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EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

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Old Terms for New Concepts in Consumer Contracts?

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European Legal Integration: The New Italian Scholarship (ELINIS)

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship*. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

--J. H.H. Weiler

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Old Terms for New Concepts in Consumer Contracts?

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Abstract

This Article deals with the many and varied meanings attributed to legal terms within the European legal system. The phenomenon should not be a cause for complacency. The broader the ambit of application which a term has, the greater the number of different legal translations there are, which become accepted in spite of their lack of precision and their inconsistency, and the more local variants in interpretation will develop, becoming consolidated over time.

As some comparison exercises in the field of consumer contracts will illustrate, when the chosen term for a European legal text comes from one of the national languages (as happens in the majority of cases), its meaning, no longer rooted in its original national culture, will be obscured. The jurist will then work together with an expert in terminology, to identify equivalences or ambiguities.

Summary:

- A. Multilingualism and Harmonisation
- B. Law, Language and Terminology
- C. Community Legal Texts drafted in more than one language and transposition
- D. Impact of Community legislation on domestic rules of contract: diatopic variation in the same language
- E. Old terms for new concepts? Some illustrations
- F. Concluding remarks

A. Multilingualism and Harmonisation

The attention of 21st-century jurists is inexorably drawn towards an awareness of the law of other jurisdictions and consequently we need to explore linguistic variation in some depth: both academic and practising lawyers encounter translation problems more and more frequently, difficulties which arise from the lack of equivalence at a conceptual level, of terminology belonging to different legal systems. Jurists are having to come to terms with semantic analysis (not their usual forum) to identify translating terms. They are coming up against different interpretative canons, which are characteristic of the multilingual global context¹. The jurists cannot, in the end, remain aloof from the “language of law”, a language which takes lexis and syntax from the ordinary one (i.e. which is not specialized or technical), transforms some elements and adds certain specific technical terms to it (*estoppel*, *chattels*, *anatocismo*, *Rechtsgeschäfts*, *vecindad civil*, etc.). However, the difficulties which jurists meet are legion. The spoken and written language in a particular part of the globe is familiar with multiple conceptual systems within it; there are meanings common to more than one language and

¹ On this issue, see the Conference held at Como, 15-16 April 2005, “*Le politiche linguistiche delle istituzioni comunitarie dopo l’allargamento/The Language Policies of EU Institutions after the Enlargement*”. The Conference dealt with drafting and translation policies related to multilingual juridical texts adopted by the European institutions (Commission, Council, Parliament, European Court of Justice -ECJ-, European Central Bank), and with their impact on the harmonisation of EU law after last Enlargement. The reports were published in V. Jacometti, B. Pozzo, “*Le politiche linguistiche delle istituzioni comunitarie dopo l’allargamento. Redazione, traduzione e interpretazione degli atti giuridici comunitari e il loro impatto sull’armonizzazione del diritto europeo*”, edited by B. Pozzo, *Le lingue del diritto*, Milano, 2006. See also the Conference held at Trento, 10-11 March 2006; the reports were published by E. Ioriatti Ferrari, “*La traduzione del diritto comunitario ed europeo: riflessioni metodologiche. Atti del Convegno (Trento, 10-11 marzo 2006)*”, Trento, 2007. For a brief introduction to what the “language of law” is, in Italian see A. Belvedere, “Linguaggio giuridico”, *Digesto civ.*, XI, Torino, 1995, pp. 21 ff.

divergent meanings within the same language; legal terms are at times untranslatable, or can only be translated by having recourse to neologisms. Moreover, languages are in a constant state of flux, and borrowings and changes in meaning are both natural and beneficial. In the course of studying changes in European legal language, jurists have begun a dialogue with linguists, experts in terminology and translators. Their action is all the more urgent because the dogma of the (alleged) neutrality of legal language understood as being exclusively in the technical-scientific domain – is being demoted as an idea, and is ceding ground to the unveiling of hidden political and economic strategies.

The language regime of the European Union, and its impact on the working of the internal market are among the themes that are enlivening the current debate². There are many contexts in which these fundamental issues are involved: *a*) multilingualism as an organising principle of the EU and the sources of the European language regime (Community Treaties and Regulations, including the internal rules of each of the European institutions); *b*) multilingualism and the problems of interpretation which are confronting the European Court of Justice (the reasoning adopted in the opinions of the ECJ when giving judgment is well-known, from the *Kerry Milk, Rockfon, EMU Tabac, Cilfit* cases, to the *Kraaijeveld* case) as is that of the Tribunal of First Instance (the *Kik* case)³; *c*) multilingualism and its impact on national laws governing the use of foreign languages or language in general (for instance, the rules on misleading advertising or product labelling, for the safety of food products, cosmetics, etc); *d*) multilingualism and Community legal texts, and the impact on national implementing legislation. This latter aspect will be explored in these brief notes.

² Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *A New Framework Strategy For Multilingualism*, Brussels, 22.11.2005, COM (2005) 596.

³ Cf. respectively the ECJ decisions: C-80/76, C-449/93, C-283/81, C-72/95 and the decision of the Court of First Instance: T-107/94. From the *Kraaijeveld* case, see paragraph 25: “As regards the reference to the English version of the directive, the Government of the Netherlands considers that the Dutch version of the directive is, as far as it is concerned, the only authentic language version. It cites the Court's case-law to the effect that the elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the principle of legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words (Case 80/76 *North Kerry Milk Products v Minister for Agriculture and Fisheries* [1977] ECR 425, paragraph 11). Uniform interpretation cannot be determined by one particular language. The various language versions are equally authentic (Case 283/81 *CILFIT* [1982] ECR 3415).”

B. Law, Language and Terminology

In Europe, too, interdisciplinary studies involving the two fields of ‘Law’ and ‘Language’ have represented a vast area of research and experimentation for at least a decade⁴. Traditionally, this has involved countries where different linguistic traditions and differing legal systems co-exist (such as Québec or Switzerland), or international organisations which adopt a certain number of official working languages and languages for debate (for example the UN). The concurrence of “official” languages with others having the status of “national” languages, together with their freedom from a single national culture, are striking features of the present legal-linguistic context in Europe.

It is a self-sufficient system, which is based on conventional European rules for drafting legal texts and on conventional European meanings belonging to the European institutions, often at the expense of national conventional rules and meanings. Every language and specialised language or ‘communication situation’ has a particular terminology, of which the legislator, the user and the translator must be aware. In the domain we are concerned with, the law-makers and the jurists have to know the terminology which belongs to the Law; this applies all the more to

⁴ Cf., among others, A. Milian-Massana, “Le régime linguistique de l’Union européenne: le régime des institutions et l’incidence du droit communautaire sur la mosaïque linguistique européenne”, *Rivista di Diritto Europeo* n. 3, 1995, pp. 485-512; S. Sarcevic, *New Approaches to Legal Translation*, The Hague, 1997; R. Sacco, L. Castellani (eds.), *Les Multiples Langues du Droit Européen Uniforme*, Torino, 1999; N. Yasue, “Le multilinguisme dans l’Union européenne et la politique linguistique des Etats membres”, *Revue du Marché commun et de l’Union européenne*, 1999, pp. 277-283; M.-J. Campana, “Vers un langage juridique commun en Europe?”, (2000) 8 *European Review of Private Law*, pp. 33-50; N. Urban, “One Legal Language and the Maintenance of Cultural and Linguistic Diversity?”, (2000) 8 *European Review of Private Law* pp. 51-57; R. Sacco (ed.), *L’interprétation des Textes Juridiques Rédigés dans plus d’une Langue*, Torino, 2002; A. Ortolani, “Lingue e politica linguistica nell’Unione europea”, *Rivista critica di diritto privato*, fasc. 1, 2002, pp. 127-168; A. Caviedes, “The role of Language in Nation-Building within the European Union”, (2002) 27 *Dialectical Anthropology*, pp. 249-268; G. Ajani, “Legal taxonomy and European Private Law”, pp. 349 ff., and O. Moreteau, “Can English become the Common Legal Language in Europe”, pp. 405 ff., both in: R. Schulze, G. Ajani (eds.), *Common Principles of European Private Law*, Baden-Baden, 2003; B. Pozzo, “Harmonisation of European Contract Law and the Need of Creating a Common Terminology”, (2003) 11 *European Review of Private Law*, pp. 754-767; B. Großfeld, “Comparatists and Languages”, in: P. Legrand, R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge, 2003, pp. 154 ff.; V. Heutger, “Law and Language in the European Union”, *Global Jurist Topics*: Vol. 3: No. 1, Article 3, <http://www.bepress.com/gj/topics/vol3/iss1/art3>; A. de Elera-San Miguel Hurtado, “Unión Europea y Multilingüismo”, *Revista española de Derecho Europeo*, n. 9, 2004, pp. 85-135; S. Ferreri, “La lingua del legislatore. Modelli comunitari e attuazione negli Stati membri”, *Rivista di diritto civile*, 2004, Parte I, pp. 561-579; P. Rossi, C. Vogel, “Terms and Concepts: Towards a Syllabus for European Private Law”, (2004) 12 *European Review of Private Law*, pp. 293-300; B. Pozzo (ed.), *Ordinary Language and Legal Language*, Milano, 2005; G. Ajani, M. Ebers (eds.), *Uniform Terminology for European Private Law*, Baden-Baden, 2005; E. Ioriatti Ferrari, “Lingua e diritto in Europa: multilinguismo, pluralismo linguistico e terminologia giuridica uniforme nel diritto europeo dei contratti”, *Diritto pubblico comparato ed europeo*, 2005, fasc. 4, pp. 1549-1567; P. Rossi, *Il diritto privato europeo nella comparazione tra sistemi giuridici nazionali: analisi linguistica e contesti interpretativi*, Torino, 2006; B. Pasa, P. Rossi, M. Weitenberg, *Il Diritto contrattuale europeo tra Direttive comunitarie e trasposizioni nazionali*, Torino, 2007.

the European law-makers and jurists, since the scant attention paid to legal terminology is detrimental to the harmonisation of the rules of the internal market.

