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Formulation of rights and European legal discourse: any theory behind it?

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Abstract: Ever since the very beginning of the European Economic Community, the EU has regulated European linguistic diversity through a policy of multilingualism (Art. 217 of the E.C. Treaty and Council Regulation No 1 April 15, 1958). Within this policy, the legislator introduced the right of EU citizens to communicate with the EU institutions in each one of the official languages. The possibility of multilingual communication with the EU institutions is not only a practical solution, but a real "core" right, recognized even in the Lisbon Treaty. In this framework, it is worth providing practical solutions as well as considering whether or not, the European Union is also favoring the enactment of rights at the European level, by formulating, enforcing and even communicating the same rule to all EU citizens, with the aid of a multilingual drafting. The EU legal terminology providing rights comes into being through specific mechanisms of lexical creation, which chiefly consist of coining semantic neologisms. Moreover, all legal texts must be written in accordance with EU drafting guidelines, prescribing that "rules have to be drafted bearing in mind their translation in all the official languages". The consequence of these drafting techniques is that multilingualism influences not only the translation, but the actual structure and content of the rule: very often the result of this praxis is a pragmatic, detailed, concrete regulation of legal instruments, rather than a system of rights. A clear example is given by the directives on consumer protection – nowadays "Directive on Consumer Rights" – and particularly the well known "right of withdrawal"; a consumer opportunity to withdraw from a contract within seven (now fourteen) days is undeniably a proper "right". However, the regulation provided in the directives is more focused on the procedure of withdrawal (the instrument) than on the effect of the withdrawal from the contract (the right). In general, the multilingual drafting of EU norms – and consequently of EU *rights* – is not automatically functional to the effective transposition of rights in the Member States and to the substantive equality of EU citizens before European law. The paper argues that this problem – causing a lack of communication between the EU institutions in charge of the formulation of European rule of law and the citizens – might be approached through different methodologies:

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linguistic, anthropological, juridical. Particularly in the analysis of the legal language of the EU comparative law science is equipped with methods and instruments which proved to be useful for breaking down the legal discourse of the European Union going beyond its words and highlighting the various "formants" (norms), some of which exist and come to light directly or indirectly as a consequence of the multilingual formulation of EU law.

Keywords: EU rules and terminology, rights, drafting, comparative law, linguistic, anthropology, methodology

1 Introduction

If the relation between language and law is studied within a multilingual context such as the European Union, the connection between the formulation and then translation of law appears to be unshakeable.

In Italy, particularly, credit mainly goes to comparative law for attracting the attention of legal experts to this fascinating, as much as complex, aspect of law. Translation and comparison are strongly related since comparative analysis assumes the transposition of norms and concepts from one language to another, or others, but not only: over time legal translation studies have developed analysis techniques and methodologies since they are a branch of comparative law.[1]

Since the last century, comparative law studies have been focusing attention on the relation between translation and multilingualism (Gambaro 1998; Ajani and Ebers 2005; Pozzo and Jacometti 2006; Sacco 2002, 2003b, 2008; Ioriatti Ferrari 2009; Graziadei 2012; Pasa 2014; Ferreri 2014). The ways in which familiar problems of bilingualism or multilingualism have been managed by different experiences of normative pluralism around the world (Ferreri 2014: 271) – mostly Canada, Switzerland, Belgium, the European Union – are interesting and stimulating; however, the ordeal of the European Union is certainly the most important global effort to create a common legal means of expression for a single legal system. Besides the political and democratic reasons which lead the Union to opt for a theoretical absolute multilingualism (van der Jeught 2015: 55), on a purely technical basis, the core of the matter is how to take on the huge burden of mitigating and solving the tension surrounding the institutional translation of

1 Translation studies are one of the main fields of study of the *Istituto Subalpino per l'Analisi e l'Insegnamento del Diritto delle Attività Transnazionali* (ISAIDAT), which was responsible for dissemination through meetings, conferences and research activities: http://www.isaidat.org/

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normative acts, in all of the 24 official languages of the EU, as well as its technical complexity.

In general, legal scholars tend to emphasize the role of translation, that is considered not only as an essential technique integrated in the drafting process (Robertson 2014: 155), but also a tool to harmonize and reduce multi-language complexity to a common meaning (Pommer 2012: 1254). However, it is well known that the multilingual normative process is so specific in the EU that it cannot be sufficiently explained by the traditional criteria for legal translation theory, such as the function of legal texts (Šarčević 2000: 5). As we will see, the EU rules in all the official languages – aiming is to guarantee full equality for all of the official national languages of the European Member States (Milian-Massan 1995: 487) – are composed by terms and texts which are standardized and repeated in each language (Robertson 2014: 155). Such a technique may be applied in a fairly repetitive way, but it is also reasonably flexible; this allows the EU terminology to be extended to potential new languages, as well as to accumulate standard groups of terms and blocks of texts.

As based on such a pragmatic technique of EU law formulation, it is worth considering whether or not the European Union is also favouring the proper formulation of *rights* at the European level, as well as providing practical solutions.[2] Particularly, does the EU extend the same rights to all EU citizens by formulating, enforcing and even communicating the same rule to all EU citizens, through the multilingual drafting? Does multilingualism really favour the integration of EU citizens in the European Union by giving all of them – regardless of the national origin and language – the same concrete capacity of being aware and possibly of enforcing their EU *rights*?

This study attempts to clarify how the tools of different sciences, particularly comparative law, can help to know the legal language of the European Union more effectively and realistically. This is possible thanks to the capacity of comparative law to penetrate legal data but also thanks to its inclination to go beyond merely nominal matters and linguistic, stylistic and semantic superstructures.

