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Clear Legal Writing: A Pluridisciplinary Approach  
La clarté rédactionnelle en droit et ses multiples horizons

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## ÉDITORIAL

La clarté rédactionnelle en droit et ses multiples horizons 5  
*Ilaria Cennamo, Agata de Laforcade, Marie-Christine Jullion,*  
*et Diana Saiz Navarro*

La reformulation intratextuelle et ses marqueurs dans les arrêts 19  
de la Cour de justice de l'Union européenne  
*Chiara Preite*

La clarté de la loi obscurcie par le technicisme formel de son écriture 37  
*Hervé Moysan*

Les limites à la clarté rédactionnelle de la loi dans la “dialectique” 49  
entre ordres juridiques. Considérations issues de la pratique éditoriale  
*Suany Mazzitelli*

Qualité et normativité dans la traduction institutionnelle 65  
*Freddie Plassard*

The Challenges of Legal Translation in Multilingual Contexts 83  
*Valentina Jacometti*

Looking for a Consistent Terminology in European Contract Law 103  
*Barbara Pozzo*

Authors 103



# Looking for a Consistent Terminology in European Contract Law

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## ABSTRACT

European Community Law has a multilingual character, which reflects the fact that the European Union is becoming an increasingly multicultural and multilingual entity. Following the accession of the new Member States in May 2004 and of Romania and Bulgaria in January 2007 and, finally, of Croatia in 2013, there are now 24 official languages that create immense difficulties in translating from one language to the others. The multilingual character of EU legislation has urged the creation of a “neutral or descriptive” language in order to forge a supranational terminology that maintains equal distance from each national language. At the same time, legal languages and legal terminologies are and remain profoundly culture-bound and the implementation process of directives are often great challenges in coping with translation issues. The aim of this paper is to investigate how multilingualism impacts on the harmonisation process of European private law.

*Keywords:* EU law; harmonisation; legal translation; multilingualism; terminology.

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## 1. INTRODUCTION

Two important directives saw the light in 2019, which represent the latest evolution of the harmonization process of European contract law that started in 2001: Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, pp. 1-27) and Directive 2019/771 on certain aspects concerning contracts for the sale of goods (OJ L 136, 22.5.2019, pp. 28-50).

These directives offer us the starting point to investigate the results of all the effort, now underway for almost twenty years, to make European contract terminology consistent with the purposes of harmonization.

The problem of harmonising consumer and contract law at EU level, in fact, dates back several years (Basedow 1996, 1169) and has been the centre of interest of Community Institutions as well as of European legal theory during the last decades<sup>1</sup>.

Since the '80s, EU legislation in the field of consumer and contract law has undergone a significant evolution in terms of quantity and of quality (Keirse 2011, 34).

From the first point of view, it is important to underline the various aspects of consumers' contracts that are now regulated by EU legislation<sup>2</sup>.

From the second point of view, it is at the same time important to highlight that this quantitative development has been accompanied by a process of awareness raising towards the creation of a consistent system of law, where the quality of legislation has been put at the core of various initiatives<sup>3</sup>. While during the first part of this evolution, the

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<sup>1</sup> In this perspective we have to place the Preliminary Draft of a European Contract Code based on the work of the Academy of European Private Lawyers of Pavia (Gandolfi 1992, 707), the General Principles of Contract Law of the Lando Commission (Lando 1992, 261), the UNIDROIT Principles (Bonell 1992, 274). On the various issues see Alpa 2007, 3.

<sup>2</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12). Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29). Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59). Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31). Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48) as modified by Directive 90/88 (OJ L 61, 10.3.1990, p. 14) and Directive 98/7 (OJ L 101, 1.4.1998, p. 17). Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19). Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, p. 83).

<sup>3</sup> In 2008 at the Utrecht Conference, the International Academy of Comparative Law has dedicated a whole session to the issue. Compare the general report by Gambaro 2007.

European legislator had taken a “pointilistic” or “piecemeal” approach to harmonisation in the area of contract law (Kötz 1986, 5), more recently the European Commission has taken steps towards a more coherent contract law, working on the development of a consistent European terminology in this field (Pozzo 2003, 754).

These evolutions in quantity and quality, which led to a more stringent Europeanisation of contract law (Somma 2007; Twigg-Flesner 2013, 1; MacQueen 2014, 529), had to cope with the great challenge of translating legal terminologies in the context of European multilingualism, as linguistic diversity is considered a defining feature of European Union law (Pommer 2012, 1241), but – at the same time – the source of numerous practical and theoretical problems (Jacometti e Pozzo 2006; Jacometti and Pozzo 2007).

The purpose of this article is to retrace the main phases of the long process that has characterized these last years, aimed at achieving greater coherence in the context of European contract law.

## 2. DRAFTING EU CONSUMERS, CONTRACT DIRECTIVES IN A MULTILINGUAL CONTEXT: PROBLEMS AND PERSPECTIVES

The problem of harmonizing European contract law has been at the core of various debates. It has been pointed out that there might be several strategic approaches to the issue (Pozzo 2013, 400), and that the choice is not simply a mere neutral or technical issue, but much more a question of power (Mathieu 2012, 1279).