When the chosen term for a Community legal text is not a new coinage but comes from a national language (as happens in the majority of cases), its meaning, no longer rooted in its original national culture, will be obscured. The jurist will then turn to the expert in terminology (also called a terminologist)⁵, who helps him to identify the ambiguity, having regard to the geographical, social and political context. Terminology has an independent dimension⁶ within linguistic studies, and has a double dimension: communicative (where the user regards terminology as a working tool) and linguistic (where terminology is looked upon as a phenomenon to study and research). There are two types of sources available: on the one hand, dictionaries (general, specialised, monolingual, bilingual) and legal texts, judgments, codes and academic writings (in the legal domain), on the other. The analysis of these documents may begin from different starting-points: either from the discourse context (concerning the discipline – law and communication), or the discourse co-text (linguistic and paralinguistic).

The expert terminologist's task is to supervise translation work and to cooperate with the translator⁷ in order to monitor the use of terms, their equivalence, their source and definition and to confer meaning, assigning them to their respective domain. The job of the terminologist therefore has clear practical consequences in the legal domain such as, for instance, preparing texts for the translators who work with the jurists, studying a particular specialist area, for example, the field of contracts.

⁵ On Terminology, as an autonomous field of knowledge in respect to Linguistic and Cognitive Sciences, to Communications Sciences and Informatics cf. E. Wüster, *The Machine Tool, an Interlingual Dictionary of Basic Concepts*, London 1968; Id., *Einführung in die Allgemeine Terminologielehre und terminologische Lexikographie*, Wien, 1991; P. Auger, L.-J. Rousseau, *Methodologie de la recherche terminologique*, Québec, 1978; A. Rey, *La terminologie: noms et notions. Que sais-je?* No. 1780, Paris, 1979 (2nd ed., 1992); R. Dubuc, *Manuel pratique de terminologie*, Montréal, 1985 (3rd ed., 1992); J.C. Sager, *A practical course in terminology processing*, Amsterdam 1990; M.T. Cabré, *La Terminología: teoría, metodología, aplicaciones*, Barcelona, 1993; Id., *La Terminología, una disciplina en evolución: pasado, presente y algunos elementos de futuro*, Barcelona, 2005 available at: http://www.riterm.net/revista/n_1/cabre.pdf; J. Pearson, *Terms in Context*, Amsterdam, 1998; M.-C. L'Homme, *La terminologie: principes et techniques*, Montréal, 2004.

⁶ Cf. R. Greenstein, "Dénotation et connotation dans le domaine du droit", Paris I, Panthéon-Sorbonne, paper discussed at the International Conference on Terminology (*Terminologia e Derecho: complejidad de la comunicación multilingüe*) in Barcelona, 11-14 July 2005.

⁷ On the role of the translator as a linguistic/cultural mediator in relation to the lack of equivalence between different legal systems cf. C. Nord, *Translating as a Purposeful Activity. Functionalist Approach Explained*, Manchester, 1997; S. Sarcevic, cit. *supra* footnote 4; R. Arntz, "La traducción jurídica, una disciplina situada entre el derecho comparado y la lingüística contrastiva", *Revista de lenguas para fines específicos*, 2000, pp. 376-399; A. Borja Albí, "La investigación en traducción jurídica", in: M.A. García Peinado, E. Ortega Arjonilla (eds.), *Panorama actual de la investigación en traducción en interpretación*, Granada, 2003, pp. 415-426.

C. Community legal texts drafted in more than one language and transposition

The question here concerns the various language versions of particular Community legal texts, the Directives, and the national laws which implement them.

It is acknowledged that Directives are the preferred instrument for harmonising European contract law⁸.

Directives are drawn up in two languages (French and English), but they are translated into the 23 official languages⁹ by the European Commission's Translation Service¹⁰.

The first problematic issue concerns translation of the legal texts (which must ensure the certainty and stability of the rules) into twenty-three official language versions, all equally authentic, but whose terms may not be equivalent. Each of the language versions represents the point of reference for each national legislative body, when it comes to transposing the Directive into the law of the Member State. Implementing provisions, when adopting the content of Community measures, reproduce the terms used by the Community law-makers, perhaps in the belief that in so doing, the text of the Directive is more faithfully preserved. As a consequence, the second problematic issue concerns the fact that the "Community/European legal French" (or Italian, German, Spanish, Dutch, etc.,) may not always coincide with the national version of legal French (or Italian, German, Spanish, Dutch etc.,).

There are no easy solutions to the problematic issues described here, given that flexibility and rigour are both objectives (although to some extent in antithesis with one other) pursued by

⁸ In more general terms, on the political and cultural dimensions of legal harmonisation of contract law, among others, see Th. Wilhelmsson, *Social Contract Law and European Integration*, Dartmouth, 1995; S. Weatherill, *EC Consumer Law and Policy*, London, 1997; H. Schulte-Nölke, Schulze R., L. Bernardeau (eds.), *European Contract law in Community Law*, Köln, 2002; F. Cafaggi (ed.), *Quale armonizzazione per il diritto europeo dei contratti?* Padova, 2003; B. Pasa, G.A. Benacchio, *The Harmonization of Civil and Commercial Law in Europe*, Ch.1, "Consumer Protection and the Law of Contracts", pp. 5-100, Budapest, 2005; E. Poillot, *Droit européen de la consommation et uniformisation du droit des contrats*, Bibliothèque de droit privé, LDGJ, Paris, 2006; R. Schulze, "Consumer law and European Contract Law", *The Yearbook of Consumer Law*, series "Markets and the Law", Asghate, 2007, pp.153-166. On the drafting techniques in contract law, see D. Kennedy, "The Political Stakes in "Merely Technical" Issues of Contract Law", (2001) 9 *European Review of Private Law*, pp. 7-28.

⁹As from the 1st of January 2007, there are 23 official languages: Bulgarian, Romanian (after last enlargement), and Irish. Irish has changed its *status* this year, from "Language of the Treaty" as it was (meaning that all secondary sources of Community Law - Regulations, Directives, Decisions, and moreover all preparatory documents - were not expressed in Irish) to "Official Language".

¹⁰ It should be noted, however, that the European institution which promotes multilingualism most actively offers complete access to its website in only 3 languages - English, French and German: cf. http://europa.eu.int/comm/dgs/translation/index_en.htm.

the legal language, in order to capture social life in all its complexity and regulate it by means of a limited number of rules which are (relatively) stable.

It does happen, for instance, that untranslatable terms are nonetheless translated. This is possible because the terms (even legal ones) do not necessarily bear identical meanings. Every word has a meaning within a frame of reference provided by basic, permanent elements (the object, its state, the action called to mind by the person using it) traditionally known as denotation; to this meaning a qualification is added, which may be positive or negative: this is its connotation. In general, the terminology adopted in a scientific-professional ‘micro language’ where the descriptive function is of paramount importance, has no connotations but a more circumscribed denotation. However, the domain of Law is not subject to this general rule: here, connotation plays a fundamental part.

Let us take, for example, within the Italian legal system, the use of the expression [*It: scienze giuridiche = legal sciences*] to describe degree courses in Law: the connotation in this case creates a strong (but maybe illusory?) association with the hard sciences (physics, chemistry, biology, geology, etc.), and for this reason those who study terminology prefer the use of the expression [*It: dominio giuridico = legal domain*] to identify the area concerned.

It can also happen that translatable terms are translated from one language to another, but not in such a way that the meaning remains unaltered. Let us take, for example, the meta-positive notion of [*contract = contratto, contrat, Vertrag, contrato*]¹¹, which turns on the notion of [*agreement = convention, accord, Einigung, consensus, pactum*]: this is the conceptual ‘genotype’ which corresponds to varying ‘phenotypes’ (to use the taxonomy of the natural sciences once again). While the genotype confines the notion to its essential elements, the phenotype adds factors which the national laws in force, in particular positive law (i.e. statutory law), deem necessary: it might be [*It: causa, Fr: cause, Es: causa*] or [*En: consideration*], or [*delivery*] or [*deed*], and so on. While it may appear to be easy enough to find a compromise to express meta-positive notions and their content, the same cannot be said for national detailed rules that often struggle to translate those notions.

¹¹ R. Sacco, *La comparaison juridique au service de la connaissance du droit*, Paris, 1991, pp. 26 ff.; R. Sacco, G. De Nova, *Il contratto*, in R. Sacco (ed.), *Trattato di diritto civile*, Torino, 1993; R. Sacco, “Il contratto nella prospettiva comparatistica”, *Europa e diritto privato*, 2001, pp. 479-488; R. Sacco, “Language and Law”, in: B. Pozzo, 2005, cit. footnote 4, pp. 1-22.

In fact, the meta-positive notions are a strategic instrument for harmonising the various species of legal language.

The many and varied meanings attributed to legal terms should not be a cause for complacency. The broader the ambit of application which a term has, the greater the number of different legal translations there are, which become accepted in spite of their lack of precision and their inconsistency, and the more local variants in interpretation will develop, becoming consolidated over time.

D. Impact of Community legislation on domestic rules of contract: diatopic variation in the same language

Community legislation in the field of contract varies according to who the protagonists in a given transaction are, and the degree of legal protection accorded. Community action aims chiefly at harmonising national laws which are applicable to contractual relationships between private actors (individuals or legal persons); in particular, to contractual relations between individuals who contract outside the scope of business or professional activity (consumers), on the one hand, and individuals, whether natural or legal persons, who are contracting within the scope of business or professional activity (professionals)¹², on the other.

