

Language in Supranational and National Law-Making

—The Case of Directives and their Transposition into National Law

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Abstract

The EU policy of language equality situates language at the core of the EU law-making process; however, the role of language in national law-making is often overlooked. Bearing this in mind, in our paper we seek to foreground the essential role that language plays in law-making both at the supranational and national levels in the EU context. To do so, we will unravel how language contributes to the production of EU directives and to their subsequent transposition into national law, and subsequently, we will use an EU directive and its transposition into British law to showcase how language impacts on the implementation of these instruments. Our findings show that language is not a mere tool in supranational and national law-making, but a vital part of it that needs to be considered to understand not only how law-making works, but more importantly, which factors may or may not contribute to a subsequent correct transposition.

Keywords

language, EU law-making, EU translation, directives, transposition, national law-making, vertical linguistic analysis

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1. Introduction

Traditionally language has been overshadowed by law in descriptions of the EU law-making process, despite the fact that it permeates every step of the production of EU law. In recent years, different authors have contributed to foregrounding the role of language within the EU context with a variety of research topics (Koskinen, 2000, 2001, 2008; Wagner *et al.*, 2002; Biel, 2007, 2014; Robinson, 2012, 2014; Baaij, 2012; Guggeis, 2014; Šarčević, 2015, 2018) as reflected in Volume 7 of the *International Journal of Language & Law on EU Legal Culture and Translation*.¹ Undeniably translation occupies a central position in the existing literature, which may be due to the fact that it is the most recognisable linguistic process within EU law-making. In this paper our goal is to go one step further and consider the essential role that language in general plays in law-making in the EU context, beyond translation.

To do so, we believe that both the supranational and national spheres need to be considered, since they both play a vital role in the implementation of EU law. Consequently, we will approach our goal from a descriptive standpoint and we will first analyse the role of language in supranational law-making focusing on the case of directives and, subsequently, in national law-making focusing on their transpositions into EU Member States' national law.² We will examine “procedural aspects”, “by asking about the methods and processes, by which the texts are drafted, translated and interpreted” (Robertson, 2018: 116). Subsequently, we will use an EU directive and its transposition into British law to showcase the role that language plays in the conduciveness of legislation to the desired regulatory effects at the supranational and national levels.

To this end, the structure of this paper is articulated around five sections. Firstly, we will briefly present directives and the general challenges their transpositions pose for the Member States. Secondly, after contextualising our study, we will focus on disentangling the role of language in the EU law making-process, and particularly on the directives making process. Thirdly, we will shift the focus to the national level, and we will delve into the transposition of directives. Fourthly, we will perform a vertical linguistic analysis (Robertson, 2015) of a real EU instrument, Directive 2004/38/EC on “the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States”,³ and its transposition into UK legislation. Finally, we will present our main conclusions.

¹ Available at languageandlaw.eu/jll/issue/view/7 (accessed 19 June 2019). Also see Svoboda et al. (2017) or Prieto Ramos (2018).

² Obviously it is impossible to reflect the whole picture of the EU law-making process and the transposition process here. Accordingly, in this paper we seek to approach the matter generally from a linguist perspective, which implies that we have decided to focus on literature written by linguists or lawyer-linguists.

³ Available at eur-lex.europa.eu/legal-content/ES/ALL/?uri=CELEX%3A32004L0038 (accessed 21 October 2019).

2. Directives and Their Transpositions

Article 288 of the Treaty on the Functioning of the European Union (TFEU)⁴ defines the types of legal acts that the EU may adopt, including directives. Directives, one type of the EU's secondary law instruments, are adopted by the EU institutions and then transposed by the different Member States into national law. Article 288 of the TFEU states that a directive is binding as to the result to be achieved, while leaving to national authorities of each Member State the form and means to achieve it. This implies that national authorities are supposed to create a national instrument(s) to implement the directive in question at the national level, unlike EU Regulations that are applicable in EU countries' internal law immediately after their entry into force. For the sake of clarity, Robertson (2011: 63) explains:

Two EU terms of art in this area are "*transpose*" and "*harmonise*". The former denotes the carrying over and implementation of obligations, the latter the making of national laws of the member states the same or similar. *Transposition* takes place from the EU context towards and into the national context and the result is that the laws of the member states become harmonised.

