and ready in our interpretation, we can sketch out a number of issues connected with the use of this legal language.

3.1 The English Reader

The attention of the English reader is immediately drawn to four phrases. First, the reader is drawn to the name that the Treaty gives the future institution: the "European Public Prosecutor's Office", which recalls the native "Crown Prosecution Service". The English reader, seeing "office" will also imagine a large European structure with many members. Even so, the choice of the word "Office" may cause some perplexity. Why not use the word "Service"? Is the intention to distinguish this new European structure from its British counterpart? Or is the idea to give symbolic emphasis to the independence of the structure from all other national and European authorities, given that the Crown Prosecution Service is not independent of the Executive? If this is the case, is a body tasked with prosecution activity in complete independence from all political power acceptable to the tradition of English law?

Second, the English reader's attention will be drawn by the ambiguous phrase "from Eurojust". This is open to several interpretations, not all of which have the same implications for the survival of Eurojust. Will the European Prosecutor's Office take after the Eurojust model and therefore be a collegial body with sitting representatives from each Member State? This interpretation does not necessarily imply the elimination of Eurojust, which could remain as a cooperative body, but it would not be consistent with the idea of a European Prosecutor's Office that is fully independent of national authorities. Or will the European Public Prosecutor replace Eurojust, substituting the mechanisms for judicial cooperation with the unification of criminal justice in Europe in regard to crimes against the financial interests of the European Union? Or else will the European Prosecutor's Office be no more than a follow-up to Eurojust so that its success will give an impetus to the creation of other European institutions with functions of judicial enforcement?

Third, the English reader will be surprised by the description of the powers of this new institution, which is to be responsible for "investigating, prosecuting and bringing to judgement". These powers far exceed those delegated by English law to the Crown Prosecution Service, which sometimes intervenes to initiate prosecutions and conduct criminal proceedings but in principle has no jurisdiction in the area of investigation. The European Public Prosecutor is therefore to be assigned new powers that go beyond bringing charges, and this implies a rethink of the relationship between police and prosecutors.

Fourth, the English reader may well be taken aback by the last sentence of paragraph 2 of Article 86 TFEU, whose scope is somewhat ambiguous. What to make of the sentence "It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences"? Is this supposed to mean that the European Public Prosecutor shall have exclusive jurisdiction to bring cases relating to the financial interests of the European Union before national courts and shall be the only body with power to prosecute in this area? Or is this better understood as a simple rule conferring jurisdiction, *viz*. in the absence of a European criminal court, the European Public Prosecutor's Office will have to

operate through the competent national jurisdictions? In any case, this phrase should have no impact on the non-mandatory nature of public prosecution.

Thus, based on the familiar expressions, similar to those used in the domestic legal system, the English reader may well envisage an original body whose creation depends on the application of novel ideas about the role and functions of the prosecutor that are foreign to English traditions. The risk, then, is that the reader will reject the project outright.

3.2 The French Reader

Shaken by some of the recent decision of the European Court of Human Rights in regard to the State Prosecutor and his or her independence from the executive and political parties,[8] the French reader may well be tempted to look to Article 86 TFUE as offering a paradigm for domestic law reform. The reader's attention will be drawn by several issues and, above all, by the name of the future institution. While other projects envisioned a "*procureur européen*" or else a European "*ministère public*", Article 86 TFUE looks forward to the creation of a "*parquet européen*". The term recalls the hierarchical structure of the French *parquet*, a State Counsel's Office that consists not only of a public prosecutor and assistant prosecutors but also of those judges who, unlike members of the bench, are answerable to the Executive. On the basis of this familiar model, the French reader might imagine a relatively streamlined hierarchical structure, headed by a European Public Prosecutor with assistant prosecutors who are answerable to national authorities and can therefore easily liaise with the national police forces under their control. Characterised by a dual hierarchical structure, this model not only would certainly have the potential for conflict, but it could also leverage established relationships between prosecutors and national police forces and not call for any revision of France's constitutional arrangements whereby judges who are members of the *parquet* are answerable to the Executive.

In the aftermath of the debates provoked by recent proposals to abrogate the office of *juge d'instruction* ("investigating judge"), the French reader's attention will also lock on to the definition of the powers of the future European Public Prosecutor who shall be "*compétent pour rechercher, poursuivre et renvoyer en jugement*" ("responsible for investigating, prosecuting and bringing to judgement" in the English version). For crimes against the financial interests of the Union, therefore, there will be no *juge d'instruction* ("investigating judge"): as in 95 % of the cases in the French system, the Prosecutor's office (*parquet*) will conduct the investigation, make a decision whether or not to press charges and therefore whether to bring the case to court and prosecute. Therefore, the question, which

[8] Cf. ECHR, 10 July 2008, *Medvedyev v. France*, no 3394/03; ECHR, 29 March 2010, *Medvedyev v. France*, no. 3394/03; ECHR, 23 November 2010, *Moulin v France*, no. 37104/06.

is germane also to projects for domestic law reform, is how to strike a balance between the powers of the investigating magistrate and the powers of the court judge. Who is to exercise control over the decisions of the European Public Prosecutor's Office? Is it a national or a European judge? Under what conditions and within what limits shall the control be exercised? The fear stalking both French and European law is that the reforms will lead to the creation of an all-powerful prosecutor who has the police forces at his command.

This worry is compounded by a third issue that arises from the last sentence of paragraph 2 of Article 86 TFUE: "*Il exerce devant les juridictions compétentes des Etats membres l'action publique*". As in the English version ("it shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences"), the meaning that comes most readily to mind upon reading this sentence is that the Article seeks to regulate the question of jurisdiction: i.e. the European Public Prosecutor's Office should conduct its prosecutions through the agency of the competent national authorities. Yet the grammatical structure also admits of two other interpretations. First, it might be seeking to affirm the sole jurisdiction of the European Public Prosecutor's Office and therefore exclude the intervention of the national authorities and actions of civil plaintiffs when initiating a criminal proceeding. This interpretation, however, may be ruled out since the text makes no reference to the initiation of a prosecution but refers, rather, to the exercise of criminal proceedings, which is to be the exclusive prerogative of the European Public Prosecutor's Office. On the other hand, the phrase does imply the institution of mandatory prosecution before national courts and therefore dispenses with the principle of prosecutorial discretion, which is a traditional feature of French law.

Just as English readers will have noticed the odd expression "from Eurojust", so will French readers notice "*à partir d'Eurojust*", a phrase that is hard to explain unless understood as being deliberately ambiguous concerning the ambition of the Treaty to turn Eurojust, the already established organ for judicial cooperation, into a European Public Prosecutor's Office to all effects. In any case, French lawmakers are more favourable to the creation of a collegial body after the Eurojust model.[9]

3.3 The Italian Reader

The Italian reader will notice that the name of the future European Public Prosecutor's Office—*Procura Europea*—recalls a very familiar institution of Italian law and will therefore imagine a hierarchical structure composed of a prosecutor and several assistant prosecutors who are independent of European and national authorities and, most particularly, independent of the Executive. Like the French reader, the Italian will find the powers of the future European Public Prosecutor's

[9] Resolution of French National Assembly of 14 August 2011.

Office to be extensive, but essentially corresponding to the powers of a *procura* in Italy, which controls the judicial police, conducts investigations, initiates court proceedings, and prosecutes in court. The reader's attention will nevertheless be drawn to the words "*individuare*" and "*rinviare a giudizio*", used in defining the powers of the European prosecutor. Indeed, "individuare"—identify, determine—is not an exact translation either of the French "*rechercher*" or the English "investigate". In Italian law, the word refers to a very specific act of investigation[10] and is not used to denote the general functions of the investigating authorities.[11] Is this a case of clumsy translation? Should we instead understand that in the Italian version, the European Prosecutor's Office is to be assigned no more than limited powers of investigation, sufficient simply to identify the perpetrators, leaving other powers to the judicial police and, as regards the deprivation of liberty, to the courts? If such were to be the case, then what would be the relations between the European Public Prosecutor's Office and the national police, and which national or European judge would have the power to curtail a defendant's freedom pending judgment? Similarly, *rinviare a giudizio* is an expression that leaves some room for perplexity because under the Italian system, the Office of Public Prosecution may initiate criminal proceedings but may not send a person directly to trial (*rinviare a giudizio*), which is the prerogative of a judge who has no part in the prosecution. Are we therefore to take it that the European Public Prosecutor's Office would be endowed with a power that is not available to the Italian Office of Public Prosecution, one reason for which is that Italian law does not consider the prosecutor as being sufficiently impartial and non-partisan? Further, these doubts about the jurisdiction of the European Public Prosecutor's Office underscore the need for rules governing judicial control of the investigative and evidence-gathering phase and, consequently, the admissibility of this evidence before all the courts in European Member States.

In compensation, the Italian reader should have few misgivings about the phrase "*Esercita l'azione penale dinanzi agli organi giurisdizionali competenti*" ("It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences") because an Italian will take for granted that the prosecution will necessarily take action, in accordance with the principle of mandatory prosecution, which is enshrined in the Italian Constitution, as well as the fact that the Office Public Prosecution and no other authority is exclusively in charge of deciding on public prosecution. In the Italian version, therefore, the last sentence simply establishes the jurisdiction of national courts.

Finally, the expression "*a partire da Eurojust*" gives rise to the same perplexities and the same interpretations that occur to the French and English readers upon seeing the equivalent phrase. This is perhaps the most successful ambiguity in the

[10] Article 361 of the Italian Code of Criminal Procedure: "*identificazione di persone e di cose*" (identification of persons and things).

[11] For the judicial police, for example, Article 55 of the Italian Code of Criminal Procedure uses the word "*ricercare*".

Treaty, thanks to which delicate negotiations can be put off until a later date. The expression also illustrates the merits of Article 86 TFUE, which uses relatively homogeneous terms in its different language versions with a view to introducing a common concept yet also manages to leave plenty of scope for different visions that are based on national traditions. It may be difficult to strike the right balance between the fears and expectations created by this method, but, assuming it ever comes into being, the European Public Prosecutor's Office will necessarily be a hybrid, the offspring of the translation of different legal cultures into a new culture and, therefore, into a new common legal language.

The Lisbon Treaty: The Spanish, English and Italian Versions of Articles 82–86 of the TFEU in Relation to Criminal Justice Cooperation

Stefano Marcolini

Abstract The present paper draws a comparison between the Spanish and the Italian versions of Articles 82–86 of the Treaty on the Functioning of the European Union, making also a brief reference to other languages (English and French), in order both to fix some specific problems and to indicate a general method to resolve multilingualism issues. Finally, a reference is made to the perspectives on creating a European Public Prosecutor.

Abbreviations

EU	European Union
LECrim	*Ley de Enjuiciamiento Criminal*
OLAF	European Anti-Fraud Office
TFEU	Treaty on the Functioning of the European Union

1 Purpose of the Paper

This paper has a dual purpose.

Firstly, it draws a comparison between the Spanish and Italian versions of Articles 82–86 of the Treaty on the Functioning of the European Union (TFEU) and makes a few brief references also to other languages (English and French). In this way, a number of practical and interpretative issues are highlighted, and some suggestions are made as to how they might be resolved. The paper, nevertheless, does not seek to indulge in destructive criticism by pointing out the inevitable

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failings that occur when multilingualism is applied to a legal environment but seeks to offer some constructive comparisons and to find out some general guidelines to resolve every juridical impasse.

Secondly, the paper stands for the adoption of a certain meaning of the concept of "minimum rules", expression contained in articles 82 and 83 of the TFEU, which should offer an opportunity to arrive at some more in-depth conclusions.

2 Preliminary Remarks on Spanish Legal System

To understand how a Spanish legal practitioner will view European Community Law, we first need to have a basic grasp of the Spanish system of justice.

To begin with, we must consider first the interesting concept of the *Ley Orgánica*, which is enshrined in Article 81 of the Spanish Constitution. In order to adopt "organic" acts relating to fundamental rights and public freedoms (*derechos fundamentales* and *libertades públicas*), the Spanish legislature must proceed by means of laws approved by an absolute majority of the Congress. This is a legislative safeguard: it constitutes a general and abstract form of protection of fundamental rights, which the Spanish legislature cannot alter on the strength of a simple majority.

A second important feature is the so-called *recurso de amparo*, which is defined in Article 41 ff. of *Ley Orgánica* (Organic Law) No. 2 of 1979, according to which if a citizen believes that one of her/his fundamental rights, as recognised in the first part of the Spanish Constitution (i.e. Articles 14–29), has been prejudiced by the public authorities, she/he may appeal for a remedy to the *Tribunal Constitucional* (which essentially corresponds in function to the Constitutional Court of Italy). This system offers a jurisdictional protection of fundamental rights: therefore not a general and abstract protection but a protection focused on a "case law" perspective.

A third point to be considered is the Spanish criminal process, which is still governed by the *Ley de Enjuiciamiento Criminal* ("LECrim"), the Spanish Code of Criminal Procedure, which dates back to 1882. The Code, of course, has been revised several times since, and a particularly important amendment in 1988 created what Spanish legal practitioners refer to as an *acusatorio formal* or *mixto* criminal justice system. One of its distinguishing features is the survival of the two-pronged procedure in the preliminary phase of the investigation, in which the public prosecutor (known as the *ministerio fiscal*) works in cooperation with the investigating magistrate (*juez de instrucción*).

A final important point to be noted has to do with the prosecution. In Spain, prosecution is truly public in the sense that all Spanish citizens can initiate it. This prerogative is not only affirmed in Article 101 of LECrim but also enshrined in the Spanish Constitution (Article 125). Thus, the public prosecutor in Spain is obliged to pursue a criminal action but does not have a monopoly of power to prosecute. There are, of course, deterrents to prevent individuals from irresponsibly undertaking groundless actions. The deterrents include *fianza*, which is the "deposit" or "bond" a private plaintiff can be required to file to the Court (Article 280 LECrim), and the provision that, in the event of an acquittal of the accused, a charge of calumny may be brought against the original plaintiff, pursuant to Article 638 LECrim.

3 A Comparison Between the Spanish and Italian Versions of Articles 82–86 TFEU. The Concept of "*resolución*" Versus the Concept of "*decisione giudiziaria*"

Article 82.1 TFEU in its Spanish version uses the term "*resolución*", whereas in Italian the term used is "*decisione giudiziaria*" [which is rendered in English by the term "judicial decision"].

The example is highly serviceable to our purposes here because "*resolución*" is an admirably precise and technical term whose significance in Spanish procedural law leaves no room for doubt. It appears in Article 141 LECrim, which states that "*resoluciones judiciales*" are divided into "*providencias*", "*autos*", and "*sentencias*", in ascending legal complexity. Essentially, it is the equivalent to the Italian "*provvedimento del giudice*" [act of the court or decision of the judge], as defined in Article 125 of the Code of Criminal Procedure, which contains the same list ("*sentenza*", "*ordinanza*", and "*decreto*" [corresponding, roughly, to judgement, order, and decree]), only in descending legal complexity.

There is only one further observation to be made in regard to the differences to the Italian text. The Italian version of Article 82.1 TFEU does not use the expression "*provvedimenti del giudice*" ["acts of the court" or "decisions of the judge"] but, rather, the different expression "*decisioni giudiziarie*" ["judicial decisions"]. For once, this apparent inaccuracy might make sense: much of the judicial cooperation activity, constructed in the shadow of the now-superseded third pillar of Community law, is based on "*mandati*" ("warrants" in the English version), such as in the case of the "*Mandato d'arresto europeo*" (the "European Arrest Warrant"), or on "*ordini*" ("orders" in the English version), such as in the case of the "*Ordine europeo di indagine penale*" (the "European Investigation Order in criminal matters"), which are atypical instruments compared to the triad of "*sentenza-ordinanza-decreto*" ["judgment-order-decree"], and so the loose concept of "*decisioni giudiziarie*" ["judicial decisions"] appears better suited for these new forms of cooperation.[1]

[1] Just two brief observations need to be made here.

The first is that in Italian legal tradition, the two terms ("*ordine*" and, especially, "*mandato*") evoke the terminology of the Code of Criminal Procedure of 1930, which was based on an inquisitorial procedure, until it was replaced by a new Code in 1988, based on an accusatory procedure. It is curious to see how these two terms have now been revived in EU law to refer to the most advanced forms of judicial cooperation. This observation was made by Ruggieri (2012), p. 169.

The second observation is that in Spain, too, the enactment of the sources of the third pillar required the introduction of legal acts whose form is atypical, compared to the triad mentioned in the text ("*providencias*", "*autos*" and "*sentencias*"): see the use of the term "*orden*", such as in the expression "*orden de detención europea*" (the European Arrest Warrant).

4 (Continued). The Difference Between "*magistrado*" and "*magistrato*"

Let us now turn our attention to the concepts underlying the two terms *magistrado* and *magistrato*, which appear, respectively, in the Spanish and in the Italian versions of Article 82.1(c) TFEU, which states that the European institutions shall adopt measures to support the training of the judiciary and the judicial staff.

This is an emblematic case of two similar words that have quite different meanings in their respective languages: what are known as "false friends".

In Italy, *magistrato* refers both to the court judge and to the investigating magistrate—i.e. the public prosecutor. Consequently, both figures enjoy independence from the other branches of government, and their autonomy in this respect is safeguarded by the *Consiglio Superiore della Magistratura* [the Supreme Judicial Council], a constitutionally recognised body.

Not so in Spain. Here, the *Ley Orgánica del Poder Judicial* (No. 6 of 1985) sets out the rules governing the status of *jueces y magistrados* [judges and magistrates], but these offices don't include at all the *ministerio fiscal* [public prosecutor]. The latter office, in fact, is regulated by a different law, namely the No. 50 of 1985, known as the *Estatuto Orgánico del Ministerio Fiscal*. Among other things, it needs to be remembered that the *Fiscal General del Estado* [state prosecutor] is a political appointee (see, on the point, Article 124.4 of the Spanish Constitution).

This alone makes it quite clear that the Italian *magistrato* and the Spanish *magistrado* are very different figures.

Now we can see the problem: the training of the "judiciary", mentioned in Article 82.1(c) TFEU, in Italy can easily refer also to prosecutors but in Spain cannot. The only way of including Spanish prosecutors in training actions is to comprise them, through a broad interpretation, in the second part of the legal text, where reference is made to the "*personal al servicio de la administración de justicia*" ["judicial staff"], even if the expression was probably intended to encompass administrative staff only.

The example of the foregoing makes it fair to say that a deep knowledge of foreign legal systems should be always a *sine qua non* when drafting these supranational rules.[2]

[2] See Selvaggi (2010), pp. 559–560. The case examined by the author concerns an Italian legal practitioner who does not know the Scottish judiciary system: on a mere literal approach, she/he could—wrongly—be led to think that the Scottish "Sheriff's Court" is not a real judge.

5 (Continued). The Ambiguous Concept of "*procedimiento penal*" and the Role of Multilingualism in Determining Its Meaning

We shall now consider the meaning of the Spanish phrase "*procedimiento penal*", which occurs in Article 82.1(d) and again in Articles 82.2(b), 85.1(a), 85.2, and 86.2 TFEU (the expression is variously rendered in the English version as "proceedings in criminal matters", "criminal procedure", and "criminal investigations").

To start, we must observe that even in Italy the term "*procedimento penale*" ["criminal proceeding"] is not entirely fixed, in as much as a "*procedimento*" may refer either to the pre-trial phase only or to the entire process, from the preliminary inquiries all the way to the sentencing. It is in the first sense that, for example, academic authors speak about the "*fase procedimentale*" (pre-trial phase); it is in the latter sense that the term is intended when Article 121 of the Italian Code of Criminal Procedure says that parties can submit to the judge written statements "*in ogni stato e grado del procedimento*" ("at every stage and level of the proceeding").

The Spanish version of Article 82.1(d) TFEU speaks of the need to "*facilitar la cooperación entre las autoridades judiciales o equivalentes de los Estados miembros en el marco del procedimiento penal y de la ejecución de resoluciones*" [in the English version: "facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions"]. However, what does it mean?

The problem of understanding derives from the fact that—unlike the previous examples of "*resolución*" and "magistrado"—"*procedimiento*" is not a technical term even in Spanish. A Spanish legal practitioner is unlikely to use the word. To indicate the preliminary investigative phase, terms such as *sumario* or *diligencias previas* are used; to refer to the entire process from the initial investigation to the intermediate phase and trial, the term *proceso penal* is available.

Acknowledging that it is impossible to attribute an unambiguous sense to the term "*procedimiento*" while remaining within the confines of the Spanish system of law, we find that the best solution is to take advantage of multilingualism: i.e., we need to look at the terms used in other EU language versions of the same law and use them to elucidate the meaning of the Spanish term.

If we begin with the Italian version, we are in for a first surprise: no mention is made of "*procedimento penale*" ("criminal proceeding"), but the text contains the phrase "*in relazione all'azione penale*", which seems to refer to a specific moment of the proceeding: the indictment.

The French text is close to the Italian text, since it uses the word "*poursuites*", a term directly related to the prosecution, i.e. to the act of indictment or (as noted elsewhere[3]) to the opposite decision not to prosecute.

[3] See Mauro (2013), pp. 90–91.

English prefers the vague term “proceedings”. If an English practitioner wanted to be more specific, however, she/he would use terms such as “prosecution”, “prosecuted”, “charge”, and “charged”.[4]

Attempts at interpretation based on multilingualism would appear to have reached an early impasse. Yet there is a way out, and we can see it in the way the Spanish version uses the expression “*procedimiento penal*” not just once but several times in Article 82 TFEU. Specifically, it recurs as follows:

– “*los derechos de las personas durante el procedimiento penal*” (Article 82.2(b) TFEU);
– “*otros elementos específicos del procedimiento penal*” (art. 82.2(d) TFEU).

For these two passages, the other language versions are consistent: the Italian refers to “*procedura penale*”; the French, to “*procédure pénale*”; and the English, to “criminal proceedings”, all of which unequivocally relate to the entire legal process, from the start of investigations to the trial and the final judgment.

Thanks to this systematic and doubly secured interpretation—doubly secured in that it is referred to more than once in the Spanish text of Article 82 TFEU and translated by various expressions in other EU languages—we can conclude that, in keeping with the meaning attributed to the expression with reference to the Italian, French, and English legal systems, the Spanish term “*procedimiento penal*” that appears several times in Article 82 TFEU signifies the legal process in its broadest sense, from preliminary inquiries to final judgment.

The term “*procedimiento penal*” does not occur only in Article 82 but also in other parts of the same Treaty, which immediately raises the question whether the meaning is the same as that we have just explicated.

Unfortunately, the answer is no.

The Spanish term “*procedimiento penal*” also carries a more technical and specific meaning. We can glean this meaning from the provisions relating to Eurojust and its tasks. Article 85.1(a) TFEU states that regulations will be needed to determine, among other things, the tasks of Eurojust, which must necessarily include “*el inicio de diligencias de investigación penal, así como la propuesta de incoación de procedimientos penales por las autoridades nacionales competentes*” [“the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities”].

The Spanish terminology is highly technical: “*diligencias de investigación*” is the specific expression used to indicate the inquiry phase of the process; the term that immediately follows, “*incoación de procedimientos penales*”, unquestionably refers to the start of a criminal prosecution.

The confirmation is to be found by adopting a multilingual approach. The other language versions create a sort of concordance, which inhibits any other interpretation: the Italian speaks of “*azioni penali*”; the French, of “*poursuites*”; and the English, of “prosecutions”.

[4] The same terminological observations are also available in Selvaggi (2010), p. 554.

The term "*incoación de procedimientos penales*" as given in Article 85.1(a) TFUE refers therefore to the decision to prosecute: and the provision says that this prerogative does not fall within the remit of Eurojust, whose power is restricted to proposing the judicial authorities of Member States to initiate this type of action.

The same meaning is to be found in article 86.2 TFEU in relation to the future powers of the European Public Prosecutor's Office. Here, the Spanish text affirms that the European Public Prosecutor's Office may "*descubrir autores (...), incoar un procedimiento penal y solicitar la apertura de juicio contra ellos*".

The same passage in Italian reads: "*individuare, perseguire e rinviare a giudizio*"; the French reads: "*rechercher, poursuivre et renvoyer en jugement*." Perhaps the English is clearest of all: "investigating, prosecuting and bringing to judgment". All three languages refer to a progression in which the first term relates to the preliminary inquiry ("*individuare*", "*rechecher*", "investigating"); the second and third terms relate to the start of the judicial process, which, in turn, shades into two areas: the first alluding to the indictment or pressing of charges ("*perseguire*", "*poursuivre*", "prosecuting"), the second to the opening of the court trial itself ("*rinviare a giudizio*", "*renvoyer en jugement*", "bringing to judgment").[5] The conceptual differences between the latter two areas can emerge whenever there is a disconnect between the taking of action by the prosecutor and the actual bringing to trial, such as occurs in the Italian system, which provides for an "*udienza preliminare*" [preliminary hearing], at which a preliminary court examines the merits of the case in order to decide whether there are grounds for granting the prosecutor's request and open the trial phase or not.

The course we have followed to determine a meaning for the Spanish expression "*procedimiento penal*" provides us with an interpretative template for other doubtful cases: if a particular piece of legislation is not clear in one language (Spanish, in this case), then the presence of official and approved versions of the same text but in different languages can undoubtedly provide additional help for the interpreter. The conclusion we may draw from this is that we would do well to renounce the traditional monolingual interpretation we have used hitherto, which is restricted by the autarky of a given country's legal system, and open ourselves to a consciously multilingual interpretation.

[5] Article 86.2 TFEU raises a series of other issues that have taken root in more recent times. While the Italian, Spanish, and French versions seem to imply that the European Public Prosecutor's Office shall be entrusted solely for the drafting and presentation of the act of indictment, the English version is equivocal, declaring that the Office "shall exercise the functions of prosecutor in the competent courts of the Member States", which seems to suggest that the Office not only initiates prosecution but then proceeds to support the charges by participating in the trial begun in the relevant Member State, which, in effect, is something quite different.

6 The Concept of "Minimum Rules"

We now look at the concept of "minimum rules". For our purposes here, we shall look at the reference made to them in Article 83, paragraphs 1 and 2 of TFEU, where they are mentioned in reference to the need to harmonise areas of substantive criminal law, and in Article 82.1, where the reference is to the approximation of other areas of criminal procedural law.

What we are dealing with here, however, is not a linguistic mismatch or imprecision but rather an ambiguity intrinsic to the concept itself. What is meant by "minimum rules" of harmonisation? It is a particularly difficult legal problem.

In the area of substantive criminal law, the interpreter at least has some pointers in as much as the European legislator specifies that the "minimum rules" concern "the definition of criminal offences and sanctions" (Article 83.1 TFEU).

Much more problematic is finding any definition in the field of criminal procedure, to which the minimum rules are supposed to refer. According to Article 82.1 TFEU, the minimum rules are to refer to several areas such as the admissibility of evidence, the rights of the person, the rights of the victims, etc., but it is far from clear what degree of specificity is intended, there being several different models available (maximum standard, better law, prevailing orientation, lowest common denominator).

The conclusion is that, at least as far as criminal procedure is concerned, it is certainly appropriate to "force" the concept of minimum rules and to build them into a set of norms as detailed as possible (the adjective "minimum" notwithstanding): this, in order not to frustrate the harmonisation effort, which runs the risk of getting lost in the folds of 27 separate Member States legal systems.[6]

7 From Legal Pluralism to the Birth of a Unified European Criminal Procedure

Our consideration of the concept of minimum rules allows us to draw some final conclusions.

Multilingualism is certainly an "ontic" fact: that is to say, it exists in reality.

It also has a "deontic" value, that is to say, it contains prescriptive elements and has the potential to exalt "the beauty of diversity". The Charter of Fundamental

[6] For a more elaborate justification of the concept of "minimum rules" in the broadest possible sense, see Marcolini (2011), pp. 537 and 540.

The same idea is also put forward in the responses provided by Insubria University to the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility (Brussels, 11 November 2009, COM 2009—624 final). The document is available at http://ec.europa.eu/justice/news/consulting_public/news_consulting_0004_en.htm (accessed 4 December 2012).

Rights recognises multilingualism (Articles 21–22), and European institutions both concern themselves with it and promote it (the European Economic and Social Committee in several recent opinions, the European Council in a Resolution dated 21 November 2008, and the Committee of the Regions). As we have seen, multilingualism is useful also for the purposes of legal interpretation.

Without repudiating what we have said above and without advocating an unlikely scenario of mandatory linguistic and cultural homogenisation, we nonetheless must have the intellectual honesty to admit the unfortunate fact that multilingualism is also a barrier to the free circulation of judicial products.

Since law, language, and culture are inextricably entwined, having 27 Member States means having 27 different legal systems, each of which is continuously and autonomously evolving. Think of what the European Arrest Warrant is today: a tool linking the 27 legal systems, each of which remains distinct, each of which preserves its own peculiarities, and each of which is subject to changes in domestic legislation. It is like a jigsaw puzzle in which the individual pieces can change shape and form, even if only slightly.

Given the current situation, no real breakthrough, I believe, will come from the slow and incremental (but never complete) harmonisation of the 27 different legal systems or even from the pragmatic and, at the same time, ingenious principle of mutual recognition, though both these remain very important elements of progress. Rather, it will come about as a result of the creation of the first unequivocally European organ of criminal justice.

An interesting example comes from the European Anti-Fraud Office (OLAF). In order to allow it to carry out its investigations, which are merely administrative rather than criminal,[7] operational procedures needed to be established and, with them, a set of guarantees (such as the right of a defendant to a lawyer). Naturally, OLAF envisages a single set rather than 27 different sets of procedures and guarantees, and this is the point.

A European Public Prosecutor's Office and, hopefully, a European judge in charge of deciding on matters of custody, as well as a European defence advocate, all of whose initially limited responsibilities would gradually increase over time, would represent true judicial innovation and serve as a very valuable laboratory of law.

This value comes from the circumstance it would be a single unified laboratory rather than 27 separate more or less diverse laboratories, and within this laboratory of law, work could begin on the lengthy task of forging the first common legal concepts relating to diverse forms of investigative acts, matters of jurisdiction, the rights of the defence, the right to interpreters, and so on, through the medium of a unified and unique language that is capable of capturing these new concepts.[8]

We have a long way to go, but the longest journey begins with a single step.

[7] See Perduca and Prato (2006), pp. 4242 ff.

[8] On this point, see the project of the University of Luxembourg to create model rules for the procedure of the European Public Prosecutor Office (http://www.eppo-project.eu/).

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The Future of the European Public Prosecutor's Office in the Framework of Articles 85 and 86 TFEU: A Comparison Between the Italian, German, and English Versions

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Abstract The article focuses on the connotations of the different versions (Italian, German, English) of the rules laid down by articles 85 and 86 TFEU referring to the future functions of the European Public Prosecutor's Office, with a view to establishing a common significance

Abbreviations

CCP	Code of Criminal Procedure
ECHR	European Court of Human Rights
GCCP	German Code of Criminal Procedure
ICCP	Italian Code of Criminal Procedure
OJ	Official Journal
TFEU	Treaty on the Functioning of the European Union

1 Subject, Scope, and Methodology

The purpose of this examination of the different versions (English, German, Italian) of Articles 85.1, 86.2, and 86.3 TFEU is to explore, from the (relatively limited) perspective of three legal systems, the EU legislator's regulatory scope for the creation of a European Public Prosecutor's Office, which is the subject of Article 86 of the Treaty on the Functioning of the European Union (TFEU).

According to Article 86 TFEU, "In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance

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with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust". The mission of Eurojust, meanwhile, is defined in the preceding article. As regards criminal procedure, which is the concern of this paper, the area of interest consists of those sections of the two articles that deal with the powers of the future European Public Prosecutor's Office.[1]

Our examination will take a two-pronged approach. First, we shall reconstruct the meaning of the specialist and non-specialist terms used in each language version; second, we shall try to determine a spectrum of semantic and conceptual interpretations that are common to the three legal systems under consideration. By this means, we can infer, at least in broad outline, the original intent, the *intentio legis*, of the EU legislator.

We have two reasons for making a comparison of at least three versions of the regulations and for including English among them. Firstly, examining several language versions of the measures has an intrinsic value for the purposes of comparison, and secondly, English had to be included as it has become the "lingua franca" of EU work.

The starting point is the well-known European Union rule[2] that prescribes, in the name of respect for the diversity of Member States, that EU lawmaking must be done in all 23 official languages, without any reference to a putative "original" text. The upshot of this principle is that there is no fountainhead—no single source text—to which we can refer for the purpose of resolving problems of interpretation that may arise in one or another language. All versions being equally authentic, the interpreter is faced with documents whose value is equal too. The absence of a prevailing version that outweighs others generally means that an interpreter has to consider all of them. This is why we feel it is useful to make a comparative study using at least three versions of the aforementioned Article 86.

It is not possible to assign any pre-eminence even to the English version of the provision. Yet it is also well known that European regulatory measures are generally translated from English, a language that has become absolutely dominant during the discussion, preparation, and drafting of texts on which the most important European agreements are based. The English used in the preparation of EU provisions has little to do with the language of Shakespeare. It is a "lingua franca", a kind of artificial language divorced from its original context and semantically simplified as a result of its use by non-native speakers. The English used in version of Article 86 TFEU shows signs of this generic and artificial nature and therefore includes expressions that are sometimes far removed from the technicalities of British common law. The English "translation" of the text gives some idea of the misunderstandings that could arise if reference were made to "proper" English for

[1] It does not, therefore, have anything to do with aspects of the legislative process.

[2] See Article 3 TFEU, which states that the European Union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced." See Article 1 of Regulation No. 1 determining the languages of the European Economic Community (OJ L 17, 10.6.1958, p. 385), as amended on the occasion of the accession of new Member States.

the purposes of interpreting EU provisions. Most of all, an examination of the text will enable us to determine whether and to what extent the indiscriminate use of English impinges upon the other language versions considered here. For instance, we can immediately remark on the fact that the necessarily imprecise use in English of references and concepts that are alien to the continental tradition has had an effect on the generic expressions used in the German and Italian texts.

For methodological purposes, we need to make a brief but essential detour into the intricate and complex issues of translation.

It is also worth noting that the thoughts reproduced here were developed by a native speaker of Italian and then translated into English. Likewise, the present author read and understood the provisions of the Lisbon Treaty in Italian, whereas on this page they are discussed in English. What we are dealing with here are concepts rather than specifically identifiable goods or things, for which one word in one language usually corresponds to another in another, such as might be the case with chair = *sedia* = *Stuhl*.[3] There is almost never a one-to-one correspondence of this sort between legal terms and institutions in different countries. No thought or abstract idea ever has an exact equivalent in another language: even where it is possible to proceed by means of literary calque—the direct lending of a word or expression from one language to another[4]—its semantic range will necessarily be different owing to differences in historical context and, by extension, in the socio-cultural environment in which the word exists. One way to circumscribe this inevitable ambiguity is to use definitions.[5]

Without going into the merits of the far-reaching and complex relations between theories of translation and comparative studies,[6] we can at least say that using a definition-based approach,[7] it is possible to consider the different language versions from an internal perspective (with reference, therefore, to the relevant legal system of each), draw parallels between them, and identify what they have in common.