The main aim is to remedy a situation of imbalance, which is the qualifying aspect of contracts made between consumers and professionals. This imbalance may arise from various phenomena: from the method used to induce the consumer, who may be taken by surprise¹³, into buying some goods or services (on the doorstep, in the street, at the station, by telephone or email, etc.); or from the newer techniques of mass contracts, such as those concluded via general conditions or pre-printed standard contract forms (contracts for banking services or insurance)

¹² According to the well-known set of Directives: Dir. 85/577/EEC; Dir. 87/102/EEC (modified by Dir. 90/88/EEC and 98/7/EC); Dir. 90/314/EEC; Dir. 93/13/EEC; Dir. 94/47/EC; Dir. 97/7/EC; Dir. 98/27/EC; Dir. 1999/44/EC; Dir. 2002/65/EC, mentioned in the Annex I to the Communication of the European Commission on European Contract Law, COM (2001) 398 final, 11.07.2001.

¹³ On bounded rationality of consumers, among others, see: R. Korobkin, "Bounded Rationality, Standard Form Contracts, and Unconscionability", 70 *U. Chic. L. Rev.* 1203 (2003); G. Mitchell, "Why Law and Economics' Perfect Rationality Should not be traded for Behavioral Law and Economics' Equal Incompetence", 91 *Georgetown L.J.* 67 (2002); J. Jacoby, "Is it Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory", 6 *Roger Williams U.L.Rev.* 81 (2000). Consumers interpret information to justify their consumption behaviour and do not always use it in the rationale manner, as neutral advice.

characterised by information asymmetry, to the disadvantage of the “weaker” party¹⁴. In all these cases, the consumer is not in a position to negotiate the content of the contractual terms, but can only either accept or reject the contract. The degree of protection offered by the legislation aims to ensure the consumer’s independence of choice, and a free and careful evaluation of the expediency of the deal. Once “*informed choice*” is assured, it is no longer (at least in principle¹⁵) the law-maker’s role to evaluate whether the contract is advantageous for the consumer, or not. From this point of view, European consumer contract law has demonstrated its coherence with the general principle of party autonomy and freedom to contract¹⁶. However, either because of the way Directives, as instruments, have been conceived, or as a result of the options which Directives leave open to Member States at the implementation stage (by means of so-called “minimum protection clauses”), or because of differing terminology adopted by Community texts and national implementation acts (which can refer to different institutions even in relation to substantive matters), the “weaker party” question has been resolved by the Member States in different ways. Consequently, the contract law which consumers and businesses use in the single market is not harmonised.

E. Old terms for new concepts? Some illustrations

The comparison exercises which follow illustrate the real difficulties encountered by the harmonisation process and the renewed need for cooperation between jurists, linguists, terminologists and translators. We are going to compare the texts of different language versions of some Directives among them; then the comparison will be between these and the national provisions implementing the same Directives.

¹⁴ See, among others, A. Schwartz, “Legal Implications of Imperfect Information in Consumer Markets”, 151(1) *J.Inst.&Theor.Econ.*31 (1995); R.T. Cruz, J.J.Hinck, “Not my Brother’s Keeper: the Inability of the Informed Minority to Correct for Imperfect Information”, 47 *Hast.L.J.* 635 (1996); In Italian see the books: G. Bellantuono, *I contratti incompleti nel diritto e nell’economia*, Padova, 2000 and M. De Poli, *Asimmetrie informative e rapporti contrattuali*, Padova, 2002.

¹⁵ The European legislator is also inspired by the idea to provide certain minimum standards of protection that have little to do with information, such as rights in the case of non-performance or certain banned clauses (cf. the list in the Dir. 93/13/EEC).

¹⁶ Cf. COM (2003) 68 final, 12.02.2003, § 93 of the document. But cf. the arguments of G. Howells, T. Wilhelmsson, “EC Consumer Law: Has It Come of Age?” 28 *Eur.L.Rev.*370, 380 ff. (2003).

The inconsistencies between legal texts often demonstrate asymmetry which is merely linguistic; at times, there is conceptual divergence both between legal systems and within one system itself.

(I). The first exercise in comparison concerns terms in general use which have been borrowed by the Law and translated without apparent difficulty in the texts of the various language versions of the Directives. However, it is not always possible to attribute the same meaning to these terms or expressions, nor even to identify similar legal rules.

Directive 93/13/EEC on unfair terms in consumer contracts¹⁷, is one of the most interesting examples of Community action in the field of contract law, both because it was a two-pronged approach, procedural as well as substantive, and because its implementation has had considerable repercussions on current commercial practice within the Union's single market. Unfair terms can be found in standard-form contracts, on pre-printed forms drawn up by one party, usually the professional, and are intended for consumers. They do not have the opportunity to negotiate the contract terms individually, and must accept or reject the professional's terms as is (the so-called "take it or leave it" technique).

In general, national provisions implementing Directive 93/13/EEC demonstrate various differences.

In one group of legal systems, these differences can be explained by the fact that, in the transposition phase, each national legislating body has partly diverged from the Community text in order to introduce amendments to *pre-existing* national provisions. In the case of Germany, the Directive was transposed by Act of 19 July 1996, which amended the previous 1976 Act (*AGB-Gesetz*); it was subsequently incorporated into the German civil code (*BGB*), following the fundamental reform of the German laws on obligations (*Schuldrechtsmodernisierungsgesetz*), at sections §§ 305-310. In France, the Directive was transposed by Act no. 95-96 of 1 February 1995, which amended the 1978 Act; it was later inserted into the French Consumer Code (*Code de la Consommation*), Art. L. 132-1 *ff*. In Spain, implementation was by means of Act no. 7 of 13 April 1998, *sobre condiciones generales de la contratación (LCGC)*, amending the previous 1984 Act (*LGDCU*), which still constitutes the central body of Spanish laws for consumer

¹⁷ O.J.1993, L-95/29-34. The deadline for its implementation was 31.12.1994: many Member States did not transpose it in due time.

protection. In England, implementation was brought about by the provisions of the *Unfair Terms in Consumer Contracts Regulations 1994 (UTCCR)* later superseded by the *Regulations 1999*, which have not replaced but stand alongside those of the *Unfair Contract Terms Act (UCTA) 1977*.

In a second group of legal systems, the Community provisions were introduced *ex novo*: the Italian legal system, for instance, had no specific regime to govern this area, and transposed the Directive by inserting five articles into Book IV (Title II, new Section XIV) of the Italian Civil Code, from 1469-*bis* to 1469-*sexies*, on consumer contracts; the provisions were then incorporated in the Consumer Code (*Codice del Consumo*) of 2005¹⁸, at Arts. 33-37.

As already noted, national transpositions have, on the one hand, tried to be faithful to the letter of the Directive, while attempting to seek coherence with pre-existing domestic legislation, on the other, where such provisions existed.

The terms adopted in the various language versions of the Directive have been translated at national level without apparent difficulty, even where the national law-makers have not been able to find solid foundations within their own legal tradition. However, terms and expressions translated in this way do not always bear the same meaning, as the example of [*good faith*] illustrates.

Indeed, one of the most surprising results which arose in English law from the implementation of Directive 93/13/EEC was acclimatising English courts and lawyers to the Continental notion of [*good faith = buona fede; bonne foi; buona fede; Treu und Glauben*].

In the continental civil codes, [*good faith*] is required of the parties at the contractual negotiation stage, up to the performance of the agreed terms¹⁹. The great 19th Century

¹⁸ Cf. *Decreto legislativo del 6 settembre 2005, n. 206 recante il codice del consumo, a norma dell'articolo 7 della legge 29 luglio 2003, n. 229, Gazz.Uff. n. 235 del 08.10.2005 – Suppl. Ord. n. 162*.

¹⁹ The *BGB* (German Civil Code), for instance, contains the *Generelklausel* of *good faith (Treu und Glauben)* in its § 242 *BGB*; the *Code civil* (French Civil Code) provides that the contract has to be executed in conformity with the principle of good faith in its Art. 1134 *Code Civil*; the same is true for the *Código civil* (Spanish Civil Code), at Art. 1.258 *Código civil*; the Italian *Codice civile* provides that the parties follow the principle of good faith during the formation of the contract (Art. 1337 *Codice Civile*) up to its execution (Art. 1375 *Codice Civile*). The expression *good faith* is interpreted in different ways by legal scholars and national case-law; it does not have one single meaning. Legal texts do not assist in resolving this problem, because the freedom of expression which lawmakers have consciously conferred upon jurists adds to the ambiguities. The legislators have left expressions to interpreters to deal with. Italian academic commentaries are numerous on this point; for an early attempt at interpretation of it cf. M. Bessone, A. D'Angelo, "Buona fede", *Enc. Giur. Treccani*, Roma, 1988, pp. 1 ff; L. Bigliuzzi Geri, "Buona fede nel diritto civile", *Digesto civ.*, II, Torino, 1988, pp. 403 ff; M. Costanza, *Profili dell'interpretazione del contratto secondo buona fede*, Milano, 1989. For a comparative overview see, among others: B. Jaluzot, *La bonne foi dans les contrats: Etude comparative de droit français, allemand et japonais*, Collection Nouvelle bibliothèque

codifications provided for several so-called “general clauses” to keep the system together and compensate for the rigidity of highly technical rules or precisely-defined concepts. In fact these “safety-valve clauses” worked to make the detailed rules more flexible, in order to adapt them more efficiently to particular cases²⁰.

From a cognitive viewpoint, general clauses can be seen as metaphors²¹, since their application in judicial rulings implies access to extra-judicial knowledge, to cultural parameters belonging to a certain context; and in fact a clear interpretation of them (not one that is vague or ambiguous) comes from their proximity to (or distance from) meta-judicial terms of reference. Such metaphors are therefore present in legal texts as “general clauses” (or rather in the form of “standards”, to adopt the legal language belonging to the Common Law tradition).

