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A DISCOURSE ANALYSIS OF NEWS MEDIA ARTICLES ON THE POLISH 'RULE OF LAW CRISIS'

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Abstract: The article identifies the discursive characteristics of news media texts covering Poland's 'constitutional crisis'. Following the conception of discourse presented in Laclau and Mouffe (1985), i.e. as an articulatory practice that conveys meaning through a structured system of positions and differences, the article highlights some features of English-language news media texts (e.g. from the *Guardian*, *Telegraph*, *Economist*, *Financial Times*, *New York Times*, *Washington Post*) that can be described as typical. The following features are identified: a lecturing tone, the use of structural oppositions, immediate rebuttals, misrepresentation, appeals to expertise, and the sovereignty taboo. These features are diagnosed as contributing to the narrow discursive range covered by news articles. To shed light on this narrow range, the article presents three conflicting positions from Polish legal theory

that address the issues of constitutional courts, the rule of law and national sovereignty: Ryszard Piotrowki's legal constitutionalism, Paweł Bała and Adam Wielomski's Schmitt-inspired position, and Adam Sulikowski's reading of the constitutional courts as an instrument of hegemonic discourse. In the conclusion it is suggested that news media discourse would benefit from demonstrating a greater awareness of other discourses, and from developing a more generous, balanced approach to presenting and addressing their claims.

Keywords: discourse analysis; news media articles; the Polish constitutional crisis; rule of law; sovereignty; legal theory.

ANALIZA DYSKURSYWNA PUBLIKACJI PRASOWYCH DOTYCZĄCYCH „KRYZYSU PRAWORZĄDNOŚCI" W POLSCE

Abstrakt: W artykule wskazano charakterystyczne cechy dyskursu publikacji prasowych poświęconych „kryzysowi konstytucyjnemu" w Polsce. Bazując na koncepcji dyskursu autorstwa Laclaua i Mouffe (1985), zgodnie z którą jest to praktyka artykulacyjna wyrażająca znaczenie poprzez ustrukturyzowany system pozycji i różnic, zwrócono uwagę na pewne typowe cechy tekstów publikowanych w prasie anglojęzycznej (np. w *The Guardian, Telegraph, Economist, Financial Times, New York Times, Washington Post*). Są to: pouczający ton, wykorzystanie strukturalnych przeciwieństw, natychmiastowe odpieranie zarzutów, przeinaczanie, odwoływanie się do wiedzy eksperckiej oraz swoistego tabu suwerenności. Wykazano, że cechy te przyczyniają się do zawężania zakresu dyskursu tychże publikacji. Następnie, celem wskazania zakresu zawężenia anglojęzycznego dyskursu prasowego, artykuł zwięźle przedstawia trzy odmienne stanowiska z obszaru polskiej teorii prawa. Podejmują one kwestie sądów konstytucyjnych, praworządności i suwerenności narodowej. Stanowiska te to konstytucjonalizm prawny Ryszarda Piotrowskiego, podejście Pawła Bały i Adama Wielomskiego, zainspirowanych teorią Schmitta, oraz interpretacja Adama Sulikowskiego, w myśl której sądy konstytucyjne są instrumentami dyskursu hegemonicznego. We wnioskach zasygnalizowano, że dyskurs publikacji prasowych istotnie skorzystałby na uwzględnieniu innych dyskursów oraz rozwinięciu bogatszego i bardziej zrównoważonego podejścia do sposobu, w jaki prezentuje i odnosi się do zawartych w nich stwierdzeń.

Słowa kluczowe: analiza dyskursu; dyskurs prasowy; kryzys konstytucyjny w Polsce; praworządność; suwerenność; teoria prawa.

1. Introduction

1.1. The issue

Over the course of 5 years, Poland's 'rule of law crisis' or 'constitutional crisis', as it is referred to in English news media and scholarship,[1] has become immensely complex and deeply divisive. The crisis essentially concerns the steps taken by the Polish government and President, after the Law and Justice Party came to power in October 2015, with regard to the judicial power (the Constitutional Tribunal, the Supreme Court, the ordinary courts and the National Council of the Judiciary), which has taken the form of appointments, mandatory retirements and legislation on structure and organisation. The conflict boils down to the constitutionality of the government's legislation and president's actions, and whether the principles of the separation of powers and judicial independence have been breached. The crisis became an EU issue when the European Commission acted to "defend judicial independence" in December 2017 (European Commission 2017), and with the EU Court of Justice ruling in January 2020 that Poland had failed to fulfil its obligations under EU law.

From the outset, the crisis has been extensively covered in UK and US publications representing positions across the political spectrum. Coverage has persisted through Covid-19 pandemic, with reference being made to the crisis in editorials in the *Guardian* and *Telegraph* on Poland's presidential election of May-July 2020,[2] and then in commentary on the 'abortion ban' of October 2020.[3]

In UK and US news sources, the Polish 'rule of law crisis' is treated as symptomatic of more general trends, with Poland frequently being positioned as further along the lurch into illiberalism and authoritarianism. In US publications, the purpose of the focus on Poland is often to warn and trigger reflection, as in Anne Applebaum's piece

[1] For a scholarly account of the crisis, see Bunikowski (2018).

[2] See 'The Guardian view on Poland's presidential election: call it off' Guardian 05.05.2020, and 'Poland's Law and Justice party needs to start living up to its name' Telegraph 12.07.2020.

[3] Author's note: the furore surrounding Contitutional Tribunal's ruling on abortion erupted after this article was submitted for review, therefore newspaper articles covering this issue fall outside the scope of the present work.

for the October 2018 issue of *The Atlantic*, 'A Warning from Europe: The Worst is Yet to Come'. In UK newspapers, the Polish crisis has been leveraged to bolster positions and push agendas on Brexit – prior to the Covid-19 pandemic perhaps the most polarizing issue in UK media discourse. Two articles – one from *The Guardian*, the other from *The Telegraph*, and thus from newspapers supposedly at the opposite ends of the political spectrum – exemplify this tendency.

In February 2019, in an opinion piece for the UK's pro-Brexit *Telegraph*, Damien Phillips, a conservative public affairs consultant,[4] argued 'A no-deal Brexit is our safest option to escape the EU police state – let's go for it'. To support the description of the EU as a police state, the author provides details on a surveillance scandal in Romania, alleging that the EU has shown "wilful blindness" to this issue. For further evidence, Phillips then details the "abuses of power" of two EU member states – Hungary and Poland:

> Meanwhile, in Hungary, we see ever more centralisation of power and authority, with judges being forcibly retired in large numbers, political figures given greater control of the judiciary and even the establishment of courts overseen directly by government. In Poland, the state has clamped down on the judiciary, press and civil rights – in violation of its constitution and Polish law. Independent courts and mutual recognition of legal decisions between member states are central to the operation of EU law and the single market, prompting legal analysts to declare Hungary and Poland as posing a far worse threat to the EU than Brexit (Phillips 2019).

Thus, the UK's exit from the EU without a trade deal is justified because: a) the EU is becoming "ever more centralised"; and yet, b) its "ostensibly rules-based order" is being challenged and undermined by the authoritarian tendencies of certain member states. The EU is thereby cast as a centralised police state, but also one which refuses "to face up to the peril of **a steady collapse in the rule of law** in many of its member states" (Phillips 2019) (emphasis added).

Over a year later, in March 2020, the Warsaw-based Annabelle Chapman[5] wrote a report-opinion piece for the pro-EU *Guardian*, arguing that 'Poland's leadership doesn't need "Polexit" – it can undermine the EU from within'. Like Phillips, Chapman pairs Poland

[4] See Phillips' articles for ConservativeHome and his Twitter activity.
[5] See Chapman's Twitter for links to her articles in *The Economist* and other publications.

with Hungary and asserts that Poland's Law and Justice party (PiS) is undermining the rule of law in the EU through its dealings with the judiciary:

> Poland has been locked in a protracted conflict with EU institutions over its judicial changes, **which the European commission has warned undermine the rule of law**. Together with Hungary's prime minister, Viktor Orbán, PiS has challenged the idea that liberal democracy is the only game in town and normalised values typically associated with the far right, including disbanding a government body that dealt with racism and xenophobia and championing homophobia.
> But the most substantial threat to the EU comes from PiS's capture of the judiciary. […] If they remain unaddressed, the Polish government's judicial changes could have **a wider impact on the rule of law in Poland and the EU** (Chapman 2020, emphasis added).

The point to be addressed here is how two journalists, writing from opposite positions on the currently most defining and divisive issue in UK politics, could at the same time adopt nearly identical positions on Poland's 'rule of law crisis'. In other words, even if their agendas concerning the EU are opposed, the authors are nevertheless united in their descriptions of the steps taken by the Polish government in its dealings with the judiciary. Their consensus is that the Polish government is undermining the rule of law in Poland and the EU; and that PiS poses a broad threat to liberal democracy in Europe. In neither text is any effort made to explore the motivations and justifications for PiS's reforms of the judiciary; neither is any attempt made to investigate PiS's ostensible challenge to liberal democracy: Chapman acknowledges there may be another "game in town", but reduces it to the irrational fears of xenophobia and homophobia.

In terms of discourse theory, both journalists can be viewed as occupying positions in the same discourse, and then, more broadly, in the same discursive formation.

1.2. Definitions and assumptions

For the purposes of this article, discourse is defined, following (Laclau and Mouffe 1985), as an articulatory practice that constitutes a meaning-system constructed through "a differential and structured

system of positions" (Laclau and Mouffe 1985: 105), and a discursive formation can be identified if "certain regularities establish differential positions" (Laclau and Mouffe 1985: 109).

The articulatory practice of writing genre-typical newspaper texts draws on a structured system of contingently fixated meanings, naturalized categories and relational identities to constitute subject positions within a broader field of "discursive struggle" (Jorgensen and Phillips 2002: 6). If certain regularities (textual features, strategies) are observed to permeate across genres – in this case newspaper articles and editorials, scholarly legal theory and normative texts (constitutions, treaties and legal rulings) – then such regularities can be identified as belonging to a discursive formation: a complex of intertextual articulatory practices and material institutions.

Unlike Foucault (1972) and Fairclough (1992), Laclau and Mouffe do not distinguish between discursive and non-discursive practices (1985: 107-109): they treat discourse as having a material aspect, in the sense that parliaments, courts, prisons, a judge's role and position, lawyers' offices, legal costs etc., are all part of legal discourse, just as much as textual phenomena (constitutions, bills, amendments, theoretical texts, newspaper articles), since they are structured by systems of signification and meaning.

Lastly, and most importantly, in Laclau and Mouffe's discourse theory, the existence of a discourse is grounded in antagonism: a discourse attempts "to dominate the field discursivity" (Laclau and Mouffe 1985: 112), and articulatory practices confront each other "in a field criss-crossed by antagonisms", from which hegemony emerges (Laclau and Mouffe 1985: 114, 134). Just as they view identities as being constructed relationally, through differential subject positionings, the same goes for discourses and discourse formations: they require a frontier and something "*beyond* them", an exteriority, in order to constitute themselves as a totality (Laclau and Mouffe 1985: 143). In other words, a discourse (e.g. legal constitutionalism) or a discursive formation (e.g. the liberal-democratic legal order) can only constitute and define itself by the antagonistic suppression (negative definition, misrepresentation) of that which they are not (e.g. populism).

1.3. Methodology

As Fairclough (1992: 57) and Jorgensen and Phillips (2002: 49) observe, the broad, macro-level approaches of Foucault and of Laclau and Mouffe do not provide examples of, or tools for, detailed text analysis. Thus, while the present article is grounded in the philosophical conception of discourse developed by Laclau and Mouffe, the methodology for the detailed analysis of news media articles draws on the insights and approaches of Fairclough (1992, 1995) and van Dijk (2009, 2014).

For Fairclough, discourse analysis is necessarily "a multidisciplinary activity" (1992: 74), since it oscillates between the descriptive analysis of textual properties and the interpretation of texts produced and consumed as a part of social practice. While textual properties can be analysed with the tools of linguistics, in particular those provided by Halliday's functional approach (2003, 2014), the tools of sociology are necessary for interpreting the socio-cognitive process involved in text production and consumption, particularly with regard to how this practice is shaped by and construct meaning through interpretation (Fairclough 1992: 71-75).

Fairclough's multidisciplinary approach is extended by van Dijk (2014), who argues that, since discourse shapes the knowledge acquired and continually updated by espistemic communities, discourse studies should draw on the various disciplines that account for knowledge production and consumption. For van Dijk, "discourse analysis is not a method but a cross-discipline"; hence, in addition to sociology, it can employ the methods of psychology, anthropology, communication studies, linguistics, semiotics etc., in order to shed light on the "knowledge-discourse interface" (van Dijk 2014: 7-12).

With this in mind, **Section 2** of this article adopts a genre-based approach to the discourse analysis of news texts covering Poland's 'constitutional crisis'. The analysis is restricted to broadsheet and weeklies, for the simple reason that tabloid newspapers have not covered this issue with any regularity.[6] Texts which address this issue

[6] When tabloid newspapers (e.g. *The Sun*, *The Mirror* and *New York Post*) cover Poland, the articles tend to focus on other issues (migration, abortion, broader conflict with the EU). For example, *The Sun* mentioned the Constitutional Tribunal following the October 'abortion ban'. See: https://www.thesun.co.uk/news/13005047/poland-ban-abortions-clashes-cops-warsaw/

are assigned to three main types: reports, editorials/opinion pieces, and blends of reports and opinion pieces. These text types are treated as constituting a system of genres, in their configuration and relationships (Fairclough 1992: 126). The texts thus assigned are then analysed to identify genre-typical features. A feature is treated as potentially typical if it appears in several texts and in different publications, thereby suggesting its systemic nature.

The method of textual analysis employed here is both descriptive, e.g. when focusing on the use of adjectives and modality, and interpretative, e.g. when highlighting the use of strategies, such as appeals to expertise, immediate rebuttals etc. It is assumed, following Fairclough, that texts are produced and consumed by social agents thorugh socio-cognitive processes that are largely unconscious: writers employ strategies to convey meaning, and readers construct meaning through interpretation (Fairclough 1992: 71-2; 1995: 233). The consideration of such strategies necessarily entails moving from the description of textual elements to interpretation of the factors that determine textual production.

Section 3 presents three conflicting positions from Polish legal theory that address the issues covered or suppressed by the articles analyzed in Section 2. The purpose in this section is not to analyse these theoretical texts in terms of genre features, but rather – following Fairclough and van Dijk's multi- and interdisciplinary discourse studies – to analyse the texts using the key tool from the discipline of philosophy, i.e. the analysis of concepts. The aim is to juxtapose divergent conceptions of the constutional judiciary, the rule of law, and sovereignty, which are currently the subject of much debate in Polish legal theory, with a view to shedding light on the narrow conceptual range found in the articles analysed in Section 2.

While it is simply impossible for a researcher to adopt a privileged standpoint outside of discourse *per se* (Jorgensen and Phillips 2002: 21), a researcher can consider the relationship and interaction between discourses, such as news media and legal theory, and analyse how a concept is presented and treated in both.

Thus, to return to the articles of Phillips and Chapman, despite the fact they articulate divergent subject positions from within the opposed corporate-subject positions of the *Guardian* and the *Telegraph*, they can be seen as deploying the same "naturalised categories" (Jorgensen and Phillips 2002: 21-26) to organize their statements and texts in similar ways. For example, in both articles, 'the

rule of law' is invoked as a common-sense, taken-for-granted category: it is not explicated or contextualized to any extent. Chapman (2020) merely describes the rule of law as one of the EU's "fundamental values" and refers the reader via a hyperlink to the European Commission's Rule of Law webpage;[7] elucidation is thereby outsourced to the experts. In turn, Phillips contrasts the "rules-based order" of the EU, characterised as centralized and tyrannical, with the UK's "liberty under the law". It is possible that Phillips' distinction alludes to deeper differences between continental law and the UK's common law, but the juxtaposition is not clarified or developed, and remains purely rhetorical. For example, a Brexiteer could argue that the UK's common law principle of 'rule of law', based on a balance between parliamentary sovereignty and 'judge-made law' whereby legislation is applied in accordance with an open, evolving, unwritten constitution (Santoro 2007: 153-200), is fundamentally incompatible continental concepts of 'rule of law' (*Etat de droit*, *Rechtsstaat* and *praworządność*), which are based on the supremacy of closed constitutions and the control of constitutional courts. Yet Phillips makes no such argument.

With these *Guardian* and *Telegraph* articles, the lack of elucidation can be interpreted in a variety of ways. Perhaps the authors assume their readers have sufficient knowledge of what the 'the rule of law' is, and thus do not require a dumbed-down explanation. Or perhaps the meaning of this concept is – deliberately or unconsciously – swept under the carpet, so the expression can function as an empty signifier, thus foreclosing reflection and discouraging deeper analysis on the part of the reader.

[7] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law_en

2. Generic features of news media texts on Poland's 'constitutional crisis'

2.1. Text types: the reporting/commenting continuum

UK and US news texts covering Poland's 'constitutional crisis' can be viewed as occupying a continuum ranging from relatively neutral reports of events to overt commentary in the form of editorials and opinion pieces. In between these two text types there are increasingly common blends of reporting and commenting.

2.1.1. Reports

Texts which can be placed on the reporting end of the continuum can firstly be distinguished by what they *do not do*. This negative definition is exemplified in in the language used to describe the chief actors. Thus in the BBC articles 'Poland reverses law on removing judges following EU court ruling', 21.11.2018, and 'Retirement age: Poland broke EU law with ruling on judges', 5.11.2019, the descriptions of the Polish government avoid the adjectives 'right-wing', 'populist' and 'nationalist', which are typical of opinion pieces; instead the following terms are used: "Poland's governing party", "the government", "The Law and Justice Party (PiS)", "the PiS".

The most descriptive premodification appears in the noun phrase "Poland's socially conservative government" (5.11.2019). I would argue that this is a more neutral premodification than 'rightwing populist' or 'nationalist', as the description signals there are different types of conservatism, and thus has an informative function, rather than a trigger function.

Other actors are described as follows: "the head of the PiS, Jaroslaw Kaczynski", "the Supreme Court chief justice, Professor Malgorzata Gersdorf"; whereas in opinion pieces and blends the same actors are described as "rightwing firebrand Jaroslaw Kaczynski" (Shotter and Majos 2019) and "the independent-minded Supreme Court president" (The Economist 2020).

Another genre-typical feature of such reports is the attempt to include the multiple viewpoints, through a mixture of direct and indirect speech, without commenting on the perspectives or developments. Thus, despite the dramatic headline of the *Express* article 'Brussels fury: Poland could be KICKED OUT of EU over controversial reforms', 19.12.2019, the actual text refrains from commenting, and attempts to present the varied perspectives of PiS representatives, the Court of Justice of the EU, protesters etc. The only opinions that the author offers concern probability ("the legislation is likely to pass") (Mowat 2019).[8]

2.1.2. Editorials/opinion pieces

Editorials on Poland's 'constitutional crisis' have appeared in the pages of the *Financial Times* and *The Guardian*. One of the typical features of this text type is the lecturing, paternalistic tone adopted, and the extensive use of modality to comment on what certain actors should do or should refrain from doing.

For instance, in the *Financial Times* article 'Poland must not slide further into illiberalism', 16.10.2019, the editorial team offers the following advice: "Law and Justice **would do better to** build on its popularity while trying to heal the country's divisions" (emphasis added). In the article 'In Poland, the rule of law is under ever greater threat', 09.02.2020, the team advises the Polish government: "If the Polish government's real aim is to provide more effective justice, **it would do better to** backtrack" (emphasis added); and EU states: "Above all, EU states **should not** shrink from linking future disbursement of lucrative structural funds to upholding the rule of law" (emphasis added).

Similarly, the *Guardian* editorial 'The Guardian view on Poland's presidential election: call it off', 05.05.2020, which connects the Presidential election to Law and Justice "playing fast and loose with democratic norms, particularly in relation to the judiciary and media", concludes that the election should be called off, stating: "On legal,

[8] For a similar range of viewpoints, see the Agence France-Presse article published in the *Telegraph* on 4.7.2018, 'Polish Supreme Court chief justice turns up to work in defiance of retirement law being challenged by EU'

logistical and ethical grounds that **would be the right course of action**" (emphasis added).[9]

This paternalistic lecturing is grist to the mill for nationalist-oriented assertions that the institutions of Western Europe – such as the EU, the Court of Justice of the European Union, multinationals and, of course 'Western media' – are tools of colonialism.[10] The fact that the editorial boards of UK newspapers take it upon themselves to tell Polish political parties and EU states what course of action they should take does seem to testify to the presence of an entitled mindset; one that presumes its Central European addressees will pay heed.

2.1.3. Blends of factual news reports and opinion pieces

The paternalistic, lecturing tone is also distinctive textual feature typical for blends of reports and commentary. Such texts also employ a range of other strategies which, due to their regularity, can be identified as genre-typical features.

The first is mixing verifiable facts with value-laden language designed to trigger associations and emotions. A case in point is Marc Santora's article 'Polish Crisis Deepens as Judges Condemn Their Own Court' for the *New York Times*, 05.07.2018, which opens as follows:

> For days, tens of thousands of Poles have marched in the streets to protest their nationalist government's purge of the Supreme Court, an action that has been condemned by the European Union as a threat to the rule of law in a country that led the struggle against Soviet domination in 1989 (Santora 2018).

[9] It would be worth exploring whether this lecturing tone is unique to 'Western' newspapers commenting on Poland. Preliminary research on Polish articles commenting on, for example, Brexit or Boris Johnson's clashes with the Supreme Court of the United Kingdom (i.e. the UK's own 'constitutional crisis') suggest that Polish dailies and weeklies do not take it upon themselves to lecture the UK. For instance, see "Sąd Najwyższy ratuje honor brytyjskiej demokracji. Co dalej z brexitem? [The Supreme Court saves the honour of British democracy. What's next for Brexit?]", *Polityka* 24.09.2019 (Skarżyński 2019); and "Brexit - lekcja dla Polski [Brexit – a lesson for Poland]" *Gazeta Wyborcza* 31.01.2020 (Michnik 2020).

[10] See, for example, Ferenc Almassy's article "Eastern Europeans Begin to Grow Tired of Western Colonialism" (Almassy 2017).