[3] See, among many, Vermeer (2006), p. 385 ff. For reflections on the ambiguous relationship between words and things, see also (though perhaps not the most efficient text for a legal scholar) Eco (2010), p. 41 ff., on the difficulty of expressing the Italian words *albero*, *legno*, *bosco*, *foresta* in French (*arbre*, *bois*, *forêt*), German (*Baum*, *Holz*, *Wald*), and English (tree, timber, wood, forest).

[4] On the significance of this operation and its various nuances, see, in brief, Beccaria (2004), pp. 124–125.

[5] See Pommer (2006), p. 54 ff. and 74–75.

[6] For a comprehensive and in-depth summary of the various orientations in both disciplines and for further bibliographic references, see Pommer (2006), *ibid.*, in which, after introducing the characteristics of legal language (*Rechtssprache*), the author addresses issues and legal translation (*Rechtsübersetzung*) and discusses its relationship with the field of comparative law (*Rechtsvergleichung*).

[7] See Pommer, note 5 above.

2 The Italian Version

We shall look at three areas: the identification of the European Public Prosecutor's Office; the definition of its functions as compared to what are, or may be, the functions of Eurojust; and the regulatory basis for the Office's activity. These three areas need to be considered with reference to the terminology used in the three language versions, which is specialist only in part.

In the Italian version of Article 86 TFEU, the specialist terms consist of the following: *procura europea* (paragraphs 1, 2, and 3), *rinviare a giudizio* (paragraph 2), *esercitare l'azione penale, organi giurisdizionali competenti* (paragraph 2), and only partially, the term *ammissibilità delle prove*. Terms that form part of everyday non-technical speech include: *individuare*, *perseguire*, and *complici*, which are to be found in paragraph 2, and *regole procedurali, controllo giurisdizionale*, and *atti procedurali* in paragraph 3 of Article 86. Likewise, Article 85 TFEU specifies, in technical terms, that *Eurojust ha il compito di sostenere e potenziare il coordinamento e la cooperazione tra le autorità nazionali responsabili delle indagini e dell'azione penale* (paragraph 1, first sentence) and that its mission may be extended *alla proposta di avvio di azioni penali esercitate dalle autorità nazionali competenti* (paragraph 1, sentence, 2 letter a) or the *potenziamento della cooperazione giudiziaria* (paragraph 1, sentence 2, letter c). The regulations relating to Eurojust make use of everyday terms when they refer to *avvio di indagini penali* (paragraph 1, second sentence, letter a) and of loosely defined terms when they refer to *la composizione dei conflitti di competenza* (paragraph 1, second sentence, letter c).[8]

Let us now look at the institution of the European Public Prosecutor's Office. The *procura* is the precise term used to define the European Public Prosecutor's Office. In the section dealing with the activities of Eurojust, however, the phrasing is different. Here, a broader spectrum is used so that Eurojust is assigned the function of coordinating *autorità nazionali responsabili delle indagini e dell'azione penale* ["national investigating and prosecuting authorities"] (Article 85.1 TFEU). A like breadth of scope is given when it comes to defining the functions of Eurojust, which are to include the *avvio di azioni penali* ["the initiation of criminal investigations"] by the *autorità nazionali competenti* ["competent national authorities"]. This last phrase, *autorità nazionali competenti*/competent national authorities, used in association with the remit of the judiciary, relates to the prosecutor and is evidently being used in a very generic sense, in the manner of the previously mentioned term *responsabili* [which does not even appear as a separate term in English].

We now turn our attention to the typical activity of an agent of the prosecution, namely issuing a "*domanda penale*" [application to prosecute]. In the Italian, as in

[8] Eurojust, as a supranational body, can help resolve conflicts of jurisdiction but not of competence. Within the context of a national system, however, competence defines the scope of jurisdiction of a court.

most European legal systems,[9] the action that the public prosecutor takes to initiate a trial is regulated by law, which defines both the content and the procedures to be followed.[10] In regard to this phase of proceedings, the reference is to the (*esercizio dell') azione penale* [prosecution], which may be initiated after a *rinvio a giudizio*[11] [indictment].

The Italian Code of Criminal Procedure does not contain any precise definition of what is meant by "*avvio delle indagini penali*" ["the initiation of criminal investigations"], which is included as one of the tasks of Eurojust. The phrase could refer to any one of several actions in Italian criminal law procedure: the start of the *fase delle indagini preliminari* [preliminary investigations] following the specific reporting of a crime,[12] the (delicate) phase of transition from an administrative investigation to a criminal investigation and the consequential application of the procedural safeguards related with the latter.[13]

The future European Public Prosecutor's Office is to be "*competente per individuare, perseguire e rinviare a giudizio"* ["responsible for investigating, prosecuting and bringing to judgment"]. Quite aside from the loose definition of the word "*competente*", on which we have already commented, only the last part of the above phrase directly relates to part of the criminal process in Italy. Although the Italian text makes use of the common words *individuare* and *perseguire* [rendered as "investigating" and "prosecuting" in English], and though neither of these two words has a specific denotation in Italian criminal law, it is nonetheless clear that the text is distinguishing the functions of the European Public Prosecutor's Office from those of Eurojust, for which no term explicitly referring to criminal action is used.

Finally, as regards the legal sources and the scope of the future rules of EU, the *regole procedurali* [regulations] mentioned in Article 86.3 come across to Italian

[9] There are many good comparative law texts dealing with this issue. In Italian, see Chiavario (2001), in relation to Belgium, France, England, Italy, and Germany; in English, with reference to the same legal systems, see Delmas-Marty and Spencer (2002). The volumes reproduce the results of the working group coordinated by Delmas Marty and Vervaele, which was held on the occasion of the second publication of the *Corpus Juris*. For a study of the other ten countries considered (all the EU Member States before enlargement), see Delmas-Marty and Vervaele (2000). Volumes 2 and 3 are dedicated to the national reports on the Public Prosecutor's Office, prosecution, and investigation.

[10] See Art. 405 of the Italian Code of Criminal Procedure. Many commentators have written about the Italian legal procedures, including, in English and in the area that is pertinent to our discussion here, Ruggieri and Marcolini in a report produced as part of a study into "Model Rules for the Procedure of the European Public Prosecutor's Office (EPPO)", conducted at the University of Luxembourg with the financial support of the EU Commission under the responsibility of Professor Katalin Ligeti (see http://www.eppo-project.eu/index.php/Home; see, moreover, Ruggieri and Marcolini (2012), p. 368 ff.

[11] See Article 405, paragraph 1 of the Italian Code of Criminal Procedure.

[12] See Articles 330 ff. of the Italian Code of Criminal Procedure.

[13] See Article 223 of the provisions implementing the Italian Code of Criminal Procedure.

legal scholars as a form of synecdoche—one part would seem to stand for the whole.

The expression *regole procedurali*, which is not always proper in relation to "civil law" systems, refers to a larger set of rules of criminal code and related provisions of the Constitution. It is a classic example of a "calque" translation[14] that, for a European legal scholar, evokes the "common law" concept of the "rule of law", as traditionally defined by Dworkin, who distinguished between rules and principles.[15]

To the ear of a scholar of Italian criminal law, the term *atti procedurali* strikes a false note, in that no such thing is defined in the Italian system, and the expression therefore lacks specific meaning. As a phrase, *atti procedurali* [procedural measures] can be understood only from a common European standpoint as referring to all the activities that the future European Public Prosecutor's Office will be able to carry out. Nor does the Italian Code of Criminal Procedure make any mention of *controllo giurisdizionale* [judicial review]. The Italian term *controllo* is used with regard to certain restrictions on fundamental freedoms, in particular the right of the inviolability and secrecy of communications.[16] The term is variously used in legal literature (but not in the Italian Code of Criminal Procedure) to explain the actions of a judge during the investigative phase (relating to actions subject to judicial review that restrict personal liberty), at the termination of the investigative phase (for the control of inaction), or in the course of an appeal. The phrase *ammissibilità delle prove* [admissibility of evidence] does belong to the vocabulary of legal procedure in Italy, but its meaning is not unequivocal. Even the word "*complici*" [accomplices] does not belong to the specialised language of Italian law, which, in matters of substantive law, prefers the term *concorrenti*[17] and, in matters of procedural law, prefers either *imputati* or *indagati in procedimenti connessi o collegati*, which, moreover, contain further distinctions of meaning.[18]

3 The German Version

The German version, like the English, speaks of the European Public Prosecutor's Office (as opposed to treating the European Public Prosecutor as if she/he were a person). "*Eine Europäische Staatsanwaltschaft*" (Article 86.1-3) is the abstract

[14] See Pommer (2006).

[15] Dworkin (1978).

[16] See Articles 34, 103, 269, 275-*bis*, 283 of the Italian Code of Criminal Procedure and 226 of the provisions implementing the Italian Code of Criminal Procedure.

[17] See Article 110 of the Italian Criminal Code.

[18] See Articles 12, 196, 197, 198, 210, and 371 of the Italian Code of Criminal Procedure.

noun that German uses where the Italian text has *procura*. The German term encompasses the term "*Staatsanwalt*", i.e. the counsel for the prosecution or, simply, the public prosecutor.

For the rest, the text generally follows the same contours as the Italian version. The power of arraignment of the European Public Prosecutor's Office is denoted in German by the specialist term *Anklageerhebung* (86.2),[19] which in German law refers specifically to the functions typical of the public prosecutor.[20] In German as in Italian, the text mixes technical with everyday language: the European Public Prosecutor's Office is to be "responsible"—*zuständig*—also "*für die strafrechtliche Untersuchung und Verfolgung*", that is to say, for the investigation and prosecution of crimes.

In the German Code of Criminal Procedure (*Strafprozessordnung)*, the term *Untersuchung* [investigation] is not accompanied by the adjective *strafrechtliche* [criminal/penal] that appears in the European provision under consideration here. In the German legal system, *Untersuchung* is used in a broad and general sense to indicate the preliminary or investigative work carried out also by the judge.[21] The word is cognate with the term *Untersuchungshaft*, which means "imprisonment on remand" (or "pre-trial detention"). The term *Verfolgung*, which is similar in intent to the French "*persecution*", can also be used to mean prosecution. In the *Strafprozessordnung*, the term appears in the rules governing exceptions to the principle of mandatory prosecution (i.e. in the rules that temper the mandatory nature of prosecution), when relating to libel actions, the powers of the plaintiff, and certain investigative actions.[22]

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[19] Literally, the "lifting" (*Erhebung)* of the charge (*Anklage*).

[20] For the German legal system, we can again refer to one of the most popular manuals: Roxin, the latest version of which (2009) is co-authored by Schünemann (Roxin and Schünemann (2009)). For comments on specific provisions with extensive case law and doctrinal references, see also the commentary in Meyer-Gossner (2011).

For an English commentary, we can once again usefully refer to Weigend (2012), p. 264 ff.

It is also available online, as part of the Service provided by the German Federal Ministry of Justice, in cooperation with "Juris GmbH", an unofficial English translation of the German Code of Criminal Procedure: see http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf (updated to 2010).

The law referred to in the text is set out in paragraph 151 of the *Strafprozessordnung* (German Code of Criminal Procedure), which states: "*Die Eröffnung einer gerichtlichen Untersuchung ist durch die Erhebung einer Klage bedingt*". Note the use of the word *Untersuchung* in connection with the investigative work of a Court. The translation reads: "The opening of a court investigation shall be conditional upon preferment of charges". Note also that the title of Section 151 is the "Principle of Indictment".

[21] Pursuant to Section 155.1 GCCP, "*Die Untersuchung und Entscheidung erstreckt sich nur auf die in der Klage bezeichnete Tat und auf die durch die Klage beschuldigten Personen*". In the unofficial English translation mentioned above, this is given as "Scope of the Investigation. The investigation and decision shall extend only to the offence specified, and to the persons accused, in the charges".

[22] A perfect example of this with respect to the mitigation of the principle of mandatory prosecution is the provisions in Sections 153, 153a, 153c, 153d, 153e, 153f, 154, 154a, 154b, 154c, 154e

By contrast, more generic terms are used in respect of Eurojust's tasks, which include *Einleitung von strafrechtlichen* ***Ermittlungs****maßnahmen* [the initiation of criminal investigations], as well as *Vorschläge zur Einleitung* [proposing the initiation] *von strafrechtlichen* ***Verfolgungs****maßnahmen* [of [criminal] prosecutions]. In the German Code of Criminal Procedure, *Ermittlungs-*, which means investigation, is used in conjunction with *Verfahren* (procedure) as a technical term referring to the phase that precedes the prosecution proper: *Ermittlungsverfahren* therefore means the procedure of preliminary investigation. *Verfolgung*, when used with reference to the European Public Prosecutor's Office, generically refers to the activity of "prosecution". The German version of the text listing Eurojust's tasks, in common with the other versions, aims at covering the entire spectrum of activities carried out by the prosecution but not expressly the "*Anklaerhebung*".

Like the Italian version, in using the word *Verfahrensvorschriften*, German is simply transliterating the English "rules of procedure" and, in so doing, adopts a word that does not appear in the lexicon of German criminal law. A like observation might be made of *die (gerichtliche) Kontrolle* (judicial review) and *Zulässigkeit von Beweismitteln* (admissibility of evidence). As in the Italian version, the first term relates to police action, especially in connection with the collection of personal data,[23] and the latter refers to the admissibility of court requests made by the prosecution and defence.[24] Finally, as regards the subject of judicial review (*der von der Europäischen Staatsanwaltschaft bei der Erfüllung ihrer Aufgaben vorgenommenen Prozesshandlungen*), that is to say, "the judicial review of procedural measures taken by [the European Public Prosecutor's Office] in the performance of its functions", German uses a compound word, *Prozesshandlungen*, to denote the activities of the prosecution. The first word (*Prozess*) also appears in *Strafprozessordnung*, together with *Verhalten*. German law refers to *Prozessverhalten* in relation to conduct (*Verhalten*) by the parties in a lawsuit during the plea bargaining phase, which was introduced to the German Criminal

GCCP, where it is specified that the prosecutor *kann von der Strafverfolgung absehen*: *i.e.* may dispense with prosecution. As regards *Privatklage* (civil action), see *Privatklage* Section 58a GCCP. As regards investigative activity, see sections 98c and 101 (relating to the processing of data), 104 (relating to searches and seizures), and 100e (relating to wire taps used to combat organised crime) GCCP. The term is used for the prosecuting authority [*Strafverfolgung Behoerde*].

[23] See Sections 163d, 163e, and 463a GCCP.

An instance of this is to be found in the translation for the term "judicial review" proposed in the section on Terminology in Sharon Byrd's book (Sharon Byrd 2011, p. 390), which defines the concept in English as "the court's exercise of its power to consider the decision of a lower court or of any branch of the government, in particular in light of their correspondence with the Constitution but also with established law" and proposes that the German term should be "*gerichtliche Überprüfung*".

[24] It is no coincidence that in the index of the manual of Roxin and Schünemann (2009), the term does not appear and under the heading "Zu" on page 568, the only reference is to *Zulassung der Anklage* (admissibility of charge).

Procedural Code only in 2009.[25] The second word (*Handlung*) is used in composition with *Haupt-* (main) to denote the trial stage (*Hauptverhandlung*) and, alone or together with *Untersuchung*, to indicate the act and/or the activity of the court or the parties.

The German version, finally, uses *Täter*[26] for "perpetrator" and *Teilnehmer* for accomplice[27] (Article 86.2).

4 The English Version

As is well known, the English text refers to a "European Public Prosecutor's Office", which, until almost three decades ago, corresponded to no comparable English institute.[28] After the establishment of the Crown Prosecution Service in 1984, the English system acquired a new branch of the judiciary specifically dedicated to the initiation of court cases that took its place alongside the traditional instigators of court cases, namely private parties or the police.[29]

In English, an impersonal formula is used to denote the party responsible for conducting prosecutions. The terminology used to define the functions of the European Public Prosecutor's Office may seem surprising, but only if one subscribes to the mistaken idea that the Anglo-Saxon tradition, being founded on a civil and discretional laws, has never reflected on "continental" questions regarding the meaning of legal action in criminal law.

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[25] See Section 257c GCCP, which was introduced in 2009 and specifies, *inter alia* (see para. C.2), that the subject matter of a negotiated agreement may include "*das Prozessverhalten der Verfahrensbeteiligten*" ("the conduct of the parties during the trial").

[26] Pursuant to Section 25 StGB (*Strafgesetzbuch:* the Criminal Code) under the section Principals: *(1) Als Täter wird bestraft, wer die Straftat selbst oder durch einen anderen begeht. (2) Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)*. Using the online translation provided by the Federal Ministry of Justice in cooperation with juris GmbH and updated to October 2009, (http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf), this translates as "Section 25- Principals (1) Any person who commits the offence himself or through another shall be liable as a principal. (2) If more than one person commit the offence jointly, each shall be liable as a principal (joint principals)." Sharon Byrd (2011), having defined "accomplice" as "someone who assists another in committing a crime", proposes the translation *Mittäter* and *Gehilfe*.

[27] That is to say "*Teilnehmer*", which, in the various forms envisaged in the *Strafgesetzbuch* (StGB), is in current use in the codified laws.

[28] See Howse, rapporteur for England in the much-cited publication Ligeti (2012), p. 134. The book also reconstructs the various sources of English law and provides addresses for downloading the relevant provisions, with particular regard to those referring to the Crown Prosecution Service (CPS).

Among the various manuals (which often bring together the relevant part of procedural with substantive law), see Archbold (2012), Atkinson and Moloney (2011), Sprack (2011).

[29] Howse (2012), pp. 134–136 and 167.

The future tasks of the European Public Prosecutor's Office include "investigating, prosecuting and bringing to judgment", all of which are imprecise terms. Or, better, they are relevant only in so far as investigating and prosecuting are two separate actions. In the motherland of adversarial law,[30] no institution or authority exists whose task can be likened to "bringing to judgment".[31]

With regard to Eurojust's tasks, which include the "the initiation of criminal investigations, as well as proposing the initiation of prosecutions", the difference, echoed in the German version, between the initiation of criminal investigations and the initiation of prosecutions is more specific and important. Eurojust may initiate criminal investigations, or it may initiate investigative inquiries that are conducted before the beginning of the trial proper and may propose that a case be brought to trial. The continental tradition has no specific term for the latter course of action (proposing bringing a case to trial), but the formula given in the provision would appear to include it here.

Finally, the expressions used to describe the purpose of future EU legislation are perfectly clear in the context of English law and consistent with the relevant specialist vocabulary. The word "rules" (as in "the general rules applicable to the European Public Prosecutor's Office, . . .the rules of procedure applicable to its activities. . . the rules applicable") (Article 86.3 TFEU) is appropriate and precise.

The reference to the "admissibility of evidence" also refers precisely to the set of rules relating to legal proof[32]; similarly, the "judicial review of procedural measures" is a correct formulation for the process of control and oversight of measures that the prosecution may demand.[33] The terms "perpetrators of, and accomplices" (86.2) accurately reflect the terminology of substantive English law and elucidate the choice of the Italian term (*complici*), which, as we can now see, is a calque from the English term.

[30] Howse (2012), p. 134, for some thoughts on this recurrent commonplace. There is a vast range of publications on the subject. Notably, they include the following classics: Damaska (1997), Damaska (1974–1975), Damaska (1986), Goldstein (1974).

[31] According to Howse (2012), p. 135, "Art. 86 TFUE distinguishes between investigation, prosecution and bringing to judgment in a criminal justice process. In English law, the process is divided into investigation and prosecution: the latter encompassing both pre-trial hearing and the trial itself".

[32] There is an enormous wealth of bibliographic resources on this, though we would do well to remember that that evidence in the English system regards the trial phase only.

[33] However, as Howse observes (2012, p. 142) with respect to the English system, ". . .there is no judicial review, in the sense of continuous judicial oversight—as exercised by a *juge d'instruction* in France. Criminal investigations are never the responsibility of judges in English law". See also note 28 above.

5 Conclusions

Within the limits we set out at the beginning of this paper, we can now draw a few brief conclusions.

In the three language versions we have looked at, the future European Public Prosecutor's Office is framed in completely impersonal terms. The EU legislator has therefore been assigned the task of making opportune choices and may, for example, revisit the options drawn up at the time of the *Corpus Iuris*[34] or adopt the more complex solutions subsequently proposed by Spain[35] or those put forward in the most recent study by the European anti-fraud office (OLAF).[36] The Treaty is silent on the question of the autonomy of the European Public Prosecutor's Office or its dependency on EU institutions. Each country will be prone to favour its own national traditions in the shaping of the Office.[37]

The functions of the European Public Prosecutor's Office are far more ambiguously defined, especially if we consider the preposition "from"[38] in the provision declaring that the Office may be established "from Eurojust".

The responsibilities of Eurojust are defined—though not without ambiguity in the English version—in such a way as to exclude the possibility that Eurojust may 1 day act as a prosecuting authority. Prosecution, in the sense of a formal act to initiate a trial in a (domestic) court,[39] is a power expressly reserved for the European Public Prosecutor's Office, which may also be allocated with more extensive powers of investigation.

No indication is given of which acts should be subject to judicial review. The generic reference to "judicial review" leaves room for the oversight of either the action or the inaction of the public prosecutor and is therefore not limited to individual acts that restrict personal freedom. The provisions indicate that the admissibility of evidence will be regulated, but it is to be wondered whether and how regulations on admissibility will affect the rules of criminal law of each Member State.

[34] See bibliographical references in note 9 above.

[35] See *The Future European Public Prosecutor's Office*, 2008.

[36] See http://ec.europa.eu/anti_fraud/about-us/legal-framework/green_paper/index_en.htm.

[37] On the structure of the separate departments of the Public Prosecutor's Offices of various Member States, see note 9 above.

[38] See Ruggieri (2012).

[39] See Ruggieri (2012).

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Part IV
Language and the Environment: Ascending and Descending Circulation of Polysemantic Words

The Environmental Liability Directive and the Problem of Terminological Consistency

Barbara Pozzo

Abstract The present paper focuses on the topics of multilingualism and EU harmonisation instruments, applied to the field of environmental protection, especially analysing the Directive 2004/35/EC and its problematic definitions and translations.

Abbreviations

EC	European Community
ELD	Directive 2004/35/EC
EU	European Union

1 Introduction

One of the core issues of EU law in recent years has been the impact of multilingualism on the harmonisation process of EU law,[1] as well as the birth of a new legal lingua franca.[2]

The thesis advanced in this paper is that in order to achieve effective implementation of environmental directives, we can learn from previous experiences and avoid the problems arising from the following:

[1] Comp. Schübel-Pfister (2004); Pozzo and Jacometti (2006); Pozzo (2012a).

[2] Pozzo (2012b).

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1. A drafting strategy that fails in taking the multilingual character of EU legislation and the terminological peculiarities of environmental law into account;
2. Failure to acknowledge the different national backgrounds and legal processes that determine path dependency.[3]

Both problems militate against harmonisation, which is supposed to be one of the main objectives of EU directives.

The present paper looks at Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD).[4]

2 The Debate Before the Adoption of Directive 2004/35

The ELD is the result of a long debate within the European Union. After the publication of the Green Paper on remedying environmental damage in 1993[5] and the presentation of the White Paper on environmental liability in February 2000,[6] more recently the ELD declares that its aim is to *"establish a common framework for the prevention and remedying of environmental damage at a reasonable cost to society"*.[7]

From the outset, the purpose of the Commission's initiative has been to harmonise Member States' divergent liability arrangements and to further the cause of environmental protection. Differences in liability rules and the considerable heterogeneity of the criteria used in determining the gravity of environmental damage threaten to distort internal market competition. The main purpose of ELD was to approximate rules on liability for environmental harm and set a lowest common denominator applicable to all Member States to ensure a level playing field.

3 The Problem of Definitions, with Particular Regard to the Concepts of "Environment" and "Environmental Damage"

In the 1993 Green Paper, the Commission declared: *"A legal definition of damage to the environment is of fundamental importance, since such a definition will drive the process of determining the type and scope of the necessary remedial action—and thus the costs that are recoverable via civil liability"*.

[3] That is, the view that technological change in a society depends quantitatively and/or qualitatively on its own past.

[4] OJ 30 March 2004, L 143/56.

[5] COM(93) 47, Brussels, 14 1993, OJ C/149 29 1993.

[6] COM(2000) 66 final.

[7] Third recital of the Directive.

In the same document, the Commission pointed out that *"Legal definitions often clash with popularly-held concepts of damage to the environment, yet are necessary for legal certainty"*.

The definitions of the environment and environmental damage are essential for building a harmonised European-level system of liability.

The key elements that must be defined are the following:

- The objects suffering environmental damage,
- The degree of impact constituting the damage,
- The person who has the right to decide on these matters.

It should also be remembered that the concept of "environment" was not defined by either the EC or the EU Treaty. Accordingly, different concepts and definitions of what constitutes the "environment" evolved nationally. In some jurisdictions, the definition was "eco-centric", whereby the environment was understood as referring to natural resources; in other jurisdictions with a more anthropocentric bent, the environment was identified in terms of a few salient aspects, namely those most relevant to human health.

Secondary legislation, too, only occasionally defined the environment, and then only with reference to certain aspects. No attempt was made to arrive at a definition, valid for all areas of the law.[8]

The ELD finally states that "*concepts instrumental for the correct interpretation and application of the scheme provided for by this Directive should be defined especially as regards the definition of environmental damage. When the concept in question derives from other relevant Community legislation, the same definition should be used so that common criteria can be used and uniform application promoted*".[9]

For the assessment and determination of liability for environmental damage, Directive 35/2004 reduces the environment to three components, which are set out in Article 2:

> *(a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I; Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.*

[8] Directive 85/337 on the assessment of the effects of certain public and private projects on the environment introduced a very broad definition of the environment as including human beings, wildlife, flora, soil, water, air, climate and landscape, and the interaction between them, as well as material assets and the cultural heritage.

[9] Fifth recital of the Directive.

(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4 (7) of that Directive applies;

(c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.

The definition of land damage, in particular, reflects the different national approaches and distinguishes itself from the previous two categories: (1) species and natural habitats and (2) water. Whereas these two categories are already covered and defined by previous EU legislation, land is defined and considered only in so far as its contamination causes a risk to human health. We might also note that "air", which is referred to only indirectly by the ELD,[10] is generally treated as a full category in other EU environmental policies.

The difficulties in identifying the objects of environmental protection are several and are largely the result of the fundamental ambivalence and ambiguity of the term "environment" itself. The same can be said about the concept of "damage". The Directive introduces a definition of damage that may well be technical enough for scientists but is not so for lawyers.

According to the definition provided by Article 2, "damage" means *"a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly"*.[11] The definition fails to supply unequivocal criteria and therefore lends itself to quite discrete interpretations by various countries, which undermines the very purpose of harmonisation that the Directive was seeking.

4 The Criteria for Determining Environmental Liability: Problems of Definition (and Translation)

Another problem that the ELD exemplifies is the difficulty of defining the criteria for apportioning liability.

In the Green Paper, and again in the White Paper, the Commission had always been clear about its preference for a two-track system of liability: strict liability rules for dangerous and specific activities that harm the environment and fault-based liability for cases of apparently non-hazardous activities that still cause harm to the most vulnerable natural resources. The definitions, however, are unclear and will need to be cleared up since the Directive is destined to become a cornerstone of future standards of environmental liability in Europe.

[10] Whereas: *Environmental damage also includes damage caused by airborne elements as far as they cause damage to water, land or protected species or natural habitats.*

[11] Art. 2(2).

The difficulties in setting criteria for apportioning liability and in reaching an unequivocal definition first became evident in the Communication on *"A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*", prepared by the Commission for European Council in Gothenburg in 2001.[12]

Indeed, while the English version of this Communication states that one of the measures that the EU had to adopt by 2003 was *"EU legislation on strict environmental liability"*, thus making specific reference to a regime of no-fault liability in environmental matters, only the German version seems to make appropriate reference to the criterion of apportioning of liability in the technical sense, by calling for "*EU-Rechtsvorschriften Annahme der über die verschuldensunabhängige Umwelthaftung bis zum Jahr 2003"*.

The French, Italian, and Spanish versions are more general, referring to liability with "narrow" defences but not necessarily to "strict" (in the sense of no-fault) liability:

- "*Mettre en place d'ici à 2003, une législation de plein droit de responsabilité environnementale*";
- *"Approvare una legislazione UE su una rigida responsabilità ambientale entro il 2003"*;
- "*Adoptar la normativa comunitaria sobre un régimen ambiental estricto de responsabilidad para el año 2003"*.

In the drafting of the Proposal for a Directive,[13] the Italian version corrects the terminology previously used, so that the Proposal contains the notion of "strict liability" for damage to the environment.[14]

The French version refers instead to *responsabilité stricte,*[15] using a peculiar terminology that is not natural to French legal vocabulary and would seem to be an effort to translate the English term *strict liability*. A similar process seems to have taken place with the Spanish version.[16]

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[12] Brussels, 15 May 2001, COM(2001)264 final.

[13] Brussels, 23 January 2002, COM(2002) 17.

[14] In the Italian version of the Proposal, we read at p. 2: *"Così facendo la Commissione onora l'impegno assunto nella sua proposta al Consiglio europeo di Gõteborg "Sviluppo sostenibile in Europa per un mondo migliore: strategia dell'Unione europea per lo sviluppo sostenibile" che prevede l'introduzione di una legislazione UE sulla responsabilità oggettiva in materia ambientale entro il 2003..."*

[15] The French version of the Proposal tries to avoid identifying which kind of liability regime should be introduced: "La Commission remplit ainsi l'engagement qu'elle a pris dans sa proposition au Conseil européen de Gothenburg, "*Développement durable en Europe pour un monde meilleur: stratégie de l'Union européenne en faveur du développement durable*". No reference to strict liability is made in the passage. Cf. Proposition de Directive du Parlament Européen et du Conseil sur la responsabilité environnementale en vue de la prévention et de la réparation des dommages environnementaux", Bruxelles, 23.1.2002, COM 17 Final, p. 2.

[16] Cf. COM(2002) 17 final in Spanish, p. 2: *De este modo, la Comisión cumple el compromiso adquirido en su Libro Blanco de 2000 sobre la responsabilidad ambiental y en la Estrategia de Desarrollo Sostenible de la Comisión que contempla "adoptar la normativa comunitaria sobre un régimen ambiental estricto de responsabilidad para el año 2003"*.

The German version of the Proposal for a Directive, however, makes use of a meaningful technical term and appropriately refers to no-fault (i.e. strict) liability (*verschuldensunabhängige Haftung*). An extensive study done in 2001 on the initiative of the European Commission,[17] concerning the different liability regimes for environmental damage in different Member States, details the problem of classifying liability by type (strict rather than fault based) and observes that the concepts need to be explored along with an analysis of the various different legal processes of the countries:

> *. . .the distinction between strict and fault-based liability is not an absolute one; it is more of a continuum than a dichotomy. A strict liability system which allows generous defences, such as state-of-the-art or permit compliance, for example, may be less onerous on defendants than a fault-based system with a demanding duty of care and narrow defences. It is the regime as a whole that matters, not just the basic liability standard.*[18]

It should not come as any surprise then that in the final text of the Directive, any reference to "strict" liability completely disappears while leaving room for a legislation that aims to regulate from a practical and factual point of view the obligations of the operator, who *"shall bear the costs for the preventive and remedial actions taken pursuant to this Directive"*, without necessity of proving fault or negligence.[19]

Similarly, there is no provision in the Directive specifically dedicated to "liability". The main provisions in this regard are to be found in Article 3, which defines the scope of the Directive as referring to the following:

> *(a) environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities;*
>
> *(b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.*

As we can see, only fault-based liability is specifically indicated. By simply omitting the term "strict liability", the Directive may have obviated issues of formulation and translation, but the result has been divergent interpretations during its transposition into different national systems. Article 3, moreover, shows major terminological discrepancies among the different language versions relating to the damage to species and natural habitats caused by professional activities not specifically identified in Annex III.

The Italian version speaks of *comportamento doloso o colposo* ("wilful misconduct or negligence"), but the Spanish, Portuguese, English, French, and Dutch versions make no reference to wilful conduct or intent, referring to

[17] Clarke (2001).

[18] Clarke (2001), p. 9.

[19] Article 8.20 Directive on Environmental Liability with regard to the prevention and remedying of environmental damage (ELD).

- "negligencia o culpa" in the Spanish version,
- "negligência ou culpa" in the Portuguese version,
- "at fault or negligent" in the English version,
- "faute ou une négligence" in the French version,
- "Schuld of nalatigheid" in the Dutch version.

Only the German version seems to adopt the same concept as that of the Italian, defining the liability as arising from *"vorsätzlich* [wilful] *oder fahrlässig* [negligent]" conduct by an operator.

5 Some Preliminary Conclusions

From this brief overview, it is evident that ambiguous terminology and poorly defined concepts in Community law put legal interpretation and the enforcement of regulations largely at the mercy of national legal systems, inevitably resulting in different outcomes from country to country.

The question of terminology is of essential importance to the enforcement of EU rules and to the whole process of harmonisation. The absence of commonly accepted terms and general legal concepts at the EU level in specific areas such as environmental law can lead to significantly different results in the legal practices of Member States.

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Emission Allowances: Non-legal Terminology and Problems of Qualification

Valentina Jacometti

Abstract The essay analyses the issue of the legal qualification of greenhouse gases emission "allowances" as a clear example of the problems arising in the translation and interpretation of legal texts within the EU context.

In particular, the essay highlights that sometimes the EU legislator introduces new concepts specific to EU law, while it applies ambiguous terms and avoids providing definitions, often as a result of the difficulties in reaching a political agreement on terms that convey concepts linked to the different legal cultures of the different Member States. In front of these difficulties in reaching an agreement on common definitions and shared concepts, the EU lawmakers tend to prefer a non-legal terminology. As these apparently neutral terms contain no useful legal content, lawyers end up facing very difficult issues of interpretation.

The absence of common terms and general legal concepts at an EU level, at least in specific areas, can lead to significantly different outcomes in the legal practices of Member States and consequently has a relevant impact on the process of harmonisation. These issues are clearly exemplified by the problem of the legal qualification of greenhouse gases emission allowances. In fact, failing a legal definition of emission allowances in EU legislation, the legal nature of allowances and their regulation are necessarily contingent on the relevant legal system, with the consequent and inevitable differences between Member States.