2 Since the very beginning of the European Economic Community the EU has regulated the European linguistic diversity through a policy of multilingualism (Art. 217 of the E.C. Treaty and Council Regulation No 1 April 15, 1958). Within this policy, the legislator introduced the right of EU citizens to communicate with the EU institutions in each of the official languages. The possibility of multilingual communication with the EU institutions is not only a practical solution, but a real "core" *right*, recognized even recently in the Lisbon Treaty (consolidated version of the Treaty on the Functioning of the European Union, arts 20, 24, 342).

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2 Multilingualism and the drafting of *rights*

A useful starting point for an analysis of the matter is the fact that in this uniquely polyglot organization – the European Union – the presence of EU language regulation does not correspond to a genuine "EU Language Policy" (De Witte 2004: 240).

A likely consequence of this passiveness is the lack of general, comprehensive considerations on language within the framework of EU action in Member States. As a consequence, the impact of these actions on language issues is largely fortuitous. A well-known example is the free movement of persons: when linguistic requirements are imposed for the exercise of a private profession, or on foreign workers, the EU action on the free movement of persons and services might be prevented by national language requirements.[3] The same obstacle might arise when national provisions pertaining to languages are imposed on commercial activities (e. g. labels); this creates additional transaction costs for firms and may hinder cross border trade (Van der Jeught 2015: 204).

The lack of a clear linguistic policy might transform the regulations of language use in economic and social fields of the different Member States into barriers to the effectiveness of EU action. According to Creech, the origin of this paradox is the EU's implicit consideration of the language issue as a merely economic affair: like law, in the EU institutional mind set, language seems to be nothing more than a medium through which the completion of the Internal market can be facilitated (Creech 2005: 157. See also De Witte 1991: 164).

From this perspective, even if multilingualism might be considered to promote the integration of European citizens in the ongoing process of the creation of the European system, the real establishment of EU citizenship is related to the extension to all European citizens of the same rights.[4] As noted above, the point at issue is the way in which the *rights* provided by EU acts – mainly enacted by means of directives and regulations – are formulated by the EU legislator and then interpreted and applied by the courts in the Member States.

This matter strongly depends on the drafting technique of the EU rules.

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3 See Court of Justice, Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*. Reference for a preliminary ruling: Pretore di Bolzano – Italy. Freedom of movement for persons – Access to employment – Certificate of bilingualism issued by a local authority – Article 48 of the EC Treaty (now, after amendment, Article 39 EC) – Council Regulation (EEC) No 1612/68.

4 The analysis of these obstacles, and in particular of the linguistic barriers, is the object of the project "bEUcitizen", financed by the EU Commission within the VII Framework Program: http://beucitizen.eu/

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The early years of the European Union were decisive as far as the choice of a technique for the drafting and translation of laws was concerned and which was – in theory – capable of filling the gaps created by the lack of a pre-existing Community legal terminology (Pozzo 2003: 756). Thus, ever since the beginning, the legal terminology of the EC came into being through the specific mechanism of lexical creation, which chiefly consists of coining neologisms. Such coinages may be entirely new terms, or words which are already pre-existent in one of the languages and are adapted for use in EU law; from a semantic point of view, the terms remain in their original form, but acquire a new, European meaning. With this method, terms such as “directive”, “regulation”, “recommendation” and “subsidiarity” have first been coined in one language, most of the time in English – collectively referred to as “semantic neologisms” (Cosmai 2007: 30) – and later transposed to all the EC official languages.

Due to the adoption of this technique EU, terminology is made of numerous neologisms the purpose, of which ideally, is to ensure that all the official languages have the same availability of legal concepts (Bonn 1964: 708) and which are signs having their own meaning in a specific sign system,[5] as the EU one.

The question that then arises is whether this technique is able to grant the transmission of the same *right* in all languages from a linguistic point of view, as well as a common interpretation and application of the legal concepts expressing it in the single Member States.[6]

This difficulty is the Achilles’ heel of the European harmonisation process which is acute in Europe – more than in other supranational legal systems such as the USA Federal system – since the decoding process of the national jurist is not supported by any pre-perception of a system which seems to be conceptually incoherent and incomplete. Furthermore, given the ambiguity caused by multilingualism, according to some authors the explanatory power of an individual word in the text of an EU law is weaker than in a monolingual context (Colneric 2005: 144).

Hence, the obvious suggestion is that EU institutions should draft “their” law better (see the proposals by Kellermann et al. 1998) but EU legal drafting is a complicated task and many actors, many languages, many interests are involved in a process that cannot be entirely controlled in terms of legal results.

5 On the legal concept as a sign see Cheng et al. 2014: 167 ff. For an application within the EU legal language system see Ioriatti Ferrari 2016 (forthcoming publication).

6 On the same matter see the very interesting analysis of Robertson 2010.

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A possible starting point in the approach to this problem – probably *the* problem of the twenty-first Century with regard to EU legislation – is a shift of mind: regardless of the mind set of the EU Commission, the activity underway to unify the laws of the European Member States should not aim solely to the achievement of the Internal market.

In this last development the emphasis at the debating table should be placed on the insufficient amount of attention paid not just to legal language in the unification/harmonization process of European law, but also to the impact of the principle of multilingualism on the structure and the content of the EU rule.

At this point of the story – that of the European Union – it is crucial not to limit the present process to laying down provisions with a purely economic scope and the importance of the opportunity to draft proper rules providing *rights* must be understood.

This is not an easy task, also because the EU drafting technique originates in the provisions prescribing how EU acts should be written from a stylistic point of view; these are contained in common guidelines[7] intended to improve the quality of the EU legislation drafting adopted by the three institutions.[8] According to one of these principles "rules have to be drafted bearing in mind their translation in all the official languages". Hence, multilingualism influences not only the translation, but the actual structure and content of the rule (Tronsborg 1997: 152). The result of this process is clearly visible in the style of the directives and regulations: a pragmatic, detailed, concrete regulation of legal instruments, rather than a system of rights.