In the field of Law, metaphors, either in the form of general clauses or standards, have been created to represent an unfamiliar idea using one which is better-known, or completely familiar²². Over time, the idea called up by the metaphorical expression may reach maturity, to the point at which the concept can be clearly described. When this occurs, the metaphor denotes

de theses, Paris, 2001; S. Le Gac-Pech, *La proportionnalité en droit privé des contrats*, L.G.D.J., Paris, 2000; R. Zimmermann, S. Whittaker (eds.), *Good Faith in European Contract Law*, Cambridge, 2000; P. Cane, J. Stapleton (eds.), *The Law of Obligations – Essays in Celebration of John Fleming* -, Oxford, 1998; H. Kötz, A. Flessner (eds.), *European Contract Law: Formation, Validity and Content of Contracts, Contract and Third Parties*, vol. I, Oxford, 1997; A. Mordechai Rabello (ed.), *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions*, The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusalem, 1997; J. Beatson, D. Friedmann (eds.), *Good Faith and Fault in Contract Law*, Oxford, 1995.

²⁰ In the words of one author, they are “*forme di espressione legislativa che consentono una maggiore autonomia all’interprete*”: cf. R. Sacco, *Le clausole generali*, in R. Sacco, G. De Nova (eds.), *Il contratto*, in *Trattato di diritto civile* diretto da R. Sacco, vol. I, Torino, 2004 (3rd ed.), at p. 131.

²¹ Some authors argued that language is essentially metaphorical, and that metaphors are not merely literary, but cognitive: see M. Turner, *Cognitive Dimensions of Social Science*, Oxford Univ. Press, 2001, pp. 144 ff. and 159 ff.; schematically, on cognitive arguments in sociology see P. DiMaggio, “Culture and Cognition”, *23 Annual Review of Sociology* 263 (1997). Others have noted that *good faith* functions properly when it is interpreted as a metaphor and not as a stereotype: cf. L. Morra, C. Bazzanella, “Considerazioni sul ‘buon padre di famiglia’”, *Rivista critica del diritto privato*, 2002, pp. 529-563; those ideas were developed in another paper, L. Morra, P. Rossi, C. Bazzanella, “Metaphor in Legal Language: clarity or obscurity?” discussed at the Conference of Boulogne-sur-mer on “Clarity and Obscurity in Legal Language”, 5-9 July 2005, published in S. Cacciaguidi-Fahy, A. Wagner (eds.) *Clarifying Legal Drafting: Practice and Tools*, Oxford, 2006, pp. 141-174.

²² By using general clauses/metaphors (other than *good faith*, such as *bonae mores*, *buon padre di famiglia*, etc.), an unfamiliar idea is represented, using one which is better-known, or completely familiar. This is certainly true for countries that have not know the term in question *at all*. However, we could assume that the idea of *good faith* has never been completely unfamiliar in the Western legal tradition, as it has certainly always circulated, and that, *historically*, it has developed before codification efforts (see the *bona fides* in Roman law).

On the role of metaphors in shaping the Law see A. G. Amsterdam, J. Bruner, *Minding the Law*, Harvard Univ. Press, 2000, pp. 189 ff., describing the Supreme Court’s patterns of solving disputes. Generally see I. Berlin *Concepts and Categories: Philosophical Essays*, Henry Hardy ed., 1979 and G. Bowker, S. Leigh Star, *Sorting Things Out: Classification and its Consequences*, MIT Press, Cambridge 1999.

a defined concept and may be used as a referential description; it may be then considered as “closed” in cognitive terms²³.

The example, in fact, is that of [*good faith*] in continental systems. As we know, in the Civil Law tradition, Codes are typical of the legislative systems: they serve to capture legal rules, but soon these rules become inadequate to govern new situations and circumstances which arise in the course of social, technological, political or economic changes; as a result, the correct solution is to insert some general clauses so that interpretation, either by academic writers or case-law development, can keep the Codes alive²⁴.

However, it should be noted that a “closed” metaphor in a given legal system, with a particular specialised language, is not necessarily so in another one. In fact, [*good faith*] in the English legal system is (still) an “open” metaphor. For a long time, [*good faith*] was even considered to be a ‘legal irritant’²⁵, since no reference to it existed in English law: indeed, before the Community intervention in this area, English jurists did not use this general clause. In any case, even when notions similar to this general clause can be identified in the Common Law²⁶, they are less broad in scope than that used in Civil Law systems; moreover, they are not creatures of statute, but mainly arose from the system of precedent which rules on specific cases, assuming differing meanings from time to time, according to the situation at hand and the nature of the contract (a contract for delivery, for insurance or for sale, and so on). So [*good faith*] remains an “open” metaphor in English law, despite efforts to conceptualise it, such as “*good standards of commercial morality and practice*”, as formulated by Lord Bingham. Indeed, in the well-known ruling by the Court of Appeal in 2000 in *Director General of Fair Trading v. First National Bank*²⁷, it was said that “*good faith has a special meaning in the Regulations, having its*

²³ Cf. L. Morra, P. Rossi, C. Bazzanella, cit. footnote 21, at p. 2.

²⁴ Cf. the Swiss Civil Code, at Art. 2, which deals with the “principle of good faith” as general principle for exercising rights and fulfilling obligations: by introducing a general clause at the beginning of the code, the legislators indicate that the whole code is to be considered in the light of this clause. Cf. also the Spanish *Código civil*, at Art. 7, which provides for the exercise of the law according to the principle of good faith.

²⁵ This is the opinion of G. Teubner, “Legal Irritant: Good Faith in British Law or How Unifying Law Ends Up in New Divergences”, in: F. Snyder, *The Europeanisation of Law*, Oxford, 2000, pp. 243 ff.

²⁶ In fact, similar concepts and terms existed and exist today in specific circumstances, cf. S. Toddington, “Contractual Good Faith: Trust and the Rationality of the Long Term”, *Journal of Law and Communications* (2005) available at: http://www.uclan.ac.uk/facs/class/legalstu/JoLaw&Comms/2005_1/Toddington-2.htm#civil.

²⁷ (2000) 2 *All ER* 759. Cf. L. Antonioli Deflorian, “L’interazione del diritto inglese con il diritto comunitario: l’esempio della direttiva sulle clausole abusive nei contratti con i consumatori ed il principio di buona fede”, *Rivista di diritto civile*, Parte I, 2002, pp. 451-489.

conceptual roots in civil law systems”, and the reference is to the 1976 German Act (cited above), which played a fundamental role at the drafting stage of Directive 93/13/EEC.

The House of Lords heard the same case on appeal in 2001²⁸. Lord Bingham, one of the Law Lords, stated in his opinion that: “*the requirement of good faith in this context is one of fair and open dealing. Openness requires that terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps (...) Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 3 of Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice*”.

An example of a “closed” metaphor in the English legal system is provided by the expression [*unfair terms*]²⁹. Consumers, and, in certain cases, the Director General of Fair Trading³⁰, who has the power to act in the interests of consumers, can contest contractual terms considered unfair. The unfairness (or “not playing according to the rules”) of the clause is measured by the Office of Fair Trading (OFT), which evaluates what the consumer’s position would have been if the clause had not been in the contract: this was set out in Regulation 4(1) 1994 and then in Regulation 5(1) 1999. The expression [*unfair terms*] predicates metaphorical access to the practice of fair dealing, to rules of a game played honestly and fairly. This metaphor, “closed” as far as English law is concerned, is not so in relation to continental systems. Indeed, the French version of the Directive makes no reference to abiding by the rules of a fair game, and the expression used in the French transposition act is [*clauses abusives*]: here

²⁸ *Director General of Fair Trading v. First National Bank plc*, 25th October 2001, (2001) 3 *Weekly Law Reports* (WLR) 1297; (2002) 1 *Lloyd’s Rep.* 489.

²⁹ The *unfairness* test is different from the *reasonableness* test previously regulated by the *UCTA 1977*. Cf. the results of the Commissions which worked on the consolidation of the two legal texts: the *UCTA 1977* and the *Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR)*: “The Law Commission and the Scottish Law Commission - Report ‘Unfair Terms in Contracts’ 2005” available at: [http://www.lawcom.gov.uk/docs/lc292\(1\).pdf](http://www.lawcom.gov.uk/docs/lc292(1).pdf).

³⁰ The *OFT* was established by the *Fair Trading Act 1973*; in addition to dealing with competition matters, the *Director of the OFT* is concerned with consumer protection. In particular, it monitors commercial practice in the sale of goods and services, draws up recommendations for the *Department of Trade and Industry (DTI)*, encourages professional associations to set up codes of practice and takes action against professionals whose conduct is unfair. If the professional refuses to amend the unfair term, the *OFT* has the power to take legal action against them (both in the County Courts and the Chancery Division of the High Court). The unfair contract clause will be deprived of legal effect, but the rest of the contract remains valid.

the metaphorical reference is to the doctrine of [*abus du droit = abuse of the law*]³¹. The Italian law-makers have remained largely faithful to the French version of the Directive adopting at national level the expression [*clausole vessatorie*], even though a not particularly attentive translation of the French version of Art. 3(1) Dir. 93/13 “*en dépit de l'exigence de bonne foi*”³² with “*malgrado la buona fede*”³³ has given rise to a wide debate as to how it should be interpreted³⁴. In particular, it has not been made clear whether or not the reference to [*good faith*] implies that the clause is unfair, despite (apparently) conforming to it, when it produces an imbalance in the parties’ positions or, otherwise, that the clause is unfair if, in violation of the principle of good faith, it causes such imbalance.

However, the argument raised by legal scholars has had no tangible results on the application of this clause by Italian courts, which have never placed importance on the good faith of professionals³⁵; for this reason the expression “*malgrado la buona fede*” has never been reformulated, and was reproduced unchanged in Art. 33 of the new Italian *Codice del consumo* (Consumer Code).

(II). The second exercise has to do with words taken from the ordinary language, which have been translated, without apparent difficulty, in the texts of the various language versions of several Directives and their transpositions. This time it does not concern metaphorical expressions from the continental tradition, but underlying principles and standardised expressions used in commercial practice. This field, as everyone acknowledges, is largely inspired by the legal terminology of the Common Law.