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Abbreviations

BGB	Bürgerliches Gesetzbuch
DEFRA	Department for Environment Food and Rural Affairs
ECHR	European Convention on Human Rights
Emissions Trading Directive	Directive 2003/87/EC
EU	European Union
GG	Grundgesetz
MiFID	Directive 2004/39/EC on markets in financial instruments
TEHG	Treibhausgas-Emissionshandelsgesetz

1 Introduction: Terminology Problems in EU Law

It is well known that the multilingual character of EU legislation necessarily entails a considerable degree of complexity along with significant translation problems that are likely to increase with the accession of new Member States.[1]

The problem is not only one of understanding EU legislation but also of ensuring its uniform application so that the laws of Member States are harmonised in fact and not in theory only. As the EU legislator should aim at harmonising the laws of the Member States, it should ensure a high degree of consistency between adopted legal provisions so that they can be interpreted in the same way and produce the same effects in all Member States. Although this seems vitally important for the ultimate goals of the European Union, it does not always occur. The causes of this failure lie in the way EU legislation is drafted and implemented and, particularly, in the problems associated with legal terminology, interpretation, and translation.

The problem of the legal qualification of greenhouse gases emission "allowances" clearly exemplifies the problem. This is certainly not only a very specific but also a very important area of EU law, which sets out the basics of the emissions trading scheme devised by EU lawmakers to meet the international commitments made with the ratification of the Kyoto Protocol.

Emission allowances fall within the purview of EU environmental law, which, generally speaking, is an area where terminological consistency is wanting. Terms are often contradictory, ill-defined, or not defined at all, which leaves too much interpretative leeway to national lawmakers, with the result that significant divergences in the application of EU directives occur in different Member States.

[1] European legal scholars have been dealing with the issue of European legal multilingualism and the related problems of legal translation for quite some time, and the literature on this topic is now quite extensive. On this issue, see in particular: Šarčevič (2001), Wagner et al. (2002), Gambaro (2004), Creech (2005), Rossi (2005), Pozzo and Jacometti (2006), Ioriatti Ferreri (2007), European Commission (2010).

Further, the EU legislator, whether using existing terms or introducing new ones, rarely specifies all the conditions and effects. As a consequence, in the concrete application, lawyers end up referring to the pre-existing legal institutions of individual Member States.

In environmental Directives, as elsewhere, one frequently encounters a terminology lacking in any precise legal significance, often as a result of compromises struck in an attempt to find a political agreement on common definitions and shared concepts. In certain sectors of EU law, the use of non-legal terms reflects the deliberate choice of lawmakers to delegate the task of defining the concepts to other sciences in the vain hope that this might lead to the adoption of "neutral" terms. As these apparently neutral terms contain no useful legal content, lawyers end up facing very difficult issues of interpretation. The tendency of EU lawmakers to prefer a non-legal terminology, often drawing on non-specialist and everyday words, means that the terms often fail to function as precise signifiers.

Directives generally need to be transposed into national law before they can be applied. National implementation measures may differ considerably from one country to another, and in many cases they make implicit reference to the national interpretation of the legal terms contained in the Directive. The problem is that the national interpretation varies significantly from one Member State to the next.

2 Greenhouse Gas Emission Allowances: The Lack of a Legal Definition at the EU Level

The example that I have decided to consider concerns the lack of a legal definition of greenhouse gas emission "allowances" in the EU legislation that introduced them in the EU system.

The legal framework for greenhouse gas emission allowances is provided by Directive 2003/87/EC (Emissions Trading Directive),[2] which created an EU-wide trading scheme for greenhouse gas emission allowances, i.e. a market of tradable pollution rights.[3]

[2] For an analysis of the EU emissions trading system, we would refer to Jacometti (2010), pp. 171 ff., and, *inter alia,* to Delbeke (2006), Faure and Peeters (2008).

[3] Generally, in a system of tradable pollution rights the amount of emissions is set by the public authorities that issue a certain number of allowances on the basis of the maximum level of pollution permitted in a given area. Such allowances, which grant the right to emit a certain amount of a pollutant over a certain period of time, are sold or "grandfathered" to polluters, who can then decide whether to use the allowances or to sell them to third parties. Indeed, there are no limits to the emissions of individual plants: to comply with the law, all they need is to have a number of allowances corresponding to their emission levels. Polluters who manage to keep their emissions below the level permitted by their allowances may sell excess allowances to other polluters; polluters that do not consider it economically viable to reduce emissions may buy allowances on the market. Such a system should provide incentives for pollution reduction and make emissions cuts to occur where their costs is lower, thus minimising the individual and collective costs for de-pollution. On tradable pollution rights, we would refer again to Jacometti (2010), pp. 3 ff.

The peculiarities of the instrument in question make it an ideal case study, also because the approaches adopted by the various legal systems in which the allowances scheme was introduced differ considerably from one another. In principle, it can be said that an emission allowance is an instrument that permits a party to discharge a certain amount of pollutants. At the same time, however, the allowance is an instrument that can be bought and sold, which makes it substantially different from a traditional environmental permit. Consequently, an emission allowance is an instrument *sui generis*, whose legal nature requires a new definition and concerning whose use new rules need to be drafted.

Without such a definition, an emissions trading system cannot work properly. It is indeed an artificial market created with a view to reducing pollution through the use of its incentives, but at the same time it is also necessarily integrated into a regulated framework. In order for the created market to function efficiently, however, the "product" itself has to be well defined, protected by law, and tradable.[4]

The legal definition of what an emission allowance actually is has a bearing on many vital aspects of a functioning emissions trading system. It affects, for instance, the rights that can be asserted by allowance holders, the protection of those rights, the circulation of allowances, the use of securities based on allowances, questions of liability, questions of accounting and tax treatment, the status of allowances in the event of insolvency proceedings, the possibility of the withdrawal of allowances, etc.

Despite all this, the EU legislator, having gone down the route of minimum harmonisation by means of a directive, confined itself to setting out only the barest essentials. The Directive makes no attempt to elucidate the legal characteristics or nature of allowances. This is evident in the phrase used in the Italian version of the Emissions Trading Directive, "*quote di emissioni*", which cannot be referenced to any concepts in Italian law. A legal qualification may not, of course, be all that important if an institution or mechanism is fully regulated in all particulars. The need for a clear definition becomes apparent precisely in those cases where issues of protection and regulation that were not foreseen by the lawmaker arise. The situation is different instead when the regulation itself is flawed, as in the case of Directive 2003/87/EC. As so often with EU law, a compromise solution seems to have prevailed, but it is one that fails to provide full regulation and makes use of ambiguous terms. It is thus left to individual Member State to decide for themselves how to implement the Directive and where in their own domestic legal systems to place the new emission trading mechanism. Consequently, if we want to find out how allowances are regulated and protected, we need to refer not to the Directive itself but to the various national provisions implementing the Directive.

Let us consider first some of the provisions of Directive 2003/87/EC itself. We find that Article 3(a) does in fact contain a definition of an "allowance" as being "an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which (. . .) shall be transferable in accordance with the provisions of this Directive". Straight away, we realise that the definition refers to a unit of measurement,

[4] See Yandle (1999).

which is a technical-scientific concept, but says little about the legal status of the instrument.

If, furthermore, following the case law of the European Court of Justice—according to which the meaning of EU legal terms cannot be inferred from a single language version but should be derived from all legal versions of the relevant provision[5]—we make a comparative study of the various language versions of the Directive, we find that the terminology used therein does nothing to clarify the legal significance of "allowance". In Italian and French, the EU lawmaker created a kind of neologism, "*quota*", and at least adopted a "neutral" term that might have gone some way to providing a possible solution to the difficulties of defining a new mechanism had it not been for the choices made in other languages. In place of "*quota*", we find "allowance" in English, "*Zertifikat*" in German, and "*derecho de emission*" in Spanish. Now, instead of being a helpfully neutral term, "*quota*" is simply a superimposed neologism, adding an extra layer of linguistic confusion.

Anyhow, whether it is a neologism or an already-existing term hardly matters because the Directive fails to regulate all the conditions and consequences of the new mechanism so that when it comes to the practical application of the directive, lawyers will end up referring not to the Directive but to their domestic institutions.

To exacerbate matters, the definition as given in Article 3(a) in the English, French, and German versions seems to refer to the concept of authorisation in a broad sense—"allowance to emit", "*Zerifikat das zur Emission (. . .) berechtigt*", "*quota autorisant à émettre*". The choice of vocabulary seems to stress the public origins of allowances and almost seems to be seeking purposely to exclude any existence of a "right". By contrast, in the Italian version we find the expression "*diritto di emettere*" and in the Spanish version we find "*derecho de emisión*", even to name the allowance itself. Here it would seem the EU legislator intended instead to grant a "genuine" right to allowance holders.

Moreover, Article 19, which deals with registries, does not shed much light on how the transfer of allowances is meant to be effected, stipulating merely that "Member States shall provide for the establishment and maintenance of a registry in order to ensure the accurate accounting of the issue, holding, transfer and cancellation of allowances" and that "Any person may hold allowances". Nor is Article 19 much clearer with its use of terminology: while the English version talks of the "holding of (. . .) allowances", the Italian speaks of "*possesso*"; the French, of "*détention*"; the Spanish, of "*titularidad*"; and the German, first of "*Besitz*" and then of "*Inhaber*". The different language versions do not appear to achieve much equivalence of meaning, and the German introduces a further note of uncertainty since the meaning of the terms *Besitzer* and *Inhaber* is not the same in Germany as in Austria.[6]

[5] As regards multilingual interpretation of EU law, see, among others, Schübel-Pfister (2004), Gambaro A (2007), Pozzo (2008), Darlén (2009).

[6] As to this, it should be recalled that German law distinguishes between "*mittelbarer*" and "*unmittelbarer Besitzer*", whereas Austrian law distinguishes instead between "*Besitzer*" and "*Inhaber*". See, in Italian, Pozzo (1992).

This is a clear example of a contradictory use of legal terms. Sometimes the inconsistencies are the result of compromise, but sometimes they are the result of carelessness, and in any case they give rise to significant difficulties when transposed into national law. The EU lawmaker seems not to perceive the differences of meaning between the terms used in the various language versions to define the very object of the Directive, while those terms recall concepts and institutions of the different legal systems of the individual Member States.

The only thing that seems clear is that the EU legislator wanted to avoid taking a net position as to the nature of emission allowances and, above all, was anxious to avoid any reference to the term "property", even to the extent of not even specifying that the Directive excludes property rights.

The US law that served as a reference point for the development of the EU emissions trading system, i.e. the 1990 Clean Air Act,[7] does provide a definition of the legal nature of allowances. The Clean Air Act is not exhaustive, but it does at least provide a general definition to the effect that, firstly, an allowance is an authorisation to emit sulphur dioxide [Sec. 402(3)] and, secondly, an allowance does not constitute a "property right" and the authority of the "United States" to terminate or limit such allowances cannot be restricted [Sec. 403(f)]. By this means, the US Congress wanted to leave open the possibility of reducing the emission allowances in circulation, without having to worry about compensating allowance holders for the taking of property under the Fifth Amendment of the U.S. Constitution.[8]

Although the Clean Air Act states that allowances are not property rights, it implicitly recognises them. Indeed, according to Section 403(f), allowances "may be received, held, and temporarily or permanently transferred". Moreover, even if not expressly indicated, allowance holders may prevent anyone, except the government, from interfering with their possession, use, and disposition of the allowances. Undeniably then an allowance falls within the purview of property rights, at least as

[7] Title 42, Chapter 85, U.S. Code. The Clean Air Act Amendments of 1990 introduced an emissions trading system for sulphur dioxide (SO_2), which is the main cause of acid rain. For an analysis of the US system, we would refer again to Jacometti (2010), pp. 58 ff.

[8] Dennis (1993). The 5th Amendment of the U.S. Constitution provides that private property shall not be "taken for public use, without just compensation" (so-called taking clause). According to US case law, the taking clause requires that the government compensate an owner after taking its property when it constitutes an "uncompensated" taking (e.g. when the property is taken for public use and not for reasons of preventing harm or loss). However, it should be noted that some legal scholars maintain that the constitutional protection that provides for the award of just compensation in the case of taking is not precluded by the fact that allowances do not constitute property rights in the strict sense (Rehbinder and Sprenger 1985, p. 67; Tether 1985). This doctrine has its foundation in the case law relating to compensation for administrative acts that affect private interests. According to this case law, the State's interest in effective regulation must be balanced with the importance of the impact on private interests (for the reference case law, see *Kaiser Aetna v. US*, 44 US164, 175 (1979); *Penn Central v. New York*, 438 US104 (1978); *Wickard v. Filburn*, 317 US111, 131 (1942). See also Boucquey 1999, pp. 38 ff.).

far as relations between private parties are concerned. At the same time, in this specific case, the property rights are circumscribed by a regulated framework that grants the government the authority to terminate or limit the allowances.[9]

3 The Legal Qualification of Allowances in EU Member States

In the absence of clear guidance from the Directive, the legal definition of "allowance" has been left to Member States, and in view of the dissimilarities between their legal systems, national legislators have naturally enough come up with different attitudes as regards the definition of the legal nature of allowances. Some countries simply avoided the issue by merely reproducing the definition provided by the Directive, like Italy, or by simply recalling it, like Britain. Germany decided on the need for at least a negative definition in order to ensure that allowances would not be treated as financial instruments. The French, on the other hand, expressly defined the term in the legislation implementing the Directive.

Let us consider the effects of these varying responses.

The Italian legislator, as we have just said, avoided addressing the problem of definition altogether, and so Legislative Decree 216/2006, which transposes the Emissions Trading Directive, merely reproduces the definition provided in the Directive without adding anything on the nature of allowances [Article 3(p)]. The term used in the Italian version of the Directive (and therefore also in the implementing decree), "*quota di emissioni*", reveals little about the legal nature of the new instrument, indeed it seems almost betraying the intention of the lawmaker not to address the issue through the use of a non-legal terminology. The phrase "*quota di emissioni*" does not correspond to any legal concept in Italian law. The word "*quota*" simply means "portion" or "part" of a whole. As often with words borrowed from ordinary non-technical language, it denotes nothing of any use from a legal point of view and is therefore a source of interpretative confusion for lawyers.

Italian courts have not had to deal with the connotations of the phrase yet, but the few legal scholars who have looked at it are still quite divided. Without going too much into detail, we can say that some scholars tend to focus their attention on the public origin of emission allowances and therefore classify them as administrative authorisations or concessions, while others believe allowances should be classified as movable goods.[10]

[9] See Cole (1999), Lucchini Guastalla (2005), Gambaro FL (2007).

[10] See Esposito De Falco (2005), pp. 70 ff.; Gambaro (2005); Lucchini Guastalla (2005); Tosello (2005); Cicigoi and Fabbri (2007), pp. 59 ff.; Clarich (2007); Lipari (2007). For an analysis of the problem of the legal nature of allowances in the Italian legal system, we would refer again to Jacometti (2010), pp. 422 ff.

In the United Kingdom, the Greenhouse Gas Emissions Trading Scheme Regulations are silent on the legal nature of allowances and simply recall the definition of Directive 2003/87/EC. This is not all that surprising, since very rarely does the British legislator, unlike its continental counterparts, address qualification questions, usually leaving to the courts the task of dealing with these issues when they actually arise.

If we look at the English definitions of "allowance" and "permit" (Article 3(d) of the Directive), we can see that they are framed in repetitive and tautological terms. It is difficult to spot the difference of connotation, if there is any, between the two concepts, since they both contain elements that are commonly used in connection with authorisations in general. Some scholars therefore suggest that it might have been better to use a term like "*quota*", which would at least avoid confusion between the two concepts.[11]

Moreover, one can raise the question in the United Kingdom, as elsewhere, whether an emission allowance can be considered a form of property.[12] Although there is still no specific case law on this issue, a decision concerning a waste management licence handed down by the Court of Appeal in 1999[13] could provide some pointers for a court called upon to ascertain whether and to what extent an allowance might be considered a form of property.[14] However, it is unclear what type of property right would be recognised[15] and what consequences would result from that classification.[16]

[11] European Commission (2010), p. 130.

[12] Cf. Hobley and Rowe (2004). For an analysis of the different concept of property in the Anglo-American common law, see Gambaro (1992), and more specifically with regard to property rights in English law, see Ball (2006).

[13] *Celtic Extraction Ltd and Bluestone Chemicals v Environment Agency*, [2001] Ch. 475.

[14] In the case, the Court of Appeal was called upon to decide whether or not a waste management licence constituted a property (for the purposes of s. 436 of the Insolvency Act 1986) and developed three tests that needed to be satisfied in order to consider such licence as property: (i) there must be a statutory framework conferring an entitlement on one who satisfies certain conditions, (ii) the permit must be transferable, (iii) the licence must have value. If these tests are applied to emission allowances as defined in EU law, it is highly likely that they will be treated as property rights in the UK. See Anttonen et al. (2007).

[15] *Chose in action, regulated investment, bond, bill of exchange, negotiable instrument, documentary intangible, etc.*

[16] In particular, the qualification of allowances as property rights affects a fundamental question, namely, the faculty of public authorities to "withdraw" allowances in circulation. As also pointed out by DEFRA, the qualification of allowances as property rights would imply that they would be eligible for protection pursuant to the European Convention on Human Rights (ECHR) and the Human Rights Act 1998. According to some legal scholars and according to the approach followed by DEFRA itself, this would disallow the power of the State to withdraw allowances in circulation, except as pursuant to Article 1 of Protocol 1 to the Convention (see Hobley and Rowe 2004). On the other hand, both the European Court of Human Rights and national courts distinguish clearly between the deprivation of property and the control of the use of property (see ECHR, 25 October 1989, *Jacobsson c. Svezia*, n. 10842/84). Some scholars therefore conclude that the rules implementing the Emissions Trading Directive—including measures such as the freezing of allowances accounts—should be considered a form of control over the use of property in accordance with the public interest and should not be viewed as constituting a violation of allowance holders' property rights (see Anttonen et al. 2007).

As for Germany, although the implementing statute largely reproduces the provisions of the Directive (§ 3(4) *Treibhausgas-Emissionshandelsgesetz—TEHG*) and does not offer any positive definition of allowances, it should be noted that the lawmaker at least provides a negative definition, by explicitly stating that allowances are not financial instruments, in order to exclude emissions trading from the control of the Financial Services Supervisory Authority. Rather, future and forward contracts relating to emission allowances are considered derivative instruments subject to financial supervision, given the high risk that their trading involves (§ 15 *TEHG*).

This has led most scholars to conclude that allowances cannot be classified as securities,[17] also because the German legislator departed from the wording of the Directive by abandoning the term "*Zertifikat*", which is generally used in the field of securities, in favour of "*Berechtigung*". On the other hand, the German legislator, having excluded allowances from the category of financial instruments, while including derivatives on allowances, complies with the provisions of Directive 2004/39/EC on markets in financial instruments (MiFID).[18]

However, given the absence of a positive definition, German legal scholars are somewhat divided on the legal qualification of allowances. In particular, as in other countries, a division exists between those scholars who consider allowances as having a public nature and those who say they represent a private right.[19]

Finally, in France we find an explicit legislative definition of emission allowances in Articles L. 229-7 and 229-15 of *Code de l'environnement*. In particular, in Article L. 229-7 we come across a first "technical" definition, specifying that an allowance is a unit of account corresponding to the emission of one tonne of CO_2 equivalent. Article L. 229-15 gives a legal definition, describing

[17] Holzborn and Israel (2005), *contra* Ehricke and Köhn (2004).

[18] On this issue, see also below.

[19] See, among others, Marr and Schafhausen (2004); Holzborn and Israel (2005); Sommer (2006), who affirms that allowances are public in nature; Ehricke and Köhn (2004); Burgi (2004), who argues that allowances have a private character; Wagner (2003), who highlights the hybrid nature of allowances that cannot be classified exclusively with reference either to public law or to private law. In this regard, we cannot ignore that the categorisation of allowances as the object of a property right under the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) seems to be problematic. In respect of private law, §§ 90 and 903 of the BGB specify that only corporeal things can be the subject matter of property, which excludes intangible entities (for an analysis of this issue, see Pozzo (1992), pp. 316 ff.). However, the concept of property in the BGB does not coincide with the concept of Article 14 of the German Constitution (*Grundgesetz,* GG), since German courts have recognised a broader concept than that used in the Civil Code. On the strength of the broader definition in the Constitution, most legal scholars seem to concur, albeit through different arguments, that the protection afforded by Article 14 GG to property will extend also to emission allowances. In fact, if this protection is implicit in cases where allowances are classified as belonging to the sphere of private law, it should also apply where they are classified as belonging to the sphere of public law, as it is commonly accepted that Article 14 GG should also be applied to protect the rights of public nature when they can be assimilated to the legal position of the owner, as in this case (for an analysis of this issue, see Burgi 2004; Winkler 2005, pp. 321 ff.).

allowances as "*biens meubles*" existing only in electronic form, which are negotiable and grant their holders the same rights. It is also worth noting that where the provision deals with the transfer of allowances, it expressly refers to the "property" of allowances.

The choice of the French lawmaker is therefore quite clear: emission allowances are movable goods object of property rights.[20] This choice to treat them as movable goods is also made clear by the fact that the French version of the Emissions Trading Directive defined allowances as authorisations to emit one tonne of CO_2 eq for a given period.[21]

For the sake of completeness, it is worth noting that the French legislator also modified the *Code monétaire et financier*, adding futures relating to emission allowances to the list of financial instruments (Article D 211-1 A). So in France, too, emission allowances would seem to be excluded from the category of financial instruments: not explicitly as in Germany but by virtue of an inference to the contrary.

With regard to the last provision, it seems interesting to make a final remark on terminology. While in the French provision, echoing the terminology of the French version of the MiFID, financial instruments seem to include futures relating to "*autorisations d'émissions*" of any kind, according to a comparative reading of the different language versions of the MiFID, one may assume that the provision deals only with futures relating to "*quotas d'émission*", since other language versions speak of "*quote di emissioni*" (Italian), "*emission allowances*" (English), "*Emissionsberechtigungen*" (German).

4 Conclusions

From this brief overview, it is evident that as a result of ambiguous terminology and the lack of a legal definition of emission allowances in EU legislation, the legal nature of allowances and their regulation are necessarily contingent on the relevant national legal system, with the consequent and inevitable differences between Member States. In fact, allowances are a new tool and not easily comparable to existing ones. They have a hybrid nature and should therefore be treated as *sui generis* and in need of a new definition by the legal system. To achieve uniformity

[20] This decision was welcomed by private law scholars (see Chaumeil and Smith 2003; Le Bars 2004; Revet 2005; Peylet 2005) but was much criticised by those legal scholars who view allowances as being administrative authorisations and challenge the recognition of property rights on allowances (see Giulj 2004; Jegouzo 2004; Mistral 2004; Moliner-Dubost 2004; Rousseaux 2006; Thieffry 2007, who, however, does not take a position in the controversy but merely notes the existing differences). For a more in-depth analysis of the legal nature of allowances in the French legal system, we would refer again to Jacometti (2010), pp. 362 ff.

[21] See par. 2 above. See also Peylet (2005) and Pâques and Charneux (2004), specifically referring to Belgian law.

and consistency between Member States, it would have been preferable if this new definition had been made at an EU level rather than deciphered by national legislators.

The problem of terminology has affected and will continue to affect the impact of EU rules on Member States' laws and the process of harmonisation. The lack of common terms and general legal concepts at an EU level, at least in specific areas, can lead to significantly different outcomes in the legal practices of Member States.

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The Influence of Directive 2008/99/EC on the Harmonization and Renewal of the Lexicon of Environmental Criminal Law

Chiara Perini

Abstract According to recent developments of European law, the phenomenon of the "flow of concepts in a multilingual world" can be examined with reference to environmental criminal law. In this field, Directive 2008/99/EC can serve as a benchmark from which progress towards the creation of genuinely "European" criminal law may be measured. The discrepancies between the terminology of the European legislator and the national legal lexicon are worth noting because they imply the introduction of several innovations in Italian criminal law, which may be considered from the following four perspectives: (a) terminological issues, (b) terminological issues with structural implications, (c) categories of criminal law, (d) principles of criminal law.

Abbreviations

CJEC	Court of Justice of the European Community
EU	European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

I want to examine the phenomenon of the "flow of concepts in a multilingual world", with reference to environmental criminal law.

Recent developments in European law suggest attention should be paid to this field. Legislation for environmental protection can serve as a benchmark from

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which progress towards the creation of genuinely "European" criminal law may be measured, that is to say, an organic set of regulations common to EU Member States, as recently formalized by Directive 2008/99/EC.[1]

The analysis of environmental-criminal law is an example of "flow of concepts in a multilingual world" and is informed by my function as a criminal law jurist.

A jurist is not directly involved in translation activity, which is a very complex and difficult task, especially when multiple official linguistic versions of a juridical text coexist. The jurist, rather, looks only at the outcome of a translation in his or her own reference language and attempts to interpret the translated text in the light of his own juridical system and lexicon.

On the other hand, criminal law perspective focuses on a peculiar typology of normative text, which is held by special principles and rules of legislative technique: the criminal law provision, which defines the constitutive elements of criminal liability and specifies the criminal sanction.

2 The Flow of Criminal Protection Models in Europe

Each EU member State's specific lexicon in the field of criminal law plays a prominent role in the currently evolving developing period of a European criminal law language. This comes out clearly, if we look at the different language versions of Directive 2008/99/EC, in particular Italian, English, French, German, and Spanish, each of which has its own specific legal vocabulary.

Due to the peculiarity of criminal law, any translation of a European provision that relates to criminal law has not only linguistic but also conceptual implications. In the field of criminal law, a national lexicon expresses a very specific way of thinking in relation to criminal law, and no two systems are therefore interchangeable. Even within the relatively narrow confines of Europe, radically different approaches coexist (civil law and common law, for example). Even when stemming from the same roots, criminal systems do not usually fit together neatly.[2]

When European lawmaker tries to harmonize criminal law in the European juridical area, the "juridical message" will inevitably be adapted to local lexicons

[1] On Directive 2008/99/EC, see Benozzo (2009), pp. 299–304; Lo Monte (2009), pp. 231–245; Plantamura (2009), pp. 911–921; Satta (2010), pp. 1222–1230; Siracusa (2008a), pp. 863–900; id. 2008b, http://www.penalecontemporaneo.it, pp. 1–22; Vagliasindi (2010), pp. 449–492; Vergine (2009), pp. 5–14.

[2] Many factors interact and determine the affinity rate between criminal law systems: often the affinity is due not only to a written law or case law influence but also to particularly authoritative juridical doctrines. Consequently, criminal law-specific lexicon is complex by nature: just because it expresses the criminal law conceptual scheme, this lexicon is created by many factors, not only the lawmaker but also jurisprudence, the law operators, and the scientific community. About the flow of juridical models, see Grande (2000). About the interaction between different factors (especially, jurisprudence and the academic world), see Braun (2006), pp. 235 ff.

and concepts. Consequently, the multilingual world of the EU requires a "model of protection" that seeks to safeguard certain specific elements of law rather than criminal concepts only.

Given that a European provision seeks to apply a common model of criminal law at a national level, its various different language versions converge with respect to function but not necessarily with respect to terminology. They seek to enforce the same model of criminal law, but they do not necessarily use the same language of criminal law.

3 Major Discrepancies Between the European and National Legal Lexicons

EU Member States' different versions of the same European provision are often more interesting for their discrepancies than for their similarities. Sometimes discrepancies are the result of translation failure; that is to say, they are inappropriate. If we compare the various versions of Directive 2008/99/EC, we find that the Italian translation, for instance, strays from the proper criminal law lexicon and becomes inappropriately confounded with the terminology of other language versions, the French version in particular.[3]

On the other hand, a discrepancy can be deliberate and can introduce a legal *innovation*, which is one of the distinguishing features of the EU model of criminal law compared with national legislation. In such cases, the translation cannot provide the right term for a peculiarity of the European criminal law model for the simple reason that the European concept in question does not exist in the criminal law system of the recipient country. The discrepancy may therefore end up changing national criminal law at conceptual as well as lexical levels.

4 The Environmental Criminal Protection Model of Directive 2008/99/EC

Before Directive 2008/99/EC was passed, two important judgments of the Court of Justice of the European Communities (CJEC 13 September 2005, case number C-176/03; CJEC 23 October 2007, case number C-440/05) affirmed and, at the same time, fixed the boundaries of the European legislator's authority to set criminal law provisions for environmental protection.[4] On the basis of these

[3] See Sect. 5.

[4] See Mannozzi and Consulich (2006), pp. 899–943; Marcolini (2006), pp. 240–247; Pelissero (2010), pp. 661–680, especially pp. 668 ff.; Siracusa (2008c), pp. 241–275; id. 2008a, pp. 866 ff.; Vagliasindi (2010), pp. 449 ff.

decisions, the European Union may pass rules to harmonize "minimal elements of punishable conduct",[5] leaving the form and degree of punishment to the discretion of national legislator.

Applying the mentioned case law principles, Directive 2008/99/EC defines nine types of conduct that harm the environment that EU national legislators must deem as punishable (Article 3).[6]

In relation to penalties, Directive 2008/99/EC states that EU Member States must ensure the offenses "are punishable by effective, proportionate and dissuasive criminal penalties" (Article 5), i.e. the Directive does not specify the *type* or *degree* of the punishment. The lack of harmonization of penalties distinguishes this Directive from any that will be passed with reference to Article 83 of the Treaty on the Functioning of the European Union (TFEU), which sets out "minimal rules with regard to crimes and penalties".[7]

[5] Siracusa (2008a), p. 871. According to Recital 12 of Directive 2008/99/EC, "this Directive provides for minimum rules".

[6] Considering that European legislator's lexical choices are of great importance in this research, see activities listed in Article 3 Directive 2008/99/EC: "(a) the discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (1) and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked; (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; (h) any conduct which causes the significant deterioration of a habitat within a protected site; (i) the production, importation, exportation, placing on the market or use of ozone-depleting substances".

[7] See Siracusa (2008b), pp. 17 ff.; Sotis (2010a), pp. 21 ff.; id. 2010b, pp. 1146–1166; Vagliasindi (2010), pp. 464 ff.

The Italian text, unlike the German, English, French, and Spanish versions of Directive 2008/99/EC, makes it clear that the European legislator is applying a "strong" as opposed to a "weak" model of protection in favour of the environment.[8]

The main structural features of the European model are the following:

(*a*) The characterization of the juridical item, which shall be protected by criminal law;
(*b*) The criminalization scheme.

In detail:

(*aa*) By the principles of "strong" criminal protection model, the juridical item "environment" is deemed to be a good, which has its own *natural solidity* and is instrumentally connected to other important human interests (particularly, public safety and health). On the other hand, a "weak" criminal protection model focuses on a *formal* concept of "environment", which fundamentally coincides with the *administrative discipline* of the environmental sector.

Article 3 of Directive 2008/99/EC defines at least two types of offense that shall be referred to a natural and instrumental idea of the good "environment": (1) those damaging to people's life or personal safety; to air, soil, or water quality; and to fauna or flora[9] and (2) those damaging to the protected animal or vegetable life or a protected habitat.[10]

(*bb*) Under a "strong" criminal protection model, the basic criminalization scheme is based on the concept of an offense that causes damage or poses a concrete danger, the notion of harm being central to criminal law. A "weak" criminal protection model, however, concentrates just on a hypothetical danger and is used for enforcing administrative provisions.

The terms of Article 3 clearly suggest that the European legislator's choice is for the former interpretation (offense that causes damage or poses a concrete danger, such as ionizing radiation emission, collecting rubbish, running a high-risk industrial plant, etc.): "which caus[e] or [are] likely to cause" substantial damage to people or ecological resources[11] or produce a "[non] negligible impact" on the

[8] With regard to the dichotomy that distinguishes between a *strong* model of environmental criminal law and a *weak* one, see A. Gargani (2010), pp. 403–430. About the protection model provided by Directive 2008/99/EC, see Siracusa (2008a), pp. 879 ff.; Vagliasindi (2010), pp. 485 ff. According to Sotis (2010a), pp. 5 ff., however, the directive in question "leads to an incorrect use of punishment according to the *extrema ratio* criminal law principle (...) [and violates] the principle of proportionality/necessity of punishment in its *utilitarian* meaning, *i.e.* referring to the capacity of punishment to safeguard concretely the protected good". On this item, see also Abbadessa (2009), pp. 478 ff.; Lo Monte (2009), pp. 238 ff.

[9] See Article 3 letts (*a*), (*b*), (*d*), (*e*) Directive 2008/99/EC in n. 6.

[10] See Article 3 letts (*f*), (*g*), (*h*) Directive 2008/99/EC in n. 6.

[11] See Article 3 letts (*a*), (*b*), (*d*), (*e*) Directive 2008/99/EC in n. 6.

conservation status of specimens of protected wild fauna or flora[12] or a "significant deterioration" of a habitat within a protected site.[13]

The protection model provided by Directive 2008/99/EC will significantly influence the Italian juridical system, which safeguards the environment mainly by means of a "weak" criminal law model and deals with serious environmental damage with reference to the Criminal Code, which however, is designed to protect goods such as public and personal safety and life rather than the environment.[14]

The Italian legislator transposed Directive 2008/99/EC in a way that lessened the impact of the provisions on Italian criminal law. With Legislative Decree 121 of 7 July 2011, the Italian legislator introduced two criminal laws, of little importance in the overall scheme of European criminal policy in the environmental sector.[15]

Assuming that the so-called Legge comunitaria 2009 (i.e. the yearly enabling act for enforcing European legislation in the Italian juridical system) fixed too narrow limits for penalties and criminalization schemes in order to enforce various European directives at the national level without distinguishing environmental protection from other issues,[16] Italian legislator deferred to a later decree the reform of Italian environmental criminal law: had the Italian legislative decree already introduced criminal penalties appropriate to the gravity of environmental offenses described by Directive 2008/99/EC, it might have been deemed *ultra vires*.[17]

5 The Italian Version of Directive 2008/99/EC: The Theoretic Implications of Lexical Choices

The Italian version of Directive 2008/99/EC is interesting for what it says about the flow of legal concepts in a multilingual world. The discrepancies between the terminology of the European legislator and the national legal lexicon are worth noting because, as we observed above, they imply the introduction of several innovations in Italian criminal law, which may be considered from the following four perspectives:

[12] See Article 3 letts (*f*), (*g*) Directive 2008/99/EC in n. 6.

[13] See Article 3 lett. (*h*) Directive 2008/99/EC in n. 6.

[14] See Ruga Riva (2010), p. 6, where the author mentions crimes such as "water poisoning, water damaging, dangerously throwing of things, environmental disaster, manslaughter or personal injury, possibly in concurrence with "sectorial" technical offences".