In many cases, the result is that in harmonizing the laws of Member States the EU has been focusing its attention on the regulation of *instruments* rather than *rights*. A clear example are the directives on consumer protection – nowadays "Directive on *Consumer Rights*" – and particularly the well known "right of withdrawal", a consumer opportunity to withdraw from a contract within a certain number of days (e. g. 14, art. 9) which is undeniably a proper "right"; however, the regulation provided in the directive is more focused on

7 *Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of Legislation within the Community Institutions* (Inter-institutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ C 73, 17.3.1999, p. 1, updated version 2014). *Manual of Precedents for Acts Established within the Council of the European Union*, Secretariat General European Union Council (legal – linguistic experts), July, 2002.

8 The European Parliament, the Council and the EU Commission.

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the procedure of withdrawal (the *instrument*) than on the effects of the withdrawal from the contract (the *right*).

In general, the multilingual drafting of EU norms – and consequently of EU rights – is not automatically functional to the effective transposition of *rights* in the Member States and to the substantive equality of EU citizens before European law.

3 A different approach

As noted above, the rules drafted at the EU level might produce different effects in the various national legal systems. The extent to which these differences lead to the recognition or to the non-recognition of a *right* is a difficult problem to evaluate, but its importance is great, as the introduction of rights is a prerequisite of European citizenship.

European institutions, such as the EU Commission,[9] endeavoured to meet this situation by commissioning legal scholars and stakeholders to draft a *Common Frame of Reference* (CFR), a European instrument which contains definitions of legal terms, model laws and general principles; the CFR was meant to be a reference point for the EU lawmakers, the Court of Justice, and the national courts.

Part of the scholarly analysis following the first edition of the CFR magnified the failure to translate legal meanings in a general, common European legal language; it is a shared opinion that the result of this "top down" initiative is a de-contextualized, artificial and just apparently common vocabulary, unfamiliar not only to national jurists, but to the actual actors involved in the EU legal drafting system too (legislator, translators, jurists, linguists, experts. See on this debate Ioriatti Ferrari 2011: 343 ff).

If the idea of a language convergence throughout Europe by means of an *ad hoc* common terminology can be deceptive and illusory, however, assumption that today the European law is expressed in a new legal language is widespread and shared among jurists and linguists (Cosmai 2007: 28).

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9 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, p. 2 as well as the following communications.

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These matters of simple observation will be discussed in the following paragraph, with some suggestions on how they relate to a possible different approach to the problem, based on the methodological instruments of both linguists and jurists. A more in-depth interest in the anthropological approach will be recommend as desirable too.

Along with the "top down" solution launched by the EU Commission, a possible approach might be to increase the level of acquaintance of the language in which the EU law is expressed. The proposal is based on a simple premise: it is not possible to evaluate the effects of a cause that is nearly unknown. The EU legal language necessitates ongoing analysis and studies, as even the actors involved in the legal drafting – legislators *in primis* – are helpless in resolving future problems which they are not able to foresee.

Understanding and knowledge need immersion in this new phenomenon. The EU language is bound to the inner grammar of the legal system of the European Union, to its policy, form of government, drafting techniques and, last but not least, to the multilingualism mission. Moreover, as we will see, rules and concepts, as well as the variables that affect the evolution of the EU language, originate in many non–legal environments. Finally, current evidence suggests that EU legal discourse is considered a technical legal language, yet not completely elaborated; for this reason, as will be discussed in the following paragraph, the approach to the analysis of this "world of words" cannot therefore be anything but interdisciplinary.

4 Comparative law and EU legal language: The theory of the "formants"

In his *Course de linguistique générale,* leading linguist Ferdinand De Saussure (De Saussure 1916), described language structure and form as arbitrary; in every language the meaning of a word emerges not because of an objective relation between a sign indicating an object and the concrete object itself, but by comparing this specific word to all the other words, as words are collective results of social interaction. ("*la parole*", in the De Saussures's word).

As noted above, in drafting its legal texts, the EU has not drawn on a pre-existing legal lexicon: as a consequence, legal concepts have to be elaborated *ex novo*, often at the very moment of the formulation of the rule, and soon translated in other languages.

Indeed, translating words with specific legal concepts because of their reiterate use in the past is the typical praxis of the translators involved in the

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drafting process of EU law; since a legal language is always part of a system of "references and referents" which are recognizable by the social group that relies on this language, the EU legal language is probably one of the most visible examples of technical language composed by legal words – concepts – entirely created by social interaction and legitimated by collective consent – actors involved in the legislative process-.

This phenomenon of rules elaborated in a non-legal context often does not require immersion in legal tradition; the effect is that the EU legislators have not needed to recognise jurists, or European legal scholarship in general, as interlocutors with whom they can develop the legal language of the EU (Gambaro 1998). But somehow paradoxically jurists – and particularly comparative law jurists – are the only specialists able to deconstruct this interaction between law and language and explain it in terms of legal results and rules.

As the rest of this paragraph seeks to show, the complexity of the relationship between law, language, praxis, actors and policy characterizing EU legal discourse, makes comparative law methodology of paramount importance for its de-codification. This attribute of EU language is important for comparative law,[10] and particularly as regards one of the methodologies provided by this science (Hage 2014 Grosswald Curran 2006–2012 Michaels 2006–2012): the theory of the formants, elaborated by Rodolfo Sacco.[11]

Unlike the traditional and positivist approach, which simply identifies law as the product of the official sources of a given legal system, the methodology involved in comparative law science presupposes the existence of a plurality of other legal rules and institutions, which are active components – "formants" – and contribute to the actual feature of this legal system too*: The comparative method is thus the opposite of dogmatic. It is founded upon the actual observation of the elements at work in a given legal system after having identified these elements* (Graziadei 2006–2012: 384). As is well known, the theory of legal formants[12] is the key for researchers who want to achieve a deep and real

10 Comparative law is a rather recent science which was imported in Italy in the 50s of the last century by Rodolfo Sacco (see Sacco 1991), emeritus professor of Comparative law at Turin University (Italy), Department of Legal Science.