In European Directives, the expressions [*plain and intelligible language*] and [*clear and comprehensible manner*] indicate the ways in which professionals must provide information for consumers: they are symbolic of the Community’s “information paradigm”³⁶, with disadvantages

³¹ L. Morra, P. Rossi, C. Bazzanella, cit. footnote 21, pp. 8 ff.

³² “*contrary to the requirement of good faith*”.

³³ “*despite good faith*”.

³⁴ Cf. F. Calvari, “Equilibrio normativo ed equilibrio economico nei contratti dei consumatori: dialogo tra la giurisprudenza italiana e tedesca”, *Contratto e impresa*, 2004, fasc. 1, pp. 40-75; A. Lamorgese, “Clausole abusive e criteri di rilevazione: un itinerario giurisprudenziale”, *La nuova giurisprudenza civile commentata*, 2004, fasc. 4, pt. 2, pp. 509-535.

³⁵ *Consiglio di Stato, sezione consultiva per gli atti normativi, parere 20.12.2004, n. 11602/04, Foro it., p. III, 2005, 348*, commentary by A. Palmieri.

³⁶ Cf. Green Paper on European Union Consumer Protection, COM(2001) 531 final, p. 15.

which some commentators have strongly emphasised³⁷. The expression [*plain and intelligible language*] appears, for the first time, in Directive 93/13/EEC on unfair terms (Art. 4.2 and Art. 5)³⁸ and becomes a constant which is repeated³⁹ in a context in which “*the information paradigm underlines transparency as the main method of consumer protection*”⁴⁰, since the “*right to information is undoubtedly the most fundamental specific consumer right*”⁴¹.

So far as transposition is concerned, it can be said that the law-makers, by and large, copy the same, identical terms used by the Community legislature. Take, for instance, Italian and English transpositions (the latter because it is the linguistic calque which stimulated the Brussels law-makers). The phrase [*plain and intelligible language = It: in modo chiaro e comprensibile*] has been copied literally in all the Italian⁴² and English⁴³ acts implementing Dir. 93/13; the same

³⁷ Cf. G. Howells, T. Wilhelmsson, “EC Consumer Law: has it come of age”, cit. footnote 16, at p. 380: “*The criticisms of the information paradigm are also well known. As many have noted, necessary information may not reach the consumers, they may have difficulties in understanding and using the given information, and they may not even find it worthwhile to make use of the information, considering the relatively small advantages it may bring. These kinds of problems also seem to accumulate in the most disadvantaged groups of consumers. For example, studies concerning truth-in-lending regulation show clearly that the improvement, if any, of the interest awareness due to such regulation seems to be concentrated in higher-income groups. The regulation of information also lacks relevance if the consumer does not have any alternatives in practice. Information that a cheap product is of inferior quality in comparison to a corresponding more expensive one does not help a consumer who cannot afford to buy the more expensive one. In other words, well-off consumers tend to gain more from a transparency strategy than their less advantaged brothers and sisters.*”

³⁸ Dir. 84/450, on misleading advertising, was the first to provide the information (Art. 3), “*truthful*” in that it represents the true state of things, and “*correct*” in the sense that it has not been altered by elements which are not strictly inherent in that contracting process; Dir. 87/102, on consumer credit contracts, provides that the consumer must be provided with “*adequate*” information in the written agreement (Art. 4): in other words, the professional must supply information which allows a fair and opportune evaluation of the contract; Dir. 90/314, on package travels contracts, provides that when a brochure is made available to the consumer, “it must indicate in a *legible, comprehensible and accurate* manner both the price and *adequate* information (...)” (Artt. 3.2 e 4.2.). The provision requires that the information is accessible to all consumers, from the point of view of semantic comprehensibility and, at the same time, ensures that it is legible, prohibiting the use of small print or less noticeable fonts for setting out the contract. Dir. 96/74, on textile products, provides that when textile products are offered for sale or sold to the consumer, and in particular “in catalogues and trade literature, on packaging, on labels and on markings, names descriptions and particulars as to the textile fibre must be indicated in *clear, legible and uniform print*” (Art. 8.2).

³⁹ Cf. the Dir. 94/47, on timesharing, which requires to provide any person requesting information on the immovable property or properties with a document which, in addition to a general description of the property or properties, must provide at least *brief and accurate* information (...)” (Art. 3.1): the professional, therefore, must concern himself exclusively with supplying all the information required by the Directive, fully but avoiding redundancy. Cf. also Directives 1999/44 (Art. 6.2, “*plain and intelligible language*”), 97/7 (Artt. 4.2, 7.3, 10.2, “*clear and comprehensible manner*”), 2000/31 (Arts. 5, 6, 7.1, “*be easily accessible and be presented clearly and unambiguously*”) and 2002/65 (Art. 3, “*clear and comprehensible manner*”).

⁴⁰ Cf. G. Howells, T. Wilhelmsson, cit. footnote 16, pp. 380 ff .

⁴¹ Ibidem, cit. previous footnote.

⁴² See Art. 25, *Legge 52/96* (which transposes Dir. 93/13) that has been incorporated into the Civil Code, Arts. 1469 bis et seq. and Art. 1, *Decreto legislativo 24/02* (which transposes Dir. 1999/44) and Art. 3.2, *Decreto legislativo 185/99* (which transposes Dir. 97/7): from 2005, all these provisions have been inserted into the Italian Consumer Code, cit. above footnote 18.

can be said for [*clearly and unambiguously* = *It: chiaro ed inequivocabile*] and for [*clear, legible and uniform print* = *It: facilmente leggibili e chiaramente visibili*]⁴⁴. Apart from some particular instances⁴⁵, the cut-and-paste technique has been widely used. However, the novel fact to note here is that the Italian implementing provision has, in certain cases, translated terms which are present in the English transposing provision, rather than in the Italian version of the Directive. This is also the case with the transposition of Directive 2000/31/EC on E-commerce: the English act implementing it has inserted some terms which were not in the original text of the Directive, such as [*easily, directly and permanently accessible*], [*clearly identifiable*], [*clearly identify*] and [*easily accessible*]⁴⁶: an excess of zeal on the part of the English drafters, which was emulated by the Italian law-makers, who inserted the phrase [*facilmente accessibili, in modo diretto e permanente*] into the domestic implementing legislation⁴⁷. Apart from a few isolated cases, the English implementation provisions, while aiming at simplicity and transparency, are more detailed and precise than the Italian ones. This may be explained in a number of ways, for instance with the *plain language movement*⁴⁸, which originated precisely in an English-language-context, with a view to simplifying legislative techniques and avoiding the variety of interpretations which developed in practice⁴⁹. Therefore, despite criticisms of the Community information paradigm made by legal commentators⁵⁰, certain information and the drafting method of all contract clauses involving consumers are subject to detailed, precise and timely regulation. Consequently the contract terms, besides having to make reference to certain basic information upon which the contract is founded (which varies according to the type of contract),

⁴³ See Regulations 2 and 6, Statutory Instrument (S.I.) 1994, no. 3159; Explanatory note 6.2 and 7.2, S.I. 1999, no. 2083.

⁴⁴ Respectively Art. 8.1 and 9.1 *Decreto legislativo 70/03* & Regulations 6(2), 7(1)-c,d), 8, S.I. 2002/2013, (which transposes Dir. 2000/31); *Decreto legislativo 194/99* & *Textile product Regulation 1986* (which implement Dir. 96/74).

⁴⁵ The *Decreto legislativo 427/98* (which implements Dir. 94/47) requires that *precise* information be supplied (Art. 2.1); on the other hand, the Directive requires the document to give the consumer “at least *brief and accurate* information”; the *Decreto legislativo 70/03* (which implements Dir. 2000/31) specifies that the information to be supplied should be “*easily accessible, in a direct and permanent way*” (Art. 7.1); the Directive 2000/31 does not require anything on this point.

⁴⁶ Respectively Regulation 6(1), S.I. 2002/2013; Regulation 7(1)-a) S.I. 2002/2013; Regulation 7(1)b), c), d) S.I. 2002/2013; Regulation 7(1)-c,d); Regulation 8, S.I. 2002/2013.

⁴⁷ Art. 7.1, *Decreto legislativo 70/03*.

⁴⁸ Cf. S. Ferreri, cit. above footnote 4, pp. 569 ff.. [George Orwell](#) wrote an important essay on the subject entitled *Politics and the English Language* (1946). The plain English revolution penetrated the fields of Law during the 1970s, with the *Paperwork Reduction Act* of 1976, and books like *Plain English for Lawyers* (1979).

⁴⁹ For instance, S.I. 1081/97, which transposes Dir. 94/47, does not use the Community formulation “*brief and accurate information*”, but only “*brief*”.

⁵⁰ Cf. out of many G. Howells, T. Wilhelmsson, cit. footnote 16.

must be drawn up in “a certain form”, in order to make the stronger contracting party more answerable and to achieve a higher degree of informed consent from the consumer.

In other words, Community law-makers make use of “formal requirements” to protect consumers⁵¹, in order that truly informed consent may be expressed. The textual form in [*plain, intelligible language*] (Art. 4.2 & Art. 5, Dir. 93/13, & Art. 6.2, Dir. 1999/44), or in [*clear, legible, and uniform print*] (Art. 8.2, Dir. 96/74), or [*comprehensible and accessible*] (Art. 4.2, Dir. 90/314) calls for greater reflection, shielding the consumer from ill-considered decisions. It should be added that, in order to facilitate transactions, it is also necessary, if not indispensable, to reduce disputes or in any case to simplify legal actions: drafting the contract in clear and comprehensible terms, ensuring a text which is easy to read and transparent in meaning, emphasises the need for the textual form to satisfy these requirements, encouraging the principle of certainty (in the sense of predictability) in the law⁵².