Anyway, limiting our analysis to the boundary of technical linguistic issues, it is important to underline some of the problems in the Community legislators’ use of a particular terminology, that have arisen in the past, when drawing up directives aimed at harmonising consumers’ protection.

While drafting the first EU legislation in the field of consumers’ contracts, the lack of definitions of legal terms at EU level led to the result that they assumed different meanings in the various national systems (Ferreri 2010).

The same basic concept of “contract” was not defined by directives (Graziadei 2007 and 2016). The absence of a clear definition of the boundaries of the notion of “contract” caused e.g. a series of problems in the implementation of the directive on unfair terms.

As pointed out by a distinguished British scholar (Whittaker 2000, 95), among the most insidious types of consumer contracts there are – without doubt – contracts for the supply of electricity, water or gas, in other words: those contracts that need a network-access. This is because, as they might relate to a monopoly, the consumer might have no choice and might even accept the most unfair terms. Therefore, a directive, which deprives unfair terms of any legal effect would be very useful, particularly in contracts with public utilities. However, this can only happen when the legal instrument to gain access to the service network is in fact a “contract”, because when this is not the case according to the individual national legal tradition, the directive does not apply and everything remains exactly as it was before. In reconstructing this problem, it has emerged that in the majority of Member States agreements for the supply of water, electricity and gas, etc., are without doubt contracts, to which Council Directive 93/13/EEC on unfair terms in consumer contracts therefore applies. Anyway, in four Member States the same relationships are certainly not contractual, being governed by administrative law. In two legal systems the legal classification is unclear, and in other two it depends on the circumstances. In all these cases, the Directive does not apply.

A further observation concerns the problem of lack of coherence in the application of terminology within the same language version, or when translated from one language to another. That was particularly true in the first phase of the evolution of a European contract law. In Council Directive 85/577 of 20 December 1985 on the protection of consumers in relation to contracts negotiated away from business premises<sup>4</sup>, for instance, the terminology used was not consistent, even within the same language version. Moreover, the terminology used in the various linguistic versions did not correspond to the meaning generally used at national level.

Article 4 of the directive, in the Italian language version, governs the right of cancellation (*diritto di rescindere*) of the contract by the consumer, not the right of withdrawal (*recesso*)<sup>5</sup>. The concepts *recesso* and

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<sup>4</sup> Now replaced by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, pp. 64-88).

<sup>5</sup> The common remedy of *recesso* is ruled by Article 1373 of the Italian Civil Code, which provides that “If one of the parties has been given the power to withdraw from the

*rescissione* are used as synonyms, even though they are not equivalent in meaning according to the Italian Civil Code.

The French version provided that the consumer had a “right to resile from the effects of the contract” (*son droit de résilier le contrat*), using the terms *résilier* and *renoncer* as if they were equivalent, even though they are not. *Résilier* refers in fact to the possibility of cancelling or withdrawing from a defective contract, while *renoncer* concerns the possibility of renouncing an intention, as in the case when someone renounces or gives up a right to take legal action.

The German version introduced the term *Widerruf*, generally used in the BGB, at least before the 2002 Reform of the law on obligations (*Schuldrechtsmodernisierung*)<sup>6</sup>, to indicate the revocation of a unilateral act, for example an offer, but certainly not to indicate a contract. This imprecise use of the term *Widerruf* needed to be considered even more confusing in the light of the fact that in the German version of the directive the term *Rücktritt* was used, as if they were synonymous.

The English version employed the following expressions without differentiation: “to assess the obligations arising under the contract”, “right of cancellation”, “right to renounce the effects of his undertaking”, “right of renunciation”.

This internal incoherence, within the same language version, is compounded by translations that multiply its effect and by the implementation process that might add further fragmentation.

### 3. IMPLEMENTING THE EU TERMINOLOGY IN THE VARIOUS NATIONAL LEGAL SYSTEMS: A QUESTION OF DIFFERENT LEGAL MENTALITIES

Regardless of the terminology used, it is further necessary to dwell on the fact that, during the process of implementing the directives, various factors may intervene which may have an additional fragmentation effect (Graziadei 2016, 83).

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contract, such power can be exercised so long as there has been non commencement of performance. In contracts for continuous or periodic performance, such power can also be subsequently exercised, but the withdrawal has no effect as to performance already made or in course [...]”.

<sup>6</sup> The law reforming the law of obligations in the German BGB was released in 2001: Gesetz zur Modernisierung des Schuldrechts vom 26. November 2001 (BGBl. I Seite 3138). For a Commentary see Dörner und Staudinger 2002.

The experience so far shows that the implementation of European directives in the various national legal systems has followed different paths that depend from various factors<sup>7</sup>. First, we have to bear in mind that according to Article 288 TFEU, a directive is “[...] binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. Directives specify a *result* to be achieved, but Member States are free to choose the appropriate ‘form and methods’ for this. Domestic laws do not take the text of directives word-for-word, and the terminology used in a particular directive does not need to be wholly adopted by national legislations<sup>8</sup>. The Court of Justice has confirmed that the use of terminology which differs from a directive, but which does not produce a substantive departure is permissible<sup>9</sup>.