11 The theory of formants is introduced for the first time in Sacco (1965a: 827) and shortly after in Sacco (1965b: 953).

12 It is worth recalling that the theory of the formants does not represent the sole methodology employed by comparatists. If the functionalist method (as described in the classic opera "*An Introduction to comparative law*" by Konrad Zweigert and Hein Kötz) is taken as a paramount cornerstone, the theory of Sacco belongs to the non – functionalist approaches, as being a response to problems which recall the structuralism methodology. According to Graziadei

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knowledge of a legal system. This method[13] moves from the undisputed premise that the various components of all legal systems may not necessarily coincide, but can actually contrast. Through the dissociation of the formants, therefore through the breakdown of its essential elements, a legal system shows how fragmented the data that its complexity lies on can actually be (Sacco 1991: 21).

In essence, formants are norms, but which do not necessary coincide with those norms produced and contained in the official sources of the law of the legal system under analysis. This always happens when statutes are analyzed, as in all the legal systems legislation is an important, official source of the law. Thus, the so called "legislative formant" coincides with the legislation, as a source of the law.

However, there are many other different types of legal formants. The "case law formant", as referred to the norms contained in the court decision is an official source of the law in the common law countries but not in the civil law ones. The same happens with the interpretation given by scholars ("scholars formant"), which suggested or interpreted rules have the status of official legal rules in some legal systems (e. g. the Muslims legal systems) and are differently considered in many other ones.

Moreover, some legal formants are not born explicitly formulated; in every legal system some rules are implicit, as the jurist applies them (e. g. in transferring movable property French jurists speak about "consent" but implicitly mean "consent based on a justification or *cause*" (Sacco 1991: 30). These last formants are called "cryptotypes".

Sometimes, formants diverges; theoretical formulations present in a system might be completely coherent/incoherent with the operational rules of that system. Differently, some operational rules are not contained in the official sources (e. g. civil code) but are nevertheless taken into consideration by the courts. Important elements are the reasons given by judges and scholars, which might be different from their conclusions, and so different "legal formants".

Jurists are responsible for identifying the content of the rule, and jurists who are experts in comparative law know very well that rules are part of a whole

(Graziadei 2003) this theory is an alternative and a supplement to the functional approach itself and together with the well known approach of Alan Watson (Watson 1993) it sheds light on the fact that culture is not a "monolith", but the result of the combined contributions of different actors, in terms of formants at work within a given legal system (also see Graziadei 2006–2012: 441 ff).

13 As regards the methodology of comparative law and the individual application of this method by each single scholar: (Vanderlinden 1995).

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universe of different models, as the legal language itself creates models. Discovering such models is the main goal of comparative law (Sacco and Rossi 2015). Therefore, the analysis of European legal language does not apply only to linguists, but to jurist trained in comparative law too.

Since there are many rules or latent linguistic patterns under the surface of the EU language that are more permanent than visible, uncovering these formants might be the key to understanding more about the nature and the functioning of the EU legal discourse. Comparative law modes of analysis should enable scholars to shed light on the *ratio legis*, by uncovering the rule/rules which are expressed in the legal language of the EU, even against or regardless of the intention of the lawmakers.

If we always consider this simple yet vital fact, comparative law can certainly contribute to the knowledge and explanation of legal translation,[14] as well as of the language of the European Union. When studying law, comparative analysis seems to be the most powerful tool to reveal the different models (formants) that constitute a legal system and their way of functioning, their combinations and their level of mutual influence.[15]

Thus, it is legal comparison that allows us to break down the legal discourse of the European Union by going beyond its *words*,[16] highlighting the various formants, some of which exist and appear directly or indirectly as a consequence of the multilingual drafting.

5 Case studies

In the following section, some samples will be examined to further explore and elaborate how legal concepts in relation to right are formulated in European legal discourse.

14 See the meetings organised by ISAIDAT (Istituto Subalpino per l'Analisi e l'Insegnamento del Diritto delle Attività Transnazionali) http://www.isaidat.org/

15 But also see the different but very instructive approach of Turi (1990: 648): "*Le droit linguistique compare étudie donc le droit des langues de par le monde (ainsi que la langue du droit et les relations entre le droit et la langue). Dans la mesure où la langue, qui est le principal outil du droit, devient à la fois sujet et objet du droit, le droit linguistique devient du droit méta juridique*".

16 It is Vanderlinden to notice that "*le mots ne sont qu'un point de départ, la façade derrière laquelles' abrite l'objet du veritable intérêt du comparatiste*"...."*qui doit franchir le miroir des mots e analyser éléments, notions, mécanismes, structures et systèmes...*" (Vanderlinden 1995: 406).

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5.1 Divergence between the title of the EU acts and the contents of the articles

Moving on from statements to facts we can recall, among the many examples, how often the rules contained in an article of a European act do not correspond to the enunciate stated in the title, or to the definitions contained in the recitals.[17]

This is a good example of different formants coexisting inside the same EU act, that is provoked by a divergence between the rules indicated in the title of the EU acts and the rules which form the content of the article itself. This happens because in respect of the legislative style of the Union, the title of the document is written using simple language and a less formal register, half way between legal and colloquial (everyday language), but then translated into many different legal languages.