In the midst of statements of identifiable and verifiable facts (a large number of Poles marched in protest; the Polish government's actions were criticized by the EU) there are some statements that are more problematic. First, the description of a government as "nationalist" has negative connotations in this context, since the article is structured around a network of positive and negative actors, with "the European Union" being the positive counterpart to the Polish government. Second, the description of the government's action as a "purge" is neither informative nor neutral: the reader is not given any information – at this point – on what exactly the government has done to the Supreme Court; and when the term 'purge' is deployed shortly before the reference to Soviet domination in the final clause, the Polish government is thereby implicitly compared with the Soviet Union, which readers with even basic knowledge of communism will associate with Stalinist purges. This comparison is echoed in third paragraph, where Poland is described as "a nation that once represented post-communist hopes for democracy but that is now under the grip of an increasingly authoritarian – though legitimately elected – government" (Santora 2018). Again, and somewhat obviously, the adjective "authoritarian" is deployed as the negative term, contrasted with "democracy".

The article also exemplifies another key strategy typical for this genre of texts on the Polish crisis: namely the presentation of a token argument which is immediately refuted by a counter argument (often drawing on anonymous, 'expert' sources), as can be seen in the following section:

> **The government says** the reforms are all intended to make the courts more responsive to the will of the people – and to free the judiciary from corrupt judges or communist-era holdovers. **But critics see** the end of the judiciary's functioning as a check on power – and a violation of the liberal democratic norms that are required of members of the European Union, which Poland joined in 2004" (Santora 2018, emphasis added).

In an article consisting of 1,777 words, a total of 31 words are devoted to the government's justification of its actions[11] – which is instantly subjected to a rebuttal ("But critics see…") that does not in fact respond

[11] A further 71 words are devoted to Zbigniew Ziobro's comments on the jurisdiction and competent of Court of Justice of the European Union, which appear at the end of the article and upon which no comment is made.

to the government's reported claims (i.e. the courts need to be more responsive; the judiciary is corrupt), but instead resorts to hyperbole ("the end of the judiciary's functioning").

This strategy of immediate rebuttal is employed in the *Washington Post* article 'If you think the U.S. is having a constitutional crisis, you should see what is happening in Poland', 25.01.2020, but here, while Polish government sources are anonymous and the argument is summarized in reported speech, the rebuttal is clearly weighted towards the expertise and authority of Koen Lenaerts, whose argument is quoted directly:

> **PiS authorities argue that** this is an instance of unwarranted European Union interference in domestic affairs. **However,** the European Union relies on cooperation between national and European courts, and E.U. membership requires respect for the rule of law, including judicial independence. **As Koen Lenaerts, president of the European Court of Justice (the European Union's highest court), put it earlier this month in a debate at Warsaw University**: 'You can't be a member of the European Union if you don't have independent, impartial courts operating in accordance with fair trial rule, upholding Union law'" (Pech and Kelemen 2020) (emphasis added).

Similar immediate rebuttals and tactical appeals to expertise can be found in the *Financial Times* article 'Poland's clash over justice system leaves courts in chaos' 24.01.2020, which cites five words of Zbigniew Ziobro, Poland's justice minister, and reports government sources anonymously ("Law and Justice argues …"), while including a lengthy direct quotation from "Marcin Matczak, a law professor at the University of Warsaw", and concluding the article by citing "Christian Wigand, a spokesman for the commission…" (Shotter 2020).[12]

[12] That the use of such textual tactics is not inevitable when covering Polish controversies is demonstrated by reports that address broader social and political issues (in addition to the 'constitutional crisis'), such as the *Times* article 'Inflamed Poland scorns Brussels', 06.08.2017 (Pancevski 2017), and the *Financial Times* article 'Poland election: the unfinished counter-revolution', 09.10.2019 (Shotter and Majos 2019). These reports – while still resorting to genre-typical dramatic phrases ("waging an unprecedented all-out war", "the PiS-loathing urban elite" (Pancevski 2017), "rightwing firebrand Jaroslaw Kaczynski" (Shotter and Majos 2019)) – can be described as reasonably balanced: multiple points of view are presented, with the use of direct quotations; and commentary is either kept to a minimum or is extrapolated from the interviewees' words.

2.2. Implicit oppositions

As has been mentioned, the discourse of news media articles on the Polish 'constitutional crisis' is structured around naturalised categories and value-laden structural oppositions that can be taken for granted in the interactive generation of meaning, and thus for consolidating assumptions and reinforcing opinions. While previous sections have highlighted how some of these categories and pairs operate in their textual context, below they are presented in a de-contextualized form.

Table 1. A selection of oppositions occurring in newspaper articles on the Polish 'constitutional crisis'.

Positive	**Negative**
Polish Crisis Deepens as Judges Condemn Their Own Court (New York Times, 05.07.2018) (Santora 2018)	
rule of law, the European Union	nationalist government; increasingly authoritarian;
post-communist hopes for democracy	Soviet domination
judicial independence; once-impartial tribunal; a non-partisan group	purge of the Supreme Court; politicized and dysfunctional; increasingly politicized; stacked with its own jurists; rigged
A no-deal Brexit is our safest option to escape the EU police state – let's go for it (The Telegraph, 08.02.2019) (Phillips 2019)	
liberty under the law	the EU police state; a dark and insidious authoritarianism; backsliding into authoritarianism; the forces of conservatism and denial
its constitution and Polish law; Independent courts; our legal integrity	abuses of power; clamped down on the judiciary, press and civil rights; a steady collapse of the rule of law
Poland must not slide further into illiberalism (Financial Times, 16.10.2019) (Financial Times 2019)	
western liberals; civil society; centrist fightback; cradle of 1989 anti-communist uprisings; Western capitals; the centre-right Civic Platform	illiberalism; Conservative nationalism; nationalist populism; Catholic-infused social conservatism; a form of one-party rule; its abrasive leader, Jaroslaw Kaczynski; illiberal quasi-authoritarianism fostered by Mr. Orban;
EU concerns over the rule of law	neuter the constitutional court; contentious legal reforms; tinker with electoral rules

Law and Justice v law and justice (The Economist, 25.01.2020) (The Economist 2020)	
concerns over the rule of law; a union made of laws	sowing chaos; an expression from communist times: *lex telefonica*
the European Commission; the ECJ; the Venice Commission	the populist Law and Justice; Hungary's ruling Fidesz Party
politically tainted	an independent jurists' association; the independent-minded Supreme Court president
If you think the U.S. is having a constitutional crisis, you should see what is happening in Poland (Washington Post, 25.01.2020) (Pech and Keleman)	
the European Commission has escalated its efforts to defend judicial independence;	the PiS government has sought to exert control over judges;
E.U. membership requires respect for the rule of law, including judicial independence.	"a Soviet-style justice system"
In Poland, the rule of law is under ever greater threat (Financial Times, 09.02.2020) (Financial Times 2020)	
The EU is built on the rule of law	Hungary's nationalist government; PiS swiftly neutered Poland's Constitutional Tribunal; chaos now threatens;
Independent experts	loyalist judges; attempts to cow the judiciary
Poland's leadership doesn't need 'Polexit' it can undermine the EU from within (The Guardian, 10.03.2020) (Chapman 2020)	
liberal democracy	The rightwing populist Law and Justice Party; the country's rightwing leadership
the fundamental values of the EU	values typically associated with the far right; championing homophobia
the rule of law in Poland and the EU	capture of the judiciary; undermining the rule of law
Poland's Right-wing populists tested by close-run presidential race (The Telegraph, 29.06.2020) (Day 2020)	
centre-Right mayor of Warsaw	populist Right-wing president
outward looking; at ease with liberal values	a defender of the "traditional family"
repair relations with Brussels	overhaul of the country's judicial system; undermining the constitutional order

This is not to suggest that there is in all cases a strict, direct one-to-one correspondence between the positive and negative sides in the table rows. The authors structure their texts around a network of oppositions, and seek to convey meaning through strategies and techniques, but how this meaning is constructed is dependent on the interpretative skills and inclinations of readers. In other words, it falls to the reader to couple the oppositions latent in the text and form binary pairs in the process of interpretation.

Since Laclau and Mouffe's 1985 model lacks a clear account of the reader's role in discursive practices, Fairclough and van Dijk can be called upon to plug the theoretical gap.

Fairclough's social theory of discourse, practice is comprised of three processes: production, distribution and consumption (Fairclough 1992: 71). In his terminology, texts "are made of forms which past discursive practice, condensed into conventions, has endowed with meaning potential". This meaning potential is reduced by interpreters, who ascribe their selected meanings in the process of reading/interpretation (Fairclough 1992: 75). For Fairclough, both the production of meaning potential in texts and the ascription of meaning in interpretation are determined by social factors and contexts. Hence the forms that the authors of newspaper articles use to produce their meaning potential are determined by past discursive practice, but also by the collective nature of newspaper text production (Fairclough 1992: 78). Teun A. van Dijk develops this further with his socio-cognitive context model of how context determines discursive communication, thus:

> The journalist writing an editorial at the same time may engage in institutional and political action, and does so as member of a media organization, as member of a professional group, and probably as a member of one or more ideological groups. When writing the editorial she thus not only instantiates a general activity of newspaper editors but also the social representations shared by the organization or groups she currently "identifies" with (van Dijk 2009: 80).

The same goes for the consumption/interpretation of newspaper articles: how a reader processes the forms embodied in a text will depend on their social context (ideological leanings, socio-cultural groups, identities and identifications). The authors of newspaper articles are able to draw on this social context to make assumptions about their readers' general knowledge and political leanings.

What is striking in the articles under consideration, however, is the regularity of the structural oppositions used, and across newspapers occupying varied and opposed positions on the political spectrum. This discursive regularity adds weight to the argument made in Section 1: that the positions articulated on Poland's 'constitutional crisis' stake out and constitute a narrow discursive field. The regularities suggest that beneath the intense divisions of left vs. right, leave vs. remain, authors and readers are united in their antagonism towards a more fundamental enemy, which is depicted as illiberal populism that undermines the rule of law.

In Laclau and Mouffe's model, 'discursive fixations' function in a similar way to Fairclough's 'forms', in the sense that they are regularities that are arrested or delimited from the surplus of meaning. Since in their conception meaning is always overdetermined, all identities and meanings are only ever partial: they are "the relative and precarious forms of fixation which accompany the establishment of a certain order" (Laclau and Mouffe 1985: 98). Thus, in Laclau and Mouffe's 1985 model, rather than a theory of specific discourse production and consumption, the emphasis is on the precarious, unstable nature of discourses and the subject positions constituted within them. But if this abstract model is applied to concrete discourse, this entails that, as an articulatory practice, the writing of newspaper articles that address and participate in social antagonisms is dependent on *rearticulation*: as events unfold and other discourses continue and develop their articulations in response to them, the unstable frontiers of a discourse and discourse formation require incessant reconstitution and delimitation. Oppositions are continually reiterated in discursive confrontation, both in the process of text production and in the interpretative process of text consumption. If the notion of "discursive struggle" is taken seriously (Jorgensen and Phillips 2002: 6), then newspaper opinion pieces on social-political crises are involved in just such a struggle. Furthermore, if Laclau and Mouffe's notion of hegemonic discourse is accepted, then the structural oppositions deployed in news media discourse have to be understood as reflecting deep-seated social antagonisms.

2.3. Direct confrontation and misrepresentation

In addition to implicit structural oppositions and the strategy of immediate rebuttal, an article from the print edition of *The Economist*: 'Law and Justice v law and justice', 25.01.2020, also employs the strategy of misrepresentation, and this is related to another typical feature of news media texts covering Poland's 'constitutional crisis', namely a systemic avoidance of the issue of sovereignty.

The *Economist* article focuses on the conflict between the Polish government, the Polish Supreme Court and the ECJ, following the Supreme Court's request, in August 2019, for a preliminary ruling from the ECJ on the Polish government's law creating a disciplinary chamber for the Court. While the first half of the article provides a summary of these complex developments, the second half presents the justifications put forward by the Polish government. Rather than analyzing these justifications in any degree of detail, each argument is followed by an immediate rebuttal. The first example:

> **The government says** it is being treated unfairly. Under EU treaties, says Andrzej Duda, the president, "Poland has the right to regulate its internal legal order." **The opposite is closer to the truth**. The treaties oblige national courts to apply EU law and obey the ECJ. European officials and experts in EU law warn that if one country's courts are politicised, others may stop accepting their rulings" (The Economist 2020) (emphasis added).

The rebuttal does not substantially address the claim made by the president: it merely asserts the opposite, before citing anonymous experts to put forward a conditional claim which: a) equates a country's assertion of sovereignty over its own legal order with the politicization of its courts; b) draws on the unquestioned assumption that national courts are by default non-politicized; and c) suggests the possible negative consequences of such politicization to the efficacy of the ECJ. The argumentation is tangential in the most generous light; in the worst, it is an example of rhetorical obfuscation masquerading as balanced argument while clearly siding with EU interests.

The *Economist* article proceeds to tackle three arguments ostensibly put forward by the Polish government in its 'White Paper on the Reform of the Polish Judiciary', which was presented to the President of the European Commission, in March 2018. In discursive

terms, this can be treated as an example of news media discourse engaging with an exterior discourse. The strategies employed in this confrontation are immediate rebuttal, suppression, misrepresentation and appeals to expertise.

The rebuttal strategy is employed to present and dismiss the first government justification:

> **One was that** the courts had never been properly de-communised. Three decades after the transition, **this seems dubious**. The average judge is far too young to have served under the communist regime. The government undermined its own case in November by appointing to the constitutional court and elderly PiS lawmaker who had served as a notorious prosecutor for the old dictatorship" (The Economist 2020) (emphasis added).

By focusing on "the average judge", the rebuttal ignores the fact that the justification in the White Paper is focused on specific judges, and concludes by listing examples of the specific sentences that had been issued by judges now sitting on the Supreme Court when they had been sitting in the lower courts during the period of martial law (White Paper 2018: 15-16).[13]

This government justification is tackled more convincingly by Iustitia, the Polish Judges Association, in its 'Response to the White Paper Compendium', 16.03.2018. The Association acknowledges that there are indeed 6 Supreme Court judges who adjudicated in courts of lower instance during the period of martial law (1982-1983), out of a total staff of 93, but suggests that if they are to be accused of "unworthy conduct" and brought to justice, this would have to be done on the basis of "an individualized (criminal or disciplinary) appraisal". Iustitia concludes that the Polish Government's systemic reform of the Supreme Court resulting in "the dismissal of 40% of the judges is a completely disproportionate measure" (Iustitia 2018: §4).

This response from Iustitia would have been available to the authors of the *Economist* article, with a modicum of research, since it was published on the association's website, in English, 9 days after the publication of the Polish Government's White Paper, and thus over 18 months before the publication of the *Economist* article. And the

[13] References are to page numbers, rather than sections or paragraphs. The White Paper is organized into numbered paragraphs, but there is some text which is not numbered (e.g. in panels).

Economist article actually mentions Iustitia's protest march which took place in January 2020.

The validity of the second government justification is acknowledged, but then immediately rebutted by citing the opinions of anonymous judges: "**Another argument is that** cases take too long […] **Backlogs are indeed long, but judges say** the reforms will not shorten them. They have not added support staff or simplified procedures much" (emphasis added). Thus, the rebuttal acknowledges the validity of the justification but shifts to criticism of the remedy.

The third and final "claim" that the *Economist* authors chose to focus on is not actually presented in the White Paper as a justification for the reforms, but is actually a response to the "European Commission's Remarks against the backdrop of the Legal System in Poland and in other EU Member States". Therein, Polish Government responds, point-by-point, to the Commission's assertion that its reforms of the judiciary constitute a threat to the rule of law in Poland. Describing these arguments as one of the "three justifications for its reforms" simply misrepresents the Polish Government's White Paper. In fact, the third justification offered by the Polish Government is that the reforms restore **balance** to the tripartite separation of powers. This far-reaching argument, involving issues of accountability, immunity and judicialization, is entirely ignored by *The Economist*. Needless to say, the argument is addressed in Iustitia's 'Response' (§7).

Nevertheless, *The Economist* asserts:

> **A third claim is that** the EU is biased against eastern European countries, since western ones also give governments some say in the judiciary. For example, in Germany, as in Poland, the president of the constitutional tribunal is picked by the government, and cases are heard by smaller panels of judges. **But** in Poland the court's president gets to select the panels and can choose loyal PiS justices (Economist 2020, emphasis added).

The use of the term "eastern European countries" sets off alarm bells, since by most accounts Poland is located in Central Europe, and a search of the White Paper reveals that at no point does the Polish Government complain of bias against "eastern European countries", and neither is any mention is made of 'western' countries. Furthermore, the White Paper makes no reference to the president of the German Constitutional Tribunal being picked the government. In the White Paper, comparisons with Germany are made with regard to: the

regulations on "trainee judges", or "a judge on probation" (38-39, 45-48); the absence of a National Judiciary Council in Germany (54); the nomination of judges by commissions composed of politicians (64-66); and judicial self-governance (84). Thus, *The Economist* simply misrepresents the White Paper and ignores the key arguments put forward.

What the White Paper does assert is that the government's reforms are "**are in harmony with long-standing standards in other European Union countries**" (underlining and emphasis in the original) (25). The White Paper concedes that "Polish regulations are not an exact copy of the Spanish, British, German or French legislation", but:

> It is completely natural for the legal regimes of specific EU Member States to differ. Such differences stem from distinctive national and legal identities, which are protected by the European Union's treaty law. However, those differences are not significant enough (e.g. mechanism of appointing judicial members for the National Council of the Judiciary varies from Spanish system only in details) to warrant claims that solutions resembling regulations that have proved themselves in other EU countries for years (and that have never presented any threat to the rule of law) should violate the tripartite separation of powers in Poland (White Paper 2018: 25-26).

The Polish Government's arguments thus appeal to the respect for national identities enshrined in Article 4 of the Treaty on European Union – identities which are "inherent in their fundamental structures, political and constitutional"; and insist that the EU Member States have "separate constitutional identities" (83). Ultimately, the White Paper is an assertion of national sovereignty, proposing that Article 4's principle of respect for national identities should allow for "constitutional pluralism" (81):

> The right to introduce its own sovereign institutional solutions concerning the judiciary is a pillar of each national constitutional system in Europe. The Polish reforms of the judiciary implement this right – they have been carried out in a way that takes into account the need to remedy the defects of the domestic judicial system, and at the same time does not diverge in a significant way from solutions that are universally applied in the European Union countries" (White Paper 2018: 83).

The crucial issue of sovereignty is simply not addressed in *The Economist* article.

Instead, the misrepresented Polish government's claim that the EU allows western governments to "have some say in the judiciary" is immediately rebutted with a reference to cherry-picking by Hungary, and then two "experts" are named in an appeal to expertise: Kim Lane Scheppele, to provide the term "Frankenstate", which describes a state composed of borrowed institutions and solutions; and Kees Sterk, president of the European Network of Councils for the Judiciary, to assert that people with knowledge of the systems in Europe are not fooled by the action of the Polish Government. The main thrust of the argumentative strategy is then made explicit: "Such complex manoeuvres may fool lay people, but not the experts" (The Economist 2020).

Rather than misrepresenting and suppressing the Polish Government's arguments, and rebutting them with superficial appeals to expertise, *The Economist* could have tackled the justifications openly and head-on. For example, in its response to the sovereignty assertion, Iustitia argued that the Polish Government's reforms of the judiciary fall outside the autonomy protected by Article 4 of the Treaty on European Union.[14] However, *The Economist* seems to assume that "lay people" are incapable of understanding such point-by-point argumentation and at the same time employs discursive strategies that make it more unlikely that "lay people" will access such arguments. The near-imperceptible blend of reporting and opinion-shaping contributes to the dumbing-down of an already narrow discursive field.[15]

2.4. Internal discursive policing and the sovereignty taboo

The *Economist* article discussed in the last section revealed the lengths some journalists will go to in order to avoid addressing the assertion of sovereignty in the Polish context. I would go as far as to assert that a

[14] "The assumption underlying the autonomy of constitutional identity is that the Member State itself abides by the principle of *patere legem quam ipse fecisti*, according to which an authority is bound by its own rules and, in particular, its own Constitution. Therefore, breaching one's own constitutional rules is a denial of the principle of constitutional pluralism and its resulting decision-making autonomy" (Iustitia: §26).

[15] For another example of a refusal to engage with the Polish Government's White Paper, see Zselyke Csasky's article for Foreign Policy (Csasky 2018).

reluctance to discuss this issue is a systemic feature of news media discourse focused on the Polish crisis.

This claim draws on Foucault's notion of "discursive 'policing'" put forward in his 1970 Inaugural Lecture "The Order of Discourse" (Foucault 1981: 56-61). While Foucault preceded Laclau and Mouffe in defining discourse as a practice which employs the principle of exclusion to distinguish itself from other, exterior discourses, he also posited that discourses are practices constituted by procedures that impose internal constraints and exercise control of the discursive interior. Thus, scientific discourse is controlled by disciplines: internal principles that define what objects a given discourse can speak of; what a science can decide is true or false (Foucault 1981: 59-60).

I suggest that the concept of internal discursive policing can be applied to news media discourse: there are certain topics and concepts that simply cannot be spoken of in this discourse, and in UK and US news media discourse that addresses the Polish 'constitutional crisis' evidence suggests that the concept of sovereignty is taboo. Even articles published by stridently pro-Brexit UK newspapers such as the *Telegraph* and *Express* tend to avoid the issue of national sovereignty when discussing Poland's clashes with the European Commission, despite the fact that the UK's sovereignty vis-à-vis the EU and the European Court of Human rights has been a defining and oft-discussed issue in articles focused on Brexit.

As we have seen (**1.1**), Damien Phillips argued in his 2019 *Telegraph* article that a no-deal Brexit was the best way for the UK to escape from the "EU police state" (Phillips 2019), and Poland and Hungary were depicted as extreme representatives of a growing authoritarian tendency. Thus, while urging the UK to protect its sovereign institutions, e.g. "We must […] shield our legal integrity from those EU states who are regressing into ever-deeper authoritarianism" (Phillips 2019), at no point does Phillips open the discursive space to allow consideration of the possibility that Poland's actions may also viewed as attempt to shield its legal integrity from the EU. At a fundamental level, the sovereignty exercised through Brexit is cast as a reclamation of British liberty ("with liberty under the law as our guiding principle" (Phillips 2019)), which must be disassociated from illiberal assertions of sovereignty, to the point where the latter are not even acknowledged as having anything to do with sovereignty.