Consequently, although Member States' transposition plays a key role in achieving harmonisation across the EU, this mandatory transposition poses significant challenges to the Member States that may hinder harmonisation. These challenges have been highlighted both in several reports by the European Commission,⁵ as the institution responsible for the monitoring of the measures adopted, and in the literature concerning the transposition of different directives (Haverland & Romeijn, 2007; Kaeding, 2008; Steunenbergh, 2007; Thomson, 2010; Zhelyazkova & Torenvlied, 2011; Zhelyazkova et al., 2018). In this paper we are interested in the *conformity deficit* (which refers to the percentage of directives incorrectly transposed) instead of in the *transposition deficit* (understood as the gap between the number of directives adopted by the EU and those transposed in Member States⁶). In our view, research on the *conformity deficit* is vital in the EU context, and could benefit from analyses (such as this one) that enable us to understand the role that supranational and national law-making may have in said deficit. In an attempt to do so, in section 5 we will connect the EU law-making and transposition processes presented in sections 3 and 4 to a specific EU directive and its transposition.

⁴ Available at eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT (accessed 19 June 2019).

⁵ See the revision made in the Report "Monitoring the implementation of EU law: tools and challenges" of 2017. Available at [europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2017\)596799](http://europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)596799) (accessed 19 June 2019).

⁶ Available at ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/transposition/index_en.htm (accessed 19 June 2019).

3. Disentangling the Role of Language in the EU Law-Making Process

The EU policy of language equality is certainly unique (Šarčević, 2018: 10). Its aim is to allow EU citizens to access EU legislation and information in their language, which presupposes accessing it in the 24 official languages of the EU. As Biel (2014: 60) contends: “This egalitarian approach to all official languages is a political necessity that guarantees the equality of EU citizens before the law and prevents linguistic disenfranchisement”. However, this multilingualism policy (Biel, 2014: 60) has a direct impact on the EU law-making process since it entails that all legal instruments in the EU need to “drafted in” 24 equally authentic language versions whose success is determined by the production of harmonised legal effects across the EU. In practice, however, “drafted in” means “translated into” for 23 of those languages, since nowadays legislation is (mainly) drafted in English⁷ and translated afterward into the other 23 official languages. This fact currently situates English as the *de facto lingua franca* (Felici, 2015) of EU legislation and translation as the “predominant means of producing multilingual legal instruments” in the EU context (Prieto Ramos, 2014: 313). This also implies that this policy of language equality situates language at the core of law-making in the EU, as we will describe in the following sections.

3.1. The Role of Language at the European Commission

The European Commission is the institution that prepares the proposal of the EU instrument in question—in this case, of directives. Before the proposal is drafted, the Commission assesses the potential consequences of the initiative through Impact Assessments and consults different experts and stakeholders. After the preparatory work is completed, the competent Directorate General (DG) of the field in question prepares the draft. Language is vital at this drafting stage, where technical experts (who may not be experts on legislative drafting) and then legal revisers are expected to respectively produce and revise highly complex texts in a language that may not be their mother tongue (Robinson, 2014: 255, 259) whilst complying with (and interpreting) the drafting guidelines (see Strandvik, 2018: 53).⁸ Consequently, the *lingua franca*, currently English, is used in this context mostly by non-native speakers (Felici, 2015: 124; Wagner et al., 2002: 70) or native speakers who lose touch with their native language in this multilingual context (Biel, 2007: 151–152; Felici, 2015: 124; Wagner et al., 2002: 76). With regard to the drafting of directives, Robertson (2011: 57) highlights:

⁷ The original *lingua franca* was French. At present, however, English has replaced it (Biel, 2007: 148).