In conclusion, the theory can be advanced that the expressions [*plain and intelligible language*] and [*clear and comprehensible manner*] have multiple meanings, since “clear” may signify information which is truthful, correct, adequate and precise, while “comprehensible” may be information which is legible and accessible. In practical terms, then, these expressions function as “repositories of meaning” for obtaining information from the professional contracting party, which ensures protection of the consumer. Some academic commentators believe that the expressions [*plain intelligible language*] and [*clear and comprehensible manner*] introduce the principle of transparency⁵³ into the Community legal system, in the sense of accessibility of information, taken to include clarity and precision in all the details provided, to permit a complete and correct evaluation of the agreement being contemplated. Moreover, we guess these Directives introduce the idea of “form as transparency”, taken as meaning the transparency, comprehensibility and potential for scrutiny of everything the professional party is proposing or

⁵¹ Cf. G. Chinè, “Il consumatore”, in N. Lipari (ed), *Diritto Privato Europeo*, vol. I, Padova, 1997, p. 175. Ibidem: “*la forma comunitaria non annulla la volontà, ma la supporta, [...]*”, in “Il diritto comunitario dei contratti”, in A. Tizzano (ed.), *Il diritto privato dell’Unione Europea*, t. I, Torino, 2000, p. 645; E. Morelato, *Nuovi requisiti di forma nel contratto*, Padova, 2006. On “formal requirements” in general see: P. Bydlinski in: R. Schulze, M. Ebers, H. Ch. Grigoleit, *Informationspflichten un Vertragsschluss im Acquis communautaire*, Tübingen, 2003, pp. 141 ff.; P. Mankowski, “Information and Formal Requirement in EC Private Law” 13 *Eur.Rev.Priv.L.*, (2005) pp. 779-796.

⁵² Broadening the scope of evaluation, another fact should be noted: the formal requirements as to information, being provided in writing or in other durable medium, favours uniformisation of consumer contract law in the Member States; other functions of the formal requirements also include the contribution they can make to evaluating standards of contract quality and business ethics.

⁵³ Cf. S. T. Masucci, *La forma del contratto*, in N. Lipari (ed.), *Diritto Privato Europeo*, vol. I, Padova, 1997, pp. 575 ff.

promoting. Then, there are those who interpret this principle as being a corollary of the principle of good faith⁵⁴, which would no longer include merely a duty of fair dealing in the pre-contractual negotiations, but also clarity and comprehensibility of everything contained in the contract, and, in certain cases, what is being advanced by the professional party in the advertising brochures. Another view treats these expressions simply as general clauses⁵⁵. As was said in relation to our previous example concerning [*good faith*], general clauses have the effect of exposing the method to balanced evaluation, because the draftsman uses words with broadly indeterminate meaning, providing the legal interpreter with a free hand. A lack of specificity is a feature of general clauses: this is what permits their application to a variety of cases and circumstances. The attitude of the Community institutions concerning the use of general clauses is set out in the Green Paper on European Union Consumer Protection⁵⁶. Here we read that the European Community operates a three-pronged strategy to ensure consumer protection: it lays down duties to inform, provides incentive for self-regulation and demonstrates a preference for general clauses. Such clauses are also generally approved by legal scholars⁵⁷; it need only be added that among the new sources aimed at governing European contract law in the future, the use of European Framework Laws, as envisaged under the European Constitution (Art.I-33), is only feasible with the insertion of general clauses.

Whatever interpretation of these expressions is intended, a different way of understanding the meaning of the requirements of “form” in European consumer contract law is emerging. The term “form” no longer simply implies identifying how the will of the parties is to be demonstrated at the time the contract is made: form is now linked to information, and becomes synonymous with transparency of the information which the professional must supply to the consumer before, during and after the contracting process. The provision of various, detailed kinds of information for which the professional is responsible has an impact on the contractual

⁵⁴ Cf. C. Amato, *Per un diritto europeo dei contratti con i consumatori*, Milano, 2003, pp. 165. *ff.*

⁵⁵ According to some authors, “general clauses” are not to be confused with “general principles”. The latter indeed lack “*un modello di decisione preconstituito da una fattispecie normativa astratta*” (Sacco, cit. above, p. 132).

⁵⁶ Cf. Green Paper of 2.10.2001, cit. footnote 34: “A framework directive would be based on a general clause for consumer-business relations. This could draw on existing legal models based on ‘fair commercial practices’ or ‘good market behaviour’. In essence, it would be a requirement not to engage in unfair commercial practices and would include a general test. Such an approach is comparable to that in the unfair contract terms directive” (at p. 13).

⁵⁷ For instance, G. Howells, T. Wilhelmsson, cit. *supra*, p. 373: “[...] *the adoption of a general fair trading framework directive would fit into the trend to rely on general clauses.*”

content as a whole, and affect its economic aspect⁵⁸ too, by making the consumer aware of his/her rights⁵⁹.

(III). The third exercise proposed is different: it concerns an expression which has to do with specific legal language, in a particular field, which national legislators do not translate when transposing Community provisions, perhaps precisely because the meaning of the term, used in a non-technical sense by Community draftsmen, remains ambiguous and, as a result, the purpose of the provisions also remains obscure.

Directive 94/47/EC of 26 October 1994 concerns the protection for the buyer regarding some aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis⁶⁰. The Community law-makers did not intend these provisions to harmonise legal rules relating to a particular kind of contract, given that this is an unusual kind of institution (known as “time-sharing”), previously regulated in only a few legal systems in the EU. The issue of the nature of this institution is not willingly confronted in the Directive: it is confined to regulating certain aspects of the right of periodic use of immovable property (for instance, an apartment at the seaside, or a house in the mountains), once again through the duty to inform and the right of withdrawal, with the purpose of offering consumers protection which is adequate. However, the solutions adopted have been demonstrably inadequate in resolving practical

⁵⁸ We disagree with the position that the formal aspect “*does not represent an intervention in the specific economic content of the contract*”, given that the formal duties do not just concern information such as the business details of the professional, but also the rights of the consumer above all his/her right of withdrawing from the contract within a certain period of time. *Contra* see A. Jannarelli, “La disciplina dell’atto e dell’attività: i contratti tra imprese e tra imprese e consumatori”, in N. Lipari (ed.), *Diritto Privato Europeo*, vol. I, Padova, 1997, p. 513.

⁵⁹ The formal requirements protect the rights of the consumer: if a Directive requires an information to be given in writing (for instance see Dir. 90/341, package travel: Art. 4 (1) (a) *The organizer and/or the retailer shall provide the consumer, in writing or any other appropriate form, before the contract is concluded, with general information on passport and visa requirements applicable to nationals of the Member State or States concerned and in particular on the periods for obtaining them, as well as with information on the health formalities required for the journey and the stay; (b) The organizer and/or retailer shall also provide the consumer, in writing or any other appropriate form, with the following information in good time before the start of the journey [...]*) or a contract to be concluded in writing (for instance see Dir. 87/102 on consumer credit: Art. 4 (1) *Credit agreements shall be made in writing. The consumer shall receive a copy of the written agreement. (2) The written agreement shall include: (a) a statement of the annual percentage rate of charge; (b) a statement of the conditions under which the annual percentage rate of charge may be amended*) and the professional does not satisfy those requirements, the question is decided at national level, where the legislator has set out rules on the right of withdrawal or rules on invalidity. The same goal, the protection of consumer, can be reached also without formal requirement: see for example the Sales Directive: a guarantee is (still) valid if the transparency requirements are not met. Cf. C. Jeloschek, *Examination and Notification Duties in Consumer Sales Law – How far should we go in protecting the consumer?* –, München, 2006.

⁶⁰ O.J., 1994, L 280/83.

problems caused by the differing forms of safeguard offered to European consumers in this sector.

The example used here is the notion of [*preliminary binding contract = contratto preliminare vincolante; contrato preliminar vinculante; contrat préliminaire contraignant; verbindlicher Vorvertrag*] to which Art. 5 of the Directive refers, in a non-technical way, and to which the French, Italian and Spanish implementing laws⁶¹ make no reference at all.

According to the Community provision, the Member States were to have incorporated the following safeguards in their domestic legislation: “*in addition to the possibilities available to the purchaser under national laws on the nullity of contracts, the purchaser shall have the right - to withdraw without giving any reason within 10 calendar days of both parties' signing the contract or of both parties' signing a binding preliminary contract. If the 10th day is a public holiday, the period shall be extended to the first working day thereafter - if the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, at the time of both parties' signing the contract or of both parties' signing a binding preliminary contract, to cancel the contract within three months thereof.*”⁶²

In the Italian legal system, [*contratto preliminare = preliminary binding contract*]⁶³ is the relevant instrument for the transfer of the real property. Such an instrument ensures that the duty undertaken by each contracting party, in order to give consent to the definitive creation of

⁶¹ The Italian transposition came late (the deadline set out in the Directive was 29.04.1997), on 09.11.1998, with *Decreto legislativo n. 427/1998*. In Spain also the delay was considerable: *Ley no. 42/98, 15.12.1998 sobre derechos de aprovechamiento por turno de bienes inmuebles de uso turístico y normas tributarias*, BOE núm. 300, 16.12.1998 (amended by: L. 14/2000, 29.12.2000, *de medidas fiscales, administrativas y del orden social*, BOE núm. 319, 30.12.2000, 46831; L. 24/2001, 27.12.2001, *de medidas fiscales, administrativas y del orden social*, BOE núm. 313, 31.12.2001, 50597; L. 39/2002, 28.10.2002, *de transposición al ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios*, BOE núm. 259, 29.10.2002, 37922); the same is true in France: *Loi no. 98-566 du 08.07.1998 portant transposition de la Directive 94/47/CE du Parlement européen et du Conseil du 26/10/1994 concernant la protection des acquéreurs pour certains aspects des contrats portant sur l'acquisition d'un droit d'utilisation à temps partiel de biens immobiliers*, JO 09.07.1998, 10486.