Further, the underlying reasons for different attitudes towards the implementation of EU directives may reside in the different legal mentality that each national system reflects. The centrality of the Civil Code in building a coherent system of concepts felt more in one system than in others, the will of presenting the own code as a model for whole Europe, the particular criteria of legal interpretation developed in one country.

The French legal doctrine has for example emphasized that the national legislator while implementing European directives on consumers’ protection was influenced by the fact that, generally speaking, a national legislation had preceded the European legislation. Not only: French legislation seemed sometimes even the source of inspiration of the European discipline. For these reasons, it is therefore not surprising that the French legislator has tried to maintain or even to grow its lexical and conceptual heritage, both for technical reasons, but also for political motives, as the two sets of reasons are closely linked (Mathieu 2012, 1280).

A different approach was taken by the Spanish legislation, where most part of the legal system is a direct and immediate consequence of the transposition of directives. Spanish scholars have pointed out that

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<sup>7</sup> On these problematics see the Special Issue of the *European Review of Private Law (ERPL)* dedicated to *The Impact of Multilingualism on the Harmonization of European Private Law* (Pozzo 2012b); see further Pasa, Rossi, e Weitenberg 2007.

<sup>8</sup> As recalled by Christian Twigg-Flesner (2012, 1369).

<sup>9</sup> Case 283/81, Judgment of the Court of 6 October 1982, S.r.l. CILFIT and Lanificio di Gavardo S.p.A. v. Ministry of Health. Reference for a preliminary ruling: Corte Suprema di Cassazione – Italy.

the implementation of directives in the field of consumers' protection has taken place without a process of much thought or previous integration (Alvarez Lata 2012, 1305). Further, the European directives have become the source of many legal terms and sometimes, of the basic concepts of the Spanish consumer protection law. But on other occasions, the pre-existence of legal categories in the Spanish legal system at the time of the implementation of European directives has either asked an *adaptation* or an *adjustment* of the use or even a real change in the meaning that the category had had so far (Alvarez Lata 2012, 1307).

In many Member States, like France, Spain, Italy and Belgium, the transposition of European directives into national laws has taken place outside the Civil Code. This choice is not without impact on the quest of a coherent system of concepts at national level, because it may give rise to a series of separated conceptual systems not necessarily integrated together, or even in contrast one to the other. The implementation of EU directives has distorted the national terminologies, while the meaning of traditional civil law concepts is no longer respected in the field of consumer law (Cauffmann 2012, 1351). In France, the consumer law has been the object of a separate codification process, the *Code de la consommation*, launched in the 1990s. Such a move was motivated by the need to order the legal norms to facilitate their use and accessibility to the citizen. The aim of this codification was therefore to bring together, in one document, the texts on a particular subject, not necessarily using the same terminology of the *Code civil*.

In Spain, the transposition of European directives into national law has been carried out by enacting special laws, which have coexisted with a general law on consumer protection: the basic national consumer law, *Ley 26/1984, General para la Protección de los Consumidores y Usuarios* (Alvarez Lata 2012, 1309).

In Italy, the consumer protection legislation of European origin was collected and organized into a consolidated Act called *Codice del Consumo* (Consumer Code)<sup>10</sup>. The Consumer Code was initially considered a milestone in the consumer protection legislation in Italy, because it was aimed to give order in a field where previously special laws were adopted from time to time, without coordination, mostly to implement EU directives. Anyway, more recent directives have not yet been introduced in the Consumer Code, and all legislation with reference to

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<sup>10</sup> Legislative Decree nr. 206, dated 6 September 2005, in force since 23 October 2005.

the electronic document has been introduced in a separate special legislation<sup>11</sup>, giving rise to a new fragmentation of the system.

The German attitude towards the implementation of European directives has been somewhat different. Here the system has relied on the centrality of the *Bürgerliches Gesetzbuch*, the German Civil Code, in building a coherent system of concepts more than others (Rott 2012, 1353). It has often been underlined that the attempt to rationalize German civil law was done in the face of the numerous innovations introduced by European directives into the law of consumers' contracts (Remien 2001, 101).

From an historical perspective, it must be recalled that in terms of integration of EU consumer law in German private law, two phases may be distinguished. The first corresponding to the period until 2001, when directives were implemented by way of special legislation<sup>12</sup> outside the German Civil Code. The second that corresponds to the period after the enactment of the *Schuldrechtsreform*<sup>13</sup>, the Reform of the Law of Obligations, that modified the Second Book of the BGB, in order to introduce most special legislation into the Civil Code (Rott 2012, 1354).

We might say that in the first phase German private law doctrine was very careful in pointing out the conceptual and terminological inconsistencies of the terminology used in the directives, while the German legislator did little to determine or clarify doctrinal concepts (Rott 2012, 1356). So it was only with the implementation of the Distance Selling Directive 97/7/EC that the legislator began to conceptualise consumer law by establishing a first set of common rules for the various rights of withdrawal that were enshrined in EU consumer law at the time (Rott 2001, 78; von Koppenfels 2001, 1360).