[15] See Article 727-*bis* Italian Criminal Code (*Uccisione, distruzione, cattura, prelievo o possesso di esemplari di specie animali o vegetali selvatiche protette*) and Article 733-*bis* Italian Criminal Code (*Danneggiamento di habitat*).

[16] See Article 2 Law 4th June 2010 n. 96. See Ruga Riva (2010), pp. 4 ff.; Sotis (2010b), pp. 13 ff.; Vagliasindi (2010), pp. 490 ff.

[17] About this item, see *Relazione illustrativa allo schema di decreto legislativo*, p. 7. With regard to Directive 2008/99/EC's enforcement by Legislative Decree n. 121/2011, see Madeo (2011), pp. 1052–1065; Pistorelli and Scarcella (2011), pp. 1–37; Ruga Riva (2011), pp. 1–18; Scarcella (2011), pp. 854–859; Scoletta (2012), pp. 17 ff.

(*a*) Terminological issues,
(*b*) Terminological issues with structural implications,
(*c*) Categories of criminal law,
(*d*) Principles of criminal law.

In detail:

(*aa*) With regard to terminology, let us consider the title of Article 3 of Directive 2008/99/EC, which enumerates the environmental offenses to be criminalized by national legislators.

In the Italian version, Article 3 is titled "*Infrazioni*", but this term surely diverges from the lexicon of Italian criminal law and would appear to be a mistranslation. The word should be "*Reati*", in as much as Article 3 sets out a list of offenses that merit criminal punishment. In the Italian legal lexicon, the word for this form of offense is *reato*, whereas *infrazione* is not a technical term and normally refers to administrative wrongs within sanction law as a whole.

Other language versions of Directive 2008/99/EC make more appropriate lexical choice: the German text uses the word "*Straftaten*"; the English text, the word "*Offenses*"; the Spanish text, "*Delitos*".

On the other hand, the Italian version seems to be seeking assonance with the French version, which refers to "*Infractions*".

(*bb*) The word "unlawful" raises terminological issues that may also have structural repercussions. This term is contained in Article 2a) of Directive 2008/99/EC and is referred to Article 3 in relation to the nine types of environmental harm to be treated as criminal offenses in national systems. The Italian term is *illecito*, and on the basis of Article 2a) "unlawful" refers to actions contrary to the following:

(*i*) Legislation adopted pursuant to EC Treaties and listed in Annex *A* Directive 2008/99/EC (for instance, the so-called Directive "Seveso-*bis*" n. 96/82/EC on the control of major accident hazards involving dangerous substances);
(*ii*) Any law, administrative regulation of a Member State, or decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (*i*) (for example, with reference again to major accident hazards involving dangerous substances, Legislative Decree no. 334 of 17 August 1999 and related provisions).

The use of the word "unlawful" in Directive 2008/99/EC has been considered ambiguous by Italian criminal law experts.[18]

Compared with the language normally used by Italian criminal law, European legislator's idiom seems to be very peculiar: since Art. 3 Directive 2008/99/EC

[18] See Siracusa (2008a), p. 889. About the type of reference made by Directive 2008/99/EC to environmental national legislation adopted pursuant to EC Treaty and listed in Directive's Annex *A*, see id. 2008b, pp. 8 ff.

aims at introducing new environmental crimes, the word "unlawful" looks like a component of crime's fact, but it does not refer pleonastically to the discrepancy between crime's fact and the juridical system (in Italian, this discrepancy is called "antigiuridicità"); the word "unlawful" is not just an "express clause of unlawfulness" (in Italian, "clausola di illiceità espressa"), well known within the theoretical structure of Italian criminal law.

The word "unlawful" is defined by reference to a whole of (European and national) provisions that enucleate rules of behaviour (and, specifically, prohibitions) in the correspondent environmental sector.[19] So in Art. 3, according to its criminalizing perspective, the word "unlawful" identifies a concept that belongs to the typology of crime's fact (in Italian, "tipicità") more than to the *contradiction* between crime's fact and the juridical system ("antigiuridicità").

On the ground of the new European criminalization duties, crime's fact outlined by Art. 3 is made indeed by juxtaposing rules of behaviour previously provided by European and national legislation and referenced to in Art. 2 (rules already often associated by themselves with criminal or administrative sanction in the national juridical system within a "weak" protection model of the environment) to further structural components defined by Art. 3 Directive 2008/99/EC.

European legislator's strategy could be convincing just in the perspective of a *flow*, first of all, *of a criminal protection model in favour of the environment*.

Thanks to such a structure of crime's fact, new environmental crimes should complete sanction norms (mostly *penal* norms, as in the case of Italy) that are already provided by national juridical systems because of the previous implementation of European directives listed in Directive 2008/99/EC annexes.

In this way, the "weak" (criminal) protection model of the environment—focused on a crime structured as a technical offense (in Italian, "reato contravvenzionale"), collateral to administrative discipline, based on a purely hypothetical danger, widely admitted to payment of fine on the spot (a crime's type chosen by Italian legislator autonomously, i.e. apart from a European criminalization duty)—is going to integrate itself with a "strong" (criminal) protection model, focused on a criminalization scheme that deeply emphasizes the harm principle and mainly corresponds to a damage- or a concrete-danger-based crime.

If we examine the linguistic expression used by the European legislator, the difference from Italian criminal law-specific lexicon hides, in this case, not a critical aspect of the translation but a novelty of the environmental protection model outlined at the EU level.

So the ambiguity remarked by Italian researchers—probably noticed by other linguistic versions' interpreters too (for example, the German version makes use of the word "rechtswidrig"—i.e. "antigiuridico"—in order to translate the word

[19] According to Recital 9 of Directive 2008/99/EC, "The obligations under this Directive only relate to the provisions of the legislation listed in the Annexes to this Directive which entail an obligation for Member States, when implementing that legislation, to provide for *prohibitive measures*".

"unlawful", which on the contrary refers, as already explained, to a component of crime's conduct according to Art. 2 Directive 2008/99/EC)—in reality shows that this European legislation embodies, first of all, a cause of *conceptual* renewal with regard to environmental protection system by means of criminal law.

(*cc*) At a *categorical* level, the Italian version of Directive 2008/99/EC—but this happens in other national versions also—uses an expression that is different from the specific lexicon of criminal law and hides a potentially very significant cause of conceptual renewal of criminal system in the category of culpability.

Specifying the contents of EU member States' criminalization duties, in fact, the European legislator indicates the guilt coefficient as a further common element to the nine types of environmental offenses described in Art. 3 Directive 2008/99/EC: culpability indeed should consist of either intention ("intentionally") or gross negligence ("serious negligence").

If we focus on the expression "serious negligence" (in the Italian version, "grave negligenza"), the difference from the lexicon established in the Italian criminal law does not refer mainly to the use of the word "negligenza" instead of the word "colpa" (the last one should be considered more appropriate because of the text of Art. 43 Italian Penal Code). Since the European legislator follows a substantial approach, the use of the word "negligenza" in the Italian version of Directive 2008/99/EC does not leave out forms of "colpa" such as "imperizia" or "imprudenza", both explicitly mentioned by Art. 43 Italian Penal Code.[20]

The most relevant difference from Italian criminal law-specific lexicon comes from the fact that European legislator distinguishes a particular type of gross negligence, which could limit and make more fragmentary negligence liability in the environmental criminal law sector.

The expression "serious negligence" is likely to renew the Italian criminal law shape not only from a lexical but also from a theoretical point of view. Italian criminal law, in fact, does not consider this type of culpability in general but already includes provisions that are compatible with it.

On one hand, the "serious negligence" ("grave negligenza") mentioned by Directive 2008/99/EC can't be considered equivalent to the only aggravated type of negligence provided by Italian criminal law, i.e. the so-called "colpa con previsione" (negligence mixed with forecast for the offense) defined in Art. 61 n. 3 Italian Penal Code. The last one, in fact, differs from "simple" negligence because of its tangible contents that include a peculiar state of mind and not because the actual negligent conduct, according to Art. 61 n. 3 Italian Penal Code, should be particularly different from the one imposed by the imperative rule of care or particularly dangerous (these elements are, on the contrary, indicative indeed of the seriousness typical of "serious negligence").[21]

[20] See, on the contrary, Benozzo (2009), pp. 301 ff.

[21] See Sotis (2010b), pp. 7 ff.

On the other hand, "serious negligence"—considered as a *variant* in the negligence culpability—exists in the Italian criminal law in embryo stage, so to say, as some types of *simple* (i.e. committed without malice) bankruptcy offense in Italian bankruptcy criminal law testify.[22] Moreover, the Italian criminal law is conscious of the theoretical possibility to measure up negligence, although it does not use the degree of negligence to determine the limits of criminal liability based on a negligent behaviour (i.e. the Italian system does not exclude *non-serious* negligence from criminal liability): in fact, the (higher or lower) degree of negligence is anyhow included among the elements to be considered in order to proportion the punishment (Art. 133 § 1 n. 3 Italian Penal Code).

Lastly, the reasonableness of restricting criminal liability by negligence—at least in some sectors—in case of serious negligence has been already weighed by Italian scientific community[23] and Italian legislator.[24] On one side, such an innovation could emphasize the fragmentary character of protection provided by criminal law by balancing more precisely issues involved and increasing the effectiveness of criminal protection itself; on the other side, this novelty should get the judge to be more careful about finding negligence as an element of crime fact and culpability.

(*dd*) Finally, with regard to criminal law *principles*, we should consider some lexical expressions used by European legislator in defining facts to be criminalized by EU member States.

Within the criminal law protection model delineated by Directive 2008/99/EC, the European legislator aims at determining the limits of criminal liability according to the harm principle of crime.

Nevertheless, this purpose is achieved by means of linguistic expressions that sacrifice the exactness and precision of criminal law provision and emphasize the discretionary power of the judge.[25]

European legislator's choice brings, namely, the *principle of legality*, which includes the important corollaries of *exactness* and *precision* of criminal law provision, into contrast with the *harm principle*: the second one is emphasized to the prejudice of the first one.

We could examine the following expressions in particular:

[22] See, for instance, the options of *simple* bankruptcy provided by Art. 217 Royal-Decree 16th March 1942 n. 267, which punishes the entrepreneur who wasted his patrimony by gambling or managing it rashly (Art. 217 § 1 n. 2) or tried to defer his bankruptcy by means of very rash transactions (n. 3) or made his financial difficulties worse because he didn't file his petition in bankruptcy or was anyhow very careless about managing his business firm (n. 4). See Lo Monte (2009), p. 241.

[23] See Vagliasindi (2010), pp. 485 ff.

[24] See Art. 16 lett. (*e*) of the Scheme of enabling act for reforming Italian Penal Code called "Progetto Pisapia".

[25] See Lo Monte (2009), pp. 239 ff.; Sotis (2010b), pp. 6 ff.; Vagliasindi (2010), pp. 485 ff.

– "danno rilevante" to the prejudice of environmental good, which serves as damage- or concrete-danger-component in some facts to be criminalized according to Directive 2008/99/EC[26];
– "quantità non trascurabile"/"trascurabile", mentioned with regard to the object involved in the conduct of the crime in order to ground and—respectively—to leave out criminal liability[27];
– "impatto trascurabile"[28] with regard to the conduct's lack of damaging power, so to leave out criminal liability;
– "significativo deterioramento"[29] with regard to the conduct's damaging power, so to ground criminal liability.

Such options—in the Italian and in the other hereby examined linguistic versions of Directive 2008/99/EC—are noteworthy not merely from a lexical point of view. They express an opposition between principles that should be considered as "constituent principles" of criminal law in the European juridical area: on one hand, the principle of legality, which not only influences the way to draw up a criminal law provision but also has a multifaceted meaning and is one of the constituent elements of the rule of law concept[30] and, on the other hand, the harm principle, which prescribes that criminal punishment should be provided by law and applied by the judge in case of offenses in prejudice of valuable goods and which derives—according to philosophy of law also—from the harm principle defined by Stuart Mill.[31]

The European legislator emphasizes the discretionary powers of the judge in prejudice of the precision of criminal law provision. Even defining a rule—such as

[26] See Art. 3 letts (*a*), (*b*), (*d*), (*e*) Directive 2008/99/EC, which has substantially the same meaning in the other versions hereby examined: in German, "*erhebliche Schäden*"; in English, "*substantial damage*"; in French, "*dégradation substantielle*"; in Spanish, "*daños sustanciales*". It is interesting to notice that the seriousness of damage or concrete danger is not a component of the structure of crime fact in the Italian criminal system but a parameter for proportioning the punishment (Art. 133 § 2 n. 2 Italian Penal Code).

[27] See Art. 3 letts (*c*), (*g*) Directive 2008/99/EC, which has substantially the same meaning in the other versions hereby examined: in German, "*in nicht unerheblicher Menge*" vs. "*eine unerheblicher Menge*"; in English, "*non-negligible quantity*" vs. "*negligible quantity*"; in French, "*quantité non négligeable*" vs. "*quantité négligeable*"; in Spanish, "*cantidad no desdeñable*" vs. "*cantidad insignificante*".

[28] See Art. 3 lett. (*g*) Directive 2008/99/EC. In the other versions hereby examined likewise: in German, "*unerhebliche Auswirkungen*"; in English, "*negligible impact*"; in French, "*impact négligeable*"; in Spanish, "*consecuencias insignificantes*".

[29] See Art. 3 lett. (*h*) Directive 2008/99/EC. In the other versions likewise: in German, "*eine erhebliche Schädigung*"; in English, "*significant deterioration*"; in French, "*dégradation importante*"; in Spanish, "*deterioro significativo*".

[30] See D'Amico (2000), pp. 11 ff.; Ciommo (2007), pp. 105–128; Fanchiotti (2009), pp. 754–765; Palombella (2009a), pp. 334 ff.; id. 2009b, pp. 27–66; Pinelli (2007), pp. 129–139; Vagliasindi (1999), pp. 277 ff., 283 ff.

[31] About the harm principle as "a parameter of control of legislative options in criminal law", see Manes (2011), pp. 2 ff.; id. 2005, especially pp. 209 ff., pp. 242 ff.

the criminal law norm—that should be inclined to the greatest precision, the parlance of criminal law has been blunted in order to achieve appropriate balances of interests.[32]

Such a phenomenon highlights that, in spite of the prevalently technical method of drawing up European rules,[33] the wording of a criminal provision, which must be laid down by national legislators according to a correspondent European directive, involves not only legislative technique but moreover legal politics. And even the reasons promoted by law politics aim at prevailing over the fundamental rules of a correct wording technique of criminal law provisions.

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[32] As regards the relation between translation praxis and options made in the field of (European and national) law politics, see Rossi (2007), pp. 139–147.

[33] See, however, Ruga Riva (2010), pp. 23 ff., with regard to the new setting outlined by the Treaty of Lisbon.

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Part V
Language and Criminal Proceedings. Some Case-Studies

The Exchange of Information Extracted from the Criminal Record: The Heterogeneity of the National Legal Systems and Problems of Language

Gabriella Di Paolo

Abstract The present paper aims to provide an overview of the mechanisms traditionally used in Europe to ensure the circulation of information on convictions and disqualifications between judicial authorities and of the legal instruments adopted at EU level with a view to overcoming the inefficiencies of such mechanisms. In the analysis of EU law, this study also focuses on questions that could arise in the interpretation of rules written in a multilingual institutional context and lacking a common frame of reference and/or common concepts.

Abbreviations

D	Decision
ECHR	European Court of Human Rights
EU	European Union
FD	Framework Decision
TFEU	Treaty on the Functioning of the European Union

1 Introduction

Envisaged as the cornerstone of judicial cooperation both in civil and criminal matters,[1] the principle of mutual recognition of judgments and judicial decisions implies that the Member States must be able to know of the existence of foreign convictions. In fact, it is evident that a necessary prerequisite for the recognition of a previous conviction

[1] See Tampere European Council (15–16 October 1999), Presidency Conclusions No. 33; see also Article 82.1 TFEU.

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handed down by the court of another Member State—in order to attach equivalent effects to this conviction as those attached to national sentences—is the knowledge that such a previous conviction exists. For this reason, beginning with the European Council of Tampere, many EU policy documents and programmes have emphasised the need to enhance and improve the exchange of information extracted from criminal records.[2] Yet with a view to promoting the implementation of the mutual recognition principle, after the White Paper of 2005 on Exchanges of Information on Convictions, the European Commission undertook a series of legislative proposals that in 2008–2009 led to the adoption of relevant "old" Third Pillar legal instruments.[3]

In the light of these premises, this essay aims to provide an overview of the mechanisms traditionally used in Europe to ensure the circulation of information on convictions and disqualifications between judicial authorities and of the legal instruments adopted at EU level with a view to overcoming the inefficiencies of such mechanisms.

From the methodological point of view, the analysis will be carried out following the approach of the project as a whole, which is to consider questions that could arise in the interpretation of rules written in a multilingual institutional context and lacking a common frame of reference and/or common concepts.

2 The Main Obstacles to the Exchange of Information on Convictions Handed Down in the EU Member States: The Inefficiency of Traditional Mechanisms of Mutual Legal Assistance and the Heterogeneity of National Systems

Being a form of mutual legal assistance, the international exchange of information extracted from criminal records has traditionally been regulated by bilateral and multilateral agreements. In Europe, the primary reference is the European

[2] Programme of measures for the implementation of the principle of mutual recognition of decisions in criminal matters (2001/C 12/02, published in OJEU C12/10 of 15.1.2001); White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union COM (2005)10 final; The Hague Programme (published in OJEU C 53/1 of 3.3.2005).

[3] In this respect, it must be noted that the exchange of information on criminal records was addressed by EU lawmakers from a rather particular perspective. A final conviction made in another State is of interest to the relevant authorities not for the purposes of its execution (to this end, the pertinent EU laws are FD 2002/584/JHA on the European Arrest Warrant and FD 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union) or for the purposes of "*ne bis in idem*" rule (i.e. to avoid double jeopardy) but exclusively for the substantial and procedural effects that it may have in the course of a new criminal proceeding. For example, the existence of previous convictions may impact on the applicable rules of procedure, the definition of the offence, the decision relating to pretrial precautionary measures, the nature and quantum of the penalty (for example, exclusion or restrictive use of suspended sentences, increase in the quantum of the penalty incurred, accumulation of or confusion with previous penalties).

Convention on Mutual Assistance in Criminal Matters of 1959 (henceforth "the 1959 Convention"), supplemented by the additional Protocol dated 17.3.1978.[4]

The 1959 Convention has several mechanisms by which the competent authorities of signatory States may know if an individual has been convicted in another State.

To begin with, the Convention provides for the communication of information upon request. Such cooperation is based on the principle of reciprocity, since Article 13 states: "*A requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case. In any case other than that provided for in paragraph 1 of this Article, the request shall be complied with in accordance with the conditions provided for by the law, regulations or practice of the requested Party*".

The 1959 Convention also governs "spontaneous" information flows, i.e. the notification of criminal convictions made on initiative of the convicting State. Article 22 states that "*each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other Contracting Parties, the information shall be given to each of these Parties, unless the person is a national of the Party in the territory of which he was convicted.*"

With regard to their actual application, both the mechanisms of information exchange just mentioned have turned out to be anything but efficient. According to the analysis contained in the White Paper on the Exchanges of Information on Convictions presented by the Commission in 2005, the unsatisfactory level of circulation of information seems to be linked to three problem areas.

The first is the difficulty of rapidly identifying the Member States in which an individual has already been convicted. Although Article 22 makes provision for the centralisation of information in the Member State of a person's nationality, the notification is required only once a year. Furthermore, the State of nationality is not obliged to enter convictions made abroad against nationals in its own judicial records or does so only on a limited basis: in practice, even in signatories countries that have provisions to include convictions abroad in their national registers, the registration is often subordinated to a series of conditions (for instance, convictions and sentences must reflect situations covered by their own systems). As a result, the Member State of nationality that has been requested by another Member State to supply details of an individual's criminal record may be able to give only an

[4] The issue is also regulated by the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, adopted on 29.5. 2000 by the European Council (published in OJEU C 197 of 12.7. 2000; for the additional protocol, which constitutes an integral part of Convention, see OJEU C 326 of 21.11.2001). For the time being, the Convention of 2000 is not in force in all the Member States, since some Member States have not ratified it yet.

incomplete and partial account of convictions issued (whether abroad or in its own territory) against its citizens. Last but not least, the mechanism of centralising information at issue cannot be applied to nationals of countries that have not signed the 1959 Convention.

Another obstacle relates to the difficulty of obtaining the necessary information promptly and by means of a simple procedure. Although Article 13 establishes a general obligation to respond to information requests, reservations made by many States in respect of this rule entail that provision of information is sometimes subject by law to restrictions. Moreover, in a similar way to other instruments of mutual legal assistance governed by international conventions, the exchange of information set out in Article 13 may be nullified by the respondent State on the ground of the principle of reciprocity. Over and above these difficulties, it must be noted that the procedure for obtaining details about an individual's previous convictions in other States may require an excessive amount of time, given that the Convention does not set any time limit for responses. For all these reasons, national judicial authorities often take the view that the procedures are too complex, unfamiliar, and incompatible with the constraints of the domestic proceedings and therefore choose not to request any information from other States.

Finally, and from another perspective, there is also the difficulty of understanding the information transmitted. Here the problem is not only linguistic but also (and above all) legal. The different languages reflect the marked diversities in the legal systems of the countries in which they are spoken. Not surprisingly, in the White Paper of 2005, the Commission underlined that "*the information entered in the national register varies considerably from one country to another. There is considerable diversity in the national systems, and recipients may sometimes be disconcerted by the information provided, particularly as regards sentencing*".[5]

Obviously, we cannot attempt to make a thorough and exhaustive examination of the various national systems for recording convictions in this short chapter, but it is worth noting that many comparative studies[6] have highlighted that the Member States follow different methods in organising their national criminal records. For instance, although almost all the Member States have a centralised national database, there are substantial discrepancies:

1. The authorities responsible for maintaining the criminal records: in most countries, the authority in question is the Ministry of Justice (such is the case in, for example, Belgium, Denmark, Finland, France, Germany, Greece, the

[5] White Paper on Exchanges of Information on Convictions and the Effect of Such Convictions in the European Union, COM(2005) 10 (final), 5.

[6] For instance, see the study carried out in 2000 by the Institute of Advanced Legal Studies (IALS) as part of the FALCONE PROJECT JHA/1999/FAL/197, The use of criminal records as a means of preventing organized crime in the areas of money laundering and public procurement: the need for Europe-wide collaboration. The findings of the study are collected in three volumes and are available at http://ials.sas.ac.uk/postgrad/cls_falcone-cr.htm. See, in particular, Xanthaki (1999), p. 8. For the various National Reports, see Stefanou and Hanthaki (1999), vol. 2.

Netherlands, Italy, and Spain), but in other countries the task falls to the police (Austria, Ireland, Sweden, and the United Kingdom) or the Attorney General (Luxembourg and Slovakia);
2. The content of the records: only some countries (including Austria, Belgium, Denmark, France, United Kingdom, Italy, Ireland, Luxembourg, the Netherlands, and Portugal) keep records of convictions against legal persons. Similarly, as we have seen, many countries do not include in their national registers convictions against their citizens imposed by other States (such as Cyprus, UK, Ireland, Poland, and the Czech Republic). Even in those countries whose legislation requires the registration of foreign convictions (Austria, Denmark, France, Finland, Greece, Ireland, Italy, Luxembourg, and Sweden), in practice, such registration is dependent on several conditions[7];
3. The right of access to national registers: while all countries allow full access to records relating to investigation, prosecution, and judicial authorities, only a few also allow access to other public authorities (such as tendering authorities) or to third parties (such as employers or professional associations);
4. Time limits for keeping information included in the registers: while most countries have systems for deleting data, in some the deleting process is automatic, but in others it must be requested. Further, the duration of time that must elapse before cancellation varies considerably.

3 The Circulation of Information Extracted from the Criminal Record in the Legal Framework of the European Union: From the FD 2005/876/JHA to the "Comprehensive Legislative Package" of 2008–2009

Also within the EU, it is commonly accepted that the availability of information about individuals' criminal histories may play a crucial role in preventing and combating crime and therefore for the establishment of a common area of freedom, security and justice. Aware of this, the EU lawmakers have adopted, with regard to the exchange of information extracted from criminal records, several measures to remedy the above-mentioned problems and failings.

In this, as in other fields, the action of the EU has been gradual. Initially, the objective of ensuring a good flow of information on convictions and disqualifications was sought simply by facilitating the existing bilateral exchanges, specifically the channels of exchange provided by Articles 13 and 22 of the 1959 Convention. At a later stage, new methods for the exchange of information were adopted, also exploiting the potential of new technologies. In this respect, on the one hand, a network connection of national criminal records offices was established

[7] Which includes verification that a decision is not contrary to the fundamental principles enshrined in the ECHR or to the principle of double incrimination. See Gialuz (2009) p. 199.

[the reference is to the decision to set up the European Criminal Records Information System (ECRIS)]. On the other hand, a new regulation for the transmission of information on convictions was adopted in order to replace, at least in the relations between the Member States, the rules set forth in Article 22 of the 1959 Convention. Even so, the organisational aspect of criminal records has remained firmly anchored to national laws. Indeed, all the legal instruments adopted carefully specify that they do not seek to harmonise the national systems of criminal records of the Members States[8] nor the consequences attached to the existence of previous convictions by the different national legislations (i.e. the substantive and procedural effects of convictions).[9] Once again is the strengthening of cooperation in criminal matters that has been pursued without any attempt at harmonisation of laws or regulations of the Member States.

The first instrument, in order of time, adopted in the context of the former Third Pillar on cross-border exchange of information extracted from criminal records was Council Decision 2005/876/JHA.[10] Following a rather traditional approach, this Decision (subsequently abrogated by the FD 2009/315/JHA) was meant solely to improve existing transmission mechanisms, i.e. those identified in Articles 13 and 22 of the 1959 Convention. It introduced three distinct obligations. Firstly, Decision 2005/876/JHA stipulated that central authorities should immediately (rather than annually) inform the central authorities of the other Member States of criminal convictions and of any subsequent measures in respect of nationals of those Member States entered in the criminal record (Article 2). Secondly, it specified that requests for information should be sent by means of a *standardised form* (attached to the Decision as an Annex) (Article 3.1). Thirdly, with respect to requests for information, it introduced a *response deadline*. It therefore specified that the reply should be immediate and, in any case, delivered within a period not exceeding 10 working days from the receipt of the request (Article 3.2).[11] As already pointed out, the approximation of national laws relating to criminal records was beyond the objective of the EU lawmakers.[12] This may be one of the reasons, other than the difficulties in finding an agreement arisen during political negotiations, why the text of Decision 2005/876/JHA contains no definition of "conviction" or "criminal record".

[8] Recital No. 12 Council Decision 2005/876/JHA, Recital No. 16 FD 2009/315/JHA, Recital No. 5 FD 2008/675/JHA.

[9] Recital No. 5 FD 2008/675/JHA.

[10] Council Decision 2005/876/JHA on the Exchange of Information Extracted from Criminal Records, published in OJEU L 322/33 of 9.12. 2005.

[11] The deadline was increased to 20 working days, starting from the receipt of the application, provided that the requesting central authority has forwarded the request in accordance with Article 3.2 of the decision in question.

[12] The "minimalist" approach of the European lawmakers is demonstrated by Recital No. 12, which states: "*This Decision does not have the effect of obliging Member States to register convictions or information in criminal matters in their criminal record other than those which they are obliged to register according to national law*".

Further legal instruments of cooperation specifically intended for the exchange of information relating to criminal records (convictions and disqualifications) of individuals were later introduced by FD 2009/315/JHA on the Organisation and Content of the Exchange of Information Extracted from the Criminal Record between Member States[13] and by Council Decision 2009/316/JHA on the Establishment of the ECRIS.[14]

As to the Framework Decision 2009/315/JHA, it marks an attempt to complete the process of rationalisation that began in 2005. To this end, the Decision, after reiterating and incorporating the obligations as already set out in Decision 2005/876/JHA (which was thereafter repealed), introduces new and more substantive obligations on Member States, with a view to replacing the mechanism of transmission of information on convictions established in Article 22 of the 1959 Convention.

In particular, as regards the method of centralising information on convictions in the Member State of the person's nationality, the FD at issue confirms the obligation, without delay, to inform the other Member States of convictions handed down against the nationals of such Member States, and it also obliges the provision (on request) of a copy of the conviction and subsequent measures (Article 4.4). In addition, Article 11 specifies the type of information to be transmitted, drawing a distinction between (a) "mandatory information" (i.e. pertaining to the personal details and identity of the person, the nature of the conviction, the offence and the contents of the judgment) that must always be communicated; (b) "optional information", which must also be communicated if entered in the criminal records and includes details such as the names of the parents of the person convicted or disqualifications arising from convictions; (c) "additional information", which, again, shall be transmitted if available to the central authority and includes details such as the number of the convicted person's ID card, fingerprints, and any pseudonym and/or aliases used. As to the relations between the convicting Member State and the Member State of the person's nationality, the FD establishes that the former shall immediately communicate to the latter any subsequent alteration or deletion of information contained in the criminal record (Article 4.3) and that this shall entail the identical alteration or deletion of records by the latter (Article 5.2). This means a sort of "primacy" of the convicting Member State, which, in the event of disputes or disagreements, is deemed to be the true owner of the relevant data. Finally, in order to ensure that the Member State of which the convicted person is a national is able to provide exhaustive and updated information in response to requests from other Member States, Article 5.1 provides that the Member State of nationality must store all information received for the purpose of retransmission. As

[13] FD 2009/315/JHA on the Organisation and Content of the Exchange of Information Extracted from the Criminal Record between Member States, published in OJEU L 93/23 of 7.4.2009.

[14] Council Decision 2009/316/JHA on the Establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, published in OJEU L 93/33 of 7.4.2009.

we noted above, the lack of any such requirement to keep transmitted information was one of the main causes of the failure of the information exchange mechanism established in Article 22 of 1959 Convention.

As far as the obligations of Member States to reply to a request for information about the criminal history of a person, Article 8 of the FD 2009/315/JHA repeats that the deadline shall be 10 working days, without prejudice to the possibility of direct exchange pursuant to Article 13 of the 1959 Convention and Article 6 of the Convention on Mutual Assistance of 2000. The FD, however, draws distinctions according to whether the request is made so that the information may be used in a criminal proceeding or whether it is made for other purposes (Article 7). If the former, then the transmission of information is essentially mandatory, though certain distinctions may be made in relation to the deadlines.[15] If the latter, the State of nationality is required to reply pursuant to its own national laws in respect of convictions either handed down in its own territory or else handed down in third countries about which it had been notified. In any event, information relating to conviction handed down in another Member State shall be transmitted only if the convicting State, in the act of transmitting the information, did not impose limits on the retransmission of the same information for purposes other than that of criminal proceedings (Article 7.2). Once again, this means is a recognition of the "primacy" of the convicting State, which is regarded as the true "owner" of the information.

While one of the salient features of FD 2009/315/JHA, in common with the repealed Decision 2005/876/JHA, is its reluctance to make any attempt at harmonisation of the national legislations governing the criminal records of the Member States,[16] it should nonetheless be noted that for the sake of enhancing the mutual understanding of information, it does provide for the use of a "standardised European format", which is contained in the Annex (Article 7.5), and it also makes an attempt to set out some criteria relating to the language to be used in the submission of requests and replies (Article 10). Moreover, unlike the repealed Decision 2005/876/JHA, the FD 2009/315/JHA pays considerable attention to the question of definitions, and as we shall see below, it establishes definitions of the terms "criminal proceedings", "conviction", and "criminal record" (Article 2).

As to Council Decision 2009/316/JHA, this aims to implement FD 2009/315/JHA, in order to establish the ECRIS. As pointed out above, this Decision marked a

[15] For example, for convictions in the State of nationality, the obligation remains, regardless of when the request was made, whereas for convictions in other Member States the obligation refers to information transmitted to the Central Authority of the State of nationality before April 27, 2012 and entered into the criminal records of the State in question (Article 7.2) and to all sentences handed down by the other Member States and transmitted to the central authorities after April 27 of 2012 (the date by which States must implement the Framework Decision).