The aim of the title is to inform the EU citizens, therefore the purpose of its description is to make the content of the document comprehensible for citizens of the European Union. Nevertheless, the title of European legal documents does have legal value (Cornu 2005: 273).[18] One of the most typical dissociations of formants passes through this dyscrasia.

This is the case of the title of the Rome II regulation "non-contractual obligations" and of one the articles of the same document: an example of this dissociation is art. 2, definition that includes concepts such as *unjust enrichment* and *negotiorum gestio*,[19] yet all attributed to the category indicated in the title "non-contractual obligations". Whilst in the classification of most of the European legal systems (Italian, as an example), *unjust enrichment* is a tertium genus among the two categories *tort* and *contract*, and not part of the "non – contractual liability (tort)", this is not the case in EU law, were unjust enrichment is a tort. However, from a systematic point of view, this is not the consequence of a classification choice of the EU legislator, but simply a side back of the application of a stylistic guide line and of the multilingual drafting.

Nevertheless, as mentioned above, even when norms are not officially recognized by the legal systems in which they are in force, but produce legal

17 See Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non – contractual obligations (Rome II).

18 See also the bibliographical references in Cornu (Cornu 2005), among which: Couvrat 2004: 513.

19 Art. 2. *Non-contractual obligations*. "For the purposes of the present regulation, damage includes every consequence of an illicit fact, enrichment without cause, negotiorum gestio or culpa in contrahendo".

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effect anyway (e. g. by influencing the interpretation at the national level, as we will see in the next paragraph b) they enable comparative law scholars to consider them as "formants" (components of the legal systems itself).

5.2 The propositions about law in the European text

As stated above, different formants can coexist in law (Sacco 1991: 1 ff.).

In particular the propositions which come from the legislator are motions with legal nature since they are "means of interpretation able to affect how the operational rule they are put before is intended" (Sacco 1991: 59). Even though they might seem as superfluous statements in a sentence from a linguistic point of view, they have an important value from the legal joint of view, as they are means of interpretation.

> *Some legal formants are propositions about law that are put forward as conclusions by scholars, legislators, or judges. Sometimes these propositions seem to explain a legal term and are supposed to connect the term with its legal effects. For example, the term may be "parents" and the legal effects may be "they have the power to manage the property of their minor children". Jurists insert a statement in the middle: for example, "parents represent their minor children". These statements are not themselves operative rules, but they are purported explanations of operative rules. Nevertheless, we should not regard them as superfluous. They can affect the way in which the operational rules they aim to explain are understood and interpreted. Thus they also rank among the legal formants of a system. (Sacco 1991: 31).*

If they are contained in a European legal rule, such motions are precious for the national judge, as they can contribute to guiding him/her as an interpreter in understanding a legal declaration formulated outside his/her national cultural system (Sacco 2003a: 5 ff).

Let us see an example regarding a suggested formulation of article 20 of the Treaty on the Functioning of the European Union (TFEU), and imagine a possible elaboration during the negotiations of the text of the article.

"Citizenship of the Union is hereby established. *Every person holding the nationality of a Member State shall be a citizen of the Union.* Citizenship of the Union shall be additional to and not replace national citizenship. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties".

Between the indication of the specific case "citizenship of the European Union is established" and the information the effects refer to "citizenship of the Union shall be additional to and not replace national citizenship"... omissis...... there is a proposition which is "*every person holding the nationality of a Member State shall be a citizen of the Union*".

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The importance of this sentence is clear, as it helps the interpreter to qualify one of the core elements of European citizenship.

As we have already seen, however, when drafting the European document precise stylistic rules must be respected. The purpose of such rules is to make the multilingual imperative realistic: not just the content but the actual structure of the document (also meaning length) must be as similar as possible in all versions.

It has already been noted how such consistency can have consequences on the law itself.

Here is the example: during negotiations regarding the drafting of the TFEU, the need to guarantee a certain consistency among its versions – especially for the English version – might have led to the following suggestion[20]:

"Citizenship of the Union is hereby established that is additional to and does not replace national citizenship. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties".

The clause extracted from the article "*every person holding the nationality of a Member State shall be a citizen of the Union*" is now deleted, but it is clear that it does not lack in importance or legal nature; it is an official rule, since it originates from the European legislator which must be taken into consideration by the national judges as a means of interpretation (a "formant", according to Sacco and Rossi 2015: 68). In this sense it can have practical utility.

This example shows how changes introduced in the legal document drafted by the legislator, due to stylistic needs driven by multilingualism, can have important consequences on the way the EU (operational) rule is interpreted and applied at the national level.

5.3 The "last word" of the court of justice of the European Union

ECJ and the "external effects" of EU legal language (the "vertical" use of EU language)

We now come to a second matter which refers to the role of the European Court of Justice.

20 Example suggested by M. Guggeis, *Workshop on legal translation of EU law,* Trento, April 2013.

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It is well known that discrepancies between multiple versions of EU legal texts, all of which are deemed to recognize the same rights in all the EU legal languages, are often submitted to the opinion of the Court of Justice of the European Union by national judges art. 267 TFEU on the preliminary ruling procedure.

In term of our research, legislation is not the sole source for the creation of an EU legal language: the European Court also plays a key role in this process, often by consolidating the same legal concepts enacted by the EU legislator (Ioriatti Ferrari 2009: 137).

Since its creation, this Court has consistently reinforced European legal terminology through the mechanism of art. 267 TFEU, as most of the times, when deciding to give a certain interpretation to the law, the Court necessarily decides the meaning of the word (Sacco 2008: 11).

Sometimes such words correspond to a European operational rule which is suitable for the harmonization of a specific field of law; furthering this line of reasoning, an important role of the European Court of Justice is to consolidate EU terms which correspond to a European operational rule so as to ensure the realization of the harmonization process in that specific field of EU law.