The *Schuldrechtsreform* of 1991 changed this approach and introduced the most important pieces of legislation into the BGB in a more coherent way, taking care of the terminological issues involved, in order

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<sup>11</sup> The EU legislation on the electronic document has been introduced in Italy by Decree of the President of the Republic of 28 December 2000 nr. 445 and by the Legislative Decree of 7 March 2005 nr. 82.

<sup>12</sup> Like for example the Doorstep Selling Act of 1986 (*Haustürwiderrufgesetz*; HausTWG), the Consumer Credit Act (*Verbraucherkreditgesetz*; VerbrKrG); the Time-sharing Act of 1996 (*Teilzeitwohnrechtegesetz*; TzWrG) and the Distance Selling Act of 2000 (*Fernabsatzgesetz*; FernAbsG).

<sup>13</sup> On the relationship between the German Reform of the Law of Obligations and EU law, compare Schulte-Nölke und Schulze 2001.

to reinstate the centrality of the German Civil Code in creating a coherent set of concepts valid for all German private law.

The German Reform acted at different levels. It implemented the Consumer Sales Directive 1999/44/EC introducing the relevant norms into the BGB. Further, the Doorstep Selling Act, the Consumer Credit Act, the Timesharing Act, and the Distance Selling Act were all repealed and their substantive law provisions were transferred to the BGB as well. The Reform also introduced the discipline on general contract terms (*Allgemeine Geschäftsbedingungen*) in a special chapter of the Second Book<sup>14</sup>.

At the same time, the legislator tried to clarify central concepts of consumers' contracts in the light of the European legislation. In particular § 355 of the BGB now disciplines in a general way the right of withdrawal of the consumer (*Widerrufsrecht*), establishing that in the consumers' contracts (*Verbraucherverträgen*) the consumer who exercised the right to withdraw her declaration in the terms provided by the law should no longer be bound by the contract already closed<sup>15</sup>. On the other side, with the Reform a new definition of "consumer" (*Verbraucher*) has been introduced in the General Part of the BGB at § 13<sup>16</sup>.

The main aim of the Reform was then to put in line the BGB with the European *acquis* and at the same time to exert influence on the future development of contract law at EU level<sup>17</sup>.

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<sup>14</sup> Buch 2 – Schuldverhältnisse, Abschnitt 2. Gestaltung rechtsgeschäftlicher Schuldverhältnisse durch Allgemeine Geschäftsbedingungen (§§ 305 ff).

<sup>15</sup> § 355 Widerrufsrecht bei Verbraucherverträgen: "(1) Wird einem Verbraucher durch Gesetz ein Widerrufsrecht nach dieser Vorschrift eingeräumt, so sind der Verbraucher und der Unternehmer an ihre auf den Abschluss des Vertrags gerichteten Willenserklärungen nicht mehr gebunden, wenn der Verbraucher seine Willenserklärung fristgerecht widerrufen hat. Der Widerruf erfolgt durch Erklärung gegenüber dem Unternehmer. Aus der Erklärung muss der Entschluss des Verbrauchers zum Widerruf des Vertrags eindeutig hervorgehen. Der Widerruf muss keine Begründung enthalten. Zur Fristwahrung genügt die rechtzeitige Absendung des Widerrufs.

(2) Die Widerrufsfrist beträgt 14 Tage. Sie beginnt mit Vertragsschluss, soweit nichts anderes bestimmt ist.

(3) Im Falle des Widerrufs sind die empfangenen Leistungen unverzüglich zurückzugewähren. Bestimmt das Gesetz eine Höchstfrist für die Rückgewähr, so beginnt diese für den Unternehmer mit dem Zugang und für den Verbraucher mit der Abgabe der Widerrufserklärung. Ein Verbraucher wahrt diese Frist durch die rechtzeitige Absendung der Waren. Der Unternehmer trägt bei Widerruf die Gefahr der Rücksendung der Waren".

<sup>16</sup> § 13 Verbraucher: "Verbraucher ist jede natürliche Person, die ein Rechtsgeschäft zu Zwecken abschließt, die überwiegend weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden können".

<sup>17</sup> See, in particular (the former Minister of Justice) Däubler-Gmelin 2001, 2281.

Not surprisingly (Riesenhuber 2011, 117) a very different approach has been taken by the British legal system, where no coherent codification of the law, nor of English consumer law has been adopted in the past (Twigg-Flesner 2012, 1369).

Measures were adopted to deal with specific problems, and there were few statutes, which were of wider application. Also the Consumer Protection Act 1987, despite its promising title, only dealt with three broad aspects of consumer law: product liability, pricing, and product safety. As there was not one single statute on consumer law, there was no coherent terminology in the field of consumer law either (Twigg-Flesner 2012, 1369).

Analysing the implementation of EU directives in the UK, we also need to bear in mind that most directives dealt with areas in respect of which there was no pre-existing domestic legislation, unlike what happened in other European countries. As a matter of fact, the implementation of directives was often done by adopting free-standing secondary legislation, while in a few rare instances was existing legislation amended in order to align it with the requirements of a particular directive. So from the outset, the conditions for uncovering the widespread infiltration of EU terminology into the domestic private law would seem to be unfavourable (Twigg-Flesner 2012, 1370).