Support for this hypothesized sovereignty taboo is provided by two articles by Peter Foster, the *Telegraph* Europe Editor. The first, entitled 'What would Brexit mean for British sovereignty?', appeared on 08.06.2016, just over two weeks before the Brexit referendum. Here, Foster outlines why EU law has supremacy over UK law, comments on the extent of EU law, and then provides a balanced and cautious breakdown of "the key areas where the EU currently impinges on UK sovereignty and how much sovereignty the UK could reclaim if we voted to leave" (Foster 2016). He covers a range of areas, including agriculture, justice, trade and immigration. Rather than present a simplistic, buccaneering image of sovereignty, Foster acknowledges the complexity of the issue and treats it pragmatically, pointing out that the UK cedes sovereignty in certain areas for the benefits that are gained.

Just over a year later, on 27.06.2017, the *Telegraph* published Foster's 'Poland's constitutional crisis threatens to pull EU apart'. Here, Foster generally frames the Polish crisis as a challenge to "the EU's integrationist ambitions" and focuses on the EU's response. The article is divided into a series of 8 questions, 5 of which explicitly focus on the EU: *So what is the EU doing about it? What's so 'nuclear' about Article 7? So is Article 7 an empty threat? So the EU will just stand idly by? So is there anything the EU can do?* (Foster 2017). Only one section presents the crisis from the Polish perspective: *So liberal democracy is dying in Poland?* Foster's answer:

> It's not as simple as that. As a counterpoint it is worth noting that, contrary to the overwhelming Western media narrative, the ruling Law and Justice party's reforms ideas are not, in themselves, necessarily anti-democratic if handled differently (Foster 2017).

This is an intriguing stance. On the one hand, Foster recognizes there is a discursive hegemony that frames Poland's reforms as anti-democratic, but on the other hand stops short of allowing that these reforms may be part of a rejection of *liberal* democracy, though not democracy *per se*. For Foster, the Polish reforms of the judiciary, "if handled differently", "if framed properly", can be presented and viewed as democratic. In other words, the agency of the Polish government is reduced to framing the issue in a certain way, to convincing the EU that its reforms are similar the process of judicial appointments in "mature democracies" such as Germany, Norway and the US (Foster 2017).

When discussing the EU's threat to trigger Article 7, Foster actually broaches the subject of sovereignty:

> The Commission wants to 'act', but by doing so it risks hitting the EU's biggest nerve: to what extent should a supra-national body of dubious democratic legitimacy be able to intervene in the internal affairs of a member state? (Foster 2017).

Here, sovereignty is revealed as the crux of the matter, but it is framed from the EU's perspective, rather than from the perspective of the member state: the question is to what extent can the EU intervene, not to what extent can a member state assert its legal autonomy and integrity within the EU framework.

In more centrist or left-leaning UK and US commentary the issue of sovereignty is regularly avoided through reference to 'the rule of law'.

In 1.1, we saw how Anabelle Chapman, in her *Guardian* article, reduced Law and Justice's agenda to normalizing "values typically associated with the far right", such as homophobia and xenophobia, and how this characterization is swiftly followed by the following claim: "And by undermining the rule of law, Warsaw is eroding one of the fundamental values that the EU was founded upon" (Chapman 2020). No effort is made to explore the Polish government's agential motivations, which are simply depicted as reactionary and destructive. As the same time, the rule of law is both positioned as fundamental and left entirely unexplored.

A similar strategy is employed in Joanna Berendt's *New York Times* article 'E.U. Court Rules Poland Must Suspend Disciplinary Panel for Judges' 08.04.2020. This time, the word 'sovereignty' actually appears in the text, when the author quotes a Twitter statement from the Polish deputy justice minister, Sebastian Kaleta, who responded to the CJEU's ruling as follows: "Today's ruling is an act of usurpation violating Poland's sovereignty".[16] The issue of sovereignty is not addressed elsewhere in the text. Instead, the author draws on a range of experts (three judges and one professor) and institutions that express their concerns: in their lengthy direct quotations, Judge Krystian Markiewicz, Professor Artur Nowak-Far and Judge Stanislaw Zablocki focus on "the rule of law", "a community of law" and "the

[16] The original tweet: https://twitter.com/sjkaleta/status/1247813390426398721

values considered to be the foundation of European law", respectively (Berendt 2020).

In my view, this evasion of the issue of national soveriegnty is both perplexing and regrettable – as is explained in the Conclusion.

3. Insights on the rule of law and sovereignty from Polish legal theory

This section will explore three different positions expressed in Polish legal theory on the crisis. As was mentioned in **1.3**, the primary aim here is to shed some light on the narrow range of positions articulated in the articles analysed in the previous sections.

3.1. Ryszard Piotrowski's legal constitutionalist approach

Professor Ryszard Piotrowski's essay 'Judges and the Limits of Democratic Power in the Light of the Constitution of the Republic of Poland', published in *Ruch Prawniczy, Ekonomiczny i Socjologiczny* in 2018, provides a lucid account of the rule of law and sovereignty in the Polish system from the perspective of liberal-democratic constitutional theory. In essence, Piotrowski shows how the Polish system fits into the European system of treaties and institutions in which, following the horrors of nationalism experienced during the Second World War, the rule of law effectively places limits on national sovereignty, by curbing the power of the parliamentary majority.

Piotrowski cites the Polish Constitution, its Preamble and a Constitutional Tribunal ruling to remind his readers that the Constitution itself posits the principle of "the inherent and inalienable dignity of the person" as the foundation of the system of the Republic of Poland and as the source of rights and freedoms. All other principles – e.g. a democratic state ruled by law, the separation of powers – are all subordinate to this founding principle. According to Piotrowski, this value does not derive from any legal act: human beings possess certain rights "simply by virtue of being born a human being"; rights which are

"not dependent on the will of the legislator" and thus lie beyond its reach (Piotrowski 2018: 215).

This is the *liberal* component of liberal democracy: the rights of the individual are protected from the power of the *demos*. While the continental rule of law model, largely developed by German jurists in the 19th century, as the doctrine of *Rechtsstaat*, was designed to protect civil society and the individual from the power of the sovereign state, after the experience of National Socialism and fascism, and in particular with the unlimited power of the Nazi state as representative of the *Volk*, the post-war rule of law doctrine designed solutions to protect the individual from the potential abuses of democracy (Costa 2007: 123-133; Piotrowski 2018: 222). One such solution was Hans Kelsen's institution of constitutional courts, which are authorized to review legislation in terms of its compatibility with constitutions.

Piotrowski emphasizes that in the system of the Republic of Poland, the judicial power is "the guardian of universal and timeless values": it safeguards these values from the parliamentary majority and, furthermore, if parliament forgets these values in the legislative process, the judicial power is legitimized to make corrections (Piotrowski 2018: 217). The Polish Constitution stipulates that the judicial power is a separate and independent power (Art. 173), and, according to Piotrowski, it assigns a specific role to the Constitutional Tribunal, namely that of guarding "the limits of national sovereignty" (Piotrowski 2018: 222). Thus, crucially, in Piotrowski's model, the Constitution limits national sovereignty, since it assigns sovereignty to the values upheld by the community of the European Union, and since the Constitutional Tribunal is endowed with the authority to review domestic legislation and international agreements in terms of their inter-compatibility (Art. 188 Constitution RP), judges are "becoming the depositaries of the Nation's sovereignty" and can represent the sovereign (Piotrowski 2018: 222). The increasing importance of the judiciary after European integration has entailed a corresponding decrease in the role of parliament, placing "the judge above the legislator" (Piotrowski 2018: 222).

Thus, in Piotrowski's account, the conflict between PiS and the judicial power boils down to issues of soveriegnty and legitimacy. Under the control of PiS, the legislative and executive powers, which derive their mandate to represent the will of the Nation from elections, are being employed in an attempt to wrest sovereignty from the guardianship of the judicial power and the values of the European

community (Piotrowski 2018: 223-4). The judicial power draws its independence and its legitimacy to represent the Nation from the Constitution (Piotrowski 2018: 223-4), which is an instrument of the rule of law; and therefore any interference with the independence of the judiciary by definition undermines the rule of law.

Piotrowski's essay articulates a position within the liberal-democratic rule of law tradition of continental Europe, the discourse of which is now thoroughly institutionalized in the courts, treaties and jurisprudence of the European Union and the European legal order. This discourse defines itself as purposely designed to limit the legislative and executive powers.

3.2. Paweł Bała and Adam Wielomski's challenge to "liberal-democratic dogma"

On 12 December 2015, Dr. Paweł Bała and Professor Adam Wielomski published an article *Rzeczpospolita* entitled "Lawyers on the Constitutional Tribunal Controversy: Who is the Guardian of the Constitution?",[17] which basically argued that the President of the Republic of Poland, rather than the judicial power, is the true guardian of the Polish Constitution.

Bała and Wielomski's argument is extrapolated from the presidential address given by President Andrzej Duda on 3 December 2015, following the swearing in of five PiS nominated judges to the Constitutional Tribunal at a midnight ceremony on 2 December. The president's words are used to reject the Rousseau-Montesquieu-Kelsen model of the rule of law (combining the general will, the separation of powers, and constitutional courts), with an alternative Rousseau-Constant-Schmitt model (will of the people/Nation, direct delegation and the executive power as a Schmittian sovereign).

The president's statement "I was guided by the will of the newly elected Sejm, in which Poles put such great hope for the repair of the Republic of Poland" is read as asserting, implicitly, that the 'naród' (people, nation) is sovereign, and that this sovereign has

[17] The original title: *Prawnicy o sporze wokół TK: Kto jest obrońcą konstytucji*?

delegated power to the Sejm (parliament). This leads to the following conclusion:

> In this vision, the will of the Nation stands above individual constitutional provisions. If the sovereign says 'I want', neither the Constitutional Tribunal, nor any other organ of the state can answer: 'You cannot, because your will is inconsistent with the constitution or laws'" (Bała and Wielomski 2015).

This account of sovereignty is therefore fundamentally opposed to that presented by Piotrowski in 2018: it is suggested that the will of the people/Nation, expressed through parliament, cannot be constrained by either the Constitution or the judicial power. Once the will of the people is placed above the Constitution, the legitimacy of the judicial power is weakened, and when viewed through the Rousseauan notion of delegation, the Sejm is viewed as receiving its mandate directly from the people, and is thus a direct delegate, but "the judges of the constitutional court [...] are delegate of delegates" (Bała and Wielomski 2015).

The authors interpret the president's claim to be "safeguarding the Constitution and the continuity of state power" to propose that the President is the true guardian of the Constitution, rather than the Constitutional Tribunal. They draw on Art. 126 (2) of the Constitution RP ("The President of the Republic shall ensure observance of the Constitution") and Carl Schmitt's constitutional theory to suggest that when President Duda told the Polish nation "In order to put an end to the unnecessary disputes undermining the authority of the key institutions of the Polish State […] I decided to take the oath from the judges […]", he was acting as a Schmittian sovereign – the "custodian of institutionalized violence" who makes "political decisions supported by real political categories" (Bała and Wielomski 2015).

Bała and Wielomski draw on Schmitt's famous dictum that "Sovereign is he who decides on the exception" (Schmitt 1985: 5) to suggest the essence of power lies with the President of the Republic, the commander of the armed forces, rather than with "deliberation, verdicts, court decisions" (Bała and Wielomski 2015). Like the Sejm, the president is also a direct delegate, but one to whom the Nation has conferred the power to defend the Republican form of government.

In their concluding paragraphs, the authors make no bones about the conflict taking place between PiS and the judicial power: the

denial of the Constitutional Tribunal's power to restrain the legislative power is an attack on the Kelsenist conception of the role of constitutional courts and, more broadly, on liberal democracy. However, Bała and Wielomski do not go as far as to assert that this attack on liberal democracy is an attack on democracy *per se*: "It is therefore a misunderstanding that the one who does not accept the vision of a 'negative legislator' automatically negates the essence of a democratic state ruled by law" (Bała and Wielomski 2015). Their suggestion is that a new "political system" could be emerging, one in which the will of the Nation-sovereign is directly represented by the legislative and executive powers.

Since their text is a provocative newspaper article, Bała and Wielomski conclude with hints and leave many questions unanswered, not least of which is how their proposed political system – with the legislative and executive powers controlled by one political party and the president as guardian of the Constitution – would be compatible with the rule of law, if the essence of the rule of law is that power is restrained by law? And how could such a system be compatible with the legal order of the European Union?

In discursive terms, it is significant that two Polish jurists felt comfortable with publicly invoking Carl Schmitt – the German jurist who notoriously supported the Nazi party and Hitler's seizure of power in 1933 – to support their notion that power should be wrested from the judicial power and transferred to the executive. In this respect, Bała and Wielomski are by no means alone: the rehabilitation of Schmitt is a characteristic of theoretical-political discourse on both the right and left these days (see Mouffe 2005; Burns 2020), in the search for alternatives to liberal-democratic thought.[18]

3.3. Adam Sulikowski's critique of neutrality

Professor Adam Sulikowski's critique of the institution of constitutional courts, such as that made in "Constitution – System – Hegemony" (Sulikowski 2016), is grounded in an anti-Kelsenist stance which draws on Schmitt's juristic theory and Chantal Mouffe's revised

[18] On the issue of Schmitt and Polish legal theory see (Bunikowski 2018).

Schmittian concept of 'the political'. Crucially, Sulikowski's arguments come from a complex philosophical position which is decidedly left of centre.

Sulikowski's central thesis is that nothing escapes 'the political', especially judicial organs such as constitutional courts. The concept of 'the political' posits that the basis of social life is antagonism, organized around 'the friend/enemy' distinction (Schmitt 1996: 26-27). According to both Schmitt and Mouffe, this antagonism is "ineradicable" (Mouffe 2005: 4-5); it is the ontological or existential antithesis at the heart of social life. Societies are viewed as being organized according to collective groupings, with the possibility of violence ever present. Peace and the operation of law require that this antagonism is sublimated and masked, but in emergency situations – the Schmittian exception – legal norms evaporate, and the contingent nature of the legal order and the identity of the true sovereign become apparent (Schmitt 1985: 12-13).

The notions of contingency and hegemony are of particular importance for Sulikowski. Mouffe argues that every social order is the result of sedimented practices "that conceal the originary acts of their contingent political institution and which are taken for granted, as if they were self-grounded" (Mouffe 2005: 17). Thus, a social order appears to be entirely natural, necessary and inevitable, when in fact it is "the temporary and precarious articulation of contingent practices. […] Things could always be otherwise and therefore every order is predicated on the exclusion of other possibilities" (Mouffe 2005: 18). This exclusion is the basis for hegemonic discourse.

Sulikowski posits that "that the constitutional judiciary is an embodiment of Enlightenment bourgeois ideology based on a certain rationalistic/liberal set of assumptions about law" (Sulikowski 2016: 253). In other words, rather than being paragons of impartiality and independence, constitutional courts are inherently and ineradicably mired in 'the political', though this fact generally escapes our attention or is forgotten. Constitutional courts employ the "juristic camouflage" of deductive argumentation and interpretative rules "to effectively mask the extra-legal motivations behind decisions" (Mouffe 2005: 256). These extra-legal motivations only become apparent when the legislative power attempts to introduce acts which conflict with the values upheld by the constitutional judiciary, or which are embodied in the constitution and its case law. Sulikowski cites the rulings

concerning the so-called abortion compromise (1997) and the lustration rulings (1998) (Sulikowski 2016: 258).[19]

According to Sulikowski, when there is a stable consensus, the assumption that law is neutral is reinforced by the media and "apologetic scholarly discourses" (Sulikowski 2016: 258). Drawing on the perspective and terminology of Laclau and Mouffe's discourse theory, Sulikowski casts the constitutional courts as deploying empty signifiers, such as "freedom", "equality" and "justice", and filling them with content through hegemonic interventions. Thus, rather than the guardians of universal, timeless values, as Piotrowski would have it, the constitutional courts are "the guardians of the hegemonic power over the content of empty signifiers" (Sulikowski 2016: 260).

The rise of populist movements, as an eruption of the existential, emotional antagonism animating the political, is therefore depicted – following Laclau and Mouffe – as a rejection of the liberal-democratic discursive hegemony: its individualistic values, its institutions, and its legal order. And this rejection can be cast as arising from a perceived lack of democracy, rather than an attack on democracy. The populist identification of enemies "is usually accompanied by a sense of disillusionment and a lack of true democracy – the ritualised 'acquis constitutionnel' ceases to appear to certain social groups as something pure, non-ideological and objective, and begins to be seen as dominated by enemies or at best too tolerant for them" (Sulikowski 2016: 261).Thus, the attack on the Constitutional Tribunal and the judiciary in Poland can be viewed as grounded in a wholesale rejection of the rule of law ideology that enshrines these institutions as impartial and independent counterweights to the will of the majority (popular/pplebiscitary democracy).

4. Conclusion

It can be argued that Poland's 'constitutional crisis' or 'rule of law crisis' is, at its heart, a sovereignty crisis. As I mentioned at the end of **2.4**, the fact that this aspect of the issue is evaded or suppressed is

[19] For an analysis of lustration in Poland, see "Polish lustration and the models of transitional justice" (Krotoszyński 2014).

somewhat perplexing. In both Anglo-American and continental constitutional theory, the concept of the rule of law is inseparable from conceptions of soveriegnty: the essence of the rule of law in all systems is that *law is an instrument used to restrain the power of the sovereign* (Costa 2007: 134-6). Through the statements of its representatives and in the justifications presented in its documents, the Polish government has explicitly sought to frame the crisis in terms of sovereignty, but English language news media articles have failed to respond to this. Whether one views the Polish government's arguments as cynical or sincere, they need to be presented and addressed, not caricatured or suppressed.

If the news media articles cited and discussed in Sections 1 and 2 are mapped against the theoretical positions on the Polish 'constitutional crisis' outlined in Section 3, they all, despite their divergences, fit inside the theoretical space staked out by Piotrowski's article. In other words, they articulate positions firmly embedded within the discursive formation of liberal democracy. This, of course, is not to say that there is anything wrong with journalists articulating the values of liberal democracy. This practice becomes problematic, however, when these values are articulated with a lack of critical awareness or as part of a strategic simplification.

When a crisis of great complexity is presented through taken-for-granted, naturalized categories (e.g. invoking the concept of the rule of law without contextualization or elucidation, avoiding the related concepts of sovereignty and legitimacy), this amounts to doing readers a disservice. Rather than informing and persuading, such writing tends to misinform and manipulate, especially if other positions (i.e. based on assumptions and values other than those underpinning liberal democracy) are strategically caricatured, misrepresented or denied. News media discourse would greatly benefit from demonstrating a greater awareness of other, exterior discourses and developing a more generous and balanced approach to presenting and addressing their claims.

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"DEAR EMMA…". GENRE OVERLAPPING AND REGISTER VARIATION IN THE ENGLISH AND ITALIAN VERSION OF SERGIO MARCHIONNE'S LETTER TO CONFINDUSTRIA[1]

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Abstract: The aim of this paper is to examine whether genre overlapping and register variation have implications in terms of translation outcomes. To this end, the English and the Italian version of the letter sent by Sergio Marchionne to the President of Confindustria – Italy's most important employers' organisation – will be analysed. The decision to investigate Marchionne's statement is based on the fact that this is a letter disseminated as a press release, which also contains highly-technical terminology pertaining to the discourse

[1] The author wishes to thank the reviewers for their useful feedback.

of Employment Relations (ER). It is stressed that a number of issues arise when deciding which genre and register to use when translating specialised texts. It is argued that genre overlapping and register variation affect the texts in English and Italian in important respects, leading to different perceptions on the part of the target audience.

Keywords: genre analysis; register; employment relations; translation; linguistics.

"DEAR EMMA…". ZAZĘBIANIE SIĘ GATUNKÓW I WARIANCJA REJESTRÓW W ANGIELSKIEJ I WŁOSKIEJ WERSJI LISTU SERGIA MARCHIONNE DO CONFINDUSTRII

Streszczenie: Celem artykułu jest zbadanie, czy zazębianie się gatunków i wariancja rejestrów mają wpływ na rezultat tłumaczenia. W tym celu analizie poddaje się angielską i włoską wersję listu Sergia Marchionne do prezesa Confindustrii – głównej organizacji pracodawców we Włoszech. Decyzja o wyborze pisma Marchionne wynika z faktu, że list ten jest rozpowszechniany jako komunikat prasowy, a jednocześnie zawiera wysoce specjalistyczną terminologię dotyczącą języka używanego w zakresie stosunków pracy (*Employment Relations, ER*). Autor zwraca uwagę na fakt, że podejmując decyzję o wyborze gatunku i rejestru podczas tłumaczenia tekstów specjalistycznych, należy uwzględnić szereg kwestii. Twierdzi, że zazębianie się gatunków i wariancja rejestrów wpływają w istotnych aspektach na teksty w językach angielskim i włoskim, w wyniku czego odbiorcy postrzegają je w różny sposób.

Słowa kluczowe: analiza gatunków; rejestr; stosunki pracy; przekład; językoznawstwo.

"CARA EMMA...". SOVRAPPOSIZIONE DI GENERE E VARIAZIONE DI REGISTRO NELLA VERSIONE IN INGLESE E ITALIANO DELLA LETTERA DI MARCHIONNE A CONFINDUSTRIA

Abstract: Il presente contributo esamina gli effetti che la sovrapposizione di genere e la variazione di registro possono avere sul processo di traduzione. A tal fine, viene proposta una analisi della versione in lingua italiana e inglese della lettera inviata da Marchionne, l'allora amministratore delegato della Fiat, al presidente di Confindustria, la principale associazione datoriale in Italia. Il messaggio di Marchionne è peculiare in quanto trattasi di un comunicato stampa caratterizzato da un tipo di terminologia altamente specialistica. Ciò che emerge è la presenza di una serie di criticità laddove il contenuto della

lettera viene tradotto dall'italiano all'inglese, che generano una diversa percezione da parte del lettore straniero rispetto agli aspetti discussi nel testo di partenza.