⁸ “EU legal acts should comply with drafting rules, formalized formulations and templates in the Joint Practical Guide (JPG), the Manual for Precedents, the Joint Handbook for the Presentation and Drafting of Acts Subject to the Ordinary Legislative Procedure and the Interinstitutional Style Guide” (Strandvik, 2018: 53).

[W]e can note that there are five structural parts, which is typical for EU directives: *title, citations, recitals, articles, annexes*. Each part has a precise role in the text and the drafting is linked to [its sic.] role and is highly stylised in presentation and formulation.

When the proposal in *lingua franca* of the directive is finished, it is sent to the Directorate General for Translation (DGT) for its translation into the remaining official languages. Participants at this stage include not only translators but also other actors with a linguistic background, such as terminologists (Stefaniak, 2017) and revisers (Strandvik, 2018). The translation of the different language versions poses several challenges to EU translators. The main practical obstacle has to do with the “principle of equal authenticity” (Šarčević, 1997: 64), which presupposes that all language versions—of directives, in this case—are supposed to have the same meaning, which has been largely contested in the literature (Biel, 2014; Koskinen, 2000; Pozzo, 2014; Šarčević, 2014). It should be noted that even if the proposal is meant to be an unambiguous instrument prepared for its translation, translators sometimes face vague terms, phrases, or sentences that they need to decode (see Šarčević (2018) on the challenges to legal translators in institutional settings). These challenges are also faced by quality managers within the DGT, in a context where quality assurance is of the utmost importance “for political reasons, for the correct application of EU legislation and as a matter of fundamental rights and legal certainty” (Strandvik, 2018: 51),⁹ and where not all language units have the same language-specific resources (Svodoba, 2017).¹⁰ After the collaborative work of said actors is completed, the resulting 24 language versions are sent to the Council and the Parliament, where the EU law-making process continues. From this succinct description, several linguistic implications can be highlighted. First, language comes into play during the preparatory work, and given the governing multilingual environment at the Commission, it permeates the whole process as summarised in Figure 1 below.¹¹

⁹ See Strandvik (2018) for an overview of the DGT’s journey concerning quality assurance.

¹⁰ Svodoba’s research on translation manuals and style guides shows that linguistic resources are vital for the production of EU law, although he concludes that “the DGT resources still show a significant variation in terms of both the extent and the topics of material represented” (Svodoba, 2017: 104).

¹¹ We should also consider the continuous multilingual oral encounters of the actors involved in this process at the Commission. Naturally, the same applies to the other two institutions.

Figure 1: The role of language at the European Commission.

Note: Author's own illustration.

Figure 1 visually represents the *main linguistic processes* involved in the production of EU law at the European Commission, although other micro-linguistic processes can be found within these processes. In order to continue describing the EU law-making process, in the following section we will disentangle the role of language at both the Council and the European Parliament.

3.2. The Role of Language at the Council and the European Parliament

A new phase begins when the language versions reach the Council and the Parliament. Most directives are adopted by the procedure formerly known as co-decision, currently known as ordinary legislative procedure. Guggeis (2014: 274–275), a lawyer-linguist from the Council, explains how it works:

The procedure by which the European Parliament and the Council interact and adopt legislative acts is the “ordinary legislative procedure” (in EU jargon “co-decision”). [...] On the basis of the subject matter, the proposal is allocated in the European Parliament to the competent standing committee and, in the Council, to a working party composed of national delegates who are experts in the field. Each institution decides, after extensive and thorough internal discussion and negotiation, the position to be taken during the interinstitutional discussions and negotiations. Representatives of European Parliament, the Council and the Commission (which defends its proposal and has the right to withdraw it at any time before an act is adopted) meet several times to examine their respective positions, trying to find common ground. After each tripartite meeting (in EU jargon, the “trilogue”), the negotiators inform

their respective Institutions of progress made and seek a mandate for the next round of talks. Once a compromise is found that is acceptable to all three Institutions, the European Parliament and the Council finally adopt the text.¹²