We come across this situation when referring to the concepts of "sale of goods" and "provision of services" as under EEC regulation n. 44 year 2001, on the jurisdiction, the recognition and enforcement of judgements in civil and commercial matters. In the words of the Court of Justice "the regulation is responsible for making the identification of the judge certain and predictable and consequently for guaranteeing the certainty also of the effectiveness of the harmonization of the regulations on jurisdiction".

The identification of the jurisdiction according to the regulation 2001/44, depends on the qualification of a contract in terms of "sale of goods" or "provision of services", as the two opposite criteria establishing the competent court in contractual matters. Therefore these two European terms, and consequently their correct interpretation by the courts of the Member States, appear instrumental to the achievement of the scope of regulation 2001/44, that is the harmonization of the EU jurisdictions. This is the reason why the Court of Justice[21] defined these institutions autonomously, thus formulating two European notions. However, the ECJ definitions do not always coincide with the same concepts as elaborated in the Member states (e. g. Italian law, as we will see in the following example).

For this reason, a national court interpreting these European concepts according not to the definition of the Court of Justice, but to a different and

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21 Court of Justice 25th February 2010, Car Trim GmbH c. Key Safety Systems S.r.l. C- 381.

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national one, applies non-European rules, which impede the positive outcome of the harmonization process.[22]

As an example of similar mistakes, we may refer to a judgement of the Court of Trapani (Tribunale di Trapani, Court of first instance, Italy), pronounced on 9th June 2010.

EEC regulation n. 44 year 2001 (on jurisdiction, recognition and enforcement of judgements in civil and commercial matters) was[23] the source that established jurisdiction in cross-border controversies. As far as contractual matters go, jurisdiction is established by art. 5.1.b, under which in the event of "sale", jurisdiction is based "in the Court of the Member State in which the goods were or should have been delivered according to the contract"; in the event of "provision of services", within the court of a Member State "in which the services were or should have been performed according to the contract". Thus, according to the rule, the identification of the competent Court depends on the identification of the contract as "sale of goods" or "provision of services".

An interesting case refers to a lawsuit for the non-performance of a contract undertaken by a company with seat in Trapani (Italy) against a company based in London. As agreed in the contract signed by the two parties, the service promised by the English company should have consisted of the production of clothing following the indications of the Italian company. The Italian company was then, in turn, obliged to purchase the end product.

Since the plaintiff had qualified the contract as a "sale" agreement, the competent Court identified was the Tribunale di Trapani (Court of Trapani), as it was also place of delivery of the goods as under art. 5 (b) of Regulation 44/2001.

The party summoned to Court objects a lack of jurisdiction based on a different qualification of the contract, that would therefore integrate a "provision of services". The party summoned therefore identifies a Court of first instance in London as competent to decide on the case.

When deciding this preliminary matter on jurisdiction, the Court of Trapani maintains jurisdiction qualifying the contract as a "sale" referring to the

22 We must remember that the Court of Justice does not consider the obligation of national judges to apply EU law as mediated by their national legal system. Each national judge must apply European law and at the same time, must not follow a possible inconsistent law of the national court (Barber 2006: 25).

23 The Regulation 44/2001 has been abrogated with the enactment of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The notions "sale of goods" and "provision of services" have been mantained unchanged in the text of the new regulation.

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decisions of the Italian Supreme Court (Corte di Cassazione) according to which the point of demarcation between the two type of contracts – "sale" or "provisions of services" – is the obligation which characterizes the contract: exchange of goods against price in the contract of "sale of good". Exchange of service against price, in the contract qualified as "provision of services".

Yet the "obligation which characterizes the seller" elaborated by the Court of Justice moves away from the word defined by the Italian Supreme Court. Instead of limiting the evaluation of the provision, the European Court considers other elements that qualify the type of contract, among which the position of the seller:

> If the seller is responsible for the quality and conformity to the contract of the products produced, such responsibility will depose in favour of a qualification as "sale agreement". On the other hand, if the seller only responds for the correctness of the service according to the instructions given by the buyer, such circumstance deposes in favour of a qualification of the contract as "provision of services" (Court of Justice, 25 February 2010, p. 42).

As regards the case examined, it is crucial to recall that the production of the clothing carried out by the English company should have been done in conformity with the instructions given by the Italian buyer.

According to the Court of Justice, this particular element deposes in favour of the qualification of the contract as a "provision of services". It follows that, under art. 5.1.b of Regulation 44/2001 ("the competent judge is the Court situated in a Member State in which the services were provided or should have been provided according to the contract"), the jurisdiction is English and not Italian.

It is therefore clear that two operational European rules are linked to the European words "sale of goods" and "provision of services", as the two opposite criteria establishing the competent Court in contractual matters. A wrong definition of the two concepts by the national Court, as based not on the ECJ case law, but on the definitions of the national Supreme Court, has provoked a mistake on the choice of the jurisdiction and consequently annulled the effectiveness of the EU harmonization of the jurisdiction on commercial matters.

The "internal effects" of the EU legal language ("horizontal" use of EU language)

The attention attracted by the EU lawmakers' use of language has been, so far, mainly concentrated on these "vertical effects" (or "external" effects) and

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particularly the issue regarding the interpretation and application by the primary end-users of European terminology, namely the national courts, as well as the difficulties encountered by national lawmakers when implementing EU law.

However, it is important to note that legal consistency could be described as "horizontal" too, in relation to the "internal" aspect of the European legal language. This concerns a theme which has remained on the outer margins of the analysis of EU terminology, but which should provide room for reflection.