[16] See Recital. No.16: "The *aim of the provisions of this Framework Decision concerning the transmission of information to the Member State of the person's nationality for the purpose of its storage and retransmission is not to harmonise national systems of criminal records of the Member States. This Framework Decision does not oblige the convicting Member State to change its internal system of criminal records as regards the use of information for domestic purposes*".

turning point in the action of the EU in this area. Whereas the exchange of information extracted from criminal records continues to pivot on the State of nationality, the Decision provides for the building of a computerised interconnection among Member States' criminal records. Furthermore, to ensure that the exchange of information takes place in a uniform, electronic, and easily translatable way using automatic instruments, the Decision provides for the use of a standardised format based on the use of numerical codes that are listed in reference tables attached to the Decision itself. Also in this case, the objectives are rather modest, since Recital No. 6 makes clear that the aim is "to build and develop a computerised system of exchange of information on convictions between Member States. Such a system should be capable of communicating information on convictions in a form which is easily understandable". Lest there be any misunderstanding, the Decision specifies that ECRIS shall be "a decentralised information technology system based on the criminal records databases in each Member State" (Article 3.1). This labelling suggests that the Decision was never aimed at setting up a centralised European criminal record office, but rather it designed a sort of "peer-to-peer" system of information sharing.[17] Another fundamental aspect of the system established by the ECRIS Decision is that, although criminal records are now shared via a network, the exchange of information continues to be based on a request and central authorities are completely debarred from direct online access to the databases of other Member States.[18] In this respect, the Decision significantly differs from other EU legal instruments such as the so-called Prüm Decision on cross-border cooperation, which relates to other types of information, such as vehicle registration data, fingerprints, and DNA profiles.[19]

Finally, although FD 2008/675/JHA does not deal directly with the exchange of criminal record data, it is pertinent for the purposes of our present discussion in that it refers to the taking into account of convictions made in Member States in the course of new criminal proceedings. In compliance with the objectives set forth in the Programme of Measures to Implement the Principle of Mutual Recognition of 2000, the aim of the FD is to enshrine the principle that foreign judgments may be taken into account in developing a domestic judgment in order to attach to them legal effects equivalent to those attached to previous national convictions. To this end, FD 2008/675/JHA—which should replace between the Member States the provisions of Article 56 of the European Convention of 28 May 1970 on the International Validity of Criminal Judgements—establishes a minimum obligation

[17] See Article 3.2: "*This Decision is not aimed at establishing any centralised criminal records database. All criminal records data shall be stored solely in databases operated by the Member States.*"

[18] See Recital No. 11: "*The European Criminal Records System (ECRIS) is a decentralised information technology system. The criminal records data should be stored solely in databases operated by Member States, and there should be no direct online access to criminal records databases of other Member States.*"

[19] See Council Decision 2008/615/JHA, on the Stepping up of Cross-border Cooperation, particularly in Combating Terrorism and Cross-border Crime, published in OJEU L 210/1 of 6.8.2008.

for the Member States to take into account convictions handed down in other Member States to the extent that previous national convictions are taken into account and to ensure that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law (Article 3.1). As clarified in paragraphs 2 and 3 of Article 3, the foregoing obligations should cover the pre-trial phase, the criminal proceedings, and the time of execution of conviction, "in particular with regard to the applicable rules of procedure, including those relating to provisional detention, the definition of the offence, the type and level of the sentence, and the rules governing the execution of the decision". However, this wide scope of application is limited by the condition that the information on conviction was obtained by means of traditional instruments on mutual legal assistance (Article 3.1) and by exceptions set out in Article 3.4.[20]

4 The Different Language Versions of EU Law

In respect of the interpretation and/or language problems that the EU law has raised, it needs to be borne in mind that they mainly stem from the fact that, when dealing with matters of criminal law, the EU lawmakers are attempting to establish legal rules unsupported by any European system of criminal or procedural law. They are, in other words, operating without any commonly accepted conceptual framework or shared terminology. As a result, the drafting of legal instruments for the transmission of concepts and legal institutions (with a view to harmonising the laws of the Member States) relies entirely on terminology coined *ad hoc*, for the most part by recourse to techniques of "risemantisation" (or "semantic change"). The point of departure is to choose a common language (usually English), borrow technical terms from it, and then assign to those terms new and autonomous meanings that differ from those attributed in their common native use. It is noteworthy that that this sensitive operation is carried out in a non-juridical context, since the terminological choices are determined by translators.[21]

In respect of the translation of EU law in the several official languages (as provided by Regulation No. 1 of 1958), as already pointed out the problem is not that of terminology used, but rather that of considerable diversities in the national systems. Therefore, the literal translation of legal instruments is not sufficient to

[20] Paragraphs 4 and 5 of Article 3 make clear that the obligation to accept a foreign sentence as having equivalent effect as a national one shall not apply "*to the extent that, had the previous conviction been a national conviction of the Member State conducting the new proceedings, the taking into account of the previous conviction would, according to the national law of that Member State, have had the effect of interfering with, revoking or reviewing the previous conviction or any decision relating to its execution*" (par. 4) or "*If the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed*" (par.5).

[21] Ioriatti, *infra*. See also Ioriatti (2010) pp. 261–312.

ensure a true understanding of their meaning. In the absence of a common criminal justice system and shared conceptual framework among Member States, terms that apparently correspond may well turn out to have very different sense in the source and target languages. So rather than seek literal fidelity, a translation must strive, as far as possible, to produce an "acceptable equivalence" between the conceptual contents of the source and the target languages.[22] Even this is not enough to eliminate the margin of error entirely. While a translator may seek formal consistency, from the perspective of the lawmakers a given term may have substantially different meanings depending on the context or field in which it is used. This is why the European Court of Justice often has such an important role to play in the redetermination of the precise significance of certain expressions.[23]

Given the above premises, an examination of the different language versions of the Proposal for a Council Decision on the exchange of information extracted from the criminal record (COM (2004) 664 final) of the FD 2008/675/JHA and of the Council Decision 2009/315/JHA will shed some light on both the aspects just mentioned and enable us to consider some of the risks associated with them. It should not be forgotten that critical issues of interpretation and language arising from the multilingual context might even hamper, to some degree, the approximation of legal systems and therefore also the implementation of the mutual recognition principle, for which the approximation of Member States' laws and regulations is an essential precondition.

4.1 Difficulties Relating to the Lack of a Common Conceptual Framework and Shared Terminology

As noted above, the inefficiency of traditional mechanisms for the exchange of information extracted from criminal records has been caused by, among other things, significant differences in national laws. Aware of these differences and cognisant also of the absence of a common conceptual framework and shared terminology, the EU lawmakers have tried to strengthen the information exchange by setting out definitions of the concepts of "conviction" (*condamnation*, *condanna*), "criminal record" (*casier judiciaire, casellario giudiziario*), and "criminal proceedings" (*procédure pénale*, *procedimento penale*). As we shall see, the concept of "conviction" has been, by far, the most difficult to be defined: owing to objections from some Member States, initially the EU shied away from working out a definition (see Decision 2005/876/JHA); later it sought a compromise solution by

[22] Ruggieri (2011) p. 682 ff.

[23] The reference is, for instance, to Grand Chamber European Court of Human Rights 18 July 2008, C-66/08, Kozlowsky, on the concept of "*residency*", in light of the Framework Decision on the European Arrest Warrant 2002/584/JHA.

proposing a somewhat limited scope of reference for the term (see FD 2008/675/JHA; Decision 2009/315/JHA).

More in detail, the first attempt to provide a definition of "conviction" with reference to the rules governing the exchange of information in criminal records dates back to the Proposal for a Council Decision on the exchange of information extracted from the criminal record (COM (2004) 664 final). In the Proposal at issue, the term "conviction" was defined as "*any final decision of a criminal court or of an administrative authority whose decision can be appealed against in the criminal courts establishing guilt of a criminal offence or an act punishable in accordance with national law as an offence against the law*" (Article 1).[24] According to the explanatory memorandum accompanying the Proposal, this was a very broad definition and it was modelled taking account of the notion of "criminal offence" resulting from the application of Article 51 of the Convention implementing the Schengen Agreement of 1990 and later reprised in Article 3 of the Convention on Mutual Assistance between Member States of 2000.[25] The definition of "criminal record", however, essentially referred back to national law, as it was defined simply as "the national register or national registers recording convictions in accordance with national law." The absence from the text of Decision 2005/876/JHA of any provision for defining the concepts under discussion is clear evidence of the impossibility of reaching a political agreement. Some Member States were evidently unwilling to understand "conviction" as being a term broad enough to encompass decisions issued by administrative authorities that might be appealed against a criminal court.

Reprising the definition contained in the Proposal for a Council Decision of 2004 (COM (2004) 664), the Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings of March 2005 [COM (2005) 91 (final)] restricted its scope of application by adopting a broad definition of the concept of "conviction" so as to include not only the decisions of criminal courts but also those issued by administrative authorities (Article 2). Moreover, although the Proposal did not expressly identify the concept of "criminal proceedings", it would appear to have taken a rather broad definition thereof. In fact, Article 3.2 made clear that the obligation imposed on the Member States to take into consideration any previous convictions handed down in another Member State and to attach thereto the equivalent effects of a conviction handed down by its own courts should be applied not only during the trial stage but also in the pre-trial stage and in the execution of the conviction. This principle was reaffirmed in the final text of FD 2008/675/JHA, which was approved by the Council in 2008. But as regards the concept of "conviction", the opposition of several Member States brought the Council to adopt a more precise definition: " *For the purposes of this Framework Decision*

[24] For the French and Italian versions, see the Annex Table.

[25] Explanatory Memorandum accompanying the Proposal for a Decision COM (2004) 664 (final), p. 3.

'conviction' means any final decision of a criminal court establishing guilt of a criminal offence" (Article 2). As suggested by some Member States, the deleted section was, however, reprised in Recital No. 3, which declares that "*This Framework Decision should not prevent Member States from taking into account, in accordance with their law and when they have information available, for example, final decisions of administrative authorities whose decisions can be appealed against in the criminal courts establishing guilt of a criminal offence or an act punishable under national law by virtue of being an infringement of the rules of law*."

Finally, something akin to the evolution that affected the 2004 Proposal for a Decision and the March 2005 Proposal has occurred in relation to the Proposal for a Council Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States [COM (2005) 690 (final)]. In this Proposal, the term "conviction" is understood in its broad sense, i.e. as covering both the decisions of a court and the decisions of administrative authorities handed down against a "person" (whether a natural or a legal person).[26] As far as the concept of "criminal record" is concerned, reference is made once again to the definitions given by the national systems. Finally, it is made clear that the term "criminal proceedings" is to be understood in its very broadest sense as referring to "*the pre-trial stage, the trial stage itself and the execution of the conviction*". On the contrary, in the final version adopted in 2009 (FD 2009/315/JHA), the Council opted to restrict the meaning of "conviction" as referring only to decisions that (a) are made by a criminal court; (b) are final, according to the norms of national system of justice; (c) refer exclusively to natural persons. No changes were made to either of the other two definitions. Once again, however, in response to the concerns of a number of Member States, the Council sought to attenuate the rigour of the definition as given above by providing that "*The application of the mechanisms established by this Framework Decision only to the transmission of information extracted from criminal records concerning natural persons should be without prejudice to a possible future broadening of the scope of application of such mechanisms to the exchange of information concerning legal persons*" (Recital No. 7).

4.2 Problems Relating to the Quality of Legal Translation

The making available of common definitions of technical terms ought to simplify the drafting process of EU legislation and its implementation at a national level. In reality, even a concerted effort to establish common terms may not resolve all the difficulties. Valuable though they may be, definitions can still leave enough room for ambiguity that the comprehension of EU laws and their uniform application are

[26] Gialuz (2009), p. 216.

compromised. Added to that, as soon as terms are translated into the various official languages of the EU, the problems usually associated with legal translations emerge. By comparing three versions, in Italian, French, and English, of legislative provisions that include a definition of the term "conviction", we can get some idea of the translation and interpretation questions that may occur when dealing with legislative texts drafted in a multilingual environment.

As we have seen, the legal instruments considered above tackle different subjects but are closely intertwined. On the one hand, under such instruments Member States are now required to take account of convictions of other Member States in the course of a new criminal proceeding. On the other hand, an attempt has been made to ensure the effective circulation of information extracted from criminal records. It is evident, indeed, that if the relevant authorities of the Members States must treat convictions handed down by foreign courts as being equal in effect to previous convictions handed down by their own courts, then it naturally follows that they must first know of the existence of these foreign convictions. This entails perfect parallelism between information that sentencing Member States are required to communicate to each other and information that the relevant authorities must take into consideration in the course of the new criminal proceedings.

In point of fact, there are good grounds for doubting that any such correspondence really exists, at least from a subjective viewpoint.

Given the opposition of several States, the final version of FD 2009/315/JHA adopts a very restrictive interpretation of what a "conviction" is by defining it exclusively in terms of a final judgment of a criminal court against a "natural person". If we look at the terms used in the three languages (Italian, French, and English) to denote the party receiving a criminal conviction, we have few grounds for doubt. The Italian term *persona fisica*, the English term "natural person", and the French term "*personne physique*" all unequivocally exclude the possibility that the information exchange mechanisms outlined in the Framework Decision might refer to convictions made against a legal person, as is also confirmed in Recital No. 7.

As to FD 2008/675/JHA, its scope of application is instead defined using terms that are a little more ambiguous and might result in significant differences when the rules are implemented at national level. In both the draft and final version of the text,[27] the provision under which previous convictions shall be taken into account for the purposes of new criminal proceedings is referred simply to "a person", "*una persona*", and "*une personne*" in the English, Italian, and French versions, respectively. The Italian legal system provides for liability of legal persons for a criminal offence, but the word "*persona*" is generally reserved for a "natural person", while the term "*persona giuridica*" is used for a legal person. In the English system, a legal person may likewise be held liable for a criminal offence, but the word "person" may refer either to a natural or to a legal person. In English, the distinction is made in the other direction, so that, for the purposes of clarification (i.e. to

[27] Of course, in this case also, the working language was English.

underline that the reference is not to a legal person or corporation), the terms "individual" or "natural person" are used. Finally, in the French system, following the reform of the criminal code in 1994, the term *"personne"* covers both natural and legal persons who may be declared criminally liable for an act.[28] In the light of these considerations, what then is the precise scope of application of FD 2008/675/JHA? Does the obligation to take into consideration prior convictions of foreign courts refer to natural persons only, or does it also refer to legal persons? Given the limited objectives of the instrument and the sensitivity of the question of the criminal liability of legal persons, it is by no means certain that European lawmakers wanted to adopt a definitive position on the question, but it is not possible to exclude that they intended to do so. After all, the EU has encouraged Member States to provide for the liability (whether criminal or of another nature) of legal persons for certain types of criminal offences.[29] And also the case law of the ECHR, which is an important point of reference for the Commission in matters of procedural safeguards, is inclined to grant the same guarantees to natural persons and corporations that are accused of a criminal offence, so much so that the *Freiburg Proposal on Concurrent Jurisdiction and the Prohibition of Multiple Prosecution in the European Union*[30] argues that protection from double jeopardy ("*ne bis in idem*" rule)[31] should be accorded both to natural and to legal persons. In conclusion, it may be said that in view of the importance of the question, the ambiguity should have been avoided through the use of a more precise terminology.

[28] For similar considerations, but regarding the framing of Article 82 TFEU, see Mauro, *infra*.

[29] In this regard, we should recall Recommendation No. R(88)18 of the Committee of Ministers of the Council of Europe to Members States concerning the "*Liability of Enterprises having legal personality for offences committed in the exercise of their activities*", which recognises "*the desirability of placing the responsibility where the benefit derived from the illegal activity is obtained*". The liability of legal persons is also provided for in the Second Protocol for the implementation of the European Union Convention for the protection of financial interests (adopted in Brussels, 26.7.1995), Article 3 of which refers to the liability (the nature of which is not specified) of legal persons for offences of fraud, bribery, and money laundering committed for their benefit. See also the Convention on the fight against corruption involving officials of the European Communities or the Member States of the European Union (Brussels, 26.5.1997) and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 17.12.1997).

[30] http://www.mpicc.de/ww/de/pub/forschung/forschungsarbeit/strafrecht/archiv/freiburg_proposal.htm.

[31] With regard to the transnational *ne bis in idem*, see Vervaele (2005); Rafaraci (2007), pp. 621 ff.; Galantini (2012), pp. 229 ff.

Appendix

French version	Italian version	English version
Proposition de Décision du Conseil relative à l'échange d'informations extraites du casier judiciaire COM (2004) 664 final	Proposta di Decisione del Consiglio relativa allo scambio di informazioni estratte dal casellario giudiziario COM (2004) 664 definitivo	Proposal for a Council Decision on the exchange of information extracted from the criminal record COM (2004) 664 final
Article premier *Définitions*	*Articolo 1* *Definizioni*	*Article 1* *Definitions*
Aux fins de la présente décision, on entend par	Ai fini della presente decisione si intende per	For the purposes of this Decision, the following definitions shall apply:
a) "casier judiciaire": le registre national ou les registres nationaux regroupant les condamnations conformément au droit national;	a) "casellario giudiziario": il registro nazionale o i registri nazionali che riportano le condanne conformemente al diritto nazionale;	a) "criminal record": the national register or registers recording convictions in accordance with national law;
b) "**condamnation**": toute décision définitive d'une **juridiction pénale ou d'une autorité administrative** dont la décision peut donner lieu à un recours devant une juridiction compétente notamment en matière pénale, établissant la culpabilité d'une **personne** pour une **infraction pénale ou un acte punissable selon le droit national en tant qu'infraction aux règles de droit**.	b) "**condanna":** ogni decisione definitiva di una **giurisdizione penale o di un'autorità amministrativa** la cui decisione può dar luogo ad un ricorso dinanzi ad una giurisdizione competente in particolare in materia penale, che stabilisca la colpevolezza di una **persona** per un **reato penale** o per un **atto punibile secondo il diritto nazionale in quanto lesivo di norme di diritto.**	b) "**conviction":** any final decision of a **criminal court or of an administrative authority** whose decision can be appealed against in the criminal courts establishing guilt of a **criminal offence** or an **act punishable in accordance with national law as an offence against the law.**
*** *** ***	*** *** ***	*** *** ***
Décision-Cadre 2005/876/JAI du Conseil relative à l'échange d'informations extraites du casier judiciaire COM (2004) 664 final	Decisione 2005/876/GAI del Consiglio relativa allo scambio di informazioni estratte dal casellario giudiziario	Council Decision 2005/876/JHA on the exchange of information extracted from the criminal record
No definition	No definition	No definition
Proposition de Decision-Cadre du Conseil COM (2005) 91 final	Proposta di Decisione quadro COM (2005) 91 def.	Proposal for a Council Framework Decision COM (2005) 91 fin.

(continued)

French version	Italian version	English version
Article 2 *Définitions* Aux fins de la présente décision-cadre, on entend par	*Articolo 2* *Definizioni* Ai fini della presente decisione quadro si intende per	*Article 2* *Definitions* For the purposes of this Framework Decision:
a) "condamnation": toute décision définitive d'une juridiction pénale ou d'une autorité administrative dont la décision peut donner lieu à un recours devant une juridiction compétente notamment en matière pénale, établissant la culpabilité d'une personne pour une infraction pénale ou un acte punissable selon le droit national en tant qu'infraction aux règles de droit;	a) "condanna": ogni decisione definitiva di una giurisdizione penale o di un'autorità amministrativa la cui decisione può dar luogo ad un ricorso dinanzi ad una giurisdizione competente in particolare in materia penale, che stabilisca la colpevolezza di una persona per un reato penale o per un atto punibile secondo il diritto nazionale in quanto lesivo di norme di diritto;	a) "conviction" means any final decision of a criminal court or of an administrative authority whose decision can be appealed against in the criminal courts establishing guilt of a criminal offence or an act punishable in accordance with national law as an offence against the law;
b) "casier judiciaire": le registre national ou les registres nationaux regroupant les condamnations conformément au droit national;	b) "casellario giudiziario": il registro nazionale o i registri nazionali che riportano le condanne conformemente al diritto nazionale	b) "criminal record": the national register or registers recording convictions in accordance with national law
*** *** ***	*** *** ***	*** *** ***
Décision-Cadre 2008/675/JAI du Conseil relative à la prise en compte des décisions de condamnation entre les États membres de l'Union européenne à l'occasion d'une nouvelle procédure pénale	Decisione Quadro 2008/675/GAI del Consiglio relativa alla considerazione delle decisioni di condanna tra Stati membri dell'Unione europea in occasione di un nuovo procedimento penale	Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings
Article 2 *Définitions* Aux fins de la présente décision-cadre, on entend par "**condamnation**", toute décision définitive d'une **juridiction pénale** établissant la culpabilité d'une **personne** pour une **infraction pénale**	*Articolo 2* *Definizioni* Ai fini della presente decisione quadro per **"condanna"** si intende ogni decisione definitiva di una **giurisdizione penale** che stabilisca la **colpevolezza di una persona** per un **reato**	*Article 2* *Definitions* For the purposes of this Framework Decision **'conviction**' means any final decision of a **criminal court** establishing **guilt of a criminal offence**
Article 3 *Prise en compte, à l'occasion d'une nouvelle procédure pénale, d'une condamnation prononcée dans un autre État membre*	*Articolo 3* *Considerazione, in occasione dell'apertura di un nuovo procedimento penale, di una condanna pronunciata in un altro Stato membro*	*Article 3* *Taking into account, in the course of new criminal proceedings, a conviction handed down in another Member State*

(continued)

French version	Italian version	English version
1. Tout État membre fait en sorte que, à l'occasion d'une procédure pénale engagée contre une **personne**, des condamnations antérieures prononcées dans un autre État membre contre cette même personne pour des faits différents, pour lesquelles des informations ont été obtenues en vertu des instruments applicables en matière d'entraide judiciaire ou d'échange d'informations extraites des casiers judiciaires, soient prises en compte dans la mesure où des condamnations nationales antérieures le sont et où les effets juridiques attachés à ces condamnations sont équivalents à ceux qui sont attachés aux condamnations nationales antérieures conformément au droit interne	1. Ciascuno Stato membro assicura che, nel corso di un procedimento penale nei confronti di una **persona,** le precedenti decisioni di condanna pronunciate in un altro Stato membro nei confronti della stessa persona per fatti diversi, riguardo alle quali sono state ottenute informazioni in virtù degli strumenti applicabili all'assistenza giudiziaria reciproca o allo scambio di informazioni estratte dai casellari giudiziari, siano prese in considerazione nella misura in cui sono a loro volta prese in considerazione precedenti condanne nazionali, e che sono attribuiti ad esse effetti giuridici equivalenti a quelli derivanti da precedenti condanne nazionali conformemente al diritto nazionale	1. Each Member State shall ensure that in the course of criminal proceedings against a **person**, previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law
2. Le paragraphe 1 s'applique lors de la phase qui précède le procès pénal, lors du procès pénal lui-même et lors de l'exécution de la condamnation, notamment en ce qui concerne les règles de procédure applicables, y compris celles qui concernent la détention provisoire, la qualification de l'infraction, le type et le niveau de la peine encourue, ou encore les règles régissant l'exécution de la décision. [. . .]	2. Il paragrafo 1 si applica nella fase precedente al processo penale, in quella del processo penale stesso e in occasione dell'esecuzione della condanna, in particolare per quanto riguarda le norme di procedura applicabili, comprese quelle relative alla detenzione cautelare, alla qualifica del reato, al tipo e al livello della pena comminata nonché alle norme che disciplinano l'esecuzione della decisione. [. . .]	2. Paragraph 1 shall apply at the pre-trial stage, at the trial stage itself and at the time of execution of the conviction, in particular with regard to the applicable rules of procedure, including those relating to provisional detention, the definition of the offence, the type and level of the sentence, and the rules governing the execution of the decision.[. . .]
Proposition de Decision-Cadre du Conseil (COM (2005) 690 fin.)	Proposta di Decisione quadro (COM (2005) 690 def.)	Proposal for a Council Framework Decision (COM (2005) 690 fin.)

(continued)

French version	Italian version	English version
Article 2 *Définitions*	*Articolo 2* *Definizioni*	*Article 2* *Definitions*
Aux fins de la présente décision-cadre, on entend par	Ai fini della presente decisione-quadro, si intende per	For the purposes of this Framework Decision:
a) "condamnation": toute décision définitive d'une juridiction pénale ou d'une autorité administrative dont la décision peut donner lieu à un recours devant une juridiction compétente notamment en matière pénale, établissant la culpabilité d'une personne pour une infraction pénale ou un acte punissable selon le droit national en tant qu'infraction aux règles de droit;	a) "condanna": qualsiasi pronuncia definitiva di una giurisdizione penale o di un'autorità amministrativa la cui decisione stabilisca la colpevolezza di una persona per un'infrazione penale o un atto passibile di sanzione in base all'ordinamento nazionale in quanto lesivo di norme di diritto, e che possa essere impugnata dinanzi a una giurisdizione competente, segnatamente in materia penale;	a) "conviction" means any final decision of a criminal court or of an administrative authority whose decision can be appealed against before a court having jurisdiction in particular in criminal matters, establishing guilt of a criminal offence or an act punishable in accordance with national law as an offence against the law
b) "casier judiciaire": le registre national ou les registres nationaux regroupant les condamnations conformément au droit national	b) "casellario giudiziario": il registro nazionale o i registri nazionali che riportano le condanne conformemente al diritto nazionale	b) "criminal record" means the national register or registers recording convictions in accordance with national law
*** *** ***	*** *** ***	*** *** ***
Décision-Cadre 2009/315/JAI du Conseil concernant l'organisation et le contenu des échanges d'informations extraites du casier judiciaire entre les États membres	Decisione Quadro 2009/315/GAI del Consiglio relativa all'organizzazione e al contenuto degli scambi fra gli Stati membri di informazioni estratte dal casellario giudiziario	Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States
Article 2 *Définitions*	*Articolo 2* *Definizioni*	*Article 2* *Definitions*
Aux fins de la présente décision-cadre, on entend par:	Ai fini della presente decisione quadro, si intende per:	For the purposes of this Framework Decision:
a) *"condamnation":* toute décision définitive d'une juridiction pénale rendue à l'encontre d'une **personne physique** en raison d'une **infraction pénale,** pour autant que ces décisions soient inscrites dans les casiers judiciaires de l'État de condamnation;	a) "condanna" ogni decisione definitiva di una giurisdizione penale nei confronti di una **persona fisica** in relazione a un **reato,** nella misura in cui tali decisioni siano riportate nel casellario giudiziario dello Stato di condanna;	(a) "conviction" means any final decision of a criminal court against a **natural person** in respect of a **criminal offence,** to the extent these decisions are entered in the criminal record of the convicting Member State;

(continued)

French version	Italian version	English version
b) *"procédure pénale":* **la phase préalable au procès pénal, le procès pénal lui-même ou la phase d'exécution de la condamnation;**	b) "procedimento penale" **la fase precedente al processo penale, la fase del processo penale stesso e l'esecuzione della condanna;**	(b) "criminal proceedings" means the **pre-trial stage, the trial stage itself and the execution of the conviction;**
c) *"casier judiciaire":* le registre national ou les registres nationaux regroupant les condamnations conformément au droit national	c) "casellario giudiziario" il registro nazionale o i registri nazionali in cui le condanne sono registrate conformemente al diritto nazionale	(c) "criminal record" means the national register or registers recording convictions in accordance with national law

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Exchange of DNA Data Across the EU: Issues and Perspectives in Light of the Principle of Proportionality

Rosanna Belfiore

Abstract The present paper examines, with reference to the principle of proportionality, measures dealing with the exchange of DNA data between Member States in the framework of judicial cooperation in criminal matters in the EU. The aim is to assess if and to what extent the circulation of DNA data within the EU abides by the proportionality principle and what the content of this principle is. The paper questions the expediency of relying upon proportionality, despite the considerable differences between national legislations that risk undermining reciprocity, on which cooperation—especially if grounded on the principle of mutual recognition—is firmly based.

1 Preliminary Remarks on the Principle of Proportionality

The principle of proportionality has been developed in German doctrine mainly from *Bundesverfassungsgericht* (Constitutional Court) case law in the domain of public law. The general principle is considered to be divided into three secondary principles: (1) suitability, i.e. a measure must be effective to attain a given objective; (2) necessity, i.e. a measure must be the only one capable of fulfilling the given objective, and no other less restrictive measures are available (also known as the *extrema ratio* criterion); and (3) reasonableness or proportionality *stricto sensu*, i.e. a measure must be the result of a fair balance between conflicting interests and guarantees.[1]

In Italy, however, as far as criminal procedure is concerned (the area of law relevant for the purpose of this paper), the only codification of the proportionality

[1] Emiliou (1996), p. 23 ff. On the principle of proportionality as developed in the Anglo-Saxon context, see Craig (1999), p. 85 ff.; Wong (2000), p. 92 ff.; and Buckley (2004), p. 161 ff.

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principle concerns pretrial coercive measures. Unlike the tripartite subdivision of German origin, proportionality in Italian criminal procedure relates only to the choice between different pretrial coercive measures and is defined with reference to the seriousness of the alleged crime and the penalty that has been issued or is foreseen to be issued for that crime. The principle of suitability is considered autonomously only in so far as pretrial coercive measures fulfil a specific need (whereas German doctrine considers suitability as part of the general principle of proportionality in its broadest sense). Similarly, the principle of reasonableness, in part ascribable to the principle of proportionality, is given autonomous relevance: the Italian Constitution affirms the principle of the reasonable length of trials, and sentencing beyond any reasonable doubt is formalised in the Code of Criminal Procedure. Reasonableness is a direct expression of a corresponding concept developed under Anglo-American common law. However, as some scholars[2] have pointed out, in its original context the concept is imbued with a strong ethical significance and seeks to achieve equity, which, being a feature of common law jurisdictions, is not always compatible with continental legal systems.

These few preliminary remarks are intended to remind the reader that proportionality is not a universal principle with definitive and unequivocal content.[3] While normally employed to restrict the arbitrary exercise of power by public authorities over rights and freedoms of individuals, proportionality can also justify the principle of "an eye for an eye", the so-called *lex talionis*, which is effectively nothing other than the application of strict proportionality in which the sanction must be equivalent to the pain caused by the offence.[4] Yet proportionality is also widely considered to be an expression of the principle of the rule of law, inherent in any legal system.[5]

Proportionality therefore exemplifies the difficulty of attributing a univocal and internationally accepted meaning to a concept. Even though proportionality is a word easily translatable[6] and a principle recognised in the majority of the EU Member States,[7] its connotations may differ markedly between national legal systems and between different areas of law.[8] In spite of its indeterminate meaning and effect, the principle of proportionality[9] is often applied by the EU legislator and

[2] Among them, see Catalano (2011), p. 87.

[3] Bachmaier Winter (2013), p. 90.

[4] On the *lex talionis* and its connection to proportionality, see Fish (2008), p. 57 ff. On proportionality as a principle of sentencing, see Bagaric and McConvill (2005), p. 50 ff.

[5] Schwarze (2003), p. 58.

[6] On the problematic issues stemming from language diversity and EU law, see Castorina (2010), pp. 111–130, and Ruggieri (2011), pp. 3–12.

[7] Schwarze (1992), p. 680 ff.

[8] See Harbo (2010), pp. 172–180; Tridimas (1999), p. 89 ff.

[9] The principle of proportionality under discussion is not that expressly provided for by Article 5 TEU—and already affirmed under the former TEC—concerning the exercise of competences by the European Union, according to which the content and form of Union action shall not exceed

invoked by EU institutions in the area of judicial cooperation in criminal matters. The absence of a common definition, however, suggests that Member States will not be able to contribute equally in cooperation procedures. This results in an increased risk of "forum shopping": criminals may prefer to operate in and from Member States where considerations on proportionality are liable to affect judicial cooperation.[10]

The principle of proportionality is also applied in the context of the Council of Europe by the European Court of Human Rights (ECtHR).[11] In view of the significant differences between national judicial systems from which the principle of proportionality stems, the Court of Strasbourg has developed the "margin of appreciation" doctrine, with the aim of introducing a certain degree of flexibility in the application of the provisions of the European Convention of Human Rights. The "margin of appreciation" doctrine weakens the significance of the proportionality test carried out by the ECtHR because the evaluation of whether a measure restricting a fundamental right is allowable falls to the competent national authorities, the ones in the best position to do this evaluation.[12]

2 The Case Study: The Exchange of Genetic Data

This paper analyses the issue of proportionality surrounding measures dealing with the exchange of DNA data between Member States, introduced by the EU in the framework of judicial cooperation in criminal matters.[13] The aim of this analysis is to assess whether and to what extent the circulation of DNA data within the EU complies with the principle of proportionality. The paper also considers what proportionality is deemed to consist of.

what is necessary to achieve the objectives of the Treaties. Nor is principle of proportionality under discussion limited to criminal law, which Article 49 of the EU Charter of Fundamental Rights refers to where it affirms that the severity of penalties must not be disproportionate to the criminal offence. On these issues, see Böse (2011), p. 35 ff.

[10] We do not share the view of Heard and Mansell (2011), p. 357, who affirm that the proportionality assessment is to be welcomed as it prevents "forum shopping", understood as the unfair advantage that prosecutors may take from differences between countries' procedural systems. See more in detail *infra*, *sub*-para. 3.

[11] With specific reference to criminal procedure, the principle of proportionality is invoked by the European Court of Human Rights in order, *inter alia*, to draw a line between arbitrary and non-arbitrary detention, assess when the length of criminal proceedings must be considered excessive, assess whether denial of access to a court is a legitimate interference on individual rights. See McBride (1999), p. 27. For a review on the case law of the Court of Strasbourg concerning the principle of proportionality, see Eissen (1993), pp. 125–146. See also Arai-Takahashi (2002) and van Drooghenbroeck (2001), p. 9 ff.

[12] This approach has been criticised by some scholars, as it sacrifices the development of objective standards and relieves the Court of this sensitive task. See McBride (1999), p. 29 ff.

[13] Measures concerning police cooperation in criminal matters are voluntarily disregarded, even though most of the considerations put forward in this paper may apply to them too.

The extremely sensitive nature of DNA data makes it an ideal subject of study, since it encompasses questions relating to the protection of individual rights, the balance between conflicting interests, and the efficacy of the practice for the purposes of prevention and prosecution of crimes.

3 Proportionality and the Exchange of DNA Data

The first relevant measure for the purpose of the present paper is Decision 2002/187/JHA[14] on Eurojust, as modified by Decision 2009/426/JHA,[15] in regard to the processing of personal data and, specifically, of DNA data.

The data may regard persons who, under the national legislation of the Member States concerned, are suspected of having committed or having taken part in a criminal offence in respect of which Eurojust is competent or persons who have been convicted of such an offence. The Decision requires that "[. . .] personal data processed by Eurojust shall be adequate, relevant and not excessive in relation to the purpose of the processing [. . .]" (art. 14, para. 3). Unfortunately, the Decision fails to clarify what the adequacy, relevance, and proportionality should actually consist of, a want of precision that merits censure, given that these principles are supposed to safeguard individual rights from potential abuses by public authorities and reliance upon national laws is impossible.[16] Domestic laws are relevant only in that they determine which subjects are liable to having their details entered in the centralised system. National legislations play no role in the processing of data by the European body.

The exchange of genetic data in the framework of EU judicial cooperation in criminal matters is also envisaged in the proposal for a Directive on the European Investigation Order (EIO).[17] To remedy the fragmentation of the existing evidence-gathering system, the European legislator has taken steps to set up a comprehensive system for obtaining evidence in cases with a cross-border dimension based on the principle of mutual recognition. A Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility was produced in 2009,[18] and the Stockholm Programme rolled out in 2010.[19] The aim is eventually to replace all the existing instruments in this area, including the Framework Decision 2008/978/JHA on the European Evidence Warrant (EEW),[20] which was the very first measure to apply the principle of mutual

[14] OJ L 63, 6 March 2002, p. 1.

[15] OJ L 138, 4 June 2009, p. 14.

[16] On the necessity of a common standard concerning proportionality at European level, see Symeonidou-Kastanidou (2011), p. 148.

[17] OJ C 165, 24 June 2010, p. 22.

[18] Brussels, 11 November 2009, COM(2009) 624 final.

[19] OJ C 115, 4 May 2010, p. 1.

[20] OJ L 350, 30 December 2008, p. 72.

recognition to the area of evidence gathering, but it expressly excluded DNA data from its scope of application. The EIO has a wide scope of application, covering all kinds of investigative measures carried out with a view to gathering evidence[21]: no prohibition is imposed on the processing of DNA data. Should the proposal be adopted as currently framed, genetic data would circulate within the EU in the same way as any other type of evidence.

