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

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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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