As noted above, consistency of terminology thus assumes great importance when acts are being drafted (Mateo 2006: 162), but the lack of reference to concepts or categories has the result that an important reference point for the EU lawmaker is the so-called "linguistic precedent": an expression already in use in European law is adopted for the sole purpose of respecting the requirement of linguistic consistency.[24]

The search for consistency therefore is often of a linguistic, rather than legal or conceptual nature, with the effect that the term is "re-used" by the draftsman in contexts which differ from the original one, with the consequent de-contextualisation of the word itself.

This brings about a phenomenon which might be called "nomadic meaning" (Ioriatti Ferrari 2009), namely the use of linguistic expressions which are identical in themselves but which potentially express very different legal concepts, by reference to the context in which they are used. The term, once "re-used", in fact, becomes part of the official "language of the law", the one which is used to draft legislation (Monateri 2006: 193). This means that EU legal terms may have the same linguistic and semantic structure, but a different legal effect with regard to the context in which they are used.

"*Free movement of services"* is an example of these semantic nomadisms within EU private law terminology:

This Community term was coined in the TEU, art. 50 – "*free movement of services"* – and subsequently "reused" in some directives, as well in the well-known Regulation 2001 no. 44 on the jurisdiction recognition and enforcement of judgments in civil and commercial matters. In a decision dated 23 April 2009 (C-533/07, European Court of Justice, 23 April 2009, *Falco Privatstiftung and Thomas Rabitschv Gisela Weller-Lindhorst*) the Court of Justice itself emphasised the diversity of this linguistic expression with respect to the

24 On the term "linguistic precedent" see the contributions of Karen Mc Auliffe (Mc Auliffe 2013, 2008).

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term "*provision of services"* as it has been used in the following provisions: in the view of the Court, "*freedom to provide services*" under art. 50 TEU is a broad concept, the purpose of which is 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 EC Treaty"; differently, "*freedom to provide services*" as adopted in the Community VAT Directives, according to the Court, is a negative definition, since the concept of "provision of services" is defined as any transaction which does not constitute a supply of goods. Finally, by reading the text of the Court decision defining the notion, it is clear that in the context of art. (1) (a) of Regulation 2001 no. 44, "*provision of services*" means the place where the service is provided in order to determine the place of performance of the obligation.

The EU legal taxonomy is currently full of "nomadic meanings". With regard to some of them, the European Court of Justice has provided new definitions and different legal effects, in accordance with the new context and their different meanings and as a consequence the term has been finally consolidated at the EU and national level.

5.4 The definitions contained in art. 2 of the EU acts

For reasons clarified in the first part of this work, neologism is the main technique, or strategy, used by the European legislator to guarantee a correspondence of notions expressed in different languages with the aim to transfer the same legal concepts. As is well known, the legislator who refers to a neologism has the power to impose a new word without the burden of elaborating a definition to specify the aspects of such category (Sacco 1991: 18 ff).

However, the legislator does have other tools available such as definitions which, if included in the EU act, can avoid having to turn to a neologism every time: as already pointed out, in the European context, the common guidelines for the drafting of EU acts assign definition a specific collocation in article 2 of the act. This type of definition has the purpose to attribute a specific content to the concepts of the article, which is sometimes different from the national one. Furthermore, a definition can also facilitate comprehension for European citizens.

Nevertheless, when the European legislator resorts to a definition, it is likely that different operational rules enunciated in the same document contrast with it.

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We witness this situation in the Directive on Consumer rights.[25] Art. 2 point 5 of the Directive defines the "sales contract" as "any contract under which the professional transfers or agrees to transfer the property of goods to the consumer and the consumer pays or undertakes to pay the price, including contracts that have as their object both goods and services".

According to the definition of art. 2, as to the contract of sale the property is transferred by consent, as effect of the agreement of the parties.

However, art. 3 establishes that "good" means any tangible movable item, water, gas and electricity included: in this case, transfer or property does not occur by consent, but after the identification of the quantity of the specific good ("individuazione" under Italian law).

What is implicitly gathered in the document is that the ownership, in this specific case, is transferred when it is identified and not when the consensus is provided by the parties.

Once more, as in the example provided in this article at point a) (*divergence between the title of the EU acts and the contents of the articles)* the indisputable presence of two opposite rules in the EU text will influence its interpretation at the national level.

5.5 Implicit formants ("cryptotypes")

A second, important aspect is worth attention.

If the analysis is extended to the various linguistic versions of the Directive on Consumer rights we notice an asymmetry between the definitions[26] and operational rules in the regulation of the "delivery".

According to the definition, ownership is transferred to the consumer once the contract is concluded.

However, the consumer/buyer, does not have immediate access to the goods at the moment of concluding the contract: art. 18 establishes that, unless otherwise agreed, the consumer-buyer has right to access the goods no longer than thirty days from the conclusion of the contract.

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25 Directive 2011/83/EU of the European Parliament and Council, dated 25th October 2011 regarding consumer rights, containing modification of directive 93/13/CEE of the Council and directive 1999/44/EC of the European Parliament and Council and which abrogates directive 85/577/EEC of the Council and directive 97/7/EC of the European Parliament and Council.

26 In this case we refer to the definition of delivery as in art. 18.

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When defining the "delivery", in paragraph 1 this article introduces a definition with a variable meaning depending on language.

German version

Artikel 18: **Lieferung**

Sofern die Vertragsparteien hinsichtlich des Zeitpunkts der Lieferung nichts anderes vereinbart haben, liefert der Unternehmer die Waren, in dem er **den physischen Besitz an den Waren** oder **die Kontrolleüber die Waren** dem Verbraucher unverzüglich, jedoch nicht später als dreißig Tage nach Vertragsabschluss, überträgt.