Initially, no reference to the principle of proportionality had been included in the proposed Directive on the EIO, which caused concern among several Member States. Nine delegations, including Italy's,[22] suggested the need for a proportionality test to be carried out by the issuing authority in consideration of the crime of the proceedings, on a par with the provision of the Framework Decision on the EEW to the effect that a warrant should be issued only when the objects, documents, and data sought are "necessary and proportionate" for the purpose of the proceedings. Under the EEW, the issuing authority has to carry out a preliminary evaluation to make sure that, in compliance with the principle of *extrema ratio*, an evidence warrant will be issued only if no other measures are available and, in any case, only for crimes for which it is worthwhile activating judicial cooperation procedures. The standards for the evaluation are set at national level under the domestic legislation of the State of the issuing authority. It is up to the executing authority to choose which instrument is best suited (i.e. most proportionate) to the execution of a warrant,[23] including coercive measures where appropriate.

The British and German delegations had suggested instead that the proportionality test should be carried out by the executing authority, which could refuse to execute an EIO it deems to be disproportionate. This last suggestion seems to hide the willingness to introduce a ground for refusal granting the executing authority with a wide margin of discretion, which recalls the discretion occurring under traditional judicial cooperation procedures,[24] without taking into serious consideration the difficulty for the executing authority to evaluate proportionality in proceedings carried out in a foreign country.

[21] The only exception is provided for measures carried out by joint investigation teams, to which the existing relevant provisions continue to apply.

[22] The other eight delegations are Czech, French, Lithuanian, Luxembourger, Latvian, Polish, and Slovak.

[23] The executing State shall be responsible for choosing the measures that, under its national law, will ensure the provision of the objects, documents, or data sought by a European evidence warrant for deciding whether it is necessary to use coercive measures to provide that assistance (Article 11, para. 2).

[24] Under the traditional letters rogatory system, the requesting authority must describe the relationship between the proceedings and the requested measure so as to allow the requested authority to assess, *prima facie*, whether the requested piece of evidence is relevant and appropriate. The request must also be detailed in order to prevent letters rogatory directed to obtain an indefinite numbers of pieces of evidence: this would be contrary to the principle of proportionality as envisaged in certain national legislations. See Aprile and Spiezia (2009), p. 303.

In the final draft currently available,[25] on which political agreement was reached in December 2011, the principle of proportionality has been introduced, defined partly with reference to the Framework Decision on the EEW and partly on the basis of a new understanding of the concept.

As under the Framework Decision, an EIO may be issued only if the issuing authority is satisfied it is necessary and proportionate for the purpose of the proceedings (Article 5a, lett. a). In a departure from the Framework Decision, it is for the issuing authority to decide, on the basis of its knowledge of the details of the investigation concerned, which measure is to be used (Recital 10 and Article 1). Therefore, as expressly clarified in the *consideranda*, the check on proportionality by the issuing authority is twofold: the evidence sought must be necessary and proportionate for the purpose of the proceedings, and the measure chosen must be necessary and proportionate for the gathering of such evidence (Recital 10a). The executing authority, too, has to carry out a proportionality test: it may have recourse to an investigative measure other than that provided for in the EIO when such investigative measure will have the same result as the measure provided for in the EIO by less intrusive means [Article 9, para. 1(bis)]. However, if the investigative measure provided for in the EIO does not exist under the law of the executing Member State or if it would not be available in a similar domestic case and no other investigative measure would have the same result as the measure requested, the executing authority does not enforce the request (Article 9, para. 3).

Although limiting recourse to the EIO to cases where it appears indispensable is to be welcomed,[26] relying upon national authorities may not be the best way forward. As rightly pointed out elsewhere,[27] a proportionality clause does not add anything to what issuing authorities have to do anyway. It may be taken for granted that an EIO would be issued only when deemed proportionate by national law, especially following the provision requiring that an investigative measure could be ordered only if an equivalent measure could have been ordered under the same conditions in a similar national case (Article 5a, lett. b), which implies that an assessment on proportionality will have been made. The problem is that considerable differences exist between national legislations, and this may result in a scenario in which, within the common area of freedom, security, and justice, certain legal systems allow the proliferation of EIOs, which then have to be implemented by the executing authorities of other jurisdictions that might, on the contrary, be highly

[25] Brussels, 21 December 2011, 18918, 2010/0817 (COD).

[26] Similar considerations have been put forward with regard to the Framework Decision on the European Arrest Warrant, where nothing is provided on the assessment of proportionality in relation to the crime under proceedings. Under the German case law, this test has been considered applicable by virtue of Article 49, para. 3 of the EU Charter of Fundamental Rights. See Vogel and Spencer (2010), p. 474 ff.

[27] Bachmaier Winter (2010), pp. 583–584.

parsimonious in having recourse to the EU measure.[28] Similarly, a proportionality test carried out by the executing authority would affect uniform application of the EU measure. Such a mismatch risks undermining the reciprocity on which cooperation—especially that based on the principle of mutual recognition—firmly rests.[29] Patchy cooperation is particularly alarming when genetic evidence is at stake, since it is not only often decisive for the final sentence but also liable to require coercive measures to be brought to bear on the body of an individual.

4 Proportionality and Data Protection

The ambiguity that characterises the principle of proportionality is replicated in the measure that the European Union has adopted for the protection of personal data exchanged between Member States for the purpose of the prevention and prosecution of crimes. Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters[30] complements Directive 95/46/CE,[31] adopted under the former first pillar, which is applicable only when data are processed in the implementation of Community law. According to the Framework Decision, Member States shall protect the fundamental rights and freedoms of natural persons and, in particular, their right to privacy, when personal data—including DNA data—are processed for the purpose of the prevention, investigation, detection, or prosecution of criminal offences or the execution of criminal penalties.[32]

In particular, Article 3 of the Framework Decision 2008/977/JHA, significantly titled "Principles of lawfulness, proportionality and purpose", stipulates that personal data may be collected by the competent authorities only for specified, explicit,

[28] This is the scenario resulting by the implementation of the European Arrest Warrant. The EU Commissioner Viviane Reding invited Member States not to make use of this instrument for petty crimes: "[...] the European arrest warrant [should] not [be] issued mechanically for crimes that are not very serious such as bicycle theft" (April 2011). See also Council Conclusions, Brussels, 28 May 2010, 8436/2/10, REV 2, p. 3.

[29] Symeonidou-Kastanidou (2011), p. 159. See also Report from the Commission, Brussels, 11 April 2011, COH (2011) 175 final, p. 8.

[30] OJ L 350, 30 December 2008, p. 60. Reform of data protection in the EU has been much debated and is still under discussion. New measures are to be adopted in the near future.

[31] OJ L 281, 23 November 1995, p. 31.

[32] The Framework Decision does not affect the data protection provisions governing the automated transfer between Member States of DNA profiles, dactyloscopic data, and national vehicle registration data pursuant to the Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. Nor does the Framework Decision affect the relevant set of data protection provisions of those acts governing the functioning of Europol, Eurojust, the Schengen Information System (SIS), and the Customs Information System (CIS, or those introducing direct access for the authorities of Member States to certain data systems of other Member States (see Recital 39).

and legitimate purposes in the framework of their tasks and may be processed only for the same purpose for which data were collected. Further, the processing of the data shall be "lawful and adequate, relevant and not excessive in relation to the purposes for which they are collected". Once again, the European legislator relies upon the proportionality principle, here emphasised by the explicit reference to two principles of which proportionality is the direct corollary: legality and purpose. However, while legality and purpose can be evaluated by reference to objective standards (the law and the crime of the proceedings), proportionality implies a discretional evaluation by national authorities.[33]

The principle of proportionality is of utmost relevance also when Member States are given the possibility of limiting the right to access to information, as expressly provided under the Framework Decision. All subjects shall have the right to know whether data relating to them have been transmitted or made available and to obtain information on the recipients to whom the data were disclosed and communication of the data undergoing processing. Article 17 provides that Member States may restrict access to information if, due regard having been given to the legitimate interests of the person concerned, a restriction is deemed to be a "necessary and proportional measure": (1) to avoid obstructing official or legal inquiries, investigations, or procedures; (2) to avoid prejudicing the prevention, detection, investigation, and prosecution of criminal offences or for the execution of criminal penalties; (3) to protect public security; (4) to protect national security; (5) to protect the data subject or the rights and freedoms of others.

Clearly, the assessment that Member States are asked to carry out in all these cases is based on discretional and unchallengeable considerations, which nonetheless have a direct impact on the sphere of the fundamental rights of individuals. In fact, the principle of proportionality is framed precisely with the purpose of justifying the wide discretion left to Member States for the sake of safeguarding overriding national interests.

The scenario is further complicated by the fact that the protection of personal data is expressly granted by Article 8 of the EU Charter of Fundamental Rights and falls within the scope of application of Article 52 of the same Charter, according to which "[. . .s]ubject to the principle of proportionality, limitations [on the exercise of the rights and freedoms recognised by the Charter] may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

[33] Also, further processing for another purpose shall be permitted in so far as, *inter alia*, processing is "necessary and proportionate" to that other purpose (Article 3, para. 2).

5 Final Remarks

In the light of the measures adopted to date at the EU level for the exchange of DNA data between Member States in the framework of judicial cooperation in criminal matters, we can draw two main conclusions.

First, the significance of the principle of proportionality varies from one legal system to another. The European legislator has mainly relied upon proportionality as understood by national authorities. This raises serious concerns regarding reciprocity, which should characterise legal assistance procedures, all the more so in a common area of freedom, security and justice. Mutual recognition demands that Member States cooperate to an equivalent extent and therefore leaves no room for "variable-geometry judicial cooperation" in criminal matters. As has been rightly observed,[34] with the increasing movement of people within the EU comes a growing need for a criminal justice system that can be equally enforced in all Member States.

Second, relying upon the principle of proportionality in criminal justice at supranational level is a demanding undertaking where legal certainty and non-discrimination are all the more necessary. Proportionality introduces a degree of flexibility that is unpredictable and unchallengeable. That "variable-geometry judicial cooperation" in criminal matters and extreme flexibility can affect exchange of DNA data (the processing of which may result in serious consequences for the subject) casts serious doubt on the wisdom of relying upon this principle.

The foregoing conclusions invite three remarks.

Firstly, as regards the proportionality test to be carried out by Eurojust, the European legislator should intervene to clarify which standards the supranational body will use to determine whether personal data are adequate, relevant, and not excessive for the purpose of their processing. This task is not an easy one, but Member States should no longer put off the need to deal with it.

Secondly, as far as the €10 measure is concerned it may be preferable for Member States to draw up a list of serious crimes (punishable by a minimum sanction)[35] for which they agree on proportionality so as to grant each other full legal assistance for the purpose of DNA data exchange. This method would obviate the threat to uniformity and reciprocity in judicial cooperation procedures posed by the divergent results of proportionality tests carried out by national authorities. The list—which may well consist of the 32 crimes for which double criminality has been removed, as already provided for in many mutual recognition measures—[36]

[34] Davidson (2009), p. 36.

[35] Similar suggestions have been put forward by Symeonidou-Kastanidou (2011), p. 143.

[36] Indeed, the abolition of the check on double criminality for certain crimes (i.e. a presumption of legality) implies presumption of proportionality. As pointed out by Bachmeier Winter, when the offence that gives rise to a European Investigation Order is not punishable under the laws of both the executing and the issuing Member States, it is manifest that they do not share the same criteria with regard to the need and proportionality of investigative measures. Bachmaier Winter (2010), p. 585.

would introduce the presumption of proportionality even in respect of gathering DNA data by coercive measures. This would help to guarantee legal certainty across the EU and non-discrimination between citizens of the 27 Member States. The importance of such positive results should not be underestimated. Indeed, since the proportionality principle is meant to prevent arbitrary action, it is an offshoot of the principle of equality[37]: safeguarding the one implies protection of the other. Moreover, the presumption of proportionality for the most serious crimes may contribute to shaping a common definition of proportionality in criminal justice throughout the EU, which, in turn, may contribute to cultivating mutual trust among Member States. To ensure mere misdemeanors are not included, it might be better to consider the actual sanction likely to be imposed rather than the sanction notionally applicable to the offence.[38]

Thirdly, as far as data protection is concerned, all considerations of proportionality should be strictly limited. As already noted above, the application of the principle of proportionality in this area of law may severely affect the hard-won recognition of individual rights.

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[38] With regard to the European Arrest Warrant, see Vogel and Spencer (2010), pp. 480–481, and Davidson (2009), pp. 34–36.

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A "Neglected Appendage": Reflections on the Difficulties of Victim Protection in EU Law

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Abstract The paper examines the progress EU law made in the recent years in order to strengthen the position and the rights of the victim in criminal proceedings. The topic is crossed with multilingualism, and the present work, after detecting the factors that, until now, prevented the victim to exercise an effective role, indicates how a recent directive could help to overcome them.

Abbreviations

EU European Union
OJEU Official Journal of the European Union

1 Introduction: How Achievement Falls Short of Intent

The protection of victims of crime in the European judicial area—and, therefore, "in the context of multilingual European Union"—has been dogged by regulatory delays and uncertainties. More than 10 years after the first important Community act—the Council Framework Decision 2001/220/JHA of 15 June 2001—the increased awareness of the plight of victims and the declarations of principle about the need for the "global" protection of victims *per se* (i.e., regardless of the specific safeguards already provided in certain delimited areas of criminal law) have been translated into actual improvements only in part. Declarations about the need to create a "European statute for crime victims" aside, the real difficulty lies in the actuation of wide-sweeping principles that require concrete and systematic execution. The most recent attempt in this direction was the definitive approval of

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the *Proposal for a Directive of the European Parliament of the Council COM (2011) 275 (final), establishing minimum standards on the rights, support and protection of victims of crime*, formally adopted by the Commission on 18 May 2011. This proposal was scrutinised, and an opinion thereon was issued by the Committee of the Regions on 16 February 2012,[1] whereupon it was approved, with amendments, by an overwhelming majority of Parliament on 12 September 2012 (611 votes in favour, 9 votes against, and 13 abstentions) before being finally enacted by the Council of Ministers on 4 October 2012. Once published in the Official Journal of the European Union (OJEU) (which had not happened at the time of writing), the Directive must be transposed into national law by the Member States within 3 years.

The original Framework Decision and the accomplishment of a concrete result are separated by an interval of 11 years, which, given the traditional rate of evolution of supranational legislation and the great importance of the theme, is a very long time indeed. Above all, the delay seems particularly regrettable considering that the recently approved Directive does not seem to have reversed the tendency to ignore this issue and has failed to secure the passage of any legislation on victim protection that we might consider final. Indeed, even the Directive itself seems to anticipate the difficulties of implementing rules for victim protection and lends credence to pessimistic forecasts about its own practical transposition onto national statute books. It is as if the long period was not enough to resolve the many fundamental doubts or to plot out a clear route towards victim protection.

Whenever we are dealing with the issue of victim protection, we find that a disjunction exists between the proclamation of principle, which is not untouched by rhetorical posturing, and the actual application of hard and fast rules.

As there is little to be gained by merely pointing to the existence of an impasse or by lamenting the difficulty of introducing a systematic and positive system of victim protection, we need to go beyond the historical fact of the problem and ask some basic questions. Why, for instance, is it that the issue of victim protection attracts support and interest at an abstract level but somehow cannot generate a stable body of law, a set of core statutes that are common to the law books of EU states? Although there is a clear answer to the question of *why* protection should be given, there are no immediate and simple answers to the questions of *how* and *to whom*.

2 How Reality Dampens Enthusiasm

By no means should we denigrate the importance of what has been achieved. Viviane Reding, Vice President of the European Commission, is quite right to evince enthusiasm when, in the wake of the approval of the Directive, she claimed it

[1] See OJEU C 113 of 18.4.2012, pp. 56–61.

was "a milestone for all the victims in the European Union" because "for too long now, victims of crime have been often treated as neglected appendages to the criminal justice system". This comment, however, touches upon the crux of the matter. We need to understand why victims have been the "neglected appendage" of the criminal justice system and why the transposition of the Directive into the national laws of Member States is likely to be laborious, complicated, and liable even to run into opposition. To this end, we need also to be aware of the hurdles on the path to approval. For example, why did the Committee of the Regions, in issuing its opinion, feel the need to propose an amendment to Recital 7, which reads: "This Directive respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union", and recommend the addition of a significant extra clause, so that the passage would read: "This Directive respects fundamental rights, *including the rights of persons under investigation and the accused in criminal proceedings,* and observes the principles recognised by the Charter of Fundamental Rights of the European Union"?

After all, we are talking about a Directive on the protection of victims, not defendants. For the first time, efforts are afoot to draw up a "minimum statute" for this neglected party, and yet the very first (of four) amendments that the Committee of the Regions saw fit to propose regards the rights of defendants and suspects because (according to the official reason given for the proposed amendment) "the presumption of innocence and respect for the fundamental rights of all persons are one of the most important achievements of the European rule of law, and should therefore be expressly mentioned in connection with the protection of victims' rights". It is as if they were saying, "We are, it is true, speaking of victims; but let us not forget the *really* important thing, which is the protection of persons charged with crimes or under investigation". Ludwig Mies van der Roche understood the nature of things when he observed, "the devil is in the details". The details in question include diabolic interpositions such as the one just mentioned, thanks to which victims of crime would appear to be doomed again, even in the very legislative text that purports to protect them.

Details such as these should prompt us to redouble our efforts to understand the reasons behind this apparent will to deny full legal protection to victims of crime. In the following few pages, for the sole purpose of encouraging reflection and without any claim to exhaustive or systematic analysis, I shall be putting forward some possible explanations for why resistance to change is far more powerful than the enthusiasm for it and why plans to grant protection to victims is so hard to translate into positive legislation.

3 The First Obstacle: Formalising the Legal Concept

One possible first reason for the failure to translate good intentions into reality may be the difficulty of arriving at a legal formalisation of the concept of "victimhood". In systems of national law, a victim acquires recognition of his or her status only by

means of a formal trial. Only when a victim assumes a specific and formal role of "private and minor actor" in a court case does he or she gain (procedural) powers and access to his or her rights as a victim. Rarely does the victim exist *outside* the formal confines of the trial. Historically, the victim has been understood as such within the confines of the court, and his or her classification as victim has tended to be functional to the trial process. Hence, the victim is regarded as a witness, as a private plaintiff who is subordinate to the prosecutor, or as a litigant in a civil suit. It hardly needs saying that the trial provides only a very incomplete and sometimes even a distorted image of the victim. Yet the moment when victim protection, as a matter of dignity and of welfare, reparation, and social solidarity, is most badly needed is precisely in the periods before and after the trial. This is when victims are most exposed legally and existentially, when they are vulnerable to social indifference and marginalisation, and when they are subject to fear and considerable suffering.

It could be (and has been) objected that pre- and post-trial protection are issues that have nothing to do with the rules and functions of court proceedings, and phases before and after a trial constitute a no-man's land that should be governed by other bodies with a recognised function of victim protection: social services, humanitarian organisations, charities, local government departments.

By seeking to create a regulatory "enclave" disconnected from the rest of criminal law, this argument perfectly exemplifies the primary difficulty that besets those attempting to secure protection for victims. First of all, no one would dare say in respect of a person charged with a crime that recognising his or her rights becomes necessary only after arraignment. Quite the contrary: the reinforcement of the rights of the accused under criminal law and the increased sensitivity to the fundamental rights of defendants are tendencies that have been characterised by the progressive expansion of the civil rights of suspects during the investigative stage. As criminal law has evolved over time into the form now practised in the signatory states of the European Convention, the protection of the right to silence, the right to have a lawyer present, the right not to incriminate oneself, the effectiveness of the rules governing the making of accusations, the admissibility of accusations in court, and other such provisions all constitute guarantees for the defendant that precede the formal arraignment of a suspect. Indeed, it is precisely thanks to the extension of these pretrial guarantees that the contours of what constitute a "fair trial" have been delineated, as the case law of Strasbourg teaches us.

For victims of crimes, no such progress has been made. Generally speaking, no one has ever measured the "fairness" of a trial with reference to the degree of protection accorded to the victim, much less advocated the principle of victim protection during the investigation or pretrial phase. Yet the fundamental problem of protection lies precisely in the need to acknowledge the status of a "victim of crime" as being such before the trial and guaranteeing him or her full access to justice. Clearly, this recognition of status must necessarily be made before the start of the criminal trial. It can therefore be said that the first difficulty is cultural in nature. The essential problem is that the protection of the victim is contingent on the holding of a trial: a victim's rights are recognised only in the event of a trial actually

taking place. Since the trial is a necessary preliminary for the formal acknowledgement of the victim's status, it is also the only forum at which the victim may assert his or her rights. It is easy to demonstrate, as I do below, that this conflicts not only with the principles of justice but also with empirical reality. Statistics show that the treatment of victims is a social problem that no legal system, whatever its cultural origins, can afford to ignore. Each year, 15 % of European citizens, or about 75 million people in the EU, fall victim to 30 million criminal acts (excluding minor offences). The number of Europeans living in an EU country other than that of origin is 12 million, and every year EU citizens make one billion trips across borders to other EU countries. In light of these figures, according the same level of protection within each Member State and establishing a common core of legal certainty are more a question of responding as necessary to a social problem than of affirming a legal principle. Yet, social awareness of this situation still needs to be heightened before systematic and decisive action can be taken.

4 The Second Obstacle: Language

The difficulty in formalising the rights of victims is also connected with conceptual and linguistic issues.

As a concept, "victim" is harder to pin down than "suspect" or "defendant". To begin with, "victim" covers a far larger spectrum of meanings. "Suspect" and "defendant" are essentially rigid signifiers that, thanks to the lack of descriptive content, always and immediately denote a known quantity. The same is not true for "victim", the meaning of which, also from a technical perspective, requires a minimum of specification. In short, the term "defendant" is, on the basis of a *de re* understanding, a means of denoting a class of person (i.e. one to whom a crime has been imputed), whereas "victim" does not refer unequivocally to any one class of person or does so only if accompanied by a specific description. To borrow again from the propositional logic of Willard van Orman Quine, the victim is defined as such *de dicto*, i.e. using a term that in different spheres may designate different objects. In fact, "victim" in a sociological or psychological sense does not correspond with "victim" in the legal sense. All this is to say that it is naturally easier to define the concept of suspect/defendant than that of the victim; consequently, pending the formalisation of the latter concept, it is easier for judicial systems to take account of only the former. Further, the highly variable nature of the signifier "victim", even when confined to the legal sphere, is evidenced by the unending battle over which of several and very dissimilar meanings should prevail: should it denote the holder of a legally protected good that has been insulted by the commission of the crime, or should it mainly refer to the person to whom the unlawful conduct has caused a compensable injury? And so on.

Linguistically, "victim" is a word that, as Émile Beneviste put it, enables us "to see what does not yet exist". In this case language is proleptic: it anticipates the concept it expresses, which, as we have seen, is quite different from what happens

in relation to the "defendant". If Beneviste is right in his claim that "we conceive a universe that our language has already shaped",[2] then the language model for "victim" is so broadly constructed that the notion, particularly in the legal sphere, is very ill-defined. The difficulty of pinning down the significance of "victim" and the linguistic uncertainty that surrounds the term have made it hard to achieve concrete legal protection. Emblematic of the difficulty are the events surrounding the preparation of the Council Framework Decision of 15 March 2001 (2001/220/JHA), whose first article defines "victim" as "a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss directly caused by acts or omissions that are in violation of the criminal law of a Member State". Called upon to transpose the Directive—i.e. to translate these linguistic definitions into positive law—several Member States essentially refused to do so, advancing an argument of *non possumus*. Italy was once such country. In response to the Commission's observations concerning its failure to implement the Directive, Italy countered that "a simple list of definitions does not require transposition into national law". Subsequently, though to little avail, the Commission declared that since the purpose of a framework decision was to approximate national laws and regulations, Member States should have the same basic terminology, without which the effectiveness of the Framework Decision would be jeopardised. In spite of the Commission's response, which dealt specifically with the definition of "victim", the Framework Decision has never been enacted in Italy. So we can conclude that language remains a precarious element, and with it, everything else.

Yet efforts to achieve greater linguistic precision in respect of the term "victim", far from leading to useful clarity, has caused greater linguistic and therefore also legal uncertainty.

We could cite numerous instances of confusion. One example that can stand for all others concerns the notion of "particularly vulnerable victims" for whom Article 2 of the Framework Decision 15 March 2001 required Member States to reserve "specific treatment best suited to their circumstances". The Report from the Commission of 3 February 2004 (COM (2004) 54) on the implementation of the Framework Decision highlighted the large divergences between different national legal systems in the interpretation (above all from a linguistic perspective) of what was meant by "particularly vulnerable" with respect to the concept of a "victim". Vulnerability is understood by some Member States (France, the United Kingdom, and Italy) as a subjective condition that derives from some specific physical or mental state and is therefore applicable to children and the physically disabled; by other countries (such as Spain, the Netherlands, and Finland), it is understood as the objective outcome of particular forms of crimes committed against the individual, such as violence within the family or terrorism. For still others, the word refers to an all-encompassing condition that may be either objective or subjective: one example

[2] Benenviste's (1971) comments, from *Problemi di linguistica generale*, Il Saggiatore, Milan, 1971, are quoted in Altieri Biagi (2012), p. 19.

is the German law to the effect that a deposition may be recorded if it has been satisfactorily established that the victim would not be able to face a public hearing but that his or her testimony is necessary.

The parameters within which the notion of "victim" is located therefore need to be determined before an instrument for victim protection can be put in place. If "vulnerability" is an entirely subjective notion, then by and large it is appropriate for purely procedural tools, such as recordings or audiovisual links, to be used for the delivery of testimony by the victim (this is the practice in Luxembourg, Germany, Austria, Belgium, and the United Kingdom). Where vulnerability is objectively determined, then the protection afforded to victims may be limited to forms of assistance, including financial aid, which is the course taken by other countries (Spain and Finland, for example).[3]

To sum up: a defendant may be an adult or a child, mentally fit or unfit, in attendance at court or in default, and so on. A series of terms can be attached to the already technical and therefore linguistically precise term "defendant", and these terms are in turn very precise in as much as they refer or lead to a set of well-defined procedures.

By contrast, the already loose concept of "victim" becomes even less precise whenever additional terms are attached, as they exacerbate the linguistic indeterminacy. This does not bode well for the achievement of a uniform system of victim protection in law.

5 The Third Obstacle: Not a Political Priority

A third obstacle is posed by cultural and historical forces. Historically, European legal systems have been more concerned to "recover" guarantees for suspects-defendants rather than to enact measures for the protection of victims. In Europe, a historical legacy of certain indefensible investigative/inquisitorial practices needed to be dismantled, and of the improvements that had to be made, first in order of importance was undoubtedly the status of the accused rather than that of the victim. The field of historical discourse is potentially so vast that it is hard to maintain it within the controllable limits necessary for the development of our argument. So strictly limiting ourselves to as few historical reflections as possible, we can observe that the Enlightenment conception of the relationship between the State and the individual undoubtedly had a positive, essential, and immediate effect: the individual, formerly a being under the authority of the State, became instead a being under the protection of the State. As a result, the progressive nature of a legal system is measured more by how well it protects resistance to the State than by how well it guarantees protection of the individual. To put it simply: when it comes to values whose defence is considered paramount, freedom of the individual

[3] Report COM(2004) 54, *ibidem*, § 2, *sub*-art. 2.

rather than social solidarity has prevailed culturally and ideologically. The preference is for technical legal instruments that uphold the former rather than any that would implement the latter. In a judicial system operating according to these priorities, guarantees for victims have often appeared to be in conflict with the rights of the offender, even if the arguments advanced to this effect are not always cogent. An archetypal example of this emphasis is the long-established and enduring idea that testimony delivered in a manner that protects a vulnerable injured party is somehow prejudicial to right of the accused to cross examine witnesses.

As the best doctrine has shown (Pagliaro), the strengthening of the public law aspect of criminal trials and the emphasis on liberal-civil right aspects have been "seemingly at odds with each other" and led to the "current situation of scarce concern for the victim", which is now a source of regret.[4]

Last but not least, the protection of the victim is often regarded as being contrary even to the very purpose of criminal investigation. Ethical and Hegelian conceptions of the State aside, criminal justice has, culturally, long been conceived not only as the weapon of choice for the defence of the community but also (and especially?) as a means of repairing the social ethos violated by the crime. The particular victim is absorbed into the general social context, so to speak, and becomes no more than an inconsequential component of the society that was insulted by the criminal act. The function of a trial, therefore, is the restoration of a violated order, and this ethical consideration necessarily outweighs the harm perpetrated on the individual. The offence is too acute an injury to society as a whole to be compared with the single victim's perspective, needs, rights, and powers.

This idea is also embedded in another aspect of criminal law with deep historical roots, *viz* that the defence of interests should be impersonal. The law traditionally regards certain interests/goods as meriting legal protection irrespective of the person who has title to them. As Antonio Pagliaro wisely observes, this impersonality "is important, because it reflects the *equality* of citizens in criminal justice". The notion that citizens have equal dignity and equal right to protection means that only in marginal cases may account be taken of the specific characteristics of the person who suffered the offence. Admitting the possibility of different protection based on the particular characteristics of the person who suffered the wrong, Pagliaro points out, represents a derogation of the abstract principle of equality.[5]

This, however, has led to the invisibility of the victim, who is essentially extraneous to the process. The law protects a good and treats an interest as meriting protection *per se*: the actual and historical holder of the title to the interest or good is an irrelevance. The pre-eminent concern must, of course, be the State's commitment to securing reparation when a social good has been damaged. What possible interest is it to the system of criminal justice to ensure the right to information for

[4] Pagliaro (2010), p. 41 ff.

[5] Pagliaro (2010), *ibidem.*

the victim if the exercise of that right might prejudice the investigation and the effectiveness of the criminal jurisdiction? The person who has sustained an offence is unidentified and does not count. The higher goal is the re-establishment of the order that the crime violated, and it is achieved by means of the impersonal restitution of the interest, which always prevails over any "subjectivisation" of protection. When criminal law pays heed to subjective elements, it does so only with respect to the defendant. For now, criminal law simply has no mode of expressing the perspective of the victim.

6 Reaching for a Conclusion: The Approval of the Directive and the Problems to Come

Without the space to develop this rather complex discourse, I will simply round off my brief overview of the current situation by considering some of the problems that are likely to arise.

The first problem to present itself is easy to guess: whether or not Member States will actually apply the Directive. This is by no means a trivial matter, at least to judge from the alarming example set by Italy. If we look back to the European Union Council Framework Decision 2001/220/JHA and Directive 2004/80/EC of 29 April 2004 relating to reparations of victims of crime and consider the time taken and the manner of implementation, we have little reason to be optimistic for future promptness or thoroughness. In fact, the failure to implement the two Directives mentioned above has been almost total, apart from a few timid attempts at a purely formal transposition.

Today, in the face of the first real piece of legislation on the systematic protection of the victim, indolence and a repeat of past conduct would be intolerable. Above all, it would constitute an unacceptable insult to the ideal of "global" protection and "minimum rules" for victims, regardless of the type of offence.

Yet any action will give rise to a second set of problems.

It will be a question not only of implementation but also of espousing the entire argument for victim protection that informs the new Directive, which, with an eye also to cultural sensibilities, is attempting to strike a difficult balance between, on the one hand, a "generalist" form of intervention—the setting of minimum rules of protection that are valid for all kinds of victims and based on a copper-fastened "minimum statute"—and, on the other, the conservation of a "specialist" form of victim protection, i.e. specific and targeted interventions already in place that relate to certain types of crime (child abuse, human trafficking, child pornography, etc.). Implementation at a national level therefore will have to cover both bases. It will have to ensure both the application of the "minimum rules" (which can be transposed, provided that linguistic harmony with the regulatory documents of EU law can be achieved) and the application of the specialist areas of victim protection. At this point, a list of legal definitions is inevitable, but its successful adoption is far from assured, given the lethargic reception of the Italian legislator the last time this was mooted.

Nor do the problems end here. The recently approved Directive has a considerable impact on the rights of victims to participate in criminal proceedings. Enforcement of this right means that national implementing laws will have to engage in a systematic (and far-from-simple) rethinking of how victims participate in court, as well as in the pretrial phase. The Directive gives victims the right to be informed, the right to be heard at trial, and the right to give evidence; it grants them the right to challenge a decision not to prosecute and guarantees them an effective defence during the court proceedings. These will be the key issues that will arise when the Directive comes to be written into the national statute books. Clearly, implementation of the Directive will necessitate a sea change in cultural outlook, which is even more important than the adoption of specific rules. This is the rather treacherous battlefield on which we must fight for the integration into national law of the principle of the effective protection of the rights of victims of crime.

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The European Investigation Order

Lucio Camaldo

Abstract Focusing on the criminal law cooperation ESTABLISHED in the European Union, the Member States have been progressively developing a common policy with the aim to create instruments to combat the international crime and to develop new forms of legal assistance. These instruments include not only the European Arrest Warrant (EAW) and the European Evidence Warrant (EEW), but also the initiative for a directive on the European Investigation Order (EIO). However, building an organic system in EU means overcoming the obstructive effects of multicultural and multilingual pluralism.

The initiative for an EIO presents not only procedural questions but also many problems of languages to be analysed. The specific problems of the translation of legal terminology are caused by the system's specificity of the legal language. This critical condition underlines the importance to create initiatives for judicial cooperation in criminal law, attending to judicial and linguistic significance of diverse terms in all the languages of the European Union.

Abbreviations

EAW	European Arrest Warrant
EEW	European Evidence Warrant
EIO	European Investigation Order
EU	European Union
FWD	Framework Decision
OJ	Official Journal of the European Union
TFEU	Treaty on the Functioning of the European Union

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1 The Necessity of a Common Language for European Judicial Cooperation in Criminal Matters

By way of a response to recent forms of increasingly organised and ubiquitous criminality,[1] international cooperation has been reshaped in view of creating a common judicial area where international criminal organisations can be countered by means of preventative and repressive actions.

Here we are focusing on the criminal law cooperation established in the European Union, where Member States have been progressively developing a common policy with the aim of creating instruments to combat the international crime. As one commentator has perspicaciously observed,[2] European Member States have undertaken a project to build a *civitas magna,*[3] consisting of an organic European system based on common legal principles, and are using judicial cooperation and initiatives in criminal law as the "scaffolding" for this new construction.

We are therefore witnessing a shift away from territorial localism in the administration of justice as Europe adopts new models for the management of a common economic, judicial and social area in which all Member States participate.

Consequently, the traditional models of cooperation in the area of criminal law are being set aside in favour of new forms of legal assistance that are increasingly shaped by the jurisdictional aspects of legal proceedings, with dialogue "between States" being replaced by dialogue "between courts".[4]

Rogatory letters are no longer the only means for obtaining criminal evidence from abroad now that new instruments guaranteeing the free circulation of judicial instruments have been introduced to the national statute books. These instruments include the European Arrest Warrant (EAW)[5] and the European Evidence Warrant (EEW).[6] Member States of the European Union are increasingly willing to allow and make use of the circulation of evidence, which relies on creating a shared jurisdiction within a single judicial area.[7]

However, building an organic system, means overcoming the obstructive effects of multicultural and multilingual pluralism, which is such a characteristic of the European Union.[8] In the European legal order, documents need to be circulated in

[1] The beginning of the new Millennium was marked by terrible terrorist attacks against the United States on 11 September 2001, followed by the tragic bomb outrages in Madrid on 11 March 2004 and London on 7 July 2005.