In order to explore the possible impact of EU terminology on English legal terminology in the field of consumer law, it is necessary to consider various different situations. In particular it is important to analyse if the transposition of a directive has been done through free-standing legislation, or if the transposition of a directive has been reached by amending existing legislation (Twigg-Flesner 2012, 1371).

In most cases, directives have been implemented through regulations which often do little more than copy-out the text of the directive (Twigg-Flesner 2012, 1371).

In fewer cases, the UK implemented EU directives through the amendment of previous existent regulation (Twigg-Flesner 2012, 1373).

One example may be taken from the implementation process of the Consumer Sales Directive (99/44/EC)<sup>18</sup>. This Directive, covered ground already largely dealt with in the Sale of Goods Act 1979, except for the remedies of repair, replacement and price reduction. These were required to be introduced by Article 3 of the directive, so

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<sup>18</sup> For a detailed discussion, see Bradgate and Twigg-Flesner 2003.

when it came to transpose the Directive, there was a choice whether to follow the approach adopted in respect of the Unfair Terms Directive, or whether to amend the existing legislation, or whether to go further and introduce a separate Act on consumer sales contracts. The government decided to amend the Sale of Goods Act to the extent that it was necessary to bring it into line with the requirements of the Directive, which meant retaining the satisfactory quality test, and introducing the remedial scheme from Article 3 into a separate part of the Act. The latter, in particular, has been the subject of considerable criticism, partly because it resulted in a very complex set of remedies for English consumers,<sup>19</sup> but also because it meant that there was a clash between different types of terminology. The Law Commission was asked to suggest how the existing remedies and those from the Directive could be combined more successfully,<sup>20</sup> but as yet, no legislation to put this into effect has been put forward. However, it was felt that the “satisfactory quality” test was clearer than the notion of “conformity with the contract”, already familiar to English consumers, traders and lawyers, and that it would be preferable to retain it rather than move to using the terminology from the Directive across the Board. (Twigg-Flesner 2012, 1373)

Finally, it is necessary to consider how the English courts have interpreted and applied the terminology in domestic legislation giving effect to EU directives (Twigg-Flesner 2012, 1374). English courts had to cope with various situations. The first concerns the case when some of the terminology used in domestic legislation adopted specifically to transpose a directive might already have been used in other contexts, and therefore have a “pre-loaded” meaning. The secondly refers to the case when domestic legislation uses a new terminology not previously used in English law. And finally, there is the case where existing legislation was regarded as sufficient to reflect the requirements of a directive, it might nevertheless be necessary to reconsider the established interpretation of certain terms.

The implication of this is that when one translates from this “English”, it is primarily necessary to comprehend which institution is concealed behind the term, which often will not have any correspondent under common law, but which could indicate an institution of civil law. In consideration of this difficulty, it will then be necessary to translate into other languages, within which it will be necessary to find a functional corresponding term. In view of the purposes of this new termi-

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<sup>19</sup> Davidson Review, Final Report (BERR, 2006).

<sup>20</sup> Law Commission, Consumer Remedies for Faulty Goods (London, 2009).

nology, created at a European level to facilitate harmonization of the law, this correspondence must subsequently be tested in relation to the other languages, in the context of a “circular” and not purely “bilateral” logic.

The challenges that a legal translation raises in respect of this new *lingua franca*, fashioned for the purposes of the harmonization of European law, are therefore multiple.

#### 4. THE INITIATIVES TAKEN BY THE EUROPEAN INSTITUTIONS TO DEVELOP A CONSISTENT TERMINOLOGY IN THE FIELD OF CONTRACT LAW: THE DRAFT COMMON FRAME OF REFERENCE

As already mentioned, since the '80s, the European Institutions<sup>21</sup> have underlined how harmonisation of certain sectors of private law was essential to the completion of the internal market. Various initiatives were launched to harmonise consumer and contract law that include EU directives, regulations, action plans, and green papers (Amato 2012, 1).

A significant step forward has been taken by the Commission with the Communication on European Contract Law of July 2001<sup>22</sup>, which launched a process of consultation and discussion about the way in which problems resulting from divergences between national contract laws in the EU should be dealt with at the European level.

The Communication of 2001 was for the first time underlying the importance of reaching a common terminology in European contract law, as different terms and concepts may create an obstacle in reaching harmonized results<sup>23</sup>.

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<sup>21</sup> See e.g. the Resolution of the European Parliament on action to bring into line the private law of the Member States (OJ C 158, 28.6.1989, p. 400); Resolution of the European Parliament on the harmonization of certain sectors of the private law of Member States (OJ C 205, 25.07.1994, p. 518).

<sup>22</sup> COM (2001) 389 def., Brussels, 11.07.2001.