Parole chiave: analisi di genere; registro; relazioni industriali; traduzione; linguistica.

1. Overview

On 30 September 2011, Sergio Marchionne – who at the time was the CEO of FIAT and Chairman of FIAT Industrial Spa – addressed a letter to Emma Marcegaglia, the then President of Confindustria, announcing the decision to leave Italy's largest employers' organisation. FIAT's withdrawal was a historic decision and attracted a lot of attention in the media, particularly considering that FIAT had been a long-standing member of Confindustria. The letter followed the conclusion of the agreement between Confindustria and a number of trade unions on 21 September 2011, which marked a turning point in employment relations (ER) in Italy – and above all the approval by Parliament of a specific provision (Article 8) establishing among other things that the June agreement would apply retroactively. Marchionne motivated FIAT's decision with the fact that the new terms placed limitations on Italian companies operating in the international markets, particularly in terms of employment relations and flexible working arrangements. The letter to Confindustria hit the headlines in the national and international press, as it was disseminated in the form of a press release, in both English and Italian.

These two versions of the text will be examined in this paper, which aims to investigate the linguistic aspects of the English and the Italian document issued by FIAT. Specifically, the paper explores the extent to which genre overlapping and register variation play a role in translation. To this end, a critical analysis will be provided of the terms used in the two versions, also focusing on ER terminology, which characterises many passages of the letters. As this is a specialised domain (Bromwich and Manzella 2018), ER features linguistic peculiarities that need to be taken into account when rendering terms denoting distinctive practices and institutions. This assumption is based on the fact that discourse is closely linked to the sociocultural context

in which it is constructed. Consequently, its interpretation relies to a large extent on the contextual constraints of the event in which it is expressed or received, cultural elements representing an essential part of these contextual constraints as they influence both the discursive organisation and the choice of realisation (Gotti 2007). These peculiarities will be scrutinised at length, examining whether genre overlapping and register variation have an impact on the effectiveness of the translation, the degree of equivalence between the source text (ST) and the target text (TT), and the extent to which context-specific terms are likely to be understood by TT readers. The remainder of this paper is organised as follows. An analysis of the existing literature on this topic will be provided in section 2, followed by a close examination of the documents selected for analysis (section 3). Finally, section 4 will comment on the main findings, making suggestions for future research.

2. Literature Review

Previous linguistics research has considered CEO letters and Chairman statements from different perspectives. In some cases, metadiscourse has been the main focus of investigation (Garzone 2007, Gillaerts and Van de Velde 2011, Huang and Rose 2018, Hyland 1998). In this sense, it has been stressed that the CEO is now expected to set the tone, shape the corporate culture, and outline a vision for the future.

This is because effective CEO communication has become essential to the management and financial performance of the corporation (Ngai and Singh 2014). The aim of the CEO letter may be said to project a positive image of the company and to raise the profile of the CEO. Thus company reporting is an important genre, especially when it is aimed at a public audience by a large corporation (Kong 2014). CEO communication has also been examined by means of text analysis (Karlsson and Rutgersson 2014, Loewenstein, Ocasio and Jones 2012, Murphy 2015). A particular focus has been placed on the vocabulary used by CEOs, with the result that more nuanced conceptualisations of the role of corporate terminology are emerging (Craig and Amernic 2014). The function of the CEO's message is to provide the investment community and the general public with information and to construct a positive relationship with them. Each of

these functions may be more or less explicit and emphasised, but both are always present (Schnizter 2017).

In addition, the terminology used in the CEO letter is intended to reflect and reinforce core organisational values, to highlight shared experience, to indicate opportunities and point to challenges to be overcome, while promoting a common organisational identity and commitment (Ilie 2017). Other scholars have looked at CEO discourse as a way to generate legitimation, which is understood as an ideological space within which the institution can operate, enjoying sufficient social acceptance to freely pursue its activities (Breeze 2013). Persuasion is another aspect that has been analysed in CEO statements. In this sense, it has been argued that these messages carefully set out their assessment of situations and events. As a rule, they construct their arguments so rationally that it is difficult to challenge them (Amernic and Craig 2006). In other words, perceptions and ideologies are shaped by means of a language game (Clifton 2012).

Finally, multilingual CEO letters have been examined from a translation perspective (Neumann 2014). Specifically, textual conventions need to be adapted to meet cultural expectations concerning the degree of certainty with which an assertion is made (Kranich 2016). The problem of equivalence has also been discussed, in that the functions that the source language text fulfils for a ST audience can only be maintained if the translator makes adaptations to enable the text to work in the same or a comparable way for a TT reader (Kranich 2016). It should be noted that the considerable body of work produced in this domain mostly deals with CEO discourse in which the target group consists of shareholders or stakeholders (in particular, employees, suppliers and customers). Building on these previous contributions, this paper aims to take a step further, examining the linguistic aspects of a letter sent by a CEO to the president of an employers' organisation, i.e. Confindustria.

3. Discussion

This paper considers the English and Italian version of the letter sent by Marchionne Confindustria in September 2011. The two documents – reproduced in Appendix A and B – will be examined through a

contrastive analysis approach, which has been widely applied to translation in connection with different language pairs (Gast 2015; Ke 2018). Contrastive analysis has proved most useful in pointing out areas where direct translation of a term or a phrase fails to accurately convey in the target language the meaning intended in the source text (Hassan 2014). More recently, contrastive analysis has become more descriptive and theoretical, and it has taken language use into account, to compare frequencies and distributions, as well as structures (Aijmer and Lewis 2017). Contrastive analysis has been used in particular to study elements which are multifunctional and cases in which the meaning is not entirely clear. This is because the translated text may give rise to issues in terms of polysemy, multi-functionality, core meaning and the distinction between meaning and function (Aijmer and Altenberg 2013). The terminology examined was selected considering the following criteria. When investigating genre overlapping, the candidate terms were identified by looking at the Italian version of the text, manually extrapolating those pertaining to specialised communication – industrial relations in our case – understood as expert-to-expert communication or communication in which at least the text producer has full expert status with regard to the topics covered (Schubert 2007). The terms chosen were then investigated to see how they were rendered in English. As for register variation, the two versions were contrasted, analysing those passages in which a clear difference emerged in relation to register use.

For the purposes of this study, it was assumed that the letter was originally drafted in Italian and then translated into English, taking account of the fact that both Marchionne (the sender) and Emma Marcegalia (the recipient) speak Italian as their first language, although Marchionne was in fact bilingual, having lived in Canada for many years before returning to Italy.

3.1. Genre Overlapping

The letter by Marchionne is characterised by a degree of genre overlapping. It contains elements of economic, ER, and political discourse, bringing to mind Bhatia's notion of interdiscursivity, which has been defined as the appropriation of contextual and text-external

generic resources within and across professional genres and professional practices (Bhatia 2004, 2008, and 2010). An awareness of interdiscursivity is key to understanding the complexities and the objectives of professional communication and to providing the opportunity for shared meaning and mutual understanding across a diverse audience (Gill 2011). It should also be noted that the message was disseminated in the form of a press release, which is usually drafted to inform the general public. More generally, one should understand the importance of framing complex issues (Lakoff 2009) in a way that is not only accurate, but also accessible to a lay readership (French and Watt 2018). Finally, it bears highlighting that the document under examination is a letter intended for both the primary addressee (the Confindustria President) and the secondary addressee (the investment community and the general public). This aspect should also be considered, in that it might give rise to communication issues as different readers may receive different messages from the text, and even the same reader may interpret the meaning differently on a second or third reading (Bloor and Bloor 2007).

The hybrid nature of the text – a letter disseminated in the form of a press release – might affect translation. Furthermore, the text is intended for a diverse audience and features a blend of technical and non-technical terminology. Consequently, some issues emerge when translating this text into another language, because doubts arise as to how to deal with it. Marchionne's letter was produced in press release format, i.e. it was ultimately intended to reach the general public. While the corporate press release – which constitutes an important sub-genre within the overall press release genre – has not yet been clearly characterised (Crawford Camiciottoli 2013), it certainly aims to meet the criteria of explanatory force and clarity (Malavasi 2011). In this sense, one might question the assumption that some concepts pertaining to specialised discourse (ER in our case) are shared knowledge, so they do not need expanding in the target language.

One example of this is 'Confindustria', which as noted above is the name of the largest employers' organisation in Italy. The word – which appears several times throughout the text – is always left in Italian in the English version of the document, without providing any explanation (an example of this is to be found in line 5 of the English version). While most Italian readers – including of course the primary addressee – are familiar with this concept, doubts arise as to whether international readers – to which the English version is directed – are

aware of the Italian system of representation. Using words from the ST in the TT language runs counter to the objective of press statements, which should be developed in a manner engaging the media with a newsworthy subject presented in a clear and compelling manner (Morrow, Hirano and Christensen 2008).

The same observation may be made in relation to another concept pertaining to ER terminology, i.e. *accordo interconfederale*, which is used extensively throughout the text. An *accordo interconfederale* can be defined as a collective agreement concluded by the employee and employer organisations, applicable to an entire sector of the economy (industry, commerce, agriculture) (EUROFOUND 2003). Unlike 'Confindustria', which was not translated, *accordo interconfederale* was rendered with the English 'interconfederate agreement' (line 4 of the English version). In other words, a literal translation was used. Even though in one case it was specified that the agreement was signed by 'national trade unions' (line 4 of the English version) the advisability of leaving this word in Italian in the TT might be questioned, because it frustrates the attempt of press releases to adopt language which is readily understood by a non-specialised audience.

This is true especially in consideration of the fact that literal translations can sometimes result in awkward expressions that puzzle readers from both cultures (Liu, Volcic and Gallois 2015). Further explanation would have been necessary to make sure this concept was readily understood. Alternatively, the recourse to different terminology in the TT might have served the purpose of ensuring clarity. A different rendering of *accordo interconfederale* could have been 'national multi-industry agreement' which, although less literal, seems to better convey the meaning of this concept in the TT. In passing, it could also be noted that in addition to *accordo*, another term was used in the Italian version of the letter to refer to this concept, *intesa*. Both *accordo* and *intesa* (line 4 and line 6 of the Italian version, respectively) were translated into English as 'agreement' (lines 4 and 7 of the English version). While this terminology is perfectly acceptable, a different word could have helped international readers to recognise the distinction between the types of agreements concluded. In this sense, it is worth recalling that "consistency of register, together with what has been referred to as internal cohesion, is what makes a text hang together, function as a unit in its environment" (Hatim and Munday 2004: 191).

Unlike the lexical items examined so far, some concepts were expanded in the English version, in order to make them understandable

to an international audience consisting of both specialists and laypersons. In other words, a different approach was adopted, which affected the translation outcome. For example, *flessibilità* (flexibility) in the Italian letter became 'labour flexibility' in the English version (line 6). The aim in this case is to specify that the changes made to Article 8 do not affect all types of flexibility, a concept so diluted that can mean everything and nothing (Stråth 2000). Rather, Marchionne referred to labour or workforce flexibility, which Fairclough has characterised as pertaining to neo-liberal discourse (Fairclough 2010) and which was based on concepts such as 'lean production', 'slimming down', 'the flexible company', and 'outsourcing' (Magnusson and Stråth 2016).

Consequently, while in the Italian version, reference is made to the general concept of 'flexibility', the concept is expressed in greater detail in the English version, as the flexibility mentioned here is the one concerning the workforce. A different approach is therefore used in terms of domain-specific concepts.

3.2. Register Variation

In addition to genre overlapping, the Italian and the English versions of the letter examined in this paper are characterised by variation in terms of register. In other words, sometimes there is a minimal correspondence between the style used in the ST and that adopted in the TT. Along with language contrast and translation decisions, register differences can give rise to issues with respect to variation between originals and translations (Neumann 2014). Halliday defines register as a configuration of meanings that are typically associated with a particular situational configuration of field, mode and tenor (Halliday 1985). However, register also has a bearing on genre, in that different genres are observed to have different degree of formality (Fang, Cao 2015). In some cases, the register used in the TT features higher levels of formality than the one chosen for the ST. The following passage from the Italian version of Marchionne's letter concerning workers' rights clearly illustrates this point*: i rapporti con i nostri dipendenti e con le Organizzazioni sindacali saranno gestiti senza toccare alcun diritto dei lavoratori* (line 30 and 31 of the Italian version. Our translation:

Relations with our employees and with the trade unions will be handled without affecting any of the workers' rights). *Toccare* (line 30) – literally 'to touch' – was used in a figurative sense to mean 'to affect'. The English translation reads as follows: "Relations with our employees and with the trade unions will be conducted in a manner that does not infringe on any rights of workers". In the TT, 'to infringe on' was used to render the Italian *toccare* (line 31 of the English version). In considering three levels of formality, viz. formal, neutral and informal (Wallwork 2016), *toccare* can be seen as having a neutral degree of formality. On the contrary, 'to infringe on' is an expression mostly employed in formal communication (Cambridge Dictionary 2020).

Another example of register variation between the Italian and the English version of the letter is to be found at the beginning of the second paragraph, when Marchionne pointed out that *La Fiat fin dal primo momento ha dichiarato a Governo, Confindustria e Organizzazioni sindacali il pieno apprezzamento per i due provvedimenti* (line 8 of the Italian version). Our translation: 'From the very beginning, FIAT expressed its full appreciation to the government, Confindustria and trade unions for the two provisions'.

Significantly, *pieno apprezzamento* was translated into English as 'unreserved appreciation' (line 8 of the English version), where 'unreserved' is a formal adjective meaning 'without any doubts or feeling uncertain; total' (Cambridge Dictionary 2020). 'Unreserved' is characterised by a higher level of formality than 'full', which in this context could be seen as the closest equivalent of the Italian *pieno*.

The same holds true for *utilizzare* (line 28, lit. 'to use', 'to utilize', or 'to make use of') which appears in the following sentence of the Italian version: *Da parte nostra, utilizzeremo la libertà di azione applicando in modo rigoroso le nuove disposizioni legislative* (Our translation: 'On our side, we will make use of our freedom of action to rigorously implement the new provisions). In the English version of the letter to Confindustria, this sentence reads as follows: 'On our side, we will exercise our freedom to rigorously apply the new legislative provisions' where 'exercise' (line 29) is more formal than 'use' or 'utilize', which would have been closer to the ST meaning.

These lexical items appear to imply that the English version adopts more formal terminology than the Italian one. Yet this is not always the case, because in some cases the terms used in the ST are characterised by a higher degree of formality than the terms in the TT. Lines 17 and 18 of the Italian version of the letter by Marchionne read

as follows: *un acceso dibattito che […] ha fortemente ridimensionato le aspettative sull'efficacia dell'Articolo 8* (Our translation: a lively debate which […] has played down expectations about the efficacy of Article 8). There exist a number of options to render *efficacia* in English, e.g. effectiveness, efficacy, validity, strength, with the first two words frequently used as synonyms (Zoppei 2017). The English version of the text under examination here makes use of 'effectiveness' (line 17) to translate *efficacia*, which is less formal than 'efficacy' (Cambridge Dictionary 2020) and might also take on a different meaning. Specifically, 'efficacy' is the ability to get things done and meet targets. The focus of efficiency is on the achievement of the result, not on the resources spent to achieve the desired result.

'Effectiveness' in this context means doing the right things, setting the right targets to achieve an overall goal and including the elements in the process. As a result, what is effective is not necessarily efficacious (Addink 2019).

4. Conclusion

This paper has examined the English and the Italian version of the letter by Sergio Marchionne, the then FIAT CEO and Chairman of FIAT Industrial Spa, to Emma Marcegaglia, who at the time was the President of Confindustria, Italy's largest employers' organisation.

The message is of a hybrid nature, in that it features the characteristics of both a letter and a press release, while containing specialised terminology pertaining to ER discourse. This combination of different genres – which Bhatia has termed 'interdiscursivity' – resulted in different and sometimes opposing translation strategies. In some cases, the text was treated as if it were a letter – i.e. peer-to-peer communication – between two professionals operating in the same field. For this reason, certain domain-specific items were taken for granted, so they were either left untranslated (e.g. 'Confindustria') or rendered literally (i.e. *accordo interconfederale*). In other cases, the need to ensure clarity prevailed, as is usually the case with press releases. Consequently, attempts were made in the English version of the message to break down certain notions that the non-specialist reader could find difficult to appreciate. The attempt to simplify specialised

concepts for a wider readership has been defined as 'popularisation', i.e. "making specialised knowledge accessible to non-specialised readers for information purposes" (Gotti 2014: 14). In the letter examined in this paper, the popularisation process seems to take place in the translation from one language to another, in the sense that some terms which are specific to ER discourse in the source language are made more accessible in the target one. However, the use of different translation strategies tends to make the TT more difficult and ambiguous, at times affecting clarity.

In addition to genre overlapping, register variation might also alter the effectiveness of communication. Striking the right note in terms of the tenor of discourse in the translation can be difficult, because it depends on whether the translator perceives a certain level of formality as 'right' from the perspective of the source culture and the target culture (Baker 2011). The lexical items examined ('effectiveness', 'to infringe on') point to a divergence between the ST and the TT in terms of register. While there is little change in meaning, an upward or a downward register shift might affect reader perception. For instance, the translation of a general, stylistically neutral word with a more specific, value-laden term may contribute to a change in the narrative standpoint, by bringing the textual world closer to the reader (Shuttleworth and Cowie 2014). Furthermore, register variation might be interpreted as an attempt to increase or decrease the relevance of the issue being discussed (Neumann 2014) i.e. workers' rights and the efficacy of the law in the text examined here. Consequently, readers of the English text, which is characterised by more formal terminology, might treat the issues discussed in the letter more seriously than their Italian counterparts. It is a matter of speculation whether genre overlapping and register variation were the result of a deliberate choice. Yet they affect the texts drafted in English and Italian in important respects, in that they might be perceived differently by the target audience, be they professionals or non-specialist readers. Future research might consider examining other press releases by CEOs published in two different languages over a specific timeframe, to see if they too are characterised by genre overlapping and register variation, evaluating the possible impact of these linguistic phenomena on the effectiveness of translation.

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- APPENDIX A (ATTACHED):
MARCHIONNE'S LETTER TO EMMA MARCEGAGLIA (ENGLISH VERSION).

- APPENDIX B (ATTACHED):
MARCHIONNE'S LETTER TO EMMA MARCEGAGLIA (ITALIAN VERSION).

PRESS RELEASE

Letter from Sergio Marchionne to Emma Marcegaglia

On Friday, September 30th, CEO of Fiat S.p.A. and Chairman of Fiat Industrial S.p.A., Sergio Marchionne, sent two identical letters to the President of Confindustria, Emma Marcegaglia. Following is the content of those letters.

****

Dear Emma,
In recent months, after years of inaction, two important decisions were taken in this country with the objective of creating the conditions necessary to revitalize our economic system.
I am referring to the interconfederate agreement signed by national trade unions on June 28th and promoted by Confindustria, and, even more important, the passing of Article 8 by Parliament that provides essential mechanisms for labor flexibility, in addition to extending the validity of the June 28th agreement to agreements reached prior to that date.
Fiat was immediate in expressing its unreserved appreciation to the government, Confindustria and trade unions for the two provisions that would resolve many sticking points in relations with the trade unions and provide the certainties necessary to this nation's economic development.
At a particularly difficult time for the global economy, this new framework would have enabled all Italian businesses to compete internationally under conditions that are less disadvantageous in comparison with those of our competitors.
However, the signing of the interconfederate agreement of September 21st sparked a heated debate that – as a result of the contradictory positions subsequently taken and even declarations by some of their intention not to apply those agreements in practice – has significantly diminished confidence in the effectiveness of Article 8.
There is a risk, therefore, that the effectiveness of the mechanisms provided under the new legislation will be undermined and operating flexibility severely limited.
Fiat, which is engaged in the creation of a major international group with 181 plants in 30 countries, cannot afford to operate in Italy in an environment of uncertainty that is so incongruous with the conditions that exist elsewhere in the industrialized world.
It is for these reasons, none of which are politically motivated or connected to our future investment plans, that I am hereby confirming that, as indicated in our letter of June 30th, Fiat and Fiat Industrial have decided to withdraw from Confindustria with effect January 1st, 2012.
We are evaluating the possibility of collaborating, in a form yet to be agreed, with several local/regional organizations belonging to Confindustria, including, in particular, the Unione Industriale di Torino.
On our side, we will exercise our freedom to rigorously apply the new legislative provisions. Relations with our employees and with the trade unions will be conducted in a manner that does not infringe on any rights of workers and in full respect of the roles of all concerned, consistent with the agreements already reached at Pomigliano, Mirafiori and Grugliasco.
This important decision was reached after long and careful consideration. It is a decision that we cannot back away from because we are committed to playing a leading role in the industrial development of this nation.
Yours sincerely,
Sergio Marchionne

****

Turin, October 3rd, 2011

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COMUNICATO STAMPA

Lettera di Sergio Marchionne a Emma Marcegaglia

L'Amministratore Delegato di Fiat S.p.A. e Presidente di Fiat Industrial, Sergio Marchionne, ha inviato venerdì 30 settembre alla presidente di Confindustria, Emma Marcegaglia, due lettere identiche il cui contenuto viene di seguito riportato.