[2] The reference is to the lucid observations of Ruggieri (2010), p. 529 ff.

[3] Pisani (2007), p. 388 ff.

[4] Parisi (2010), p. 483.

[5] Framework Decision (FWD) on the European Arrest Warrant (EAW), OJEU 2002, L 190/1.

[6] Framework Decision (FWD) on the European Evidence Warrant (EEW), OJEU 2008, L 350/72.

[7] In this regard, see Campailla (2011), p. 90 ff.

[8] Bauman memorably described Europe as the "motherland of permanent translation": see Bauman (2006), p. 90.

different languages, and "it is essential that the words of the source language are translated into the target language in a way that permits reciprocal understanding without traducing the concepts. The risk of misunderstanding is great".[9]

This impetus towards the increasing use of instruments of cooperation among Member States and the concurrent difficulty of homogenising the linguistic connotations of European measures before they can be standardised from a legal and procedural prospective[10] is encapsulated in one of the most recent and innovative instruments produced by the European Union: the European Investigation Order (EIO).

2 The Initiative for a EIO: The Legal Basis

As regards the policy of the European Union in the area of criminal affairs, the international system of cooperation that it has put in place focused on three objectives: (*a*) Member States want to enhance the tools at their disposition to combat the more serious forms of crime (international terrorism, human trafficking, bribery and corruption, and drug trafficking); (*b*) international cooperation as an integral and essential element for the creation of a common area of justice, which implies the mutual recognition of judicial decisions; (*c*) the approximation of the national judicial systems of EU Member States.

The European Council is fundamental to the attainment of these objectives, and, on several occasions, taking cognizance of the fragmentary nature of the tools of cooperation in the area of criminal law has drawn attention to the need to harmonise the criminal procedural systems of Member States. With a view to creating a common area of justice in the European Union and approximating the national legal systems of Member States, a number of basic guidelines have therefore been delineated. The roadmap towards union in the area of justice was developed at the Tampere European Council of 15 and 16 October 1999[11] and further elaborated in the Stockholm Programme,[12] adopted by the European Council on 11 December

[9] Buzzelli (2005), p. 710.

[10] On this theme, see Ruggieri (2006), p. 1234.

[11] The principle of the mutual recognition of convictions and judicial decision was deemed "fundamental" for judicial cooperation for the first time by the European Council of Tampere on 15 and 16 October 1999; see *http://ec.europa.eu/archives/european-council/index_en.htm*.

[12] The Stockholm Programme, which replaces the Hague Programme, was adopted on 10 December 2009 and published in the OJEU on 4 May 2010, C/115/01, and is "a working agenda" for Member States for the period 2010–2014. It sets out measures to be taken to "ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe" (Article 1.1). A meticulous examination of different means for sharing information, which is essential for the strengthening of judicial and police cooperation, is offered by Di Paolo (2010), p. 1969 ff.

2009. In particular, the Stockholm Programme included a decision to set up a global system, based on mutual recognition, for the acquisition of evidence relating to cross-border criminal activities.

The impetus towards the creation of a common area of cooperation in criminal matters undertaken by the European Council acquired explicit legal force when it was enshrined in the Treaty of Lisbon.

Article 67 of the TFEU declares that the Union shall constitute an Area of Freedom, Security, and Justice with respect for fundamental rights and the different legal systems and traditions of the Member States. A matching regulatory prescription is to be found on Article 82 of the same Treaty, which specifies that judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judicial decisions.

It was against this background that seven EU Member States (Belgium, Bulgaria, Estonia, Luxembourg, Slovenia, Spain, and Sweden) launched an initiative for a directive on the EIO.[13]

The EIO shall be a judicial decision issued by the competent authority of the Member State (the "issuing State") in order to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") with a view to gathering evidence in criminal proceedings.[14]

On the basis of the principle of mutual recognition, Member States shall execute any EIO.

The initiative for an EIO would therefore do away with the tradition of validating for double criminality, a precautionary principle that is included not only in the Framework Decision (FWD) on the EAW,[15] but also in the more recent FWD on the EEW,[16] in cases where the warrant refers to the seizure or confiscation of objects, documents, and data or to a crime that is not one of the thirty-two for which no validation is required.

The EIO is intended as a new and more agile operational tool to replace the instruments currently used for the purposes of obtaining evidence in the context of European cooperation. It is to be applied to any criminal investigation, with the exception of material gathered by joint investigative teams or evidence arising from the interception and immediate transmission of telecommunications to the requesting State pursuant to Article 18 paragraph 1 (a) and (b) of the EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000,[17] for which the regulatory provisions previously in force continue to apply.

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[13] Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia, and the Kingdom of Sweden for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters (2010/C 165/02), OJEU 2010, C 165/22.

[14] For an initial reaction upon the first reading of the proposed EIO by Italian jurists, see, *inter alios*, De Amicis (2010); Pulito (2010), c. 381 ff.; Pisani (2011), p. 1 ff.

[15] OJEU 2002, L 190/1.

[16] OJEU 2008, L 350/72.

[17] OJEU 2000, C 197/1.

The initiative for an EIO specifies (see Article 5 par. 2) that each Member State shall indicate the language(s) that, among the official languages of the institutions of the Union and in addition to the official language(s) of the Member State concerned, may be used for completing or translating the EIO when the State in question is the executing State.

3 A Critical Analysis of the EIO: Procedural Questions

The EIO, in the form provided for in Annex A to the proposal for a Directive, shall be transmitted by the issuing authority to the executing authority by any means capable of producing a written record under conditions allowing the executing State to establish authenticity.

All further official communication shall be made directly between the issuing authority and the executing authority.

An EIO shall be recognised without any further formality being required, and the executing authority shall immediately take the necessary measures for its execution in the same way and under the same modality as if the investigative measure in question had been ordered by the authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 10 of the initiative (for example, if the laws of the executing State provide for immunity or privileges that would render the execution of the EIO impossible or if the execution of the order would be prejudicial to national security interests or if it would involve the use of classified information relating to specific intelligence activities).

The decision on recognition or execution shall be taken "as soon as possible" and "no later than 30 days" after the receipt of the EIO by the competent executing authority. The deadline may be extended of a further 30 days if the issuing authority is duly informed and the specific requirements of the issuing authority are taken into consideration.

The executing authority shall carry out the investigative measure requested without delay and no later than 90 days after the decision has been adopted. Moreover, the executing authority acting "without undue delay" (Article 12) must transfer any evidence it has gathered or that was already in its possession. If requested in the EIO and if permitted by the national laws of the executing State, the evidence must be "immediately" transferred to the competent authorities of the issuing State assisting in the execution of the EIO.

Member States, finally, must guarantee all parties affected by the EIO the right to challenge the order using the same instruments available to them under national law.

It is impossible not to notice a certain number of critical aspects in the EIO as described above.[18]

[18] See Zimmermann et al. (2011), pp. 56–80.

Firstly, the initiative is completely lacking to harmonise investigative procedures, in spite of the need for a robust common system of criminal procedure as highlighted in the Action Plan for the implementation of the Stockholm Programme,[19] and the need for the adoption of common rules for the collection of criminal evidence as set forth in the "Green Paper on obtaining evidence in criminal matters from one Member State and securing its admissibility".[20]

Secondly, although Article 1 par. 3 of the initiative makes a gesture towards respecting the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union, it does not provide sufficient guarantees for the suspect's rights and surrenders excessive powers to the investigating authorities to the detriment of the rights of the defendant.

Developments are needed to ensure to the suspected or accused persons the right to information, as prescribed in the recent Directive of the European Parliament and of the Council on the right to information in criminal proceedings.[21]

The deadline of 30 days, which may be extended of a further 30 days (see Article 11), is too short and improperly restricts the range of options available to the defence.

A solid logical and judicial basis is also lacking for the provision in the initiative for a Directive that would permit a witness or expert to refuse to appear by videoconference at a hearing (see Article 21). Whereas the defendant may claim the right to silence, the same cannot be applied to witnesses and experts.

Further, it is completely beyond the bounds of any legal logic and any principle for the safeguarding of legal procedure for the EIO[22] to specify that the temporary transfer to the issuing State of person held in custody in the executing State should be contingent on the consent of this person (see Article 20), since this enables the suspected or accused person to block or impede inquiries.

As regards legal remedies (see Article 13), it would be useful if the proposal for a Directive were to indicate that the substantive reasons for issuing the EIO can be challenged in an action brought not only before a court of the issuing State but also before a court of the executing State.

It might also be specified that the issuing State shall be exclusively liable for the costs incurred by the executing State.

[19] The plan for the implementation of the Stockholm Program of 20 April 2010, COM (2010) 171 final, is available at *http://www.europa.eu*.

[20] The Green Paper on Obtaining Evidence in Criminal Matters from One Member State to Another and Securing Its Admissibility, COM (2009) 624 final, is available at *http://ec.europa.eu/justice/news/consulting_public/news_consulting_0004_en.htm*.

[21] The Directive of the European Parliament and of the Council on the rights to information in criminal proceedings of 22 May 2012, OJEU 2012, L 142/1.

[22] The expression and, more generally, the observation is contained in the Resolution of the Second Select Committee (Justice) of the Senate, approved in the first afternoon session of 2 March 2011, Rapporteur R. Centenaro, available at *http://www.senato.it*.

4 The Different Official Versions of the Initiative for a Directive Introducing the EIO: The Problem of Languages

The procedural deficiencies of the EIO are compounded by linguistic problems relating, on the one hand to terminological equivalents in the translations of the initiative for a Directive on the EIO into EU Member State languages and, on the other hand to the linguistic correspondence, or lack thereof, between the institutes and principles set forth in the initiative and the institutes and principles of national judicial systems.

The first problem—which we may define as "horizontal" aspect—emerges with particular force in the area of European Union when a legal act has to be translated into all the languages of the EU, according to the principle of multilingualism: all national languages are also official languages of the Union.[23]

As linguists pointed out, the specific problems of the translation of legal terminology are caused by the system's specificity of the legal language.[24]

The matter is further complicated by the presence in Europe of two different legal traditions: civil law and common law. The common law tradition (which applies, for example, in the United Kingdom) contains concepts, categories, and distinctions that are very different from those present in the civil law traditions of countries such as Italy, Spain, France, and Germany. It is therefore difficult, and sometimes impossible, to translate concepts and categories that are specific to common law systems into the legal language of civil law countries, and vice versa.

Moreover, difficulties of translation also arise even between countries that share the same legal tradition (for example, Italy and France have two very different approaches on the enforcement of criminal law).

European institutions' acts are generally created in a single language, which is usually English or French or else the language of the country presenting the initiative. The text is then translated into all the other languages of the Union by "language experts", who are responsible not only for the literal translation of the text, but also for verifying the "juridical equivalence" of terms.[25]

For a long time, attention focused exclusively on the linguistic aspects of the translation, and the legal terminology was neglected. Only recently it was taken into consideration that one legal language should not translate into the ordinary words of the target language but in another legal language. Translators of legal terminology are obliged to practise comparative law. Through comparative law, the translator of

[23] Selvaggi (2010), p. 543 ff.

[24] Pommer (2008), p. 17; Ajani-Rossi (2006), p. 124, who report that the "difficulty of organising a uniform terminology in legal matters, which does not apply in Physics, Economics and other sciences, the lack of correspondence between terms that are used in different local cultures and the fact that the refer to 'external' objects: law shapes reality through instruments of cultural communication".

[25] Pommer (2005), p. 376 ff.

legal terminology needs to find an equivalent in the target language's legal system for the term of the source language legal system.

The initiative for a Directive on the EIO can help us better understand the nature of the problem.

Article 2 of the initiative defines the "issuing authority" in Italian as being "*un giudice, un magistrato inquirente o un pubblico ministero competente nel caso interessato*", which in English is expressed as "*a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned*"; in French, as "*un juge, une juridiction, un magistrat instructeur ou un procureur compétent dans l'affaire concernée*"; and in Spanish, as "*un juez, órgano jurisdiccional, juez de instrucción o fiscal competente en el asunto de que se trate*".

Clearly, a good translation must consider the nexus of cultural references that surrounds each term, according to the individual and highly diverse judicial traditions of Italy, England, France, and Spain. As example, we need only to look at the enormous institutional differences that distinguish the functions and powers of the "*pubblico ministero*" of Italy, the "*public prosecutor*" of England, the "*magistrat instructeur*" of France, and the "*Fiscal*" of Spain.[26]

The German version uses the word "*gerichtlich*" (meaning "by a court"). Consequently, the EIO seems to cover only measures that have been ordered by a judge, but the translation ignores that the proposal explicitly attributes to investigating judges, public prosecutors, and some other authorities the competence to issue an EIO. The German wording of this article is obviously due to an imprecise translation.[27]

Similar considerations can be made with reference to the translation into the different languages of the EU of the primary purpose for which the EIO is issued (see Article 1). From the perspective of literal translation, it would seem that there is a direct correspondence in translation between the Italian sentence "*uno o più atti di indagine specifici*", the English sentence "*one or several specific investigative measures*", the French sentence "*une ou plusieurs mesures d'enquête spécifiques*", and the Spanish sentence "*una o varias medidas de investigación*", but the same cannot be said for the underlying concepts to which these sentences refer, since investigative activities do not take the same form in the different legal systems of these countries, nor do they consist of the same type of acts.[28]

The conceptual problem is even more evident if we look at the different language versions referring to the "grounds for refusal" of the EIO (see Article 10).

The possible grounds for refusal include a circumstance, which in Italian is rendered as "*la legislazione dello Stato di esecuzione preveda immunità o privilegi che rendono impossibile l'esecuzione dell'OEI*"; in English, it is expressed as "*there is an immunity or a privilege under the law of the executing State which*

[26] To explore the idea in greater detail, see Cavini (1999), p. 302, and Perrodet (2001), pp. 393–406.

[27] In this regard, see Ruggieri (2012).

[28] On this topic, see Chiavario (2001) *passim*.

makes it impossible to execute the EIO"; and in French, as "*le droit de l'État d'exécution prévoit une immunité ou un privilège qui rend impossible l'exécution de la décision d'enquête européenne*".

Terminological equivalence by no means guarantees conceptual equivalence because the precepts themselves ("immunity" and "privilege") have radically different connotations in the Member States in which the foregoing languages are spoken.

These few examples are sufficient to demonstrate how the translation of the initiative for a Directive regarding the EIO into the various languages of the Union demands knowledge of different legal systems. The risk is that the terminology chosen, it may be accurate from a literal point of view, but will actually refer to profoundly different legal concepts.

5 Grafting the Language of the Directive onto the Italian Criminal Law Process

The translation of acts framed by European institutions can lead to another type of difficulty—which we may refer to as being "vertical" problem—as it concerns the problem of grafting the terminology of an instrument created in the European context into the Italian legal system.

In this case, the issues have to do with whether the terminology used in the Italian version of the Directive corresponds adequately to the precepts and institutes of the Italian legal system. The European lawmakers draw on a lexicon that does not correspond precisely with the specialist language used in the Italian legislation.

Indeed, it is a well-known aphorism that to "translate" is often to "traduce": translation can betray meaning.

Using the EIO directive, we can find some interesting examples of this.

Neither the Italian term "*ordine*" (order) used in reference to the EIO nor the term "*mandato*" (warrant) used in reference to the EAW appears in the Code of Criminal Procedure of Italy, adopted in 1988. The terms belong to an earlier version of the Code, the "Codice Rocco" (adopted in 1930), in which "*mandato*" was used for an arrest warrant issued by the "*giudice istruttore*" (an "investigating judge") and refers to an instrument different to that available to the public prosecutor, which was known as an "*ordine*".[29]

As one commentator has observed, the fact that a decision, primarily cultural in effect, was made to reinstate a term that had been removed from the language of procedural criminal law with the coming into force of the new code in 1988 is something upon which we should reflect.[30]

[29] As described by Ruggieri (2012).

[30] *Ibidem*.

There are many other examples from the Italian translation of the EIO proposal of terminology that is ambiguous or, in any case, not appropriate to the precepts and institutes of Italian criminal procedure.

Examples of such terms include "*decisione giudiziaria*" ["judicial decision"], "*uno o più atti d'indagine specifici ai fini dell'acquisizione di prove*" ["one or several specific investigative measure(s) ... with a view to gathering evidence"], "*l'acquisizione di prove in tempo reale, in modo continuo e per un periodo determinato*" ["gathering of evidence in real time, continuously and over a certain period of time"].

The terminological choices have conceptual ramifications affecting important conceptual categories of criminal procedure in Italy. The attempt to foist somewhat ambiguous or imperfectly matched terms into the area of law where they are supposed to operate can lead to their outright rejection or, at the very least, to considerable difficulties of interpretation and application.

It is to be hoped that during the process for the approval of the initiative, amendments will be made, including from a linguistic perspective, so that this new instrument of judicial cooperation in criminal matters can be properly interpreted and therefore applied.

6 Conclusions

In recent years, the traditional models of judicial cooperation in criminal law have been replaced by the principle of mutual recognition among European legal systems and the use of instruments that are increasingly based on procedural jurisdiction, which is characterised by direct communication between the judicial authorities of Member States.

However, these new European instruments may well collide with the principles of pluralism and multilingualism that are defining characteristics of European Union.

The analysis of the Initiative for an EIO, which, as recently observed, "is aimed at conquering the most intimate essence of any system of criminal procedure, namely the system of proof and evidence",[31] displays not only procedural problems, but also serious linguistic failings relating both to the translation of the initiative into the different languages of the European Union ("horizontal problem") and to the grafting of its terminology into national systems of criminal law procedure ("vertical problem").

To prevent Europe, a "pomegranate of languages",[32] from becoming a "Tower of Babel", initiatives for judicial cooperation in criminal law need to take account of the highly particular judicial and linguistic significance of diverse terms in all

[31] Pisani (2011), p. 6.

[32] The phrase comes from the linguist Zanzotto (1995); see also Beccaria (2008).

languages of the European Union and the ramifications that these terms can have for the legal systems of different nations.

It would seem that an intervention is needed, on the one hand, to encourage linguists to specialise in the law, especially through comparative law courses on the legal systems of the Member States of the European Union. On the other hand, an intervention is needed to train legal practitioners (judges, public prosecutors, lawyers) in the problems of interpretation and translation of legislation from European sources.

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Multiculturalism, Coercive Measures, Human Rights in EU Judicial Cooperation in Criminal Matters*

Stefano Ruggeri

Abstract The present paper analyses the issue of coercive measures in EU cooperation in criminal matters. This study focuses on transnational criminal investigations in the framework of horizontal cooperation, providing an overview of the way the systems of judicial assistance based on the MLA and the MR models have dealt with coercive means. The analysis aims at a reconstructive proposal based on the idea of a multilevel integration of the laws of the cooperating authority aimed at creating an ad hoc transnational procedure reflecting a new balance between the state's need to ensure efficient prosecution and the protection of the fundamental rights of the individuals affected by investigative measures of coercion.

Abbreviations

AFSJ	Area of Freedom, Security and Justice
n.v.	New version
CCP	Code of Criminal Procedure
CISA	Convention Implementing the Schengen Agreement
ECMACM	European Convention on Mutual Legal Assistance in Criminal Matters
EIO	European Investigation Order
EU FRCh	Charter of Fundamental Rights of the European Union
EUCMACM	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
FD EEW	Framework Decision on the European Evidence Warrant

*This paper was submitted for publication in July 2012. Therefore further developments have not been considered.

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FD OFPE	Framework Decision on the Execution in the EU of Orders Freezing Property or Evidence
IACMACM	Inter-American Convention on Mutual Assistance in Criminal Matters
MLA	Mutual Legal Assistance
MR	Mutual recognition
o.v.	Original version
PD EIO	Proposal for a Directive on a European Investigation Order
PFD EEW	Proposal for a Framework Decision on the European Evidence Warrant
SAP ECMACM	Second Additional Protocol to European Convention on Mutual Legal Assistance in Criminal Matters
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN MTMACM	United Nations Model Treaty on Mutual Assistance in Criminal Matters

1 Introductory Remarks

Over the last few decades, the significant increase of transnational crime has strengthened the need for more efficient forms of cross-border prosecution than in the past time. This pragmatic approach has led to the enhancement of traditionally distrusted methods of conducting transnational inquiries, such as extraterritorial investigations, as well as to the introduction of unprecedented models of transnational prosecution. At EU level, this has led to posing the principle of mutual recognition as the cornerstone of almost the entire area of judicial cooperation, regardless of the very different nature of the judicial products concerned.

This phenomenon has consequently been accompanied by a significant raise of investigative measures impinging, albeit in different fashions, on the sphere of the rights of the individuals involved in transnational procedures (suspects, victims, witnesses, etc.). At EU level, the Lisbon Treaty has allowed for legislative initiatives to be launched with the purpose of protecting the rights of individuals in criminal procedures, which of course encompass *transnational* criminal procedures [Art. 82(2)(b) TFEU]. More specifically, the protection of the defendant's rights must be indirectly granted through a legislative intervention in the field of admissibility of transnational evidence [Art. 82(2)(a) TFEU]. Whatever the meaning of these provisions is, the introduction of minimum rules to the extent strictly necessary to facilitate mutual recognition calls for a minimalist approach. It is questionable whether such methodology is in line with the "unique vulnerability of defendants", and in general terms of individuals, "facing international investigations", which requires standards of protection "surely *exceed*[ing] those currently available in domestic proceedings".[1]

[1] Vogler (2013), p. 30.

Doubtless, one of the main grounds for this vulnerability is the difference of languages and procedural laws, a situation that paradoxically raises many human rights concerns in the EU AFSJ, where 23 official languages coexist. However, in the framework of the present paper, multilingualism will not be dealt with as a barrier for harmonisation. Significantly, the existence of the EU AFSJ can be predicted *insofar as* fundamental rights are respected and the differences between the legal orders and traditions of the Member States are preserved [Art. 67(1) TFEU]. More specifically, it is worth noting that the need to respect the legal orders and traditions of the Member States is posited as a prerequisite for the establishment of common rules in the aforementioned areas [Art. 82(2) TFEU]. In this light, the legal multilingualism, far from representing an obstacle to the approximation of legal systems, promotes the integration of procedural cultures and therefore constitutes a value that cannot be waived in the European scenario. Multilingualism is strictly linked to the interaction of different legal levels, and this suggests adopting a methodological approach aimed at analysing their mutual relationships. In light of the fundamental rights protection required at primary level for the constitution of a common AFSJ, the present analysis will therefore move from a *multilevel* towards an *inter-level* approach.[2]

2 Preliminary Issues

2.1 Object of the Analysis and Terminological Premises

The present paper deals with measures of coercion in the field of transnational inquiries. In light of the approach of this research, the definition of the object of the present analysis requires two expressions to be clarified in advance:

(a) "*Transnational inquiries*". This study deals with cross-border investigations in the field of horizontal cooperation between two or more States. All forms of vertical cooperation fall outside the scope of this study. Horizontal cooperation encompasses some very different forms of transnational inquiries, and various models have been drawn. Although some traditional differences have been tempered by recent legislative initiatives, the present paper distinguishes between two systems of cross-border investigations, depending on whether investigations are carried out by foreign authorities in response to a request for judicial assistance or domestic authorities allow foreign authorities to carry out investigations in their own territory. In the present paper, the former arrangement will be referred to as "*judicial assistance*", while the latter as "*extraterritorial investigations*". This distinction does not coincide with the usual distinction

[2] On this methodological approach, see, in the Italian constitutional literature, D'Andrea (2009).

between the *request model*, typical of mutual legal assistance, and the *order model*, typical of mutual recognition model.[3] On the one hand, also instruments based on the mutual recognition principle aim, in a great part, to obtain an investigative activity being carried out overseas and therefore to obtain judicial assistance from abroad.[4] The main difference with respect to judicial assistance is that foreign authorities are here ordered rather than requested to help. On the other hand, although new instruments inspired by the mutual recognition principle, such as the proposed EIO, have incorporated some forms of extraterritorial investigations (controlled deliveries, covert investigations), these mainly remain linked to the classic request model.[5] Following this approach, I shall be focusing here only on transnational inquiries in the broadest sense, reconstructing the development of the *system* of judicial assistance through the analysis of the two main *models* of conducting investigations abroad, i.e., MLA and MR.

(b) "*Measures of coercion*". The expression "measures of coercion", albeit deeply rooted in most legal systems, has very different meanings and, above all, relates to procedural means having very different scopes of application. In the European scenario, the term—despite its increasing use in EU legislation—still remains undefined. This calls for the adoption of a research notion of "coercion", which shall be adapted to the different modes of cross-border investigations under examination in this study. In the present research, the expression "compulsory measures" shall be considered as synonymous to "coercive measures",[6] since both expressions presuppose the use (or the threat of use) of coercion. However, it is noteworthy that the system of judicial assistance has progressively incorporated investigative means that are not perceived by the affected individuals as coercive (*e.g.*, interception of communications, covert investigations). The increasing use of such measures, which is the result of the adaptation of criminal inquiries to the advances of science and technology, has led the science of criminal law to replacing the expression of "measures of coercion" with the notion of "interference with fundamental rights" (*Grundrechtseingriffe*).[7] This terminological choice

[3] See Klip (2012), pp. 342 ff.

[4] This is explicitly laid down in many MR instruments. For instance, the FD OFPE includes among the grounds for refusal the risk of infringement of the *ne bis in idem* principle arising from the *judicial assistance* rendered through the treatment of the frozen property [Art. 7(1)(c)]. Similarly, in the FD EEW the execution of the evidence warrant is aimed at providing *assistance* to the issuing Member State [Art. 11(2)]. Also the PD EIO shares this approach by laying down, for instance, that in case of impossibility of finding an investigative measure other than that provided for in the EIO, the executing authority will have to notify the issuing authority that it has not been possible to provide the "*assistance requested*" [Art. 9(3) PD EIO c.v.].

[5] See Article 27a PD EIO, according to which an EIO may be issued with the purpose of *requesting* foreign authorities to assist the issuing State in conducting covert investigations.

[6] Significantly, the former expression—contained, as we will see below, in the UN MTMACM—appears in some linguistic versions in the same terms of coercive measures. For instance, the German version relates to "*Zwangsmaßnahmen*", while other linguistic versions (*e.g.*, Spanish) refer to different and broad concepts, such as "*medidas de cumplimiento obligatorio*".

[7] Cf., among others, Amelung (1976).

reflects, *inter alia*, the need to cover a wider range of investigative means than that limited to the measures entailing the use of coercion, as well as the need to cover those investigative powers implying coercion only for their practical implementation.[8] I will conduct my analysis starting from the doctrine of *Grundrechtseingriffe* and seek to determine whether the theoretical underpinnings of the fundamental rights' protection need to be expanded.

2.2 Methodology and Structure of the Analysis

The multilevel character of the theoretical starting point of this analysis—i.e., the concept of *Grundrechtseingriffe*—reflects the complex nature of European criminal law as "crosscutting subject" (*Querschinttsmaterie*), whose study requires the combined analysis of different fields, such as criminal law, criminal procedure, constitutional law, European law, and the general theory of fundamental rights.[9] Among these fields, one—i.e., comparative criminal law—pursues different research goals depending on the research methodology. Thus, the choice of the type of comparative analysis is a methodological issue of great relevance.

In this paper, I shall combine two types of comparative analysis, i.e., the functional comparison (*funktionale Strafrechtsvergleichung*)[10] and the reconstructive-theoretical comparison (*theoretische Strafrechtsvergleichung*),[11] as follows:

A. The first purpose of this paper is to provide a comparative analysis of how two systems of judicial assistance, based respectively on the models of MLA and MR, have dealt with coercive measures. Since significant changes have occurred both in the MLA and the MR models, I will analyse them historically. Following the requirements of the functional comparison, this study aims to answer comparatively the following question:

How can the models of MLA and MR ensure a proper balance between the interest of efficient transnational prosecution and the need to protect individual rights in the multilingual EU area, where criminal investigations require the use of means interfering with the sphere of fundamental rights?

To compare the systems of judicial assistance, I will mainly analyse the following international and supranational instruments:

[8] On the latter phenomenon and on the problems concerned with the so-called *Annexkompetenz*, see in the German literature, among others, Kühne (2010), pp. 248 ff.

[9] Hecker (2010), pp. 7 ff.

[10] On this method, see Jescheck (1955), pp. 36 ff.; Reimann (2002), 679 f.; Sieber (2006), pp. 112 ff. Criticism against function comparative law has been raised by Großfeld (1984), pp. 12 ff.

[11] For this aim of comparative criminal law, see Eser (1998), pp. 1515 ff.

(a) International instruments: ECMACM and SAP ECMLACM, CISA, EUCMACM; on specific topics, some references will also be made to the UN MTMACM;
(b) Supranational instruments: FD OFPE, FD EEW, PD EIO.

B. On the basis of the results of this analysis, the second aim of the research is to propose some guidelines for a theoretical reconstruction and a future regulation of coercive means in the field of transnational investigations.

3 Judicial Assistance and Investigative Means Impinging on Fundamental Rights

3.1 The Development of the MLA-Based System

3.1.1 The MLA-Based System

In this section, I shall examine the development that occurred in the system of MLA in the way of dealing with investigative means affecting fundamental rights. For the sake of clarity, I shall distinguish three phases of development and show that the last one already anticipated some of the typical features of the models based on the logic of mutual recognition.

A. The traditional system of letters rogatory. The traditional MLA system did not address the issue of coercive means in general terms. In its original text, the ECMACM contained no general clause specifically aimed at regulating the use of coercive means in the context of legal assistance. Since *lex loci* applied, as a rule, to *any* letters rogatory [Art. 3(1)], the protection of the rights of the individuals involved in the proceedings in the home State depended entirely on the standards of the host State, which rendered the participation of the defence of private parties pursuant to Article 4 ECMACM a purely formal guarantee. To compensate for the rigid application of *lex loci*, the case laws of many countries have elaborated general clauses to ensure compatibility with their own legal systems, such as the consistency with the *Rechtsstaatsprinzip* (Germany)[12] or with the fundamental principles of the domestic legal system (Italy).[13] Yet domestic case laws show that these clauses have been interpreted very broadly and have failed to restrict the use at trial of evidence gathered overseas through methods that are rarely compatible with the domestic rules of the home State.[14]

[12] BGH 11 November 1982–1 StR 489/81 = NStZ 1983, 181.

[13] See, among others, Court of Cassation, 8 March 2002, Pozzi, in *CED Cass.* 222025. See Caprioli (2013), pp. 445 ff.

[14] See, in relation to Italy, Caprioli (2013), p. 445.

Since the 1950s, however, special regulations have been laid down in respect of sensitive investigative measures with the purpose of enhancing the protection both of the national sovereignty and individual rights. The main example offered by ECMACM related to search and seizure of property. The Convention allowed for the requested State to make its assistance dependent on the respect of the dual criminality requirement [Art. 5(1)(a)], although this did not constitute a general requirement of letters rogatory. This phase was thus characterised by a classical understanding of *Grundrechtseingriffe* as referring to measures restricting, by means of coercion, certain fundamental rights (*e.g.*, property).

B. The intermediate phase of MLA. This phase was characterised by radical changes in the way MLA was provided. The main change was the introduction of a new way of providing assistance to foreign authorities, in that the requesting State was allowed to require the fulfilment of specific formalities of its own law. This reform coincided chronologically with the introduction, within the Schengen area, of the possibility of direct contacts between the domestic judicial authorities while sending and receiving requests for assistance [Art. 53(1) CISA].

This combination of *lex loci* and *lex fori*, already experimented in some bilateral agreements in the 1980s,[15] was laid down, in general terms, by the UN MTMACM, which made it dependent on the demanding condition of consistency with the law and practice of the host country (Art. 6). This allowed an unprecedented concrete integration of procedural laws to take place, an approach that gave new significance to old mechanisms but raised new legal problems for both the cooperating authorities. As the requested authority was required to apply foreign law, the possibility of the attendance of officials and private parties of the relevant proceedings at the execution of letters rogatory undoubtedly gained an important role by helping the requested authority to fulfil such a difficult task.[16] However, the complete realisation of this procedural integration presupposed an additional condition to those traditionally required, i.e., the knowledge of foreign law on the part of both cooperating authorities. This required an additional effort by both sides: the requesting authority had to learn the law and practice while choosing the formalities to be followed in the gathering of evidence overseas, whereas the requested authority had to familiarise itself with *lex fori* to apply it properly. This marked a huge cultural change in the field of judicial assistance. Under the traditional MLA system, the strict application of *lex loci* allowed both parties to ignore foreign law, and it is no surprise that even those countries that continue to use the old MLA system waive their right to verify whether *lex loci* has been respected, thus acknowledging a presumption of compliance with *lex loci*.[17]

[15] See Marchetti (2011), pp. 137.

[16] Significantly, outside Europe, the IACMACM strengthened this possibility allowing officials and private parties of the home State not only to be present but furthermore to take part in the execution of letters rogatory (Art. 16).

[17] See, in Spain, Supreme Tribunal, judgement of 5 May 2003 (ROJ 3023/2003). On this topic, cf. Gascón Inchausti (2013), p. 484.

This cultural reform was accompanied by general clauses concerned with coercive measures showing up in international texts. This phase did not lead to a substantial change in the way of conceiving coercive means as investigative measures implying the use of coercion. However, it is noteworthy that the UN MTMACM provided for the refusal of assistance if granting it would require the requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction [Art. 4(1)(e)]. Consequently, only those coercive measures that would have been admissible in a similar domestic case in the host country could be executed. This assured the individuals subject to restrictions through coercive means the same standards of protection as laid down by *lex loci*, a guarantee, moreover, that did not rule out that a *higher* level of protection might be afforded through the formalities of *lex fori* required by the requesting authority in light of the principle of the most favoured treatment.[18] In the same years, outside Europe, the IACMACM drew special attention to the protection of the rights of third parties under *lex loci* in regard to specific means of coercion [Art. 13(2)].