<sup>23</sup> In particular, the Communication was stating that “Using abstract terms in EC law can also cause problems for implementing and applying EC law and national measures in a non-uniform way. Abstract terms may represent a legal concept for which there are different rules in each national body of law”. As a matter of fact “Differences between provisions in directives can be explained by differences in the problems which those directives seek to solve. One cannot, therefore, require that a term used to solve one problem is interpreted and applied in precisely the same manner in a different context. However, differences in terms and concepts that cannot be explained by differences

In a further Communication of 2003<sup>24</sup>, the Commission was launching an Action Plan for a more coherent European contract law. The Commission subsequently financed the work of an international academic network, which carried out the preparatory legal research. This research work was finalised at the end of 2008 and led to the publication of the Draft Common Frame of Reference (von Bar, Clive, and Schulte-Nölke 2009) as an academic text. In parallel to this, analytical work was also carried out by the *Association Henri Capitant des solutions Amis de la Culture Juridique Française* and the *Société de Législation Comparée* drafting the *Principes Contractuels Communs* (Fauvarque-Cosson and Mazeaud 2008; Pozzo 2013, 400).

As part of its Action Plan, the Commission financed a Union-wide academic project to elaborate a Common Frame of Reference (CFR)<sup>25</sup>, with a view to providing best in terms of common terminology and rules, by defining fundamental concepts and abstract terms such as “contract” or “damage”. Anyway, we need to recall that the DCFR goes beyond contract law and covers most of private law including tort, unjustified enrichment, trusts and personal property (Eidenmüller *et al.* 2008, 659; Micklitz and Cafaggi 2010).

In this search, the best concept or the best rule could be found either in one or more of the existing legal systems or only in the “wishful thinking” of the drafters, while not necessarily having to coincide with the most popular one in the European legal cultures examined (Marchetti 2012, 1265).

The choice of defining the concept of contract in the DCFR<sup>26</sup>, for example, has to be considered an epochal change compared to other

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in the problems being addressed should be eliminated”. The Communication was further specifying that “domestic legislation adopted by Member States to implement EC directives refers to domestic concepts of these abstract terms. These concepts vary significantly from one Member State to another. The absence of a uniform understanding in EC law of general terms and concepts at least in specific or linked areas may lead to different results in commercial and legal practice in different Member States”.

<sup>24</sup> 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.

<sup>25</sup> Communication from the Commission to the European Parliament and the Council: *European Contract Law and the revision of the acquis: the way forward*, Brussels, 11.10.2004, COM (2004) 651 final.

<sup>26</sup> See Art. II.-1:101: “Meaning of ‘contract’ and ‘juridical act’: (1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act”.

soft law documents like the UNIDROIT Principles<sup>27</sup> or the Principles of European Contract Law (PECL)<sup>28</sup>, where no such definition can be found. The decision not to define the concept of contract in the PECL was based on the intention to be as neutral as possible with regard to the various legal traditions European national systems. Art. 2:101 of the PECL defines the ways in which the contract, which is nowhere expressly defined, is to be concluded<sup>29</sup>, but no further element is required in order to consider a contract binding<sup>30</sup>.

On the contrary, the choice made in the DCFR was that of offering an autonomous definition of contract, independent of any national legal context. The DCFR avoids any list of requirements needed for the formation of contract, while focusing on the condition without which the contract cannot exist, that is to say the “agreement”, or: a “bilateral or multilateral juridical act”<sup>31</sup>.

A peculiar feature of the DCFR was the list of definitions added in the Annex at the end of the code. The DCFR is the first of the European soft law codes to provide a comprehensive list of definitions clarifying the meaning of the legal terms used by the Study Group. It is precisely this feature that witnesses more than any other the very purpose of the DCFR: the setting of a new widespread and comprehensive system of terminology and taxonomy (Marchetti 2012, 1265).

From a linguistic perspective, some observations seem appropriate.

The Study Group avoided “legalese and technicalities drawn from any one legal system”, favouring the emergence of a new *lingua franca*. Since the emerging European legal order is multilingual, the drafters

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<sup>27</sup> UNIDROIT Principles of International Commercial Contracts (UPICC). Vogennauer 2015.

<sup>28</sup> Lando and Beale 2000.

<sup>29</sup> Art. 2:101: “Conditions for the Conclusion of a Contract

(1) A contract is concluded if:

(a) the parties intend to be legally bound, and  
(b) they reach a sufficient agreement without any further requirement.

(2) A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses”.

<sup>30</sup> Marchetti 2012, 1265.

<sup>31</sup> This choice hence differing from the example of some national codifications such as the Italian or the French one, where in contrast the definition of contract was meant to precisely identify all necessary requirements for its formation. See Art. 1321 and Art. 1325 of the Italian Civil Code and Art. 1101 and Art. 1108 of the C. Nap., as explained, for the Italian readers, by Sacco 2004, 55.

made painstaking efforts to create a neutral language void of legalese and technicalities that could be “readily translated without carrying unwanted baggage with it”<sup>32</sup>. For this reason, terms such as “recission”, “tort” and “delict” are avoided and replaced by descriptive paraphrases. For instance, torts (delicts) are described as “non-contractual liability arising out of damage caused to another”. The injured party is referred to as “a person who has suffered legally relevant damage” and the tort-feasor as “a person who caused the damage” (VI.-1:01). For greater concision, neologisms have been created whenever possible, some of which are descriptive, others literal translations. For example, the rule on *force majeure* is called “event beyond control” (VI.-5:302), the German *Rücktritt* is “unilateral withdrawal”, and *Rechtsgeschäft* is “juridical act” (II.-1:101). Latin phrases are also avoided. For instance, instead of using the usual Latin term *negotiorum gestio*, the civilian institution *Geschäftsführung ohne Auftrag* is called “benevolent intervention in another’s affairs” (Book V).