****

Cara Emma,
negli ultimi mesi, dopo anni di immobilismo, nel nostro Paese sono state prese due importanti decisioni con l'obiettivo di creare le condizioni per il rilancio del sistema economico.
Mi riferisco all'accordo interconfederale del 28 giugno, di cui Confindustria è stata promotrice, ma soprattutto all'approvazione da parte del Parlamento dell'Articolo 8 che prevede importanti strumenti di flessibilità oltre all'estensione della validità dell'accordo interconfederale ad intese raggiunte prima del 28 giugno.
La Fiat fin dal primo momento ha dichiarato a Governo, Confindustria e Organizzazioni sindacali il pieno apprezzamento per i due provvedimenti che avrebbero risolto molti punti nodali nei rapporti sindacali garantendo le certezze necessarie per lo sviluppo economico del nostro Paese.
Questo nuovo quadro di riferimento, in un momento di particolare difficoltà dell'economia mondiale, avrebbe permesso a tutte le imprese italiane di affrontare la competizione internazionale in condizioni meno sfavorevoli rispetto a quelle dei concorrenti.
Ma con la firma dell'accordo interconfederale del 21 settembre è iniziato un acceso dibattito che, con prese di posizione contraddittorie e addirittura con dichiarazioni di volontà di evitare l'applicazione degli accordi nella prassi quotidiana, ha fortemente ridimensionato le aspettative sull'efficacia dell'Articolo 8.
Si rischia quindi di snaturare l'impianto previsto dalla nuova legge e di limitare fortemente la flessibilità gestionale.
Fiat, che è impegnata nella costruzione di un grande gruppo internazionale con 181 stabilimenti in 30 paesi, non può permettersi di operare in Italia in un quadro di incertezze che la allontanano dalle condizioni esistenti in tutto il mondo industrializzato.
Per queste ragioni, che non sono politiche e che non hanno nessun collegamento con i nostri futuri piani di investimento, ti confermo che, come preannunciato nella lettera del 30 giugno scorso, Fiat e Fiat Industrial hanno deciso di uscire da Confindustria con effetto dal 1 gennaio 2012. Stiamo valutando la possibilità di collaborare, in forme da concordare, con alcune organizzazioni territoriali di Confindustria e in particolare con l'Unione Industriale di Torino.
Da parte nostra, utilizzeremo la libertà di azione applicando in modo rigoroso le nuove disposizioni legislative. I rapporti con i nostri dipendenti e con le Organizzazioni sindacali saranno gestiti senza toccare alcun diritto dei lavoratori, nel pieno rispetto dei reciproci ruoli, come previsto dalle intese già raggiunte per Pomigliano, Mirafiori e Grugliasco.
E' una decisione importante, che abbiamo valutato con grande serietà e attenzione, alla quale non possiamo sottrarci perché non intendiamo rinunciare a essere protagonisti nello sviluppo industriale del nostro Paese.
Con i miei migliori saluti.
Sergio Marchionne

****

Torino, 3 ottobre 2011

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DEFINITION AS A GENRE IN THREE LEGAL SYSTEMS: A COMPARATIVE ANALYSIS

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Abstract: This paper aims at comparing the definition of 'trademark' in three different legal systems – EU law, international law and US common law – in order to identify the discoursal, generic and textual characteristics of definition as a genre. The selected corpus of analysis is made up of three definitions from EU Regulation 2017/1001, WTO Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) and US Lanham Act (sec.45) and of several US cases from 1926 to 2019. The theoretical framework within which the analysis is carried out is the seminal work on definition as carried out by Richard Robinson (1954) and Harris and Hutton (2007). The approach is mainly linguistic, though a historical *excursus* on the concept of definition is provided as a necessary introductory premise. The findings demonstrate that EU legal texts are characterised by a hybrid style (Robertson 2010) which results from the combination of common law and civil law textual features.

The analysis of the definitional sections here displayed supports this point and confirms that EU term formation and definition are text-driven (Šarčević 2016). EU legal texts in their English version originate from the dynamic combination of two aspects: one connected to EU legal English – which is not common law English – and one connected to matters of terminology, syntax and general structure which has a French origin.

Key words: definition; legal language; discourse analysis; interpretation; semiotics.

DEFINICJA JAKO GATUNEK W TRZECH SYSTEMACH PRAWNYCH: ANALIZA PORÓWNAWCZA

Abstrakt: W artykule porównuje się definicje pojęcia ‘trademark’ w trzech systemach prawnych – prawie UE, prawie międzynarodowym i amerykańskim *common law* – w celu określenia dyskursywnych, gatunkowych i tekstowych cech definicji jako gatunku. Korpus analizowanych tekstów składa się z trzech definicji zawartych w rozporządzeniu UE 2017/1001, Porozumieniu WTO w sprawie handlowych aspektów praw własności intelektualnej (TRIPS) i amerykańskiej ustawie Lanhama (par. 45) oraz w aktach kilku spraw sądowych z USA z lat 1926-2019. Ramy teoretyczne analizy zawarte są w pracach poświęconych zagadnieniu definicji autorstwa Richarda Robinsona (1954) oraz Harrisa i Huttona (2007). Niniejsza praca ma zasadniczo charakter językoznawczy, zawiera jednak także niezbędny tu wprowadzający ekskurs historyczny. Rezultaty badania wskazują, że teksty prawne UE charakteryzuje styl hybrydowy (Robertson 2010), wynikający z połączenia cech prawa *common law* i prawa kontynentalnego. Świadczy o tym analiza omówionych w pracy partii definiujących, która zarazem potwierdza, że kształtowanie się terminu unijnego i jego definicja mają charakter tekstowy (*text-driven*) (Šarčević 2016). Teksty prawne UE w wersji angielskiej powstają z dynamicznego połączenia dwóch aspektów: pierwszy wiąże się z prawnym językiem angielskim UE – który nie jest angielszczyzną *common law* – a drugi z problematyką terminologii, składni i struktury ogólnej.

Słowa kluczowe: definicja; język prawny; analiza dyskursu; interpretacja; semiotyka.

LA DEFINIZIONE COME GENERE IN TRE ORDINAMENTI GIURIDICI: UN’ANALISI CONTRASTIVA

Abstract: Il presente contributo mette a confronto la definizione di ‘trademark’ come riconosciuta in tre diversi ordinamenti giuridici - diritto comunitario, diritto internazionale e *common law* statunitense - al fine di

identificare le caratteristiche della definizione come genere testuale. Il corpus di analisi è costituito da tre definizioni tratte dal Regolamento UE 2017/1001, dall'Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS), dal Lanham Act e da diversi casi dibattuti fra il 1926 e il 2019 nei tribunali statunitensi. Il quadro teorico all'interno del quale si svolge l'analisi è la ricerca sulla definizione svolto da Richard Robinson (1954) e Harris e Hutton (2007). L'approccio è prevalentemente linguistico, anche se un excursus storico sul concetto di definizione è fornito come necessaria premessa introduttiva. I risultati dimostrano che i testi giuridici dell'UE sono caratterizzati da uno stile ibrido (Robertson 2010) che deriva dalla combinazione delle caratteristiche testuali del diritto comune e del diritto civile. L'analisi delle sezioni di definizione qui analizzate supporta questo punto e conferma che la formazione e la definizione dei termini UE sono text-driven (Šarčević 2016). I testi giuridici comunitari nella loro versione inglese hanno origine dalla combinazione dinamica di due aspetti: uno legato all'inglese giuridico dell'Unione - che non è l'inglese del *common law* - e uno legato a questioni terminologiche, sintattiche e generiche da ricondurre alla lingua francese.

Key words: definizione; linguaggio legale; analisi del discorso; interpretazione; semiotica.

1. Introduction

The original stimulus for this paper was an enlightening paper by Colin Robertson (2012) who carried out a comparative analysis between common law and civil law discoursal, generic and linguistic peculiarities in order to identify their influence on European Legal English. Although many other scholars have investigated the differences and similarities of common law and civil law legal systems (Bhatia 1993, Foley 2002, Pozzo 2016, Šarčević 2016) from different perspectives, Robertson assumes that EU Legal English is neither a dialect nor a variant of standard English but a new genre. As a genre, Robertson (2010, 2011, 2012) and other scholars (Mattila 2013, Cacchiani 2015, Felici 2016) recognize hybridity as one of the main characteristics of EU legal discourse, whose source of creation are treaties – prototypical textual expression of international law – and whose textual outcome are binding documents, drafted in 'the' English

– which is not the common law language – and characterised by terminology, syntax and general structure of French origin.

As definitions are an important section in EU legal documents – in particular in regulations and directives – in international agreements and in common law statutes, this paper aims at identifying the linguistic (textual and discoursal) peculiarities and the cognitive structure of these sections in a selected collection which consists of the definition of the term 'trademark' in European, international and common law context of competition law. In order to carry out this analysis, the seminal work on definition by Richard Robinson (1954) provides the theoretical framework which has been complemented with Harris and Hutton's integrationist approach (2007) applied to legal definition, which makes Robinson's stipulative definition central to the topic of definition.

The discoursal hybridity which characterizes EU legal texts is ascribable to the peculiarity of the European legal order, where the coexistence of national, international and supranational law reflects the society which these legal orders regulate, and addresses "a need for consistency, coherence, predictability and certainty [which] leads to efforts to harmonize the rules across the range of fields and make them compatible with each other" (Robertson 2016: 42).

The concept behind and within 'trademark' seems to be a telling example of the hybridity – discoursal, terminological, cognitive but also jurisprudential – which characterizes EU textography (Swales 1998). As an example, it sheds light on the 'crucible', namely on the space in which EU "legislative language is tested and refined" (Foley 2002: 362) and proves the European legal order to be "a synthesis of interaction of the relevant rules of international law and the laws and jurisprudence of the European Union" (Muravyov 2003 in Smyrnova 2013: 126).

Thus, the ultimate aim of this paper is to demonstrate whether the discoursal hybridity of EU legal language – which results from the process of legal harmonization – is recognisable in the definitional sections of EU legal acts and whether these definitional sections have the features of a text type "developed as a pattern of message for certain communicative situation […] evolved from conventionalised situations" (Sager 1997). As legislative statements have a conventionalized communicative purpose (Bhatia 1993: 117), this analysis questions whether definitional sections (or definitions) in legal

documents have the characteristics of a subgenre since they serve one main communicative purpose.

The concept selected for the analysis belongs to the branch of competition law, because the three legal systems of reference have a consolidated tradition in this field and in particular, according to the EU legislative *praxis* as ratified in art. 103 TFEU "The Union shall have exclusive competence in the […] establishing of the competition rules necessary for the functioning of the internal market".

2. Method and material

The analysis used three definitions of the term 'trade(-)mark' as shown in EU Regulation 2017/1001 – as an example of supranational law, in WTO Agreement on Trade-Related aspects of Intellectual Property Rights – as an example of international law, and in US Lanham Act and certain of US cases from 1926 to 2019 – as an example of national (and common) law. The method adopted to describe the textual and generic characteristics of the definitions was genre analysis (Bhatia 1993, 2004; Swales 1998) and in particular the structural interpretation of the text-genre as presented in Bhatia (1993: 29-34) in terms of interactive cognitive structure. For each definition, the cognitive structure was made clear through a graphic representation, which emphasized two main aspects: 1) each step (Rasmussen and Engberg 1999) or move (Swales 1990; Bhatia 1993) recognizable in the definitions at issue (estensive, intensive, ostensive, denotative, implicative, and rule-giving to name but a few) fulfilled a particular communicative function; 2) the combination of the identified steps created recurrent patterns, which were useful variables to investigate and identify genres.

3. Theoretical framework

Even though there may be a common agreement on the usefulness of 'definition' as a procedure to understand the essential nature of a thing or a word used by some actual individuals which, otherwise, would not be able to give sense to the material and immaterial phenomena which

characterise their everyday life, it is difficult to provide an unambiguous and universally accepted definition of 'definition' since it is a multifaced concept which has been investigated for centuries – starting from Plato in the IV century B.C. – by philosophers, logicians, mathematicians and linguists from different epistemological perspectives. The simple and common-sense definition (also known as lexical definition) provided in the opening sentence of this paragraph is just one out of eighteen species of definition which Robinson (1954: 7) identifies and which are ascribable to three main approaches to definitions: realist, nominalist and conceptualist. In addition, Harris and Hutton (2007: 18-19) propose their "integrationist approach [which] recognizes definitions as being stipulative" since "they provide practical guidelines for the conduct of communicational activities". After presenting these approaches theoretically but briefly – due to the limited space and the purpose of this paper – in the next section, they will be applied to legal definitions and in particular to a collection of definitions from legal written documents which belong to three legal systems: EU law, international law and US common law (and case law).

3.1. Definition defined

By the phrase 'species of definition' mentioned in the paragraph above, Robinson refers to both purposes and methods of a definition. Basically, a definition is a mental activity, which provides the ground where logic and psychology touch and which may be described as a "*secondary* symbolic activity" (Robinson 1954: 13), namely a subsequent process that reflects on the use of symbols or linguistic signs. As far as communicative purpose is concerned, a preliminary distinction between real definition (or definition of things, or *res*) and nominal definition (be it a word-word definition or a word-thing definition or definition of words, *nomina*) is necessary. The former kind of definition – real definition or thing-thing definition – dates back to Socrates and Plato, who are "the inventors of the notion of definition" (Robinson 1954: 149) and to Aristotle. In many writings, Plato's model of discussion starts with a question having the form 'What is x?', namely with a request for a definition. In particular, in *Theaetetus*, the question to answer through the dialogue is 'What is *logos*?' where *logos* is a thing

and not a word. The answer presupposes that one already knows the use of the word, which, as something that is a weaving together of the names of the elements of a thing, must be suitably explanatory (Fine 1979). If with Plato, *logos* refers to either 'sentence' or 'statement' or 'explanation' or 'account' producing knowledge – namely to definition – Aristotle in *Topics* defines definition as "the statement that gives the essence" of a thing, not of a word. The reocentric view of meaning (Harris and Hutton 2007: 24) – which links Plato, Aristotle, Cicero (in *Rhetorica ad Herennium*, Book IV, "Definition in brief and clear-cut fashion grasps the characteristic qualities of a thing, […] and is accounted useful for […] it sets forth the full meaning and character of a thing so lucidly and briefly that to express it in more words seems superfluous, and to express it in fewer is considered impossible") over the centuries through Spinoza to J.S. Mill – depends on the existence of the 'x' mentioned in the question. Thus real definition appears as an Analysis, with a capital letter, since several processes – 'abstraction', 'relation', 'synthesis' and 'substitution' – from which the vague formula 'What is x?' flourishes from are implied (Robinson 1954: 178ff). The analytic enumeration of the simple ideas (Locke 1706) which combine in the meaning of the term to be defined, hints at the existence of complex ideas made up of simple ideas or natural kind terms which "play an important role of pointing to common 'essential features' or 'mechanisms' beyond and below the obvious distinguishing characteristics" (Putnam 1970: 188) and which, for this reason, are not definable.

In contrast with this last assertion on indefinability, Robinson states that "nothing is lexically indefinable" (1954: 41) and that this consolidated misunderstanding is due – among different reasons connected to the emotional force and the indicative power of a word – to the fact that 'indefinable' does not mean 'non-admitting a definition' but rather 'non-requiring a definition'. This refers to the abovementioned nominal definition, which exists as word-word definition or as word-thing definition.

Word-word definition has the form of an interlingual translation, as it is "an interpretation of verbal signs by means of other signs of some other language" (Jakobson 1959: 233) and it correlates a word to another word having the same meaning; word-thing definition correlates a word to a thing. The relationship established between a word and a thing serves two distinct purposes and originates the lexical (or historical) definition and the stipulative (or legislative) definition.

Lexical definition, which provides a customary or dictionary meaning of the word at issue, is a form of history (Robinson 1954: 35) and reports "the meaning that a word has in a language" (Hurley 1988: 82). It basically involves three agents: the definer (or the lexicographer), the hearer (or reader) and the user (or the individual whose usage of the word gives the word itself the meaning it has). It provides four dimensions of the word in question, namely the contextual, the syntactical, the expressive and the indicative one, since its ultimate goal is to say how words are used. As descriptive linguists, lexicographers empirically analyse and describe a language with a traditional emphasis on individual items of vocabulary and fulfil a function of mediation between the community of linguists and the community at large (Kirkness 2004). With Harris and Hutton (2007: 78), "lexicographical definition is deliberately constructed and allocated by the lexicographer on the basis of materials selected for study, and its allocation depends on the viewpoint the lexicographer has chosen to adopt". As a matter of fact, dictionaries are "books or banks about words" (Kirkness 2004: 59), while encyclopaedias are " books or banks about facts" (Kirkness 2004: 59): "the Cyclopaedia *describes things*, the Dictionary *explains words*, and deals with the description of things only so far as is necessary in order to fix the exact signification and use of words" (Murray 1884 in Harris and Hutton 2007: 81, italics in the original). Yet, although the distinction between dictionaries and encyclopaedias is pretty obvious, "a hard and fast distinction between lexical and encyclopaedic information is not possible […] since humans use language to communicate about facts, things or people" (Kirkness 2004: 59) through linguistic signs.

Stipulative definition, which provides one's own meaning for a word and reports or establishes the meaning of a (linguistic) sign, is "an announcement of what is going to be meant by it in a work, or a request to the reader to take it in that sense" (Robinson 1954: 59). In the act of assigning an object to a name, the lexicographer is not recording an already existing assignment, but is showing how words should be used (Robinson 1954: 59). From the legal Latin word *stipulatio*, which means "a solemn promise, a contract, or an obligation", stipulative definition makes the lexicographer a legislator (Robinson 1954: 54) or an arbiter (Robinson 1954: 56) who attempts to replace the varieties of actual usage by a single unambiguous usage. As a request or a binding commitment, stipulative definition is a proposal rather than a proposition and looks to the future – not to the past – in a sort of "turning

our backs to reality" (Robinson 1954: 69). In Harris and Hutton (2007: 71), "stipulative definitions function as performatives – in something like the Austinian sense of *performative*" – thus are subject to the kinds of Austinian felicity conditions which performatives in general are subject to. In particular, stipulative definitions – like performatives – do not 'describe' or 'report' or constate anything at all, are not 'true or false' (Austin 1962: 5) and in their lack of truth value, they display their arbitrariness (Robinson 1954: 67) and at the same time their function as a cure for ambiguity. Arbitrariness and ambiguity, but also peculiarity and distinctiveness, characterize legal language when it comes to questions of definition (Goodrich 1987: 54). Since performatives are assertion that do not describe or expose a certain state of affairs, but allows the speaker to perform a real action, what is said to be done is accomplished and consequently a real fact is immediately produced. Performative acts, which according to Austin started from a basic premiss about language as social action, are always situated. If every utterance is a performance, the utterer is actually doing something, which is taken to be the "equivalent of *intending* something" (Goodrich 1987: 74). When the speech act is legal, to do or to intend something may be interpreted in two ways: on the one hand, it may mean that normative or directive statements are intended to affect behaviour, since law prescribes behaviour by means of a generic set of conventional meanings. On the other hand, it may refer to the utterer's intentions (the intentions within a rule or a statute) which have to be recognised by the listener who intends the intentions behind the utterer's words (Hart 1952) and for this reason this second sense pertains to the realm of subjectivity. This look at law in terms of being a concept connected to social life implies that legal norms are acts of will "*intentionally* directed to the behaviour of another" (Kelsen 1981: 180) and as legal speech acts, they have a formal rather than material attribute. Legal speech acts are different from everyday speech acts in that they "invoke the rules and conventions of the law and carries with it a certain legal force" (Fiorito 2006: 103), they create obligations, permissions, and prohibitions. As an example, it is possible to mention international treaties, conventions and protocols which are all different names to refer to what they are in their essence, namely contracts (Robertson 2016: 60) which compel the parties to perform the acts as recorded in their agreement.

3.2. Legal definition defined

Law only exists in human language (Braekhus 1956 in Mattila 2013, Goźdź-Roszkowski 2011, Engberg 2016) though legal meaning may be different from linguistic meaning (Robertson 2016: 141). Methods of interpretation of legal texts may vary according to the generic feature of the document (Jopek-Bosiacka 2011), thus specific definition is "the chief means by which the precise meaning of a lexical unit is determined and legal certainty is guaranteed" (Alcáraz and Hughes 2014: 30). As Down (in Alcáraz and Hughes 2014) pointed out, interpreting a legal text is construing it ideologically; constructing a legal text is creating it linguistically. Once the legal text has been created, namely constructed, it has to be construed or interpreted by judges or other legal professionals. Allowing that the purpose of interpretation is to construe the law, the legal text is an element in this exegetical process which may take place according to a literal or a liberal approach (Walker 2001 in Robertson 2016: 65): "the need for the courts to try to appreciate the overriding intention of the legislation, the general policy behind the Act and the need to further remedies and not take refuge in pettifogging verbal objections". Alcáraz and Hughes further elaborate on the liberal approach and identify other rules of judicial interpretation: the holistic rule (legal documents are to be interpreted as a whole), the golden rule (ordinary words are to be intended as ordinary words, technical terms as technical terms), the mischief rule (in amending legal texts ambiguous terms are to be construed to facilitate the amending purpose), the *ejusdem generis* rule (in the presence of a list of hyponyms followed by general words, general words are to be interpreted as referring to other specific items belonging to the same class as the hyponyms), and the rule *expression unius est exclusion alterius* (in the presence of a list of specific items and in the absence of generic words, the list is to be considered explicitly complete). Not only is the literal approach just one out of several approaches to interpret legal texts, but judicial approaches to interpretation are influenced by the context within the disputes take place and by the legal order of reference. Nonetheless it is possible to identify a 'canon of interpretation', a rule for those involved in the exegetical process, which tends to favour a common sense result rather than a strictly legal or logical outcome, called the rule of leniency, which holds that "any lexical vagueness or syntactic ambiguity is to be

interpreted against the drafter in both civil and criminal law" (Alcáraz and Hughes 2014: 30).

From a semiotic point of view, the words with which legal documents are drafted are mere signs, "indirect expressions of a reality" (Tiefenbrun 1986: 97), and may be explicit – providing a monoreferential correspondence between word and reality –, deceptive explicit or implicit – when the correspondence between word and reality is not limited to one immediately identifiable meaning. Therefore, both meaning and misunderstanding (linguistic and legal) are located in an intricate relation of signifier/signified/referent (Tiefenbrun 1986: 103) and in this semiotic process of Piercean mediation or thirdness – which characterises the indirect nature of the law – "legal language in written form takes place" (Robertson 2016: 135). These principles also inform Wille's tripartite 'method' (1944) which recognise three stages in the construction of satisfactory legal definitions: as with (legal) definitions the difficulties arise when it is hard to identify the superordinate or the *genus* of the term to be defined (the 'impossibility thesis' by Benthan 1960 in Hacker 1969: 343), three stages – formation, legal effect or consequence and extinction, namely birth, life and death – may serve the purpose of constructing legal definitions of primary legal ideas. In law, the process of mediation carried out by drafters and judges is a process of interpretation which is not grounded in rules whose meaning is clear and fully determinate in a positivist and Saussurean fashion (Tiefenbrun 1986; Jopek-Bosiacka 2011), but in more realistic and Piercean terms it is a subjective and relatively free mental activity. To Pierce, law is a provisional and open-ended system (Kevelson 1992), which, tackling the contradiction and paradox inherent in language and in human relations, is prescriptive rather than descriptive, incomplete and reinterpretable. From this perspective, the presence of definition in legal documents and contexts is reasonably justified and fulfils a crucial communicative and operational function, "as shorthand expressions [which] permit the saving of time and energy" (Cairns 1936: 1102).