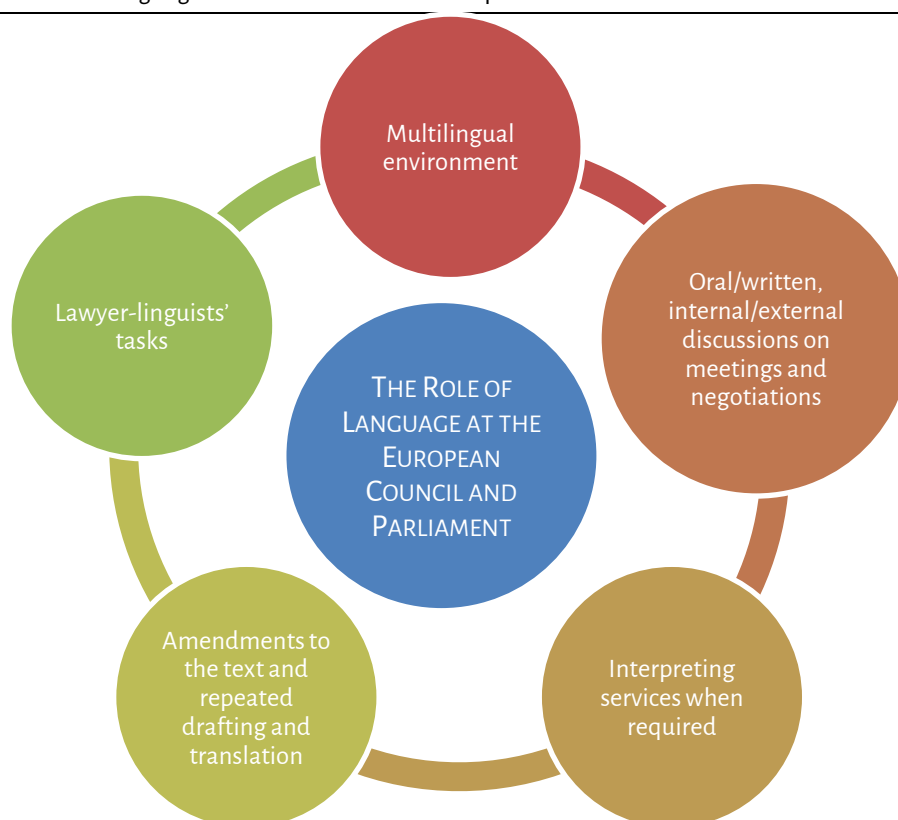
Therefore, at this stage language is used in very different ways. First, it should be noted that even though the Commission's proposal is submitted in all the official languages, throughout this phase some of the discussions may focus on just one language version (Robinson, 2012: 11). This means that some of the actors involved need to use a foreign language to understand the proposal and, when needed, to negotiate. Therefore, language is the medium by which negotiations or meetings take place, orally or in writing; internally within an institution or externally; and with or without interpreting services (Garcimartín Alférez, 2018). This presupposes that the multilingual environment previously mentioned also has an impact at this later stage in which different amendments to the initial proposal are made until a final compromise is reached. Therefore, as an instrument that goes through several amendments, and hence drafting, it is also repeatedly translated at this stage.¹³ Undeniably, the role of the lawyer-linguists of both the Council and the Parliament is also worth mentioning since they have “the twofold task of checking the drafting of the final versions of legal texts produced by their respective institutions and ensuring that all the language versions corresponded exactly” (Robinson, 2014: 268–269), while they may face the same challenges as the translators in terms of ambiguousness and vagueness. Therefore, language pervades the EU law-making process at the Council and the Parliament, as described by Biel (2014: 67–68) below:

First, [...] the drafting of EU legislation and its translation often take place concurrently and are intertwined. The proposal for a legal instrument is drafted in a procedural language only, but it is then translated into official languages before it reaches the Council, therefore translation is involved at all stages of drafting rather than at the final stage only (Doczekalska 2009: 360). The source text is revised, discussed and consulted in national languages. The final joint text after the negotiations between the Parliament and the Council is prepared in English and then all the languages versions are finalised (Meunier 2013). [...] Thus, the drafting process is multistage and multilingual; it ends with the authentication of translation as languages versions of equal force by publication in the Official Journal.