It is further necessary to underline that, although the DCFR was drafted in English, ‘this’ English is different from the one that expresses the concepts of the common law.

In the context of the DCFR, English becomes a neutral or descriptive language, which is associated with a classic civil law background. As such, it no longer transposes common law concepts (nor those of another specific legal order, historically given), but rather those of an emerging legal order, the European legal system, which is greatly influenced by the various cultural and legal backgrounds of the Member States (Pozzo 2015, 73).

A British Assessment of the language of the DCFR confirms that the drafters have generally managed “to express its rules in terminology which is comprehensible in English but which is not too tied to the technical concepts of English law itself”. Nonetheless, despite the neutral, descriptive language of the DCFR, the Assessment remarks that “some significant problems of terminology” remain, which “will become apparent in the translation of the CFR into all the official languages of the EU” (Whittaker 2008, 102).

Some scholars have questioned how a ‘harmonised’ form of law ensures the preservation of cultural and linguistic diversity (Sefton-Green 2006; Wilhelmsson, Paunio, and Pohjolainen 2007). The approach of the DCFR is that diversity is respected by ensuring the

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<sup>32</sup> Introduction to the DCFR, pp. 29 ff.

participation on an equal footing of lawyers from all European legal cultures and by the attempt to reflect all legal systems of the EU Member States<sup>33</sup>. Linguistic diversity is respected by ensuring that the DCFR is translated into as many European languages as possible (Giliker 2013, 23), although it is questionable how easy it would be to translate such a document accurately into the twenty-three languages of the European Union (Pozzo 2016, 156). Translation from Community English appears to be a new and largely unexplored continent, also since it is just now emerging and its boundaries are as yet undefined (Pozzo 2012a, 156).

With regard to this phenomenon certain observations can be made that highlight new problems to be resolved. Primarily legal translation problems are no longer the classic ones, which a comparative scholar generally deals with on translating a term from one language to another, in consideration of various difficulties in the standardization of a concept or institution between one legal order or another. Translations in a multilingual context must pursue the same purposes as the multilingual legislation and in particular that of the harmonization of law. The problem does not arise in respect of translation between one language and another, but rather between the 23 official languages and English, which has to some extent been reinvented precisely so that it can act as a go-between. In other words: the intent is that of formulating a law in English, which when translated into the 22 other official languages produces the same result – once transposed in the 27 Member States. This is no easy feat.

## 5. THE PROPOSAL FOR A COMMON EUROPEAN SALES LAW (CESL)

The final Draft Common Frame of Reference (DCFR)<sup>34</sup> was finally approved and published in 2009 (von Bar, Clive, and Schulte-Nölke 2009), with a dual purpose. First, it was intended to serve as a tool for improving the *acquis* by providing clear definitions of legal terms, fundamental principles and coherent model rules of contract law which draw on the existing *acquis* and best solutions found in the legal systems of the Member States. Second, it was said that the DCFR could serve as the basis for an optional instrument on European Contract Law (Schulze and Wilhelmsson 2008, 154; Adar and Sirena 2013, 1).

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<sup>33</sup> DCFR, Introduction, § 19.

<sup>34</sup> Available at: [ec.europa.eu/justice/policies/civil/docs/dcfr\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf).

Indeed, the initial Proposal for a Common European Sales Law (CESL), published by the Commission in 2011 in the form of a regulation<sup>35</sup>, was aimed at introducing an optional regime with a uniform set of contract rules for the cross-border sale of goods between businesses and consumers<sup>36</sup>.

The CESL draws heavily on the Draft Common Frame of Reference, both in content and style. Though the Draft Common Frame of Reference was intended as the starting point for a European law of obligations, it was first and foremost an academic text<sup>37</sup>. This had two consequences: first, it was designed for a different, broader purpose; second, it was somewhat cumbersome and far from user-friendly (Giliker 2013, 23). The CESL has been the subject of a heavy debate among academics, but also among politicians and Member States (Schulze 2012). Among the critiques that were raised on the CESL we find the little attractiveness among users. During the discussions that followed the publication of the Proposal, it was noted that it was considered particularly important in consumer transactions that disputes should end up being resolved outside the courts.

As pointed out by Pauliine Koskelo, President of the Supreme Court of Finland:

Having to seek redress through the courts is in most cases not a good option. Quite often it is no realistic option at all. In order to facilitate redress and the settlement of disputes without recourse to the court system, the applicable rules need to be sufficiently clear and precise. Rules that are vague or otherwise formulated in general terms leave plenty of room for different interpretations. Such rules are generally not a good or sufficient basis on which the parties to a dispute can reach a solution without recourse to some independent body. The need for sufficiently clear and precise rules carries with it the downside that the rules, being rather detailed and comprehensive, also become numerous and seemingly complicated.