In addition, "although the legislature cannot change the ordinary meaning of [a word], it does have the power to define the term for the purposes of its legislation" (Tiersma 2000: 116-117) as they are "rules of law" (Cairns 1936: 1103) which however, due to the impossibility to "devise a rule covering all such possible cases in advance", cannot be considered statements of facts in their attempt to be all-inclusive, accessible and transparent (Bhatia 1993, 2010). Words

are correlated with the fact not solely by the rules of standard English, but also by the rules of law.

In his method of elucidation, Hart (1954) states that the general characteristics of legal language are, first of all, a typical context where legal words are at work. There, by analysing statements of 'rights' and 'duties' – and other legal words – as predictions, namely as texts having a peculiar cognitive property (like instructions, according to Werlich's text typologies (1976), without options and whose communicative function is not to predict the future but to refer to the present without describing it), Hart has no doubt that legal words neither stand for nor describe nor state the existence of anything, but that "when someone has a legal right a corresponding prediction will normally be justified" (Hart 1954: 27).

A second characteristic of legal language is the existence of a legal system made of rules, a third characteristic is that "the same assertion varies its communicative effect according to the function of the speaker who utters it" (Hart 1954: 29) and the fourth and last characteristic is that in any system, rules may attach identical consequences to any one of a set of very different facts (Hart 1954: 30). Hart's truth-conditional definition rejects any sort of analytic definition (Hacker 1969) and suggests a peculiar use of legal concepts rather than peculiar meanings, since "the common use of the words is known but not understood" (Hart 1954: 37). Strictly connected to the above mentioned contextual aspect, in legislative provisions there is a further 'unique contextual factor': the drafting community's first concern is to give in the legal document an honest expression to the intentions of the legislative institution they serve (Bhatia 2010: 46), but, even though the document is meant for ordinary citizens, "the real readers are lawyers and judges, who are responsible for interpreting those provisions for ordinary citizens" (Bhatia 1993: 103).

As it is clear now that the purpose of legal language and in particular of legal definitions is better fulfilled by stipulation rather than by analysis, a third complementary perspective on legal definition is offered by the integrational approach (Harris and Hutton 2007), which makes semantic indeterminacy the background against which participants "construct, impose, contest and debate meaning and seek to impose or deny order, coherence and narrative" (Harris and Hutton 2007: 194). Integrationist indeterminacy is radical and context-oriented as "the sign does not have its own meaning: it is made to mean whatever

the circumstances require […] and is subject to recontextualization" (Harris and Hutton 2007: 201-202).

The principles and conventions applied to formulate legal definitions mainly depend on five factors as indicated by Jopek-Bosiacka (2011: 9): 1) type of legal genre; 2) position in the instrument; 3) type of legal definition; 4) legal system; 5) branch of law. For the purposes of this paper, as established in the introduction, the branch of law taken into account is competition law and the contextual legal systems are EU law, international law and, US common law (and case law). As far as concerns the other factors, they are variable or do not provide any operative premise to the analysis since the paper aims at investigating how different definitions of the same legal concept are influenced by different generic, textual and legal contexts.

3.2.1. 'Trade (-) mark' defined

The word 'trademark' is highly evocative and once mentioned, generally pictures of famous brands and logos appear in the mind of the general public. People in general agree that trademarks can be valuable for companies, though they would not be equally aware of the fact that trademarks are the most valuable assets in a majority of modern global companies. Trademark value is increasing rapidly in modern society, where more and more of world business is intangible, and consists of trademarks, patents and such assets. Although in everyday speech – and in General English dictionaries, too – trademark and brand are used as synonymous concepts, from a legal perspective there are crucial differences. As a matter of fact, the conventional definition of 'trademark' provided by the online Merriam-Webster Dictionary:

> 1: a device (such as a word) pointing distinctly to the origin or ownership of merchandise to which it is applied and legally reserved to the exclusive use of the owner as maker or seller 2: a distinguishing characteristic or feature firmly associated with a person or thing[1].

[1] https://www.merriam-webster.com/dictionary/trademark (accessed 25.06.20)

is followed by the section of synonyms, where the only entry is 'brand'. The same happens with the Britannica Encyclopaedia, which considers 'brand name' as an alternative title to 'trademark', whose definition reads

> Trademark, any visible sign or device used by a business enterprise to identify its goods and distinguish them from those made or carried by others. Trademarks may be words or groups of words, letters, numerals, devices, names, the shape or other presentation of products or their packages, colour combinations with signs, combinations of colours, and combinations of any of the enumerated signs[2].

From the legal point of view, 'brand' is a term that refers to a social activity which may help to build a reputation and thus comprises, among other things, marketing activities. Branding may therefore be defined as a social activity. 'Trademark' is a term that refers to a 'social construction', as it is nourished and developed in relation to a company's existing potential customers and stakeholders. Thus, trademarks are also legal constructions defined and explained by trademark law. The value of a brand is called 'brand equity' and it is based on the presumption that a well-known brand will generate more revenue because potential customers will believe that a product with a well-known brand is better than a product that is less famous. Brand equity is an asset as crucial as impossible to quantify and within its core trademarks are located. As the definition of 'trademark' reads – and confirms – in *The Advanced Dictionary of Marketing* (2008: 265), 'trade-marks':

> are protective legal rights covering words, symbols, phrases, names, or other devices or combinations of such devices associated with ownership of a product or service, and trade secrets, which are processes, patterns, formulas, devices, information, and the like that are known only to their owner (or, in the case of a firm, the owner's employees).

In his telling semiotic interpretation of modern trademark, which appear as a 'floating signifier', Beebe (2004: 622) recognises a triadic structure in every trademark, which appears to be "a set of semiotic relations of reference" among a signifier (or a tangible symbol), a signified (or a type of use) and a referent (or a function or a product). This relational

[2] https://www.britannica.com/topic/trademark (accessed 25.06.20)

nature, which is inspired with Saussurean semiology and informs the trademark as a 'full-blow sign' and not as a mere signifier, often fails to be recognised and would be the cause of judicial error (Beebe 2004: 650). This premise is necessary since the three elements identified by Beebe and their relation make the trademark deserving of 'trademark rights' and this last aspect is inevitably linked to the legal definition of 'trademark'. The legal definitions which make up the corpus of analysis of this research are presented below in Table 1.

Table 1. Legal definitions of Trade(-)mark analysed in this article.

REGULATION (EU) 2017/1001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 on the European Union trade mark. CHAPTER II **THE LAW RELATING TO TRADE MARKS** *SECTION 1* ***Definition of an EU trade mark and obtaining an EU trade mark*** *Article 4* **Signs of which an EU trade mark may consist** An EU trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of: (a) distinguishing the goods or services of one undertaking from those of other undertakings; and (b) being represented on the Register of European Union trade marks ('the Register'), in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor. *Article 5* **Persons who can be proprietors of EU trade marks** Any natural or legal person, including authorities established under public law, may be the proprietor of an EU trade mark. *Article 6* **Means whereby an EU trade mark is obtained** An EU trade mark shall be obtained by registration. *Article 7* **Absolute grounds for refusal** The following shall not be registered: […] *Article 8* **Relative grounds for refusal** Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered: […]
AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

(as amended on 23 January 2017)
ANNEX 1C
SECTION 2: TRADEMARKS
Article 15
Protectable Subject Matter
1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.
2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).
3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.
4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.
5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

Lanham Act – TITLE X - Construction and definition; intent of the chapter; § 45 (15 U.S.C. § 1127).
The term "trademark" includes any word, name, symbol, or device, or any combination thereof—
(1) used by a person, or
(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

The three factors which lead the analysis – type of legal genre, position in the instrument, and type of legal definition – cannot exclude a preliminary orthographic remark: in Regulation (EU) 2017/1001, the term at issue is written as a two-word term. Although this is not a radical

deviation, nonetheless it is choice made by EU drafters if not to avoid misunderstanding or overlapping of a European Union law concept with other terms from other legal systems (Engberg 2016; Šarčević 2016; Anselmi and Seracini 2015), at least to differentiate the spelling of the EU term. In the WTO Agreement and in the US Statute (respectively the second and the third document presented in Table 1) the term is written as a one-word item. Yet, a hyphenated version (trade-mark) was used habitually at the end of the XIX century and at the beginning of the XX century in the US Trade Mark Act of 1881 and in legal judgments such as in *Elgin Nat. Watch Co. v. Illinois Watch Case Co*. (1901).

As far as concerns the type of legal genre, the EU regulation is an example of secondary legislation, which implements the principles expressed in one or more supranational treaties (primary legislation and typical instrument of international law). Thus, from a treaty – voluntarily negotiated by each member state – regulations derive as legally binding documents, immediately after the Member State have ratified them, and become part of the national legal framework of the Member State itself. Regulations – and other legal documents such as directives and decisions – are unique instruments at the EU disposal and characterize the European legal discourse. The second definition is taken from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as amended on 23 January 2017 as an example from international law. International agreements are voluntarily negotiated and ratified documents and their canon is defined in the 1969 Vienna Convention on the Law of Treaties: a treaty is an "agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". The third definition is from Lanham Act, also known as Trademark Act, which is the primary trademark statute in the United States of America. Despite the fact that in the English system of common law judge-made law based on the precedents has always had a prominent role, statutes are the actual form of legislative activity of the British Parliament or the American Congress.

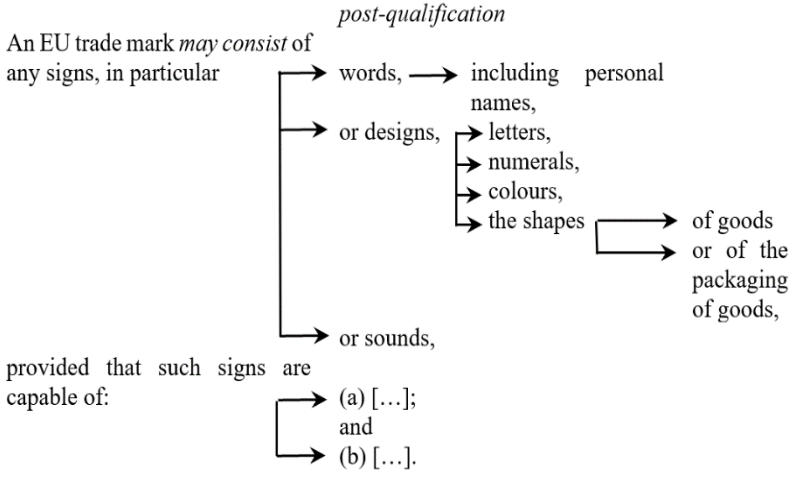
The EU Regulation, the WTO Agreement and the US Act have their own characteristic structure or canon which – as far as concerns EU regulations - is codified in official documents like, for example, the *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union*

legislation (2015). There, it is specified that "[t]he definition must not be contrary to the ordinary meaning of the term (section 14.1) [and] must not contain autonomous normative provisions (section 14.4)". This established canon gives definitions a precise location, and as far as concerns the three examples at issues, in the EU Regulation it has a dedicated section at the beginning of the enacting terms, immediately after the preamble, as in mathematical and physical works where the definitions are necessary premises, "indispensable for a logical or systematic investigation of a subject matter" (Cairns 1936: 1100). Although legal definitions, as nominal definitions, have no truth value, in the context of EU regulations their intermediate position clarify what comes after – as suggested by Plato in the *Phaedrus* –, but may be no use for what has immediately come before, namely recitals and citations. As far as the WTO document and the US Act are concerned, the definitional sections are respectively in Annex 1C and in Title X (out of XII) thus in final position. This aspect recalls Kant and his point on definitions in philosophy which "are not the conditions of knowledge; they are what we hope to conclude with, not the raw material with which we begin" (White Beck 1956: 188). Although philosophical definitions serve a concluding function as they are the result of elaborations and thus the end product of speculative processes – which justifies their final position – in common law and international law legal definitions have a similar position but a different function. As a matter of fact, the final position of the two definitions at issue seems to provide extra rules or technical data that may be consulted by judges or other legal professionals in the practice of their profession as a reference and not as a premise or as the starting point for their judgement or counsel.

The last aspect to consider is the type of legal definition, namely the methods followed by drafters to construct a given stipulative definition. The basic distinction that serves as a premise is between equative and non-equative definitions (Jopek-Bosiacka 2011: 18). The equative one is the typical legal definition which follows the structure of an equivalence, or a relation between a sign (the *definiendum*) and something that is not a sign (the *definiens*) through a defining connective. Within equative definitions it is possible to distinguish intensional (or analytic) definitions and extensional (or synthetic, or synonyms) definitions (Robinson 1954; Jopek-Bosiacka 2011; Alcáraz and Hughes 2014). Notwithstanding "statutory definitions are extensional" (Jopek-Bosiacka 2011: 19), the case of the EU definition

seems to be quite unusual: in the very first part (art.4) the habitual practice of formulating extensional definition with the phrase *shall mean* is replaced with the modal *may* followed by *consist* followed by a list of examples of what is meant by the word 'signs' and the effect is an extensional chain generated by a series of short 'operational qualifications' (Bhatia 1993: 103) which results in syntactic discontinuities. An example from art. 4 is presented in the scheme below:

Graph 1. Graphic representation of syntactic discontinuity in EU trade mark definition.



Article 7 'Absolute grounds for refusal' and Article 8 'Relative grounds for refusal' set the limits of the *definiendum* by means of exclusion which has – as a defining connective – the phrase *shall not be registered* six times, in complete accordance with the traditional rules of definition as set out by Stebbing (in Robinson 1954: 141), in particular with rule 5 which provides that "The *definiens* should not be expressed negatively unless the *definiendum* is negative". The *definiendum* here is the 'refusal', a list of the characteristics that a sign must not have to be accepted as a trade mark and the method adopted here is intensional.

The other two definitions are relatively shorter than the European one which is made of 1420 words in contrast with 268 words in the WTO agreement and 78 words in the US statute.

In the WTO agreement the *definiendum* is positive, but some negative *definiens* are provided. The structure of this definition is less rigorous, from a cognitive point of view, as extension and intension as methods coexist and from a purely linguistic perspective, *shall* and *may* are used as nearly interchangeable items, with *may* which appear only in the affirmative form and *shall* in both affirmative and negative.

The US statute definition hinges on two verbs: *includes* and *applies*, which is used to introduce the functions – and the characteristics – of a given trademark and thus to provide an intensional definition of the term. The brevity of the definition inserted in Lanham Act is not surprising: as a common law statute, the reasoning procedure is inductive, namely "it imputes a rule from a set of circumstances" (Robertson 2012: 1222) and the decision taken by members of the judiciary may become binding on all subsequent cases pursuant to the principle of precedence. In particular, a considerable number of cases – in the section devoted to the statement of the *ratio decidendi* of the case, "which leads to and justifies the pronouncement of the judgment" (Bhatia 1993: 130) – provide further stipulative intensional definitions of the term trade-mark. The exegetical function (and the prescriptive power) of the Courts has always been apparent: in *Duro Pump and Mfg. Co. v. California Cedar Products Co.* (1926), in *California Packing Corp. v. Tillman Bendel* (1930), and in *Continental Corp. v. National Union Radio Corp.* (1933), the provisions of the Trade-Mark Act of 1905 (15 USCA § 85) have been interpreted to determine the legal and linguistic meanings (and implicatures) of the term 'trade-mark' which

> […] is created chiefly by use which must be general, continuous, and exclusive and applied to goods and used in trade under such circumstances of publicity and length of use as to show an intention to adopt the mark for specific goods and to have become known as the distinguishing mark for such goods (*Continental Corp. v. National Union Radio Corp.*, 67 F.2d 938, 942 7th Cir. 1933).

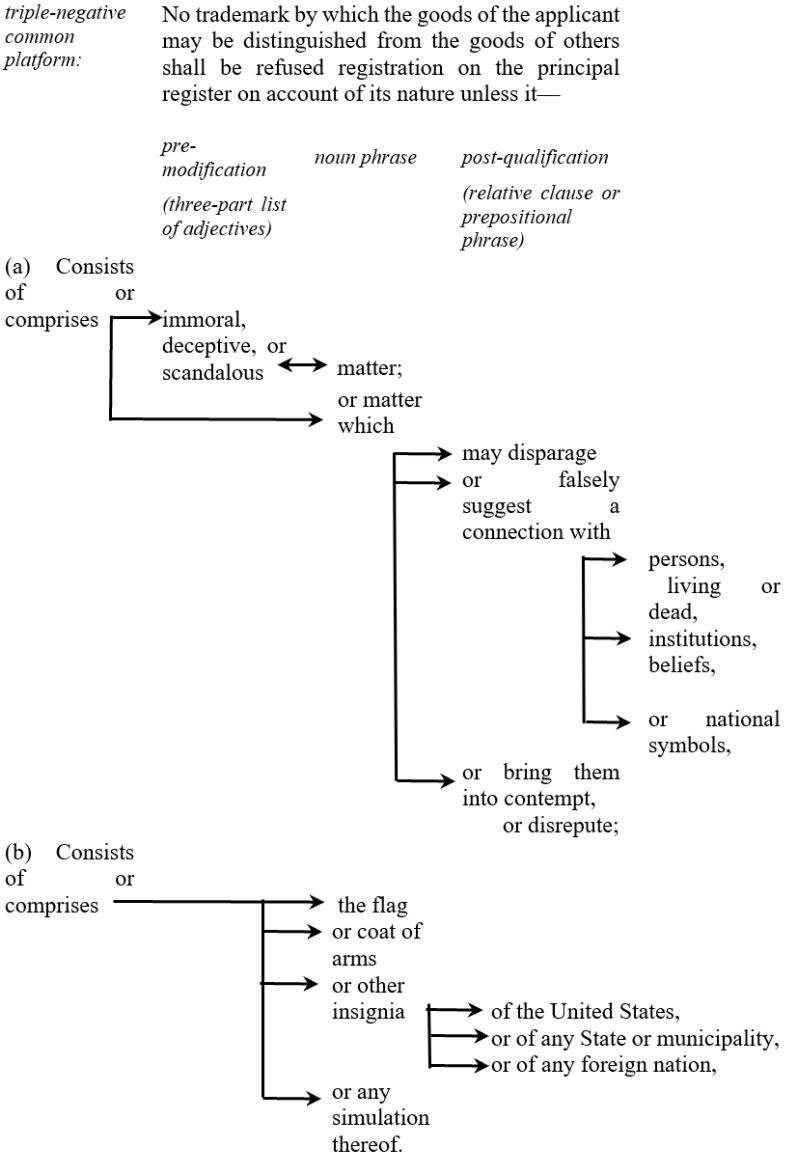
and of the phrase "merchandise of the same descriptive properties" (section 5 and 16 of the Act):

> […] the term "of the same descriptive properties" must be given its ordinary and colloquial meaning, and […] that the meaning of the phrase "merchandise of the same descriptive properties" must not only be ascertained in the light of the use of the words "goods of the same class," […] and the words "of [substantially] the same descriptive properties" […], but must also be construed in connection with the

> predominant phrase of the provision "as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers," and the predominant word "distinguished" in the first part of the section. (*California Packing Corp. v. Tillman Bendel*, 40 F.2d 108, 108, 111 C.C.P.A. 1930).

A similar issue related to the choice of the name 'FUCT' for a clothes trademark and to its evocative (and potentially offensive power) is settled in *Iancu v. Brunetti* (2019) where "The meanings of 'immoral' and 'scandalous' are not mysterious, but resort to some dictionaries still helps to lay bare the problem." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Though the dispute concerns the adequacy of the name above-mentioned for a trademark, the provisions that regulate the controversy cannot be found in the definitional section 45 of Lanham Act, but in section 2 – Trademarks registrable on principal register; concurrent registration. If in section 45 the definition provided is extensive, as a list of five items – word, name, symbol, or device, or any combination thereof – which is "taken to be literal and […]*explicitly* complete in contrast with the default tendency to give three-part lists as *symbolically* complete" (Jeffries 2010: 70), in section 2 the definition is intensive, as an indented list of items whose standard form is a triple-negative common platform (No… refused… unless) at the beginning followed by the verbal group 'consists of or comprises' followed by a noun phrase which is pre-modified and post-qualified by a qualifying relative clause and a prepositional phrase. The example below, which is taken from section 2, is a graphic representation of the description provided above. The two parts (a) and (b) are examples of extensive definitions which exploit mainly three-part lists, which fulfil a symbolic completeness function.

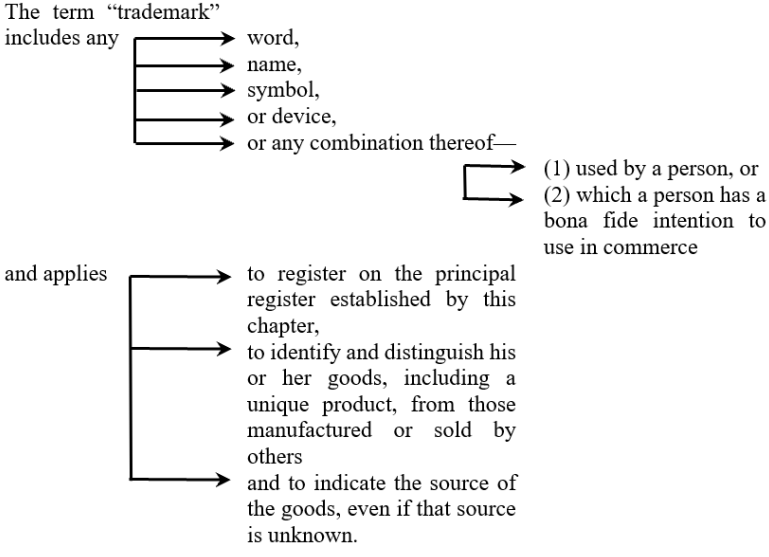
Graph 2. Graphic representation of syntactic discontinuity in Lanham Act trademark definition.