⁶² In spite of the *Heininger* case (ECJ judgement of 13.12.2001, case C-481/99, O.J. 2001, I-9945,) which treats as unenforceable any national provision which imposes a time limit from which the consumer's right of withdrawal runs, where s/he has received inadequate information, it should be noted that some European legal systems behave differently. The Italian legal system, unlike the Spanish or German ones, has maintained the time-limit of 60 or 90 days, where the professional has not complied with the duty to inform (see Art. 65.3 of the Consumers' Code). Cf. M. Ebers, E. Arroyo, “Heininger y las sanciones a la infracción del deber de información sobre el Derecho de desistimiento *ad nutum* (STJCE 13 de diciembre de 2001, Asunto C-481/99)”, *Revista Jurídica de la Facultad de Derecho de la Universidad de Granada*, (2006) pp. 407-432.

⁶³ At national level, the Italian expression is [*contratto preliminare = preliminary contract*], without the term [*binding = vincolante*], because the fact that it is “binding” is a consequence of the fact that it is treated as a contract itself (in other words it is *in re ipsa*).

the contract *at a later date*, is taken up. This concerns an independent contract, which gives rise to the duty to conclude a subsequent definitive contract. The subject-matter of the first contract is to be considered exclusively as the obligation of future performance, namely, giving consent when the contract comes to be made; this is kept distinct from the subject-matter of the second, future, definitive contract, which relates to the real property which is to be transferred (*effetto traslativo del diritto*)⁶⁴.

The system outlined in the French Code is different, and equates the [*promesse de vente = promise to sell*] to the sale itself, re-allocating the proper effects of the contract to the preliminary phase⁶⁵.

The Spanish system, traditionally reluctant to recognise preliminary contracts and its potential effects, in the absence of a provision in the Code permitting the development of such an institution, has eventually imported the category of [*pre-contracts = Es: precontrato*] via the reception of the Pandectist doctrine in the 20th Century⁶⁶.

The legislation implementing Directive 94/47/EC, both in France and in Italy, requires that the professional's offer is in written form (and is irrevocable for a period of seven days in France and ten days in Italy) and that the contract takes the form of a notarial act and is registered⁶⁷, but makes no reference to the notion of preliminary binding act (as we said: *contrat*

⁶⁴ Italian legal scholars have so expressed themselves, on the basis of Arts. 1315 and 2645*bis* of the Civil Code. In particular, the latter article deals with the registration of the preliminary contract which transfers ownership or sets up or amends other property rights in relation to real property arising out of notarial act (*atto pubblico*) or authenticated private deed (*scrittura privata autenticata*). The provision was introduced by Italian Decree no. 669 of 31.12.1996 (Art. 3) [later transformed into Act no. 30 of 28.02.1997 (the Financial Act for 1997), in the *Official Gazette*, no. 50, 01.03.1997] and inserted into the Civil Code.

⁶⁵ See Art. 1589 (1) of the *Code Civil*. A case that does not conform to this rule is that contained in the *Loi n° 67-3 du 3 janvier 1967* (JO 4.01.1967, *en vigueur le 1er juillet 1967*), amended by *Loi n°71-579 du 16 juillet 1971*, Art. 44 II, III (JO 17.07.1971, *en vigueur le 1er janvier 1972*). The Act made provision for the preliminary phase of the sale, by which "*le vendeur s'engage à réserver à un acheteur un immeuble ou une partie d'immeuble*" (Art.11); in addition, provided that the *acte authentique* must be registered once the building has been built (Art. 7) and that the buyer does not pay the price (even in part) before the work is finished and the notarial act has been signed. The rule created under French Act no. 67-3 concerning the acquisition of a property still under construction (*en l'état future d'achèvement*) has been inserted into the *Code Civil*, at Arts. 1601-1 *ff.*

⁶⁶ A first comparative outlook in A. Chianale, "Contratto preliminare in diritto comparato", *Digesto civ.*, IV, 1989, p. 290-294; *Id.*, *Trascrizione del contratto preliminare e trasferimento della proprietà*, Torino, 1998.

⁶⁷ These systems require certain registration procedures to be undertaken by public bodies, the *Conservatorie* of land registries, on prior authentication by public officials (normally notaries) of the document establishing (or transferring or amending in some other way) ownership of the property. Such registration has the function of resolving any eventual disputes between parties to an action, guaranteeing an order of priority. For instance, the buyer of the right to use immovable properties on a timeshare basis, who has already paid over the sum stipulated in the preliminary phase of the contract, would be well-advised to register the contract, to avoid a situation where a dishonest seller, in the time interval between the preliminary contract and the definitive one, transfers the right to another buyer, who then registers it first.

préliminaire contraignant; contratto preliminare vincolante). Neither Italian Legislative Decree no. 427/1988, whose provisions were subsequently inserted into Arts. 69-81 of the 2005 Italian Consumer Code, nor the French Act no. 98-566, inserted into the French Consumer Code at arts. L.121-60, make use of this concept. Nor does the Spanish implementing Act, no. 42/98⁶⁸, make any reference to the *contrato preliminar vinculante*; it regulates only the contract itself. It requires that the contracts be drawn up in written form, but not necessarily by notarial act (Art. 9.1.11.b Sp. Act); furthermore, the parties may elect to conclude the contract in a formal way by notarial act (Art. 14.2 Sp. Act) and, in this case, any contract agreed in advance between private parties will be of binding effect. However, the Spanish legal system constitutes an exception: despite the fact that concept of the *contrato preliminar vinculante* does not have a direct counterpart in the national implementing act, it is used in the legislation of the *Comunidades Autonomas*, which have legislative competence in matters concerning tourism⁶⁹ and therefore, in relation to this special right of periodic use of immovable property. Before the implementing legislation came into force, the Balearic Islands, where the phenomenon of time-sharing is very widespread, had already issued Decree no. 117 of 6 September 1997, which governs certain specific aspects of this *sui generis* right. Article 5.1 of the Balearic Islands Decree governs the duty to give the consumer an information booklet and adds that it must be offered to safeguard the buyer's right to full and truthful information before the conclusion of either the *preliminary* (known in the Balearic Decree as *proyecto de contrato*) or the definitive contract. Article 5.2.1 of

⁶⁸ The Spanish act does not use the word *multipropiedad* for translating *timesharing*, but introduces a different expression "*derecho de aprovechamiento por turno*", which is considered a new *iura in re aliena* (Art. 1.4 Spanish Act): cf. J.M. Ruiz-Rico Ruiz, "Multipropiedad y ley sobre derechos de aprovechamiento por turnos: la incomprensible voluntad de poner puertas al campo", *La Ley*, n.3, 1999, pp. 2136 ff.

⁶⁹ The particular features of the Spanish system derive from the fact that the 1995 national law, transposing Directive 90/314/EEC on package tours, established that the *Comunidades Autonomas* could issue detailed provisions relating to tourism issues. Cf. *Ley no. 21/1995, 6.07.1995, reguladora de los Viajes Combinados (LVC)*, BOE núm. 161, 07.07.1995, 2065; its Art. 13 was amended (and Art. 14 introduced *ex novo*) by *Ley no. 39/2002, 28.10.2002, de transposición al ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios*, BOE núm. 259, 29.10.2002, 37922. On the various provisions adopted by the *Comunidades* cf. for example Catalonia (*Decreto 168/1994, 30.3.1994*), Balearic Islands (*Decreto 43/1995, 6.4.1995*), Madrid (arts. 18 to 22, *Decreto 99/1996, 27.6.1996*), the Canary Islands (*Decreto 176/1997, 24.7.1997*), Valencia Region (arts. 19 to 26, *Decreto 20/1997, 11.2.1997*), La Rioja (arts. 24 to 28, *Orden 35/1997, 27.6.1997*), Aragón (arts. 17 to 21, *Decreto 51/1998, 24.2.1998*), Extremadura (arts. 24 a 28, *Decreto 119/1998, 6.10.1998*). Before the 1995 implementing law, the field was regulated by the *Real Decreto 271/1988, 25.3.1988, por el que se regula el ejercicio de las actividades propias de las Agencias de Viaje*, BOE núm. 76, 29.03.1988; and under *Orden 14.4.1988 por la que se aprueban las normas reguladores de las Agencias de Viajes*.

the Balearic Decree further establishes that the information document must contain this information in the language of the contract or the *proyecto de contrato*⁷⁰.

In short, the national transposing provisions, with some rare exceptions, collocate both preliminary and definitive contracts under the same legal regime. The confusion is of some consequence, given that it may determine a differing *dies a quo* for exercising the right of withdrawal conceded for the protection of consumers: where there is a preliminary contract, in fact, a further period for exercising this right, following the signing of the definitive contract, is excluded. One must ask whether this result was one that the Community institutions actually wished to achieve, or whether it is one of the side effects brought about by the implementing mechanisms of Member States, to the disadvantage of consumer protection.

F. Concluding remarks

Today, at national level, every lawyer or judge must deal with an ever-increasing number of provisions which, with the aim of implementing EC Directives, have transformed the domestic law of contracts. This large-scale intervention by the Community institutions and the detail of the legal solutions introduced have led to the formation of a “new law of contracts”, based on a minimum substrate, which is apparently common to national legal systems.

Our exercises on terminological and language problems in the field of consumer contracts, where both rules of a general nature are relevant (e.g. Directives on unfair terms in consumer contracts, sales of consumer goods and associated guarantees) as well as rules applicable to certain types of contract (e.g. Directives on contracts negotiated away from business premises, on package holidays, tours and package travel, on timeshare, etc.) have illustrated the difficulties that the European harmonisation process is facing.

As we endeavour to demonstrate, the “transformation” of domestic rules in the law of contracts, through the implementation of EC Directives by national measures, does not mean “harmonisation” or “uniformisation” of those domestic laws. As many commentators have pointed out⁷¹, the disintegrative effects of the EC’s fragmented private law legislation on the

⁷⁰ Cf. F. Llodrà Grimalt, “The Binding Preliminary Contract in European Private Law”, in: G. Ajani, M. Ebers (eds.) 2005, cit. footnote 4, pp. 199-218.