English version

Article 18: **Delivery**

Unless the parties have agreed otherwise on the time of delivery, the trader shall deliver the goods by **transferring the physical possession** or **control of the goods** to the consumer without undue delay, but not later than 30 days from the conclusion of the contract.

French version

Article 18: **Livraison**

Sauf si les parties en disposent autrement concernant le moment de la livraison, le professionnel livre les biens en entransférant la **possession physique** ou **le contrôle** au consommateur sans retard injustifié, mais au plus tard trente jours après la conclusion du contrat.

Italian version

Articolo 1**8: Consegna**

Salvo che le parti abbiano concordato altrimenti in merito al termine di consegna, il professionista consegna i beni mediante il **trasferimento del possesso ("transferring of possession")** o **del controllo fisico dei beni** (or "**physical control of the goods")** al consumatore senza indebito ritardo e comunque non oltre trenta giorni dalla conclusione del contratto.

The Italian version is different from all the other versions, as instead of transferring the physical possession or control of the goods the key sentence provides "transferring of possession" or "physical control of the goods".

This version seems the only one admitting that the delivery may be replaced by a legal relationship being agreed between the owner and the buyer by which the buyer obtains indirect possession. This is the so called "constructive delivery"[27] ("costituto possessorio", "Besitzkonstitut").

27 *Constructive delivery*. If the owner is in possession of the object, the delivery may be replaced by a legal relationship being agreed between the owner and the acquirer, by which the latter obtains indirect possession.

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Therefore, according to Italian law the delivery of the goods involves both the concrete transfer of the goods (*physical control of goods*), as well as the legitimate possession (*transfer of possession*). The English, German and French versions are apparently different as the literal meaning seems to leave no space to any concept of delivery besides that of an actual material disposition.[28]

However, when other versions are read in the light of the Italian one it is clear that the "constructive delivery" may be simply implicit: see for example the German version, where the constructive delivery (Besitzkonstitut[29]) is contained in the sentence "die Kontrolleüber die Waren".

When read though the theory of the formants (implicit, cryptotype) the Italian version is not isolated, but the text regarding the constructive delivery is explicit; in the other versions (German) on the other hand, it is simply present as a cryptotype but it becomes visible as soon as the text is set against the Italian one.

The very moment in which the consumer/owner is entitled of his property *right* is apparently different in some language versions and, as a consequence, in some of the Member states.

Why are some concepts implicit in EU law?

A possible explanation might be that legal words have a peculiar tenacity with an ability to achieve stability within a particular legal system. However, in order to achieve this result, language needs ties between words and ideas and these relationships are compromised if the denotation of the concepts is not well established (Sacco 2000). The legal language of the European Union is a melting pot of intrinsic and extrinsic influences and it is not possible to decipher the language through an analysis of the historical dimension of words. However, on the other side, the EU is an area that is characterized by a certain homogeneity from a cultural point of view and the EU text is a rather recent composition and the jurist's knowledge is often supported by similar conceptions. Sometimes there are concepts that are simply implicit.

As noted at the beginning of this work, this is one of the reasons why the multilingual drafting is not always functional to the formulation and transposition of the *rights* enacted at the EU level, under the same conditions and terms, in all the Member States, so as to preserve the substantive equality of EU citizens before European law.

28 English version: «transferring the physical possession or control». French version «en transférant la possession physique ou le contrôle».

29 § 930 BGB *Besitzkonstitut*. Ist der Eigentümerim Besitz der Sache, so kann die Übergabe dadurch ersetzt werden, dass zwischen ihm und dem Erwerberein Rechtsverhältnis vereinbart wird, vermögedessen der Erwerber den mittelbaren Besitzerlangt.

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6 Conclusion

The EU legal order is the product of a specific cultural, historical and ideological context, which aspects are filtered, sometimes implicitly, through its legal process and discourse. Against this background, the task of "translating" black letter or implicit rules into a common system of *rights*, denoting shared legal concepts within the EU legal systems, is the province of legal scholars.

In fulfilling this task, comparative law scholars might find support in other legal sciences. As noted in the first part of this work, the traditional linguistic theory – De Sussurre's structuralism – could help us to imagine EU terminology (which might or might not express the same legal rule in all the language versions of an EU legal act) as a technical language created by social interaction and legitimated by the collective consent of the actors involved in the legislative process.

Furthermore, legal anthropology is an informative experience for one who studies comparative law. A legal anthropologist is confronted by rules that have not been adequately formulated in the very society that applies them. Consequently, if the researcher wishes to explain its findings, he himself must set about formulating these rules using precise concepts expressed in a suitable terminology. Therefore, legal anthropologists are scholars trained to collect data in environments where legal data have to be uncovered or reformulated, as is the case of the EU legal language,[30] searching for what is universe and consistent in all legal orders (Ainsworth 2014: 43).

According to Vivian Grosswald Curran "historically, language and law both have known relentless human aspirations towards a universalist perfection that would eliminate disorder. These continue today" (Grosswald Curran 2006–2012: 23). Universalist claims for EU law and language order at the EU level will soon admit that EU legal language messiness cannot be entirely reduced. However, linguistic, legal anthropology and comparative law methodology can be effective approaches to this problem; this may happen by conveying messiness more accurately (Grosswald Curran 2006–2012: 40).

Therefore, a primary task of scholars dealing with EU legal language is a deeper understanding of the different ways in which concepts and rules are present within the European legal discourse, which do not fit within the traditionally exclusive categories of law or ordinary ways of norm formulation.

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30 Most of the data collected for the above mentioned research (see Ioriatti Ferrari 2013) have been collected by means of questionnaires and interviews, according to the legal anthropology method of analysis.

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Comparative law scholars, particularly, are the "translators" of this multilingual law into a common legal discourse of EU *rights*.

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