In section 45, and as shown in its graphic representation below, to draw a comparison between the two definitional extracts, the definition is divided into two parts, too, but the former hinges on the verb *includes*, is extensive and fulfils an explicit completeness function thanks to a five-part list of items whose shape any trademark may assume. The latter hinges on the verb *applies*, is intensive and fulfils a symbolic completeness function thanks to a three-part list of actions – which a trademark allows people to perform in business and commerce – and frequent syntactic discontinuities.

In particular, the scheme below emphasises the double structure of the US act definition (Section 45), where extensive and intensive 'steps' (Hyland 2012; Rasmussen and Engberg 1999) coexist, and confirms legislative provisions as "two-part interactive move-structure consisting of the main 'provisionary clause' and the attendant qualifications" (Bhatia 1993: 130) whose cognitive structure displays a non-linear organization due to the interplay of the main provisionary clause and its qualifications or discontinuities.

Graph 3. Graphic representation of syntactic discontinuity in WTO Agreement trademark.



As it frequently happens in EU legal documents too and as demonstrated by Cutts and Wagner (2002), in the US act further definitional information is not provided in the section devoted to definitions (Section 45) but 'somewhere else' (Section 2): as suggested by Cutts and by the principles which underlie the Plain Language Movement, it would be better to "group all the definitions in one place for ease of reference" (Cutts and Wagner 2002: 11). Yet, given this peculiarity, both the US act and the EU legal documents, may be considered as 'diffused stipulative definitions' which develop throughout the whole document by alternating extensive with intensive communicative steps, which symbolically and explicitly express completeness in a partially successful attempt to be all-inclusive and precise.

4. Conclusion

From the analysis of the definitions which made up the corpus, the EU definition seems to leave not too much wiggle room to readers and interpretants, or at least seems to cover as many cases as possible, though it is impossible for any legal definition to cover and foresee every possibility that can arise (Robertson 2012). It is possible to say that the trade(-)mark case is neither an example of the use of a common word with an uncommon meaning nor the deliberate use of a word with a flexible meaning: it is an attempt at extreme precision as "[e]xplicit definition is simply a particular application of the law's major approach to precision, i.e., an attempt to put a brand on the mavericks of speech […] to distinguish the language of the law from common tongue" (Mellinkoff 1963: 23).

Thus the findings of this research confirm the premises, that is common law and civil law linguistic and textual peculiarities merge originally in the EU law, where a code-based written deductive approach – well aware of the constraints afore mentioned – may count on a court-oriented and inductive reasoning where the predictive function of law, despite the abstract context anticipated in legal text written in 'advance', may provide certainty and regularity in civil society. From the analysis carried out on the definitions of 'trademark', stipulative legal definition as a genre results "a staged, goal-oriented,

social activity" – to paraphrase Martin (1986) definition of genre – where different methods of definition corresponds to different, but predictable stages or moves (Bhatia 1993), aimed at establishing how to use – and how to interpret – a given legal term in the context of a legal document and at involving laypeople and experts due to their performative nature. The particularity of common law and the generality of civil law result in a cross-cultural generic variation in the context of the European legal discourse where the definitional section provide terminological explanation and define the domain of application of the term 'trade mark'. As demonstrated above, selected facts lead to the legal drafting (rules) which as a reference has an ideal world. Case law represents the world of reality where relevant facts are taken into account to construe the meaning which is constructed by drafting and which is rarely of universal application (Bhatia 1993).

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PROTOTYPE THEORY IN THE JUDICIAL PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION. A CASE STUDY[1]

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Abstract: Prototype theory is a semantic theory according to which the membership of conceptual categories is based not on a list of criterial features, but rather on the similarity to the most representative member of the category. Consequently, conceptual categories may lack classical definitions and rigid boundaries. This article supports the claims, already made by other scholars working in the field, that prototype theory may greatly augment our understanding of legal (i.e. statutory, judicial) interpretation. Legal provisions are traditionally written as classical definitions, but they are rarely applied that

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way. Statutory concepts tend to be interpreted with a great deal of flexibility, using a wide array of extra-textual factors. This is especially true for the case law of the Court of Justice of the European Union, which has to deal with the challenges of the multilingual, supranational law of the European Union.

Key words: judicial interpretation; legal semantics; prototype theory; cognitive linguistics; EU legislation.

TEORIA PROTOTYPU W PRAKTYCE ORZECZNICZNEJ TRYBUNAŁU SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ – STUDIUM PRZYPADKU

Streszczenie: Teoria prototypu jest teorią semantyczną, zgodnie z którą przynależność do kategorii pojęciowych nie opiera się na zestawie określonych cech, lecz na podobieństwie do najbardziej reprezentatywnego egzemplarza danej kategorii. W związku z tym kategorie pojęciowe mogą nie poddawać się klasycznemu definiowaniu, a ich granice bywają rozmyte. Artykuł ten wspiera twierdzenia innych autorów, że teoria prototypów może znacząco pogłębić nasze rozumienie interpretacji prawniczej. Przepisy prawne są tradycyjnie formułowane jak klasyczne definicje, jednak rzadko są stosowane w ten sposób. Pojęcia ustawowe są często interpretowane z dużą elastycznością, przy wykorzystaniu szerokiej palety czynników pozatekstowych. Jest to szczególnie aktualne w przypadku orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, który stoi przed wyzwaniem stosowania wielojęzycznego, ponadnarodowego prawa Unii Europejskiej.

Słowa kluczowe: interpretacja prawa; semantyka języka prawnego; teoria prototypu; językoznawstwo kognitywne; prawo Unii Europejskiej.

1. Introduction

Legal theory has always been interested in the achievements of philosophy of language, formal logic, linguistics and other language-oriented disciplines. This is because language is the most common means of expressing legal rules: "[t]he law is a profession of words" (Mellinkoff 2004: vii). Perhaps a more scholarly proposition would be that "law is not a discipline of words, but of concepts" (Bajčić 2017: 7), because when it comes down to it, concepts – not words – are the "crystallisations of legal rules" (Mattila 2006: 137). Bearing that in

mind, in this article I advocate the relevance of a semantic theory named *prototype theory* as a way of understanding the practice of legal (i.e. statutory, judicial, juristic) interpretation. This is not a genuinely novel idea. Similar claims have been made by others in the fields of legal theory and legal linguistics (see, for example, Winter 2001; Solan 2010; Bajčić 2017). I offer some additional support for such claims in the form of a detailed analysis of the case law of the Court of Justice of the European Union. I also argue that prototype theory obtains particular significance in the context of the legal system of the European Union, due to its institutional, political and linguistic characteristics.

2. Prototype theory – an overview

Prototype theory is a theory of categorisation originating from the work of American psychologist, Eleanor Rosch. It is based on psycholinguistic experiments conducted in the 1970s. It goes directly against what is known as the classical approach to human categorisation. According to that approach, which can be traced back to Aristotle, conceptual categories are defined by sets of features that are both necessary and sufficient. An object is recognised as a member of a category if it exhibits all the relevant features. It follows that (1) all members of a category are equal, (2) membership of a category is an all-or-nothing affair, and therefore (3) categories have rigid boundaries. Classical theory prevailed for centuries in numerous disciplines, including philosophy, psychology, anthropology, linguistics and – most notably for our purposes – law. As Lawrence Solan puts it: "[s]tatutes are generally written as classical definitions, which in turn are familiar to us as rules that tell us the conditions that are necessary and sufficient for us to use a word appropriately" (Solan 2010: 18).

Rosch's research proved that the actual psychological mechanisms of categorisation do not comply with the classical approach, at least with reference to certain types of conceptual categories, including: colours and shapes, natural-kind names (i.e. *bird*, *fruit*), artefacts names (i.e. *furniture*, *vehicle*, *weapon*). Instead of being defined by a set of necessary and sufficient features, these categories were found to be organised around the best, or the most representative example – called *the prototype*. The membership of a category is

established on the basis of similarity to the prototype. It results in an internal structure: "categories are composed of a 'core meaning' which consists of the 'clearest cases' (best examples) of the category, 'surrounded' by other category members of decreasing similarity to that core meaning" (Rosch 1973: 112). Extensive research by Rosch and others has proved that prototypes have psychological reality, i.e. they are involved in category processing, including association, speed of reaction, recognition, probability judgments, drawing inferences, learning, and memorising (Rosch 1973, 1978, 2011).

It should be stressed at this point that, contrary to a popular misreading, the notion of prototype should not be understood as referring to any particular entity, especially to a specific member of a category. Rather, it may refer to an abstract, idealised member of a category, a cluster of attributes providing the highest cue validity, or statistical functions over attributes: "To speak of a prototype at all is simply a convenient grammatical fiction; what is really referred to are judgments of degree of prototypicality" (Rosch 1975: 200). Rosch herself claims that there are no less than fourteen different types of prototypes that are appropriate for different types of conceptual categories (Rosch 2011: 101–103).

Although prototype theory originated in the field of experimental psychology, it has been quickly taken up by linguists from the emerging movement labelled *cognitive linguistics*, most notably by: George Lakoff, Charles Fillmore and Ronald Langacker. It offered an alternative for "checklist theories of meaning" (Fillmore 1975), i.e. formal semantics based on componential analysis, employed in the transformative-generative grammar. Today, prototype theory is considered one of the cornerstones of cognitive linguistics, and has been utilised in various domains of linguistic research, including lexical semantics, syntactic theory, morphology, and phonology. (see: Lakoff 1987; Langacker 2008; Taylor 2003). For convenience, it is often referred to as *prototype theory*. As a matter of fact, however, it is not a single theory, but rather a cluster of theories that share certain general characteristics (sometimes referred to as prototypical *effects*). According to Dirk Geerearts, these common characteristics boil down to the following four features (Geerearts 2016: 6–8):

(1) Prototypical categories cannot be defined by means of a single set of necessary and sufficient features. Take a classic example

of a category FRUIT.[2] Normally we expect fruits to be sweet, to have a certain size and shape, and to be eaten as a dessert.[3] However, there are obviously fruits that are not sweet (i.e. grapefruit, avocado), that are extraordinarily large (i.e. watermelon, coconut), and that are used for other culinary purposes (i.e. cranberry, avocado, lime). This lack of common features makes it impossible to formulate a rigid, classical definition of the concept of fruit, as such definitions are based on single sets of sufficient and necessary features.

(2) The structure of prototypical categories takes the form of a radial set of clustered and overlapping senses. This characteristic is attributed to Ludwig Wittgenstein and is called *family resemblance*. It means that, instead of a set of common features, we can observe "a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail" (Wittgenstein 1953: 32). Apples and pears have a similar shape and size, which they share with peaches and apricots. The latter two, however, have also a large stone in them that makes them similar to plums, mangos and avocados. All these fruits grow on trees, just like cherries. Cherries, however, are much smaller in size, which makes them similar to grapes, blueberries, gooseberries and raspberries, etc.

(3) Prototypical categories exhibit degrees of category membership. This feature is also known as *typicality* or *goodness-of-example*. It means that not every member of a category is equally representative – some members are better examples than others, because they exhibit more relevant features of the category. This is how the core-periphery distinction is formed. Apples, pears, peaches and oranges are prototypical examples of fruits and they constitute the "core" of the category. Watermelons, tomatoes and avocados are less prototypical, because they lack some of the typical features of fruits (i.e. watermelons have an enormous size and grow on the ground, tomatoes and avocados are not sweet and are not served as a dessert, etc.). They constitute the "periphery" of the category. The phenomenon of typicality is

[2] Note that the ordinary or folk meaning of *fruit* is concerned here, not a botanical definition.

[3] These expectations are obviously culture-dependant (as opposed to universal), which is explicitly admitted in the prototype theory.

encoded in natural languages in the form of so-called hedge words (*typical, technically, virtually, strictly speaking, sort of, par excellence*, etc.) It explains why we can say "Tomatoes are technically a fruit", while the sentence "Apples are technically a fruit" sounds peculiar (Lakoff 1973).

(4) Prototypical categories are blurred at the edges, which means that they do not have rigid boundaries. This links with the previous characteristics in that the degree of membership of a category may diminish to the point where it is no longer clear whether an object is still a member of the category. For instance: tomatoes, pumpkins, coconuts, olives and avocados are borderline fruits (Rosch 1975: 229-230). The non-rigidity of lexical categories poses serious problems for formal semantics, but not so much for everyday, practical purposes. From this perspective it should be rather considered a virtue (Wittgenstein 1953: 33).

There is also one very important meta-theoretical commitment shared by prototype theorists and cognitive linguists in general. It is the assumption that linguistic knowledge cannot be precisely separated from a background of general knowledge about the world. In other words, there is no strict border between linguistic meaning and other areas of conceptual information, and consequently between semantics and pragmatics. This idea has been developed by numerous scholars and under various theoretical propositions, including the concepts of a semantic frame (Fillmore 1975) and the Idealized Cognitive Model (ICM) (Lakoff 1987). For the purposes of this article, however, the notion of encyclopaedic semantics will be used (Langacker 2008: 46-47).

3. The interpretation of EU law

The prototype theory is relevant for legal practice, and consequently for legal theory, because the process of applying the law can be viewed as an act of categorisation. The core of judicial activity consists in classifying particular factual situations into relevant legal categories. As aptly put by the famous legal philosopher Herbert L.A. Hart:

> "[T]he law must (...), refer to *classes* of person, and to *classes* of acts, things, and circumstances; and its successful operation over vast areas

> of social life depends on a widely diffused capacity to recognize particular acts, things, and circumstances as instances of the general classifications which the law makes" (Hart 1994: 124).

Although categorisation is a complex cognitive operation, in the absence of doubts the human mind is capable of performing it unconsciously. In legal theory, such instances are often called *easy cases*. However, whenever doubts arise, legal categorisation becomes a deliberate process known to lawyers as *legal interpretation* or *legal construction*. Lawrence Solan describes it in the following way: "Most disputes over the meanings of statutes are about the fit between events in the world and the words in the statute" (Solan 2010: 50). These are known as *hard cases* and are the bread and butter of the judiciary in every legal system. The legal system of the European Union (hereinafter: the EU) is no exception.

The EU courts, most notably the Court of Justice of the European Union (hereinafter: CJEU), are given the task of applying – and consequently – interpreting EU law, including both primary law in the form of European treatises, as well as secondary law consisting of regulations, directives, decisions, recommendations and opinions. As documented by the CJEU case law, the interpretation of EU law does not essentially differ from the interpretation of national law and utilises traditional methods of interpretation, namely linguistic (or textual), systemic (or contextual) and teleological (or purposive) (Lenaerts and Gutiérrez-Fons 2013: 4; Pacho Aljanti 2018: 33). However, two characteristic features of EU law are frequently discerned in the literature: conceptual autonomy and multilingualism (Bajčić 2017: 79-106). Conceptual autonomy leads to the semantic independence of EU law. The legal concepts encapsulated in EU legislation are not the same as national legal concepts, even if denoted by the same terms (Bajčić 2017: 80). The multilingualism of EU law is a major topic in legal linguistics (see, for example, Šarčević 2013; Bajčić 2017). Put very simply, it means that every piece of European legislation has 24 language versions, with each version being equally authentic, "meaning that 24 different terms must refer to the same European concept" (Bajčić 2017: 165). Such a policy creates numerous practical problems. One of them is the existence of inevitable discrepancies between different language versions. In the CJEU's interpretive practice, this has resulted in a diminished role of textual methods and a reliance on

extralinguistic methods, including the teleological (i.e. purposive) approach, which the Court is famous for (Fenelly 1996: 664).

These two features of EU law, namely conceptual autonomy and multilingualism, offer a unique theoretical perspective. As rightly noted in the literature: [W]ithin a multilingual legal environment such as the EU, the (...) problems of understanding the law are multiplied" (Bajčić 2017: 137). If we view, as Solan and many other theorists do, the application of law as an art of matching a legal provision with reality, then the application of EU law may be perceived as an art of matching two dozen legal provisions with more than two dozen different realities. As a result, CJEU case law provides fertile soil for semantic analyses.

4. The concept of judicial authority

The case study in this article is based on a series of CJEU judgments concerning the European Arrest Warrant (hereinafter: EAW). The EAW is an instrument of judicial co-operation in the area of criminal justice. It was introduced by the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). It is considered to be the main EU legislative reaction to the events of 9/11 (Klimek 2015: 365). Amongst the Member States, the Framework Decision has replaced the traditional multilateral system of extradition based on political decisions with a system based on the principle of the mutual recognition of judicial decisions. On the one hand, the system is relatively simple, fast and effective. It has been praised as being possibly "the most successful mutual recognition instrument ever" (Klimek 2015: 1). On the other hand, it has the potential to violate important legal values, including the accused or the convicted person's fundamental rights (van der Mei 2017: 883). It does not come as a surprise, then, that CJEU case law concerning various aspects of the EAW system is very rich and not without controversy. For the purposes of this article, only one of these aspects will be discussed, namely the concept of judicial authority.

According to the legal definition provided in the Framework Decision:

> The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[4]

The body responsible for issuing (as well as executing) an EAW is denoted as *judicial authority*:

> The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.[5]

Judicial authority is a pivotal term, given the high stakes involved in issuing an EAW. However, it is not defined in the act. Prima facie, the term should not pose interpretive problems. English legal dictionaries define the adjective *judicial* quite clearly as "referring to a judge, court or the court system"[6] or "relating to the courts or belonging to the office of a judge."[7] Therefore, it seems that *judicial authority* should be interpreted as covering only courts as institutions and individual judges.[8] However, there are 22 other authentic language versions of the term.[9] Many of them also refer directly to judges or courts (i.e. the Polish version: *organ* sądowy and the Slovakian version: *súdny orgán*). However, some versions may be construed more broadly, as covering also institutions other than courts or judges (i.e. the Swedish version: *rättsliga myndigheten* or the German version: *Justizbehörde*). These linguistic differences constitute the first layer of semantic discrepancies. It may be worth noting that the CJEU occasionally acknowledges such differences and conducts a comparative linguistic analysis as part of the interpretive process (Pacho Aljanti 2018; Paluszek 2019). However, this was not employed in cases concerning the term in question. It follows that it is not linguistic differences that pose the real interpretive problems.

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[4] Article 1(1) (2002/584/JHA).
[5] Article 6(1) (2002/584/JHA).
[6] *The People's Law Dictionary* by Gerald and Kathleen Hill. URL: https://dictionary.law.com/Default.aspx?selected=1062
[7] *West's Encyclopedia of American Law*, edition 2. Copyright 2008 The Gale Group, Inc. URL: https://legal-dictionary.thefreedictionary.com/judicial
[8] Note, however, that the term *court* has not been given a rigid definition by the Court (see: Bajčić 2017: 145).
[9] The Gaelic version is currently unavailable. For reference, see: table 1.

Table 1. The terms for *judicial authority* in different EU language versions:

Language version	Term used
ENG	Judicial authority
BG	съдебен орган
ES	autoridad judicial
SC	justiční orgán
DA	judicielle myndighed
DE	Justizbehörde
ET	õigusasutus
EL	δικαστική αρχή
FR	autorité judiciaire
GA	-
HR	Pravosudno tijelo
IT	autorità giudiziaria
LV	tiesu iestāde
LT	teisminė institucija
HU	igazságügyi hatóság
MT	L-awtorità ġudizzjarja
NL	rechterlijke autoriteit
PL	Organ sądowy
PT	autoridade judiciária
RO	Autoritatea judiciară
SK	súdny orgán
SL	pravosodni organ
FI	oikeusviranomainen
SV	rättsliga myndigheten

The second and, judging from the role it plays in the CJEU's considerations, much more essential layer of semantic discrepancies is constituted by differences between the legal systems of the Member States. Although the general principles of the rule of law and the separation of powers are shared among all Member States, the specifics of the legal systems involved vary significantly. This includes the shape of criminal justice systems: their structure, hierarchy, internal institutional relations, external relations with other branches of government, number, types and character of institutions, procedural issues, etc. For instance, in some Member States, the pre-trial part of criminal proceedings is the domain of public prosecutors, while in

others it is run by examining magistrates or investigative judges. In some Member States, prosecutors' offices are part of the judiciary, while in others they are subordinate to the executive. According to Article 6(1) of the Framework Decision, each Member State is entitled to assign the judicial authority responsible for issuing an EAW accordingly to its national law. Due to organisational, practical, political, historical or other reasons, many states have given the authority to issue an EAW to non-court bodies or offices, such as public prosecutors' offices, police services or ministries of justice.[10] Of course, these authorities also vary from state to state in their institutional position, internal organisation, procedural issues, etc. As a result, it is not always clear, especially for the prosecuted person, whether an institution assigned by a particular Member State should count as a *judicial authority*. Hence in the last couple of years,[11] there have been numerous requests for preliminary rulings from CJEU whose real concern was the meaning and scope of the term *judicial authority* or, in other words, the contents of the concept of judicial authority.

Table 2. Institutions and persons capable of issuing EAWs in legal systems of different Member States (based on *Questionnaire on the CJEU's judgments in relation to the independence of issuing judicial authorities and effective judicial protection* by Eurojust & European Judicial Agency).

Member State	**Issuing authority**
AT	Prosecutor (but EAW becomes valid only if it is authorized by a judge)
BE	Investigative judge or prosecutor (following an arrest warrant issued by a court in the trial phase, or for the purpose of prosecution of minors, or for the purpose of the execution of sentences)
BG	Public prosecutor or court
CY	District court judge
CZ	Court

[10] See: table 2 for reference. Note, however, that some Member States have already adjusted their legislation to match recent CJEU case law and thus the contents of the table may diverge from the analyses presented in the article.

[11] The recent increase in the numbers of preliminary rulings on EAW-related issues has to do with a procedural change that entered into force in 2014. Since then, the Court's preliminary rulings on criminal matters are no longer subject to prior acceptance by the Member States (see: van der Mei 2017: 882-883).