⁷¹ Cf., among others, C.U. Schmid, “Pattern of Legislative and Adjudicative Integration of Private Law”, 8 *Columbia Journal of European Law (Colum.J.Eur.L.)* 415 (2002) and G.-P. Calliess, “Coherence and Consistency

bodies of national laws indicate the transition from the national systems towards a European multilevel regime, which entails difficult issues of overlap and inconsistencies between European and national layers of private law.

This is not only because of the type of harmonisation process, which is fragmentary, incomplete and partial, but rather as a result of another fundamental reason, namely the failure to reflect on the language choices made by the Community legislature; an attempt to deny responsibility for making choices and decisions on what is beyond Law and Language, and part of cultural identity, a way to refuse to see the consequences thereof.

For some time now, some legal scholars have been indicating that action on legal terminology is a priority. It was only with the Communication 2003⁷² that the European institutions have shown a clear intention of taking examples cited by academics into account, in the process of reorganising traditional legal concepts and terms unconnected to one another, to enhance uniformity of legal language both at European and domestic level. In its Action Plan, the Commission proposed to review legal vocabulary: in particular, it put the emphasis on the idea of a “Common Frame of Reference” (CFR) in the definition of legal concepts, central to a codified system of legal reasoning.

The system can not work without this precision in legal concepts. It has been emphasised effectively that: *“It is true that what members of a community share is the homology of the linguistic structure. It is equally true that this is what distances them from other communities of speakers. But after having admitted that, in a certain way, where the lexical structure is different, the world is different, it is necessary to underline what does not imply either the reciprocal incomprehensibility, i.e. the incommunicability, nor incomparability, nor incommensurability”*.⁷³

in European Consumer Contract Law: a Progress Report”, *German Law Journal (GLJ)*, vol. 04, no. 4, 2003, pp. 333-372.

⁷² Cf. Communication from the Commission to the European Parliament and the Council: “A More Coherent European Contract Law: An Action Plan”, COM(2003) 68 final, Brussels 12.02.2003. See also the Commission’s follow-up to the 2003 Action Plan: “European Contract Law and the revision of the *acquis*: the way forward”, COM(2004) 651 final, Brussels 11.10.2004, at p. 3: “(...) *the Commission will use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law. At the same time, it will serve the purpose of simplifying the *acquis*. The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders.*” .

⁷³ A. Gambaro (2004), “The Trento Theses (Comparative methodology for legal comparison)”, *Global Jurist Frontiers* March 22, 2004.

To build a common European identity (a shared cultural identity which takes heed of local variations) the crucial role of *inter-* and *trans-* disciplinary comparative studies in every context of the social sciences must be recognised⁷⁴. Harmonisation necessarily presupposes the mature recognition of “diversity”⁷⁵ and the European Parliament has already called for differing legal traditions and systems to be respected⁷⁶.

Harmonisation cannot be brought about without first precisely identifying differences, and this is what the discipline of comparative law looks at when studying European integration. The recognition and mapping of similarities and differences between the national legal systems, among competing systems which are supranational (PECL, UNIDROIT Principles) and between principles and rules deriving from existing Community law (*Acquis* principles) imply research into terminology to identify ‘vulnerable’ legal terms, on the one hand, and ‘solid’ ones, on the other. Community law results from an intense process of comparison, more (or less) aware and more (or less) exact; it is founded on general principles, rules and legal solutions which are at times original, but more often the result of a compromise between various national legal systems. The synthesis of the European legal systems and their amalgamation into a common supranational legal system seems to be the primary goal to achieve, and it is pursued in various ways. A single method of comparison, in fact does not exist: legal reform, research and teaching are very different contexts to be explored using a single approach and there have been calls for a transparent comparison of the varying approaches taken by jurists in the comparative field⁷⁷.

⁷⁴ Since the 60s, two Italian jurists in particular have distinguished themselves in this field: Gino Gorla (1909-1992), Professor of Comparative Law at Rome, who devoted his time to comparative studies from a historical perspective. His most influential work concerns the law of contracts and the part played by judicial precedent in the Roman-Germanic legal tradition; and Rodolfo Sacco, who advanced the theory of legal ‘formants’: cf. *Introduzione al Diritto Comparato*, Torino, 1980; in English: R. Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (instalments I & II)”, 39 (1991) *American Journal of Comparative Law* (AJCL), 349.

⁷⁵ T. Angelo, “The Challenge of Diversity”, in: I. Schwenzer, G. Hager, *Festschrift Peter Schlechtriem*, Tübingen, 2003, pp. 311 ff.; R. Cotterell, “Seeking Similarity, Appreciating Difference: Comparative Law and Communities”, in: A. Harding, E. Örüçü (eds.), *Comparative Law in the 21st Century, 2002*, pp. 35 ff.; W. Van Gerven, “Comparative Law in a Regionally Integrated Europe”, in: A. Harding, E. Örüçü (eds.), *Comparative Law in the 21st Century, 2002*, pp. 155 ff.; R. Sacco, “Diversity and Uniformity in the Law” 49 *AJCL* 171 (2001); M. Bussani, “‘Integrative’ Comparative Law Enterprises and the Inner Stratification of Legal Systems”, 8 *Eur. Rev.Priv.Law*, (2000) pp. 85-99.

⁷⁶ Cf. the European Parliament “Resolution on European contract law and the revision of the *acquis*: the way forward”, Brussels 23.03.2006, point (9).

⁷⁷ On “cognitive control” and on the “imperialistic attitude” of some comparatists cf. G. Frankenberg, “Critical Comparison: Rethinking Comparative Law”, 26 *Harvard Intern. LJ* 411 (1985), available in internet at *Trento Common Core Project* (2005) video archive: <http://www.jus.unitn.it/services/arc/2005/0609/home.html>. The multiplicity of methods is suggested by V.V. Palmer (2004), “From Lerotholi to Lando: Some Examples of Comparative Law”, *Global Jurist Frontiers*, vol. 4, issue 2, article 1.

Then we agree that a multiplicity of methods and an interdisciplinary approach in comparative law is *indispensable* to cope with the complexity of EU integration. The possibilities are endless: functional comparisons, which uses problem solving to bridge the differences between Common law and Civil law (which is admittedly an important means of seeing differences and similarities and indeed it has been one of the comparative law's principal methods during the 20th century)⁷⁸; historical comparisons, which illuminate the migration of legal ideas and the filial relationships between legal systems; empirical and statistical comparisons, which conduct surveys, hold interviews, collect empirical data, and issue questionnaire; evolutionary comparisons; structural comparisons; thematic comparisons, and all of these can be carried out from a "micro" or "macro" point of view. A variety of approaches and tools, and a multiplicity of methods have been a source of enrichment in the best comparative work. The appropriateness of method follows from the choice of goal and from the principal user groups: legal scholars, legislative reformers, judges, etc. This way of doing comparison is what a jurist has called "*a pragmatic and inclusive approach*", which takes into consideration the costs and benefits to different users and recognizes that methods of scholars may be inappropriate to legal reformers and law appliers⁷⁹.

Another possible approach is to be added to the previous: that which introduces *inter-* and *trans-* disciplinary evaluation in comparison. It has become indispensable for the jurist as interpreter of the law, to conduct a dialogue not only with sociologists, economists, anthropologists, historians and political scientists, but also with translators, linguists and expert terminologists. In order to make sense of the Law and the polysemous nature of its Language, a steady, constant reworking of the context⁸⁰ which defines Law and Language is required. On this point, the post-modern critical darts coming this way from the United States, according to which Law is a narrative technique, have challenged continental theories and left evident traces among European jurists⁸¹. The *Crits* have added an essential factor to current European legal thinking:

⁷⁸ On it see M. Graziadei, "The Functionalist Heritage", in: P. Legrand, R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge 2003, pp.100 ff.

⁷⁹ V.V.Palmer (2004), cit. footnote 77, pp. 3 ff.

⁸⁰ Gadamer famously contends that meaning and application are interrelated: the meaning of a principle is not determined at the outset for all time, but changes as it is applied in new circumstances. As Gadamer argues, application involves "co-determining, supplementing, and correcting [a] principle." For Gadamer, Law is a primary exemplification of this interrelation. H.-G. Gadamer, *Truth And Method*, (*Wahrheit und Methode*, 1960) London, 1992, p. 39.

⁸¹ D. Kennedy, *A Critique of Adjudication (fin de siècle)*, Cambridge, Massachusetts, 1997; A. Ainsworth, "Categories and Culture: On the 'Rectification of Names' in Comparative Law", 82 (1996) *Cornell L.Rev.* 19; A.

Law is “narrative” in two distinct (but related) senses: in the modern academic sense, as a social construct that integrates diverse phenomena into some meaningful, if necessarily incomplete, whole; and in the powerful sense of narrative as story, as a tale that has power and relevance because it has a beginning, a middle and an end⁸². Translators, linguists and terminologists can help jurists to interpret this “narrative”, as important mediators of communication.

Peters, H. Schwenke, “Comparative Law beyond Post-Modernism”, 49 (2000) *Int’l & Comp. LQ* 800; E. Öricü, “Critical Comparative Law, Considering paradoxes for Legal Systems in Transition”, (2000) at www.ejcl.org/41/art41-1.html; U. Mattei, A. Di Robilant, “The Art and Science of Critical Scholarship. Post-Modernism and International Style in the Legal Architecture of Europe”, 75 (2001) *Tulane Law Review* 1053; T. Wilhelmsson, “The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law”, in: J. Smits (ed.), *The need for a European contract law: empirical and legal perspectives*, Groningen, 2005, pp. 123-154.

⁸² Cf. G.H. Taylor, M. J. Madison, “Metaphor, Objects, and Commodities”, 54 *Cleveland State Law Review* 141 (2006), hosted by The Berkeley Electronic Press, <http://law.bepress.com/pittlwps/papers/art48>, at 162 ff.