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<sup>35</sup> COM (2011) 635 final, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. The CESL is based largely on the DCFR and the Feasibility Study completed in May 2011 and available at: [http://ec.europa.eu/justice/contract/files/feasibility\\_study\\_final.pdf](http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf).

<sup>36</sup> The Proposal for a Common European Sales Law (CESL) has been withdrawn in December 2014.

<sup>37</sup> The Proposal for a Common European Sales Law: The Way Forward, WORKSHOP with the participation of EU National Parliaments Wednesday. Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs Legal Affairs, 10 July 2013 JAN 4 Q 1, PE 474.401.

The CESL is one example of this dilemma, known to anyone involved in legislative activity. The voluminous and rather complicated appearance of the CESL is a consequence of the necessary ambition of providing a clear and precise set of rules that broadly covers the range of issues that may arise in a contractual relationship. While the degree of coverage and detail is both intended and needed in order to ensure the usefulness of the rules, the impression of volume and intricacy in the CESL may also hamper its attractiveness among users. (Koskelo 2013, 8)

One of the primary aim of CESL was in particular to address the changes brought about by digital technologies, dealing with information obligations, incorporation of standard terms, unfair terms, non-conformity and remedies.

Notwithstanding a general appreciation of the Commission's proposal from the side of the European Parliament, it soon became clear that the Regulation proposal would not make it in Council.

In 2014, the Juncker Commission finally withdrew the Regulation Proposal for a Common European Sales Law (CESL), determining the end of the long-lasting dream to harmonize European contract law (Savin 2019, 19).

## 6. THE NEW DIRECTIVES ON DIGITAL CONTENT

After the withdrawal of CESL, the Commission presented two new directives proposals<sup>38</sup>, in line with the Digital Single Market Strategy of 2015<sup>39</sup>, which was expressly dealing with the harmonisation of private law relating to consumers.

Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services<sup>40</sup> and Directive 2019/771

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<sup>38</sup> Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, Brussels, 9.12.2015 COM (2015) 634 final. Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, Brussels, 9.12.2015 COM (2015) 635 final.

<sup>39</sup> A Digital Single Market Strategy for Europe, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 6.5.2015, COM (2015) 192 final.

<sup>40</sup> OJ L 136, 22.5.2019, pp. 1-27.

on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC<sup>41</sup> were both published in May 2019.

Despite the long process that should have led to greater awareness on the importance of a consistent terminology for achieving harmonization of contracts in this area, the two directives that have been promulgated in 2019, still use definitions that are very problematic as far as achieving this goal.

Let's take the example of the pivotal definition introduced in Article 2 (5) that in English is expressed with the term "trader", which refers to "any natural or legal person, irrespective of whether privately or publicly owned, that is acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft, or profession, in relation to contracts covered by this Directive".

This concept has been translated in the various official languages with very heterogeneous terms, like *professionel* in French, *Unternehmer* in German, *operatore economico* in Italian, *empresario* in Spanish and *profissional* in Portuguese.

The same difficulty in trying to find a consistent terminology could be said for the *remedies for lack of conformity* (Art. 14), that are translated with:

- *Mezzi di ricorso per difetto di conformità* in Italian;
- *Recours pour défaut de conformité* in French;
- *Medidas correctoras por falta de conformidad* in Spanish;
- *Abhilfen bei Vertragswidrigkeit* in German;
- *Meios de ressarcimento em caso de falta de conformidade* in Portuguese.

Only time will tell if these terms during the implementation process will lead to a harmonized interpretation.

## 7. CONCLUSIONS

The precision of legal terminology and the clearness of legal rules are important under various aspects. Intelligible and accessible rules favor access by non-technicians and especially by the ordinary citizens to the law, it enhances certainty and foreseeability of decisions and it is a neces-

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<sup>41</sup> OJ L 136, 22.5.2019, pp. 28-50.

sary pre-condition in the creation of a harmonized legal framework in the context of European legal and linguistic diversity (Mathieu 2012, 1277).

However, the yearning for clarity and intelligibility in the area of contract law had to confront the complexity deriving from multilingualism, the founding principle of the European legal system.

The various initiatives implemented by the European institutions have led to the first results, like the Draft Common Frame of Reference. However, the road ahead still seems long and full of pitfalls.

Beyond the political initiatives, it would probably be necessary to invest in cultural policies inclined to develop a greater awareness of the concrete problems present in this context.

This could be achieved through the introduction of specific interdisciplinary university courses that would allow national lawyers to better understand the issues related to the expression of European law in the various official languages.

The study of law at national level is unfortunately still too often anchored to ancient archetypes, which do not allow to meet the challenges of today's world. Few countries still offer their students the opportunity to attend comparative law courses that would allow them to understand the deep reasons for the differences between European legal systems and – of consequences – to understand the difficulties that legal translation presents.

For this reason, more than relying only on political initiatives, it would be necessary to develop a more careful evaluation of the task that universities could carry out in laying the foundations of a legal system that, while respecting linguistic and cultural differences, could properly be defined as European.

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