DK	Court
DE	Court
EE	Prosecutor's office
EL	Public Prosecutor of the Court of Appeals
ES	Investigative judge or court
FI	Public prosecutor
FR	Public prosecutor's office
HR	Public prosecutor
HU	Investigative judge or court
IE	The High Court
IT	Investigative judge or court or public prosecutor (for the purpose of the execution of sentences)
LT	Prosecutor General's Office or County Court
LU	Investigative judge or Prosecutor General (for the purpose of the execution of sentences)
LV	The Prosecutor General's Office
MT	Court of Magistrates
NL	Investigative judge
PL	Circuit court
PT	Public prosecutor or judge
RO	Court
SE	Public prosecutor
SI	Investigative judge
SK	Court
UK	Judge
NO	Regional public prosecutor

5. The case study

The first judgment in the series was case C-452/16 PPU (Poltorak).[12] The facts of the case are as follows: Mr Poltorak, a Polish national, was given a custodial sentence by a District Court in Sweden. The EAW with a view to executing that sentence in Sweden was issued by the Swedish police board, in accordance with the national law. The executing authority requested a preliminary ruling from the CJEU regarding its doubts as to whether the police board can be counted as the *issuing judicial authority* for the purposes of executing a custodial sentence. The Court acknowledged that the term *judicial authority* is not defined in the act, and that it requires "an autonomous and uniform interpretation which (...) must take into account the terms of that provision, its context and the objective of the Framework." Next, the Court stated that "the words 'judicial authority', contained in that provision, are not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the authorities required to participate in administering justice in the legal system concerned." However, referring to the principle of the separation of powers, the Court drew a line between authorities administering justice (which can be considered as *judicial*) and the administrative or police authorities, which are within the province of the executive. Consequently, it ruled that the term *judicial authority* cannot be interpreted as covering the police services of a Member State.

On the same day, a judgment was passed in the case C-477/16 PPU (Kovalkovas).[13] The request for a preliminary ruling was made in connection with the execution of an EAW issued by the Ministry of Justice of the Republic of Lithuania with a view to executing a custodial sentence. The argumentation of the Court was nearly identical to the one provided in the previous ruling. It was based on the distinction between judicial and administrative authorities, with the Ministry of Justice obviously falling within the scope of the latter.

These cases make the first series of CJEU judgments concerning the concept of judicial authority.[14] On the one hand, the

[12] Judgment of 10 November 2016.
[13] Judgment of 10 November 2016.
[14] The third judgment of that day is C-453/16 PPU (Özçelik) which deals with a different – though largely interconnected – issue, namely the concept of judicial decisions.

rulings confirmed that the concept should be construed as denoting not only judges or courts, but also other authorities participating in administering justice. Note that this is contrary to some language versions of Article 6(1) of the Framework Decision, which seem to refer exclusively to courts. On the other hand, it drew a line between judicial and administrative authorities, defining police services and ministries of justice as the latter. These considerations, however, have mostly a negative or exclusionary aspect – they tell us which authorities do *not* count as judicial authorities, yet they do not provide us with any substantial definition of the term in question.

The second series of judgments was passed in 2019 and comprises of three cases. In the joined cases C-508/18 and C-82/19 PPU,[15] EAWs were issued by the offices of German public prosecutors for the purposes of criminal prosecution. Building on the previous case law, the Court initially recognised that public prosecutor's offices in Germany must be regarded as participating in the administration of criminal justice. As such they meet the institutional requirements put forward in C-452/16 PPU and C-477/16 PPU cases. Nevertheless, the Court questioned the independency of the issuing authorities from the executive. According to the information provided by the German government, public prosecutor's offices in Germany are part of a hierarchical structure that is connected with the minister for justice of a given *Land*. A minister for justice has the power to issue instructions to public prosecutors in specific cases. Although this power is exercised very rarely and in accordance with statutory law, and had not been exercised in the cases in question, the risk remains that a decision on issuing EAW may be influenced by the executive. For this reason, the CJEU ruled that the concept of judicial authority,

> must be interpreted as not including public prosecutors' offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant.

On the same day, a judgment was passed in case C-509/18[16] concerning an EAW issued by the Prosecutor General of Lithuania for the purposes of a criminal prosecution. The argumentation was almost

[15] Judgment of 27 May 2019.
[16] Judgment of 27 May 2019.

identical to the one discussed above, except for the conclusion. The Court recognised that the Lithuanian prosecutor general, although institutionally independent from the judiciary, is also independent from the executive in the context of issuing an EAW. Consequently, it meets not only the institutional requirements discerned in the previous case law,[17] but also the requirement regarding independence from the executive, which was not met by the German public prosecutors' offices.

This second series of judgments provided a refinement of the concept of judicial authority. A new definitional element was added, namely the requirement of independence from the executive. As we have seen, not all prosecutors' offices of the Member States meet this requirement.

The third and the most recent series of judgments was passed at the end of 2019. In case C-489/19 PPU[18] a request for a preliminary ruling was made in the context of the execution of an EAW issued by an Austrian public prosecutor's office for the purposes of conducting a criminal prosecution. The Court acknowledged that public prosecutors' offices in Austria are directly subordinate to the higher public prosecutors' offices and subject to their instructions, and that the latter are in turn subordinate to the Federal Minister of Justice. Therefore they do not meet the criterion of independence, just like their colleagues from Germany. However, an EAW issued by a prosecutor's office in Austria, in order for it to be transmitted, must be endorsed by a court, which checks the conditions necessary for the issue and the proportionality of the EAW. The endorsement decision is subject to appeal before courts. This complies with the demand, expressed in previous case law, namely that the decision to issue an EAW, when it is taken by an authority that participates in the administration of justice without being a court, must be capable of being the subject of judicial proceedings that meet the requirements of effective judicial protection. As a result, the Court ruled that the described procedure satisfies such

[17] It is worth noting that, according to the Lithuanian constitution and the case law of the Lithuanian constitutional court, the prosecutor general of Lithuania is not responsible for the administration of justice, and does not perform any functions related to the administration of justice during any pre-trial criminal investigation for which he is responsible. Apparently then, the Court decided to interpret the requirement of administering criminal justice autonomously, in a direct conflict with the national law.
[18] Judgment of 9 October 2019.

requirements and the Austrian authorities fall within the concept in question.

In the joined cases C-566/19 and C-626/19,[19] the Court addressed the status of public prosecutors in France (called *magistrates*). The Court first dealt with the requirement of independence, stating that it is not called into question by the fact that French prosecutors are placed under the direction and supervision of their superiors, and are therefore required to comply with their instructions, nor by the fact they may be issued general criminal policy instructions by the Minister for Justice. The Court then discussed the requirement of effective judicial protection. It acknowledged that effective judicial protection may be achieved by various means, and a separate right of appeal against a decision to issue an EAW, as identified in one of the previous judgments, is only one possibility. In the case of the French legal system, judicial protection and the proportionality of an EAW is safeguarded by the fact that national arrest warrants, which may subsequently form the basis of EAWs, are issued by investigative judges, i.e. judicial authorities *par excellence*, whose decisions are subject to judicial review. Analogical argumentation and conclusions were presented in case C-625/19[20] pertaining to Swedish prosecutors' offices.

The last case in the series, C-627/19,[21] addressed a question concerning an EAW issued by a Belgian prosecutor's office, not for the purpose of a criminal prosecution, but for the purpose of enforcing a custodial penalty imposed by a final sentence. Belgian law does not provide for an appeal against a decision on issuing an EAW. However, the Court ruled that whenever an EAW

> (...) is aimed at the enforcement of a penalty, judicial oversight is achieved by the enforceable judgment on which the arrest warrant is based. The enforcing judicial authority may presume that the decision to issue such an arrest warrant was taken in judicial proceedings in which the person sought was the beneficiary of guarantees as regards the protection of his fundamental rights. Furthermore, the proportionality of that arrest warrant also follows from the sentence imposed (...).

[19] Judgment of 12 December 2019.
[20] Judgment of 12 December 2019.
[21] Judgment of 12 December 2019.

As we see, the third series of judgments concerning the concept in question provided further requirements, as well as modifying the previous ones. Contrary to some earlier decisions, public prosecutors' offices in several Member States were classified as satisfying the requirements established by the Court, based not necessarily on their institutional position, but rather on different safeguard procedures that they provide.

6. Semantic analysis

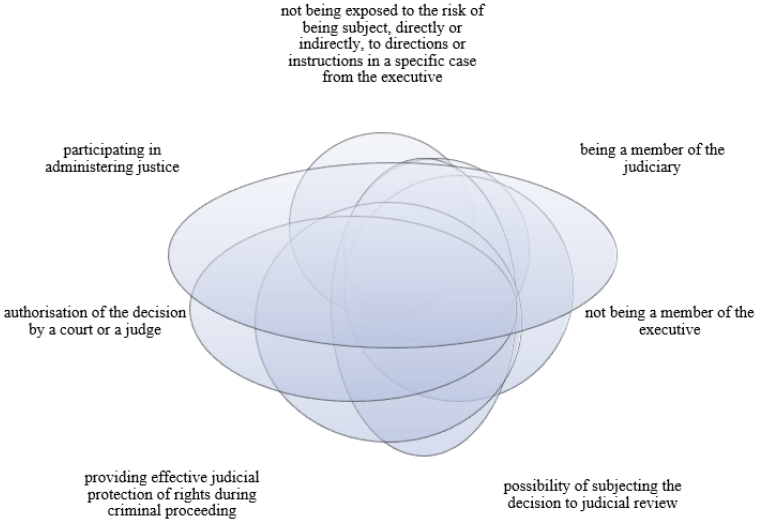
It follows from the foregoing discussion that the concept of judicial authority is complex and problematic. The Court has not even attempted to determine its scope and meaning through a single, all-inclusive definition. Instead, it has identified various requirements that must be satisfied by a person or an institutional body in order to be considered a *judicial authority*. It should be apparent now, however, that these requirements do not form a list of necessary and sufficient conditions, as expected in the classical theory of categorisation. Rather, the Court's case law became an arena of an ongoing development and modification of these requirement. In one case the Court stated that public prosecutors' offices may not be counted as *judicial authorities* if they are instructed by the executive, such as a minister for justice. In another case it concluded that such instructions from a minister for justice are acceptable if the decision can be reviewed by a court. In yet another case it stated that such a review is not necessary in the case of issuing an EAW for the purposes of executing a sentence (as opposed to conducting criminal proceedings). Further distinctions and restrictions are likely to come with future cases, as the discussion about the concept of judicial authority can hardly be considered settled. What we are witnessing is a process of constant refinement of the concept in question.

In the analysed judgments, no less than seven requirements for a judicial authority may be distinguished (see: diagram 1):[22]

[22] Because of the theoretical, rather than practical, goals of the article, the list does not purport to be exhaustive. For instance, it does not take into account several important judgments concerning the sister concept of judicial decision that are undoubtedly relevant to the issue discussed here.

1. being a member of the judiciary;
2. participating in administering justice;
3. authorisation of the decision by a court or a judge;
4. providing effective judicial protection of rights during criminal proceedings;
5. possibility of subjecting the decision to judicial review;
6. not being a member of the executive;
7. not being exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive.

Diagram 1. The definitional aspect of the category JUDICIAL AUTHORITY:



In terms of the theory of categorisation, these requirements can be perceived as features or attributes associated with the category JUDICIAL AUTHORITY. The important thing to note is that a person or an institutional body does not need to exhibit all these features in order to be classified as a *judicial authority*. We have seen that, according to CJEU case law, not all judicial authorities are members of the judiciary (i.e. the prosecutor general in Lithuania), not all are independent from the executive (i.e. the public prosecutors' offices in Austria), not all have their decisions subject to judicial review (i.e.

public prosecutors in France and Sweden), not all provide effective judicial protection of rights during criminal proceedings (i.e. public prosecutors in Belgium in the case of issuing an EAW for the purpose of executing a custodial sentence), etc. In other words, the category JUDICIAL AUTHORITY reveals a prototypical structure. It explains why the Court has not opted for a rigid, classical definition. Instead, its case law provides an intricate network of requirements that take into account the institutional peculiarities of different national legal orders. It should also be noted that the list of requirements is not necessarily complete – it is very likely that future cases will cause the Court to identify additional requirements, or to refine those previously discerned, as has already occurred. This phenomenon has been duly recognised in legal translation theory: "word meaning is a dynamic entity subject to change in connection with the argumentative battle concerning meaning" (Engberg 2002: 385). It concurs with the idea that meaning is constructed in application to particular facts, and not in advance of application, which is advocated not only in cognitive linguistics, but also in hermeneutic tradition (Walshaw 2013).

The aforementioned discussion concerned the definitional or intensional dimension of the concept in question. In that aspect, the category JUDICIAL AUTHORITY, as construed by the CJEU, conforms to the tenets of prototype theory, namely to the lack of a rigid definition and to family resemblance as a principle governing its internal structure (Geerearts 1989: 7-8). Now let us turn to the referential or extensional dimension of the category JUDICIAL AUTHORITY.

As has already been mentioned, the types of institutional bodies or individuals notified by the Member States as *judicial authorities* are diverse (see: diagram 2).[23] Those bodies that exhibit all the aforementioned features form the "core" of the category. They are the prototypical examples of judicial authorities, most notably various types of national courts (the white boxes on the diagram 2). Then, there are those that exhibit only a minimal number of relevant features, and thus cannot be classified as judicial authorities. For instance, Swedish police services do participate in conducting criminal proceedings and enjoy much institutional independency, but they lack other features, such as being a part of the judiciary, or providing an effective protection

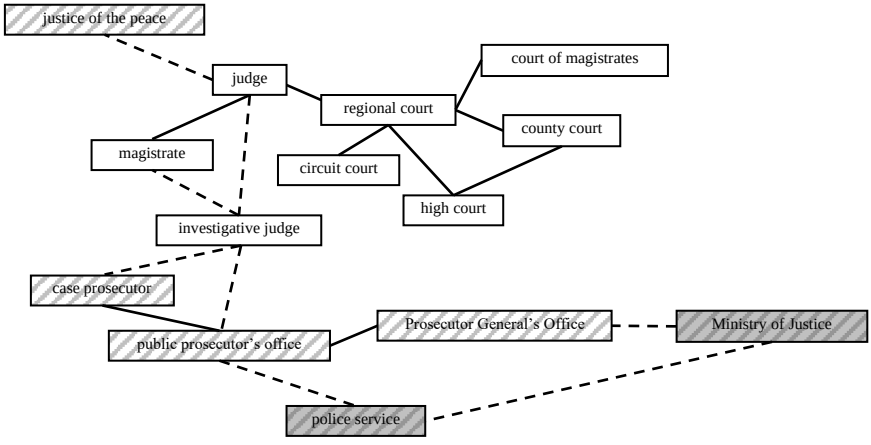
[23] It should be noted, however, that this diversity has recently been diminishing due to the impact of CJEU case law.

of rights (the grey boxes on the diagram 2). Finally, there are those that exhibit some of the features of the category. They are non-prototypical examples of judicial authorities and they form the "periphery". This is the case of public prosecutors' offices and prosecutors general (the white-grey boxes on the diagram 2). It should also be noted that the borderline of the category is blurred. Consequently, public prosecutors' offices and prosecutors general in some member states fall within the scope of the concept in question, while in others they do not. It depends on the number and the relative weight of the features they exhibit. As the recent CJEU case law illustrates, there are no hard and fast rules governing the process of their classification. The number of relevant features is potentially infinite, because there are infinite possibilities of how a national system of criminal justice can be constructed. Because of that, the fuzzy borderline of the concept in question should be considered rather a virtue than a drawback, just as Wittgenstein claimed (Wittgenstein 1953: 33).

Again, we can see that the treatment of the category JUDICIAL AUTHORITY by the CJEU conforms to fundamental characteristics of prototype theory. Firstly, there are certainly better (i.e. courts) and worse (i.e. prosecutors' offices) examples of the category. Secondly, the category has proved to be flexible and lacking rigid borders. This observation may seem to be conflicting with the nature of adjudication, as the Court has to decide every case in an all-or-nothing manner. In other words, each particular institution or person must be declared either as falling within the scope of the concept of judicial authority or not, *tertium non datur*. However, we have seen that, even within a given subcategory (i.e. a public prosecutor's office) the classifications made by the CJEU are neither homogeneous nor fully predictable.[24]

[24] This thesis is additionally supported by the discrepancies between Court judgments and the opinions of Advocates General on the subject matter. For the sake of brevity, however, this thread had to be omitted.

Diagram 2. The referential aspect of the category JUDICIAL AUTHORITY. The colours of the boxes symbolise different levels of category membership. The lines between the boxes symbolise relative similarity (solid line – strong similarity, dotted line – weak similarity):



7. Conclusions

The common view about language and meaning shared by generations of lawyers and jurists is based on the classical theory of categorisation. This includes reliance on classical definitions, deductive reasoning and other tools of formal logic (Winter 2001: 6-12). However, in practice, legal rules do not always work as expected by this approach. As O.W. Holmes famously wrote: "The life of the law has not been logic: it has been experience" (Holmes 1882: 1). One of the reasons for this is that reality does not have a rigid, logical structure. As put by H. Hart:

> "If the world in which we live were characterised only by a finite number of features, and these together with all the modes in which they could combine were known to us, the provision could be made in advance for every possibility" (Hart 1961: 128).

But it cannot. Reality is much too complicated, manifold and unpredictable to be fully covered by any system of language or logic. Consequently, it is the prototype theory of categorisation that provides

a more suitable description of the practice of interpreting and applying the law. As such, it offers a useful tool for legal theory.

The above statement has a universal appeal, as proved by numerous previous legal analyses employing the prototype theory to various theoretical as well as practical issues (see for example:Winter 2001; Hamilton 2002; Paul 2002; Solan 2010; Osenga 2011; Smith 2011). However, there are reasons to claim that the prototype theory may be particularly useful in the context of EU law. It turns out that the characteristics of EU law, namely multilingualism and conceptual autonomy, provide a very convenient opportunity to examine the mechanisms of human categorisation. These two features taken together serve to underline the difference between words and concepts or, accordingly, between the linguistic and conceptual levels of law. Whereas in a unilingual environment it is rather unnatural to detach a concept from the term naming it, in a multilingual environment – such as EU – it becomes not only a theoretical, but also a practical necessity. As a result, conceptual phenomena become more visible and susceptible to analysis.

This article has been deliberately restricted to the concept of judicial authority. However, further to my research of CJEU case law, many similar analyses could be provided to support this claim. For practical reasons, two types of concepts that seem to be particularly apt for this form of examination may be discerned. The first type is concepts denoted by highly technical, legal terms, such as *judicial authority*, *detention*,[25] or *probation measure*.[26] Their meaning is constructed against the background of national legal systems, which may vary significantly. As a result, they have to be construed to be flexible enough to embrace various institutional realities and to secure the purposes of the legal instruments they designate. The second type is concepts denoted by common language names for the purposes of tax classifications, such as *beer*,[27] *dry pasta*,[28] *packing containers*,[29] *electrical machine with translation or dictionary functions*,[30]

[25] See: judgments of 28 July 2016 C-294/16 PPU and of 14 May 2020 C-924/19 PPU and C-925/19 PPU.
[26] See: judgment of 26 March 2020 in Case C-2/19.
[27] See: judgment of 13 March 2019 in Case C-195/18.
[28] See: judgment of 6 September 2018 in Case C-471/17.
[29] See: judgment of 20 November 2014 in Case C-40/14.
[30] See: judgment of 11 June 2015 in Case C-58/14.

thermometer,[31] etc. There are obvious prototypical examples of such categories, and it is easy enough to formulate their approximate definitions. However, human technological and economical invention keeps throwing up novel, unpredictable examples that constantly challenge such definitions and reveal new layers of doubts.[32] The Court appears to be fully aware of that. In such cases, it tends to refrain from formulating classical definitions of the concept in question, and instead rely on identifying requirements that are flexible and adjustable.

As has already been mentioned, the CJEU is often associated with a teleological (i.e. purposive) approach to legal interpretation, as opposed to a linguistic (i.e. textual) approach. The case study concerning the term *judicial authority* would be a good example of this approach. The requirements and exceptions identified by the Court for judicial authorities can hardly be derived from the dictionary meaning of the term. They are clearly effects of extralinguistic, teleological considerations. Note, however, that this is perfectly in line with cognitive linguistics and its denial of a separate level of purely linguistic meaning. If we adopt the encyclopaedic concept of meaning then we will no longer see the Court's approach as a rejection of linguistic methods of interpretation. Rather, we will expect the meaning of legal terms to be modified by a "dynamic matrix" of extralinguistic knowledge (Bajčić 2017: 166) and we will understand that it is shaped by the normative context of European and national legal orders (Šarčević 2000: 5). Although this is mainly a matter of perspective, I believe that prototype theory gives a more credible, more cohesive and more comprehensive account of the application of law, especially though not exclusively, by the Court of Justice of the European Union.

One final remark has to be made with a view to the practical consequences of the approach advocated in this article. After all, prototype theory is a linguistic – not a legal – theory. It reveals the mechanisms of conceptual categorisation. It may, as a result, lead jurists to adopt a different view about categorical borders (see: Bajčić 2017: 166). However, as mentioned earlier, it offers no excuse for a judge whose job is precisely to decide "whether a particular event in the world fits a legally relevant category" (Solan 2018: 338). Therefore, it should

[31] See: judgment 26 November 2015 in Case C-44/15.

[32] For instance: are noodles that were pre-cooked, fried and then packed in a dry state to be classified as *dry pasta*? Are paper, one-use indicators of a certain threshold temperature to be classified as *thermometers*?

not be treated as a theory of how judges (or jurists, or lawyers) are supposed to interpret the law. Nor should it be used as a direct justification of any particular interpretive choice. Lawrence Solan, who is an undisputed champion of contemporary legal-linguistics, has noted: "[m)any of the problems concerning the construal of legal language are linguistic in nature. However, the solutions to these difficulties are not linguistic unless the legal system makes them so" (Solan 2018: 338). As rightly acknowledged by another scholar, "standards for the determination of legal meaning are necessarily internal to legal practice" (Fallon 2015: 1243). In other words, linguistic theories have the potential to enlighten those engaged in legal practice and help them properly understand the fabric of the language they happen to be working with. As a result, they may support certain approaches to legal interpretation and undermine others that are based on incorrect assumptions about language. At the same time, however, they cannot replace the legal considerations, legal values and legal arguments necessary to resolve interpretive questions in applying law.

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