C. The improved MLA. In line with the suggestions of some scholars of criminal law,[19] the third phase of MLA inherited methodologically the combination of *lex loci* and *lex fori* initiated in the intermediate phase. The analysis of the EUCMACM and the SAP ECMLACM shows, however, that this approach was adopted with the remarkable difference that the formalities and procedures of *lex fori* had to be consistent not with the entire legal system of the host country but only with its fundamental principles.[20] This mechanism required the requested authorities to comply with foreign procedural forms, even if they were fully unfamiliar and rarely compatible with domestic law, as long as they did not infringe the fundamental principles thereof. While jeopardising the procedural integration of the laws of the cooperating authorities, this also created a tangled normative web for the requested authority whose only exit was through the ascertainment of infringement of the fundamental principles of its own legal order.[21]

What raised even more concerns, however, was that the application of the procedural rules of foreign law could encroach on the fundamental rights sphere.[22] From a human rights perspective, one of the most significant changes to occur in this third phase was the disappearance of general clauses concerning the use of coercive means. Furthermore, this phase of MLA launched a new approach in the conception of coercive means. On the one hand, the

[18] Criticism against the application of the clause of the most favoured treatment of the individual in transnational procedures has been raised by Böse (2002), pp. 152 ff.; Böse (2003), pp. 238 ff.

[19] See, among others, Vogel (1998), p. 977; Spinellis (1999), p. 372; Perron (2000), pp. 207 ff.

[20] See, respectively, Art. 4 EUCMACM and Art. 8 SAP ECMLACM.

[21] In this sense, see, more in detail, Ruggeri (2013b), p. 549.

[22] See Gleß (2008), p. 619.

combination of *lex loci* and *lex fori* was deemed insufficient for the management of new investigative methods with the potential to impinge on the sphere of fundamental rights. This led to establishing further rules to be applied irrespective of what can be requested in the concrete case. One of the most significant examples of such rules concerns videoconferencing, in respect of which the EUCMACM specified that (a) no matter what the requesting State has required, the person to be heard must be assisted by an interpreter, if necessary, at his or her request;[23] (b) the person to be heard may claim the right not to testify, which would accrue to him or her under the law of either the host or the home country, in light of the most favoured treatment.[24] On the other hand, the EUCMACM introduced for the first time a specific regulation on cross-border wiretapping aimed at intercepting the telecommunications of individuals present either in the requesting or in the requested state and even in a third State [Art. 18(2)]. However, this regulation—closely tied to *lex fori*, regardless of the territory in which the person is to be wiretapped [Art. 18(1)]—contains no rules aimed to ensure a proper balance between conflicting interests and values and makes no attempt to define a fair procedure for obtaining evidence at a transnational level.[25]

3.1.2 Interim Result

The analysis of the development of the system of MLA reveals significant changes in the way measures of coercion are dealt with. These changes can be summarised as follows:

- The transition from the first to the second phase of MLA led to a significant enhancement of human rights protection, even though the conception of coercive means in terms of investigative measures of coercion remained unchanged. Thus, the possibility for the requested authority to reserve the right to make the execution of specific coercive measures (search and seizure) dependent on the conditions of respect for dual criminality and the consistency with the law of the requested state evolved into a general rule allowing the requested state to refuse any compulsory measure inconsistent with the law and practice of its own country in a similar national case. Moreover, the introduction of the obligation for the requested State to fulfil the formalities requested by the home State, albeit primarily intended to lower the risk of inadmissibility at trial of overseas evidence, had the subsidiary and positive result of subjecting the use of coercion to the requirements of *lex fori*.

[23] See, respectively, Art. 10(5)(d) EUCMACM and 9(5)(d) SAP ECMLACM.

[24] See, respectively, Art. 10(5)(e) EUCMACM and 9(5)(e) SAP ECMLACM. On this case, see Gleß (2006), pp. 117 ff.

[25] In this sense, Gleß (2006), pp. 118 ff.

- Responding to the development of science and technology, the third phase of MLA provided a specific regulation for new investigative measures relevant, albeit to different extent, to the sphere of fundamental rights (*e.g.*, interception of telecommunications). This regulation brought about a remarkable change in the way coercive measures were viewed. On the other hand, two quite opposite innovations had a major impact on the way coercive means were used: (1) the disappearance of general clauses allowing the requested State to refuse the adoption of coercive measures incompatible with its own law and (2) the introduction of a new general rule on execution of investigations abroad obliging the requested authority to combine *lex loci* with the specific requirements of *lex fori* set by the requesting authority provided the latter are not contrary to the fundamental principles of its own law. The combination of these two innovations significantly impinged both on individual rights and the national sovereignty of the host country by curbing the discretional powers of the requested authority not only in respect of requests for assistance entailing coercive means but also in respect of requests to comply with coercive methods allowed by *lex fori*.

3.2 The MR-Based System

3.2.1 The Development of the MR-Based System

In the following sub-paragraph, I shall analyse how the system of judicial assistance based on the MR model has dealt with the issue of coercive measures. The purpose of this analysis is to show the development occurred also in the context of mutual recognition, which appears today in very different terms than in the first years of the last decade. Also here, I shall distinguish three phases, although the conclusions concerned with the last one, while focusing on a legislative proposal, are inevitably provisional.

A. The first phase of MR. An examination of the FD OFPE shows that the first legislative phase was characterised by a strict application of the mutual recognition principle. The executing authority was required to acknowledge the request and proceed with the *immediate* execution of the freezing, unless grounds for refusal or postponement existed [Art. 5(1)]. Moreover, these were drastically reduced, which led to the disappearance of some of the classic sovereignty-based clauses (*e.g.*, the prejudice of essential national security interests), and some of the surviving grounds for refusal were construed in a way that weakened them and constituted a dangerous backward step in the human rights protection.[26]

[26] For instance, the infringement of the *ne bis in idem* rule became a facultative ground for refusal [Art. 7(1)(c) FD OFPE].

As to the modes of securing evidence, the FD OFPE inherited the combination of *lex loci* and *lex fori* that characterised the last phase of MLA, including the requirement that requests should conform to the fundamental principles of the legal system of the executing country. Nevertheless, the scale of integration with foreign law was remarkably reduced, in that the possibility for the issuing authority to require the fulfilment of procedural formalities of its own law was allowed only to the extent necessary to ensure the validity of evidence in the relevant proceedings [Art. 5(2)]. Furthermore, like in the phase of improved MLA, the first legislative phase of MR contained no general clause regarding the use of coercive means. The reason for this approach becomes clear in the FD OFPE, since the freezing order directly restricts the right to property. This explains why *additional* coercive measures, rendered necessary for the execution of the freezing order, may be applied, and it is noteworthy that the applicable law in this case is the sole *lex loci* [Art. 5(2)]. Certainly, the tendency to return to *lex loci*, confirmed also by the reduction to a strict minimum of the combination with *lex fori*, was the result of the very rigorous enforcement in this first legislative phase of the MR principle, which was underpinned by the obligation to trust in the law of other Member States. One of the most significant consequences of this approach was that, unlike the MLA instruments, it failed to provide for any form of joint participation of officials and mostly private parties in the execution of the freezing procedure. This marked another significant backward step both in the protection of national sovereignty and individual rights.

B. The intermediate phase of MR. The FD EEW marked a significant development of the MR principle. The rigorous logic of the order model was remarkably smoothened by the reintroduction of some classic sovereignty-based clauses (*e.g.*, the prejudice of essential national security interests) and, in general terms, by the re-expansion of the list of the grounds for refusal. This led also to the introduction of a validation procedure aimed at strengthening the basic guarantee of jurisdictionality provided for by many Member States in relation to measures impinging on the sphere of fundamental rights [Art. 11(4) and (5)].

More generally, the FD EEW has drawn particular attention to the issue of *Grundrechtseingriffe* through the introduction of a general clause giving, as a rule,[27] the executing authority full responsibility for choosing whether and which

[27] The only exception relates to the use of measures, including search and seizure, in case of the offences listed under Article 14(2), to which the dual criminality requirement does not apply [Art. 11(3)(ii)]. This provision raises many human rights concerns. What is the nature of the measures that must be (always) available in case of those offences? If *any* measure, even of a coercive nature, must be available, what is the relationship between the type of the offence (and the severity of its punishment) and the duty to fulfil an evidence order imposing upon the use of coercion? The consequence of this approach is that the issuing authority, while determining the threshold of punishment of the offence under prosecution within the list of Article 14(2), establishes also the necessity of using a means of coercion in the concrete case. This result proves unsatisfactory, taking also into account that also the FD EEW has failed to provide for any possibility of joint participation in the execution of the evidence warrant in the host country.

coercive means could be used in the execution of the evidence warrant [Art. 11(2)]. This clause was flanked by a further provision, according to which the fulfilment of the formalities and procedures of *lex fori* in the execution of the evidence warrant did not imply any obligation for the executing State to adopt coercive measures.[28] This provision—while offering an unprecedented solution, both in the MLA and MR systems, to the use of *lex fori*—raises problems of interpretation since Article 11(2) already bans the imposition of coercive means. Thus, since the aim of the provision is to avoid that the procedural requirements of *lex fori* produce a coercive result, its scope of application should refer to the risk that non-coercive measures might be applied through coercive methods (*e.g.*, narcoanalysis).[29] This double protection accorded to the executing State against the imposition of coercion explains why the tests of proportionality, necessity, and availability set out in Article 7 have been left *only* to the issuing authority.[30] As a consequence of this approach, even when the executing authority opts for the least intrusive means to obtain documents, objects, and data,[31] this must be deemed necessary.

C. New perspectives for the horizontal cooperation based on the MR principle. The analysis of the PD EIO cannot but lead to provisional conclusions yet. A careful comparison of the original text of 2010 with the draft proposal on which a general agreement was reached in the Council in December 2011[32] reveals significant changes but does not make it easy to understand fully the new perspectives opened up in the field of horizontal cooperation by this legislative proposal.

The main purpose of the PD EIO was to present a new way of providing mutual recognition by combining the traditional mutual recognition logic with the flexibility of the traditional MLA system. However, the original proposal was not fully consistent with this approach in at least two respects. Firstly, it drastically reduced the grounds for refusal, which significantly restricted the margins of discretion of the executing authority while threatening both national sovereignty and the sphere of human rights.[33] Secondly, it included an innovative approach that focused on the

[28] The proposal of 2003 provided for some fundamental procedural guarantees to be followed in order to ensure full respect especially for the subsidiarity and the *nemo tenetur* principles [Art. 12 (1)(a) and (c) PFD EEW, COM(2003) 688 final]. See Gleß (2011), p. 606.

[29] Ruggeri (2013b), p. 553.

[30] Instead, this provision raises further human rights problems in the case of Article 11(3)(ii) examined above, footnote 27.

[31] See point 10 of the *Considerandа*.

[32] See, respectively, Interinstitutional File 2010/0817 (COD), COPEN 115 EJN 12 CODEC 363 EUROJUST 47, and Doc. 18918/11, COPEN 369 EJN 185 CODEC 2509 EUROJUST 217. In the present analysis, I will relate to the two texts, respectively, as to "PD EIO o.v." and "PD EIO n.v."

[33] Peers (2010), pp. 1 ff. Surprisingly, the original draft proposal reproduced instead a typical sovereignist ground for refusal, i.e., the prejudice to essential national security interests [Art. 10(1) (b) PD EIO o.v.].

investigative measure to be taken rather than on the evidence to be obtained.[34] Thus, unlike any previous legislative instrument, the PD EIO left the choice of the investigative measure exclusively to the issuing authority [Art. 1(1)]. To be sure, as noted above, the original draft proposal had already enabled the executing authority to choose, under specific conditions, a different measure than that requested (Art. 9). In this case, the issuing authority could only withdraw the order, which offloaded onto this authority the responsibility to decide whether to disavow evidence that might be useful to its inquiries or to accept the results of investigative activities even if they were incompatible with its own law. The reason for this conflict is that, as we shall see below, the Directive proposal did not include a provision obliging the cooperating authorities to work together to find the most appropriate investigative measure. All this rendered the transnational procedure more rigid rather than more flexible than the traditional MLA.

As noted above, however, many changes have since been made to the original proposal, which has been integrated and considerably enriched during the examinations in the Council. I will focus on two issues, which in my view have particular significance from the perspective of this study: (a) the increasing rise of the grounds for refusal and (b) the inclusion of the availability model into the goals of the new instrument. These two partially overlapping[35] points deserve careful examination.

To start with, the new version of the draft proposal not only adds new grounds for refusal by reintroducing clauses belonging to most MR instruments (*e.g.*, the principle of *ne bis in idem*) but furthermore provides a two-tier list of grounds for refusal. Thus, in addition to the grounds for refusal applicable to any investigative measure pursuant to Article 10(1), the execution of some investigative measures abroad presupposes two further requirements being fulfilled, i.e., dual criminality and the respect for specific limitations on the adoption of the ordered measure in the executing country, limitations concerned with specific categories, or lists of offences and thresholds of punishment [Article 10(1b)]. The importance of this approach in the context of this analysis lies in the fact that the distinction between the two levels has been made on the basis of the coerciveness of the measures.[36] This confirms that, unlike the FD EEW, the PD EIO allows both the adoption of coercive means overseas and the execution of non-coercive measures using coercive methods.

However, the wording of Article 10(1b) (measures "other than those" referred to in paragraph 1a) can lead to confusion and contradictory interpretations of this legal construction. To be sure, the only provision explicitly relating to "coercive means" in the context of Article 10 is laid down in paragraph 1(f), which states that assistance can be refused where the EIO was issued for obtaining a coercive

[34] Point 10 of the *Consideranda*.

[35] Indeed, the issue of an EIO with the aim of obtaining evidence already in possession of the executing authority appears among the first list of the grounds for refusal [Art. 10(1a)(c) PD EIO n.v.].

[36] See Doc. 10749/11 REV 2, COPEN 130 EJN 70 CODEC 914 EUROJUST 85, p. 3.

measure in respect of an act allegedly committed outside the issuing state and wholly or partially in the territory of the executing state, but this act does not constitute a criminal offence under *lex loci*. Instead, paragraph 1a contains a generic reference to "any non-coercive investigative measure" (lit. b). But what is meant by non-coercive measures? There is no doubt that the measures under paragraph 1b are of a coercive nature, and this justifies compliance with further requirements. This applies especially to the dual criminality requirement, since it is certainly "inconsistent that a State might be obliged to restrict the fundamental rights of its own citizens in its own territory to investigate an act that is not punishable under its own laws".[37] The main problem relates, however, to the other measures mentioned in paragraph 1a. How should they be considered? Their autonomous position in the context of paragraph 1a might lead to the conclusion that their execution could entail the use of coercion; otherwise, they would fall into the field of application of paragraph 1a(b), which contains a comprehensive clause relating to *any* non-coercive measure. This interpretation raises, however, further doubts as to the meaning of paragraph 1b: what is meant by measures other than both non-coercive and coercive measures?

An alternative reading would be that all the measures referred to in paragraph 1a are non-coercive, as the reference to hearings of victims, suspects, and third parties (letter a) would suggest. Such an interpretation, apart from the aforementioned incongruence in respect of letter b, would, however, run counter to the nature of search and seizure, which cannot of course change simply because in the home state the proceedings were initiated for one of the thirty-two offences for which dual criminality is not required. Moreover, given that the measures are subject only to the grounds for refusal laid down in paragraph 1, how could the provision under paragraph 1a(f) apply to non-coercive measures where the territoriality exception presupposes the use of coercive means?

Also, this interpretation cannot therefore be shared, since some of the measures listed in paragraph 1a may entail the use of coercion. Such a conclusion certainly applies firstly to search and seizure, which raises further human rights concerns. Why should these measures not be subject to the dual criminality requirement within the area of the thirty-two offences of Annex X, following the approach of the FD EEW? Certainly, the waiver of dual criminality plays a very different role where the execution of the judicial order contributes to strengthening the right to freedom through the adoption of alternatives to remand detention[38] and in the cases in which the judicial order is aimed at the execution in the executing state of a measure that impinges on the fundamental rights of the parties.[39]

On the other hand, the analysis of the FD EEW has shown that coercion can be used as a means of carrying out non-coercive measures. This applies to the hearings

[37] Bachmaier Winter (2010), p. 585.

[38] See the Framework Decision 2009/829/JHA on the application of the mutual recognition principle to supervision measures as an alternative to provisional detention.

[39] In this sense, Ruggeri (2013b), p. 558.

of Article 10(1a)(a) because in some criminal justice systems, coercive means may be used to enforce mandatory hearings, or use may be made of investigative techniques forbidden in other Member States (*e.g.*, lie detection). But also here, why should victims or witnesses be obliged to submit to a hearing, with the additional risk of exposing themselves to criminal liability for an act that either does not constitute an offence in the executing State or, at least, does not entail the mandatory application of the requested measure?

Against this background, special attention must be paid to the case in which the EIO aims at obtaining evidence already in possession of the executing authority, a case that has been incorporated into the PD EIO during the examinations in the Council and appears today among the main goals of the new instrument [Art. 1(1)]. This mode of obtaining evidence, which aims at the real movement of evidence since the investigative activities were conducted in the executing country prior to the issue of the EIO, has become increasingly widespread in countries still strongly tied to the traditional MLA system, such as Italy,[40] and has proven very problematic from a human rights perspective.[41] From the viewpoint of this analysis, the inclusion of this case among the basic list of grounds for refusal reveals that it has been dealt with in the same terms of non-coercive measure. This systematic choice is highly questionable, given that case law often uses the exchange of information to obtain the evidential results of coercive activities, if not even to achieve the collection of evidence by coercive means (*e.g.*, wiretaps) bypassing the classic MLA instruments.[42] Therefore, the non-application of both the requirements of paragraph 1b cannot be shared.

3.2.2 Interim Result

The analysis of the development of the model of judicial assistance by foreign authorities based on the MR system shows a parabolic trend in the protection of human rights concerned with the use of investigative measures of coercion, leading to the following findings:

- The first phase, albeit aimed not at collecting but at securing evidence,[43] is heir to the last phase of MLA in regard to the obligation for the executing State to comply with requests for assistance that entail the use of coercive means. As to the modes of executing such measures, however, the risks arising from the obligation to comply with requirements of foreign law were reduced to what was strictly necessary to ensure the validity of evidence in the relevant proceedings.

[40] See Caprioli (2013), pp. 451 ff.

[41] Cf. Ruggeri (2013b), p. 560 f.

[42] On this use of such mode of obtaining evidence from abroad, see, with regard to Italy, Caprioli (2013), p. 452 f.

[43] Gascón Inchausti (2007), pp. 137 ff.

- Compared with this phase, the second one was marked by a greater attention to the issue of coercive means. The FD EEW, though it did not reproduce many of the relevant proposals of 2003, gave the executing authority full responsibility for choosing whether and which coercive means can be used in the execution of the evidence warrant. Moreover, although the requirement of necessity while complying with the formalities set by foreign authorities was dropped, the executing authority was left free to decide whether to follow coercive procedures.
- The third phase has remarkably decreased the protection of individual rights against coercive means. The PD EIO has hitherto reproduced none of the general limitations set by the FD EEW on the use of coercion, which is allowed in general terms. Moreover, the distinction between the grounds for refusal as set forth in Article 10 does not enable to understand clearly what is meant by "coercive means" in the framework of this legislative initiative while allowing even results achieved through coercive means to be obtained without the respect for fundamental requirements, such as dual criminality.

4 Multiculturalism and Human Rights Protection. Proposals of Reconstruction

The analysis of these models raises questions of great importance from the perspective of the present research. Doubtlessly, multilingualism does not relate solely to the use of different linguistic codes but also, in a deeper sense, to the different theoretical background of common concepts already rooted in the cultural heritage of the procedural law of the Member States. This applies equally to the notion of "coercive measures", as a comparative analysis at domestic level would clearly show. A further question arises about what is meant by "coercion" at the EU level. It has been observed that the expression "coercive means" has, for many years, been part of EU legislation without its meaning being sufficiently clarified. Moreover, a comparative analysis of the last phase of both the MLA and MR systems confirms the outdatedness of the concept of "coercion", which no longer constitutes an appropriate reference point for EU legislation. As noted above, the notion of *Grundrechtseingriffe* is certainly more appropriate for investigative measures, such as those referred to by the PD EIO, that are not perceived by the individuals in terms of coercion (*e.g.*, interception of telecommunications, covert investigations). In general terms, this legal concept offers a better theoretical basis for new investigative means that have emerged with the advancement of science and technology. A further merit of this legal concept is that it is focused—much more than the notion of "coercive means"—on the impact on the sphere of fundamental rights and on both the constitutional[44] and supranational justification for interference.

[44] This merit of the notion of *Grundrechtseingriff* had already been underlined in the 1980s by Amelung (1987), pp. 738 ff. In the same sense, see Kühne (2010), p. 248.

Despite its uncontested merits, however, the concept of *Grundrechtseingriffe* relates only to interventions *affecting* individual rights in terms of restriction or deprivation, whether or not by means of coercion. Thus, it does not cover those investigative activities or methods (*e.g.*, such hearings by videoconference), which, even without restricting individual freedoms, nonetheless requires the protection of specific fundamental rights (*e.g.*, the right to silence). To be sure, these investigative activities interfere with the sphere of fundamental rights in the sense that the enforcement of such measures requires the fulfilment of specific requirements to safeguard individual rights (the right to an interpreter or translator, the right to a defence, etc.). In respect of these measures, I shall use the notion of "investigative measures relevant to fundamental rights", thus using a legal concept deeply rooted in the German criminal law doctrine (*grundrechtsrelevante Ermittlungsmaßnahmen*).[45] Although this expression is widely used as synonym of *Grundrechtseingriffe*, I prefer to consider the measures *affecting* fundamental rights as a part of investigative means *relevant* to fundamental rights. The common feature of both types of measures is that they potentially impinge on the sphere of fundamental rights. Besides, both of them are referential notions, which require the ascertainment of what system of human rights protection is at stake. Since transnational procedures involve, at a horizontal level, at least two procedural and two constitutional systems, interaction will firstly involve two or more domestic systems for the protection of fundamental rights. In this respect, then, multilingualism poses new challenges of multiculturalism.

A significant enhancement of the perspectives of the two domestic legal orders involved in the judicial cooperation was the result of the introduction of a general test of necessity and proportionality in the second phase of MR.[46] The inclusion of this requirement by the PD EIO during the Council examinations [Art. 5a(1)(a) PD EIO c.v.], taking into account the wide range of measures that can be carried out through the new instrument, is therefore to be welcomed. Unlike the FD EEW, however, it is worth observing that the PD EIO does not require this test to be conducted *only* by the issuing authority. This omission is consistent with the current proposal's efforts to strengthen the admissibility powers of the executing authority while ascertaining the recognition of the requested measure. As noted above, the original proposal had already enabled the executing authority to use a different measure where, *inter alia*, the same evidential result could be achieved by less intrusive means [Art. 9(1)(c) PD EIO o.v.]. This mechanism, albeit not necessarily sufficient to reach a proper balancing from a human rights perspective,[47] confirmed

[45] See, among others, Beulke (2010), p. 67.

[46] On this topic, see recently Bachmaier Winter (2013), pp. 96 ff.

[47] This can happen because of the lack of any participation of officials and private parties of the relevant proceedings in the choice of different measure to be adopted. Moreover, in cases of *Grundrechtseingriffe*, it would be preferable to adopt a provision such as that proposed by the EU FRA in its Opinion of 14 February 2011 on this legislative proposal, whereby the executing authority should adopt the *least* intrusive measure. See Opinion of the European Union's Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order, http://fra.europa.eu/fraWebsite/research/opinions/op-eio_en.htm, p. 12.

the potentiality of the proposed new instrument to impinge on fundamental freedoms. The current text of the draft proposal, while confirming the right of the executing State to choose another measure, requires it to consider two further conditions: (a) the availability of the requested measure in a similar national case under *lex loci* and (b) the respect for the limits concerned with lists or categories of offences and punishment thresholds as established under *lex loci*. These tests can lead to two different outcomes, i.e., respectively, the use of another measure [Art. 9(1)(b) and (1a) PD EIO c.v.] and the refuse of assistance [Art. 10(1b)(b) PD EIO n.v.]. It is worth observing that all the three requirements—i.e., reduced intrusiveness, availability of the requested measures, and respect for the limits imposed by domestic law—share the common aim of avoiding negative repercussions on the sphere of proportionality from the perspective of the law of the country where the investigative measure has to be carried out, since the execution of a measure that fails to meet the conditions, limits, etc., of *lex loci* would clearly result in being disproportionate. Against the background of the whole transnational procedure, this approach shows the awareness that respect for the procedural requirements of *lex loci* needs to be enhanced to secure stronger protection of fundamental rights.

Instead, what still lacks in EU legislation is a virtuous *interaction* between the national systems of human rights protection involved in the transnational procedure. This conclusion applies also to the PD EIO. The first example relates to the case in which the executing authority opts for a different measure than that requested, since the Proposal fails to require a new test of proportionality, necessity, and availability by the issuing authority of the different measure.[48] That said, the most controversial omission concerning interaction between domestic laws relates to the execution of the requested measure. This is a common shortcoming of the last phase of MLA and all the phases of MR. In my view, the solution of combining *lex loci* and *lex fori* upon the condition of consistency with the fundamental principles of the host country cannot ensure a proper interaction of the two procedural laws, since it can seriously alter the balances of interests carried out by the domestic laws. This applies firstly to *lex loci* due to the obligation for the executing authority to comply with foreign requirements that might be even "unfamiliar"[49] to its own law. Nor does this solution, which is clearly aimed at fulfilling the needs of *lex fori* to facilitate the admissibility at trial of evidence in the relevant proceedings,[50] ensure a proper application of *lex fori*. Indeed, both the FD EEW and the PD EIO have failed to provide for any form of participation of private parties of the relevant proceedings in the execution of the requested measure, a vacuum that not only impinges on the defence rights but also shows the underestimation of the defence's contribution to secure the correct application of its own law.

[48] On this point, see Ruggeri (2013a), p. 291.

[49] This eventuality was explicitly foreseen by Article 8 SAP ECMACM.

[50] Compared with the international instruments of the third phase of MLA and the FD OFPE, the PD EIO, like the FD EEW, does not limit the duty of compliance with the formalities of *lex fori* to the sole requirements necessary under this law.

In a deeper sense, the potential of certain investigative means to impinge on the sphere of fundamental rights should require a multilevel interaction in the European area, where EU Member States are cooperating in criminal justice affairs on a national, bilateral, global (UN), and European scale.[51] From a human rights perspective, basically two main systems for the protection of individual rights—i.e., the domestic constitutional systems and the supranational Charters of human rights—should interact with each other. From this viewpoint, however, the existing MR instruments and the PD EIO undergo a methodological backwardness, since on the one hand they ignore the constitutional requirements of evidence of the domestic systems of the cooperating authorities, while, on the other hand, they provide only the traditional clause of non-modification of the obligation to respect the fundamental rights enshrined in Article 6 TEU. And although this reference now has a different significance than in the past as a result of the legal force accorded to the EU FRCh by the Lisbon Treaty, the risk of the fundamental rights enshrined in this Charter being infringed through investigative measures cannot allow for refusal *per se* of the requested assistance. But what raises even more concerns is that neither in EU legislation nor in this legislative proposal is there any trace of interaction between these two levels.

In light of the above, the setting of a virtuous transnational procedure aimed at obtaining evidence overseas requires methodologically an inter-level approach, whatever system is adopted, whether mutual recognition or mutual legal assistance. Such an approach would, in my view, be the most proper solution to bring about the AFSJ as construed in the terms of Article 67(1) TFEU, an area that can be considered as "common" *insofar as* the adoption of shared standards can also ensure a proper protection of individual rights and national legal cultures.

This approach should encompass the following:

A. The introduction of sunset clauses aimed at avoiding the infringement of fundamental rights (*fundamental rights clauses*). Due to the complex nature of human rights, such clauses should be introduced at different levels and stages of the transnational evidential procedure.

   - As to both the admissibility stage and the phase of obtaining evidence, the need for ensuring the widest protection of fundamental rights from the combined perspective of Article 67(1) TFEU, which calls for protection both of the supranational human rights systems and of the national constitutional systems, suggests adopting two different clauses, such as those proposed in the Legislative Resolution of the European Parliament on the proposal for an FD EEW. These clauses should contain (1) a general ground for refusal where the requested measure would prevent a Member State from applying its *constitutional rules* relating to due process, privacy, and the protection of personal data, freedom of association, freedom of the press,

[51] Hecker (2010), pp. 159 ff.

etc.; (2) a general ground for refusal where the requested measure would undermine the obligation to respect the fundamental rights enshrined in the *ECHR* and the *EU FRCh*. As to the latter clause, in order to ensure consistency in the protection of fundamental rights, a general duty of referral to the ECJ for a preliminary ruling might be introduced.[52]

- As to the phase of admissibility at trial in the issuing State, a closure clause should be introduced, following again the proposals of the Legislative Resolution of the European Parliament on the proposal for an FD EEW, to avoid that the use of overseas evidence jeopardise the rights of defence applying to domestic criminal proceedings.

B. Setting up a transnational multilevel procedure. This result should be pursued both at *legislative* and *procedural* levels. Such integration could follow two possible schemes.

The first solution consists of combining *lex loci* with specific procedural requirements of *lex fori*, thus aiming at bilateral horizontal integration. Following this scheme, to achieve the goal of a proper integration of domestic procedures, the requested authority, as in the second phase of MLA, should have to comply only with those procedural forms that are fully consistent with its own law and practice rather than with those that merely avoid infringing the fundamental principles of its own law. This approach, however, would not necessarily suffice to ensure full respect for individual rights. The French CCP offers an interesting solution, according to which the formalities of *lex fori* may be complied with as long as they do not lower the level of protection of the rights of the parties involved in cross-border activities [Art. 694–3].[53] At any rate, such solutions cannot be adequately realised without the participation of the defence both to counterbalance the presence of officials from the issuing State in the investigations being conducted abroad and to contribute to the correct application of *lex fori* by the authorities of the host country.

The major limitation inherent in this solution derives from the way of rendering *lex fori* compatible with *lex loci*, which is combining specific formalities of the former with the latter. This produces a rather unbalanced relationship between the two laws, since it results in the partial application of *lex fori* and the full application of *lex loci*. In short, however the combination is configured, this model remains based essentially on *lex loci*. Depending on how deep integration goes, *lex loci* will not necessarily remain immune to the requirements of foreign law, and the same applies to *lex fori*. However, this model does not aim to reach a homogeneous integration of both reference laws but only seeks to preserve the needs of each, i.e., respectively, the identity of the legal system of the requested country and the formalities required to ensure the admissibility of evidence in the requesting country. Thus, in my view, the greatest shortcoming of this model is that it treats the requirements of the two reference laws as parts of their domestic laws rather

[52] Hecker (2010), p. 452.

[53] See Lelieur (2013), § 2.1.

than as sources for the development of an integrated procedure rooted on a common basis. This is what makes it difficult for the requested authority to apply properly procedures that remain part of *foreign* law.

An alternative solution would be to set up an *ad hoc* procedure of gathering evidence on a balanced basis. This approach would be based on the understanding that the laws of both the issuing and the executing countries cease to be part of the statutory framework of the two nation states as soon as they are applied in a transnational procedure.[54] This applies also to *lex loci*, which is applied on its territory with the purpose of providing assistance to another country. But how could this integration be realised? Since integration must be sought in relation to the requested assistance, a *new* procedure must be set up and a *new* balance of interests must be achieved to ensure full respect for the domestic balances between the interest of efficient prosecution and the need to protect individual rights. In other words, a request for assistance will always give raise to an atypical procedure, whose modes must be established in the *concrete* case. The biggest shortcoming of the traditional approach is that it attempts to combine *single* procedures of both laws, as if they could be dealt with outside the legal context they belong to. But any provision is part of its own law and reflects specific balances between often-conflicting interests against a constitutional framework. A mixture of single procedural forms can alter this scheme and lead to different constitutional balances colliding with each other. The requirement of coherence is of great importance where the use of measures restricting fundamental rights is at stake.

Such *ad hoc* procedure would certainly run counter to the project of harmonising the rules of evidence, especially where coercive powers are at stake. On the other hand, the awareness has grown today that human rights requirements must be assessed in the concrete case.[55] Neither can this approach raise concerns as to the legal basis of the combined procedure, since the new balance should firstly be sought on the basis of the *legislative* requirements predetermined by both national laws. This does not rule out that also supranational or international requirements can play an important role,[56] providing a *higher* level of protection than that provided by either of the domestic laws. However, it would be very useful that at supranational or international level specific criteria for the solution of conflicting situations could be laid down *in advance*. Significantly, many countries have incorporated—additionally to the combination rule between *lex loci* and *lex fori*—a general criterion, according to which the requested assistance cannot cause substantial disadvantages for the people involved in transnational procedures, a criterion that is usually independent from the constitutional requirements of

[54] From a similar perspective, see Klip (2012), p. 393, which points out that domestic judicial products are no longer products once they go across the border, where different requirements apply.

[55] Sanders et al. (2012), pp. 29 ff.

[56] In this light, the introduction, at supranational or international level, of specific guarantees in cases of investigative activities impinging on fundamental rights, such as those provided for by Article 12(1)(a) and (b) laid down in the proposal of 2003 on a FD EEW, would be welcomed.

lex loci[57]. Starting from this basic requirement, which shall be deemed as "emergency brake", concrete criteria should be elaborated in relation to specific state-related interests (*e.g.*, investigation secrecy) and specific individual rights (*e.g.*, the right to information). In my view, any hierarchisation of such criteria should be avoided, as it would jeopardise the flexibility of the mechanism, which aims at reaching new balances of interests in the concrete case. An acceptable solution on an individual basis for a *fair* evidential procedure cannot, therefore, start from imperative sentences but from the assessment of specific value-based decisions. A fruitful approach derives from the so-called *Qualitätsprinzip* proposed in the field of conflict of jurisdiction, a principle that aims at the most proper balancing between the values at stake in the concrete case.

This solution cannot be completely realised without combining *legislative* with *procedural* integration. In this light, moreover, not only both the cooperating authorities, as provided for by Article 8(4) PD EIO, but also private parties should play an essential role in reaching an agreement on such modes. The contribution of the defence(s) could, in my view, be waived only in cases of investigative measures not requiring, according to both laws, the information of the individuals concerned. Where a proper agreement on a new balance of interests relating to the specific investigation requested is impossible, assistance should not, in my view, be provided. Any different solution would lead to contradictory conclusions, i.e., either obliging the requested authorities to carry out an investigative activity reflecting a balance of interests unadapted to its own law or leaving to the requesting authority the decision on whether to accept and use at trial a piece of evidence obtained without respecting the balances of interests of *lex loci* or to declare the inadmissibility of the results of the transnational procedure.

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[57] See Art. 146(2) der portugiesischen *Lei da cooperação judiciária internacional em matéria penal* (144/1999). This conclusion does not, however, apply to the French CCP, which states that "*si la demande d'entraide le précise, elle est exécutée selon les règles de procédure expressément indiquées par les autorités compétentes de l'Etat requérant, à condition, sous peine de nullité, que ces règles ne réduisent pas les droits des parties ou les garanties procédurales* prévus par le présent code" (Art. 694–3).

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