Figure 2 summarises the role of language at the Council and the European Parliament. As in Figure 1, our goal with Figure 2 is to visually represent the *main linguistic processes* involved in the production of EU law—in this case, at both the Council and the European Parliament:

¹² It should be noted that the procedure may differ if either the Council or the Parliament considers it inappropriate to enter into negotiations.

¹³ Hanzl & Beaven's (2017) research explores quality assurance at the Council of the EU's Translation Service.

Figure 2: The role of language at the Council and the European Parliament.

Note: Author's own illustration.

To conclude this section, it is worth highlighting that, particularly in the case of directives, different legal tactics are used (Prieto Ramos, 2014: 321–322; Robinson, 2005: 7) and linguistic concessions are made (Frame, 2005: 23) by Member States in the law-making process to attain necessary compromises, and especially “to implement a measure in a way that suits their domestic agenda” (Frame, 2005: 23). Therefore, analysing the transposition into Member States’ legislation is vital to understanding how EU law is actually implemented across the EU and, particularly, how these domestic agendas are implemented, as will be highlighted in section 5. Before that, in section 4 we move to the national arena to delve into the transposition process.

4. Disentangling the Role of Language in the Transposition Process

After the language versions are published in the Official Journal, the Member States are required to transpose the directive in question into national law before the deadline set by the EU. But what does transposition mean? As rightly explained by Prechal (1995: 5), transposition can be defined as the “[p]rocess of transforming directives into provisions

of national law by the competent national legislative body or bodies”.¹⁴ Some authors, such as Biel (2014) or Robertson (2015), regard transposition as a form of intralingual translation. In fact, Biel (2014: 59) points out: “The intralingual translation of directives may be perceived as their recontextualisation and localisation into the national legal environments”. This process is far from simple, and it is organized differently depending on the Member State’s standpoint. For instance, the UK and Spain can be highlighted as opposing examples of how to transpose and how to organise transpositions in general. On the one hand, the British government makes online information available concerning the transposition of directives in the UK, and provides the actors involved with a guide on how to transpose called “Transposition guidance: how to implement EU Directives into UK law effectively”.¹⁵ This guide provides officials with clear instructions concerning the stages of the process and the role of the actors involved. On the other hand, Spanish authorities do not provide any guidance, as criticised by Spanish legal professionals,¹⁶ and there is some obscurity surrounding how the process actually works, which may hinder this multistage process in the Spanish context. Nevertheless, what these examples reveal is that the Member State’s view on how to approach transposition undoubtedly has an impact on the process as a whole. Shifting our focus to the transposition process, as suggested by Mousmouti (2014: 313), the tasks at hand at the supranational and national levels differ:

The European legislator determines the end results and the standards to be achieved through a concrete set of rules and mechanisms set out in Directives. In turn, the national legislator legislates to transpose the European provisions correctly and do so in a way to achieve the required end results and make them effective in the legal culture and circumstances of a given member state (Mousmouti, 2014: 313).

As for language, Robertson’s words (2011: 63) highlight the linguistic dimension of the transposition process:

Transposition implies: first, analysing the directive, interpreting it, understanding the intentions, objectives and methods, deconstructing it, discarding purely EU elements (such as EU committee procedures and EU review arrangements); second, making an analysis of national law point by point for each element in the directive and identifying whether the obligation is already respected or requires new national laws and if so what; third, constructing national texts within the national legislative framework in accordance with national rules on drafting (intertextually) in order to implement the EU policy.

As can be observed, transposition implies a wide variety of linguistic tasks that help to construct “national texts within the national legislative framework in accordance with

¹⁴ Obviously, if the legislation of the Member State is already in compliance with the directive in question, this would not be necessary.

¹⁵ Available at gov.uk/government/publications/implementing-eu-directives-into-uk-law (accessed 19 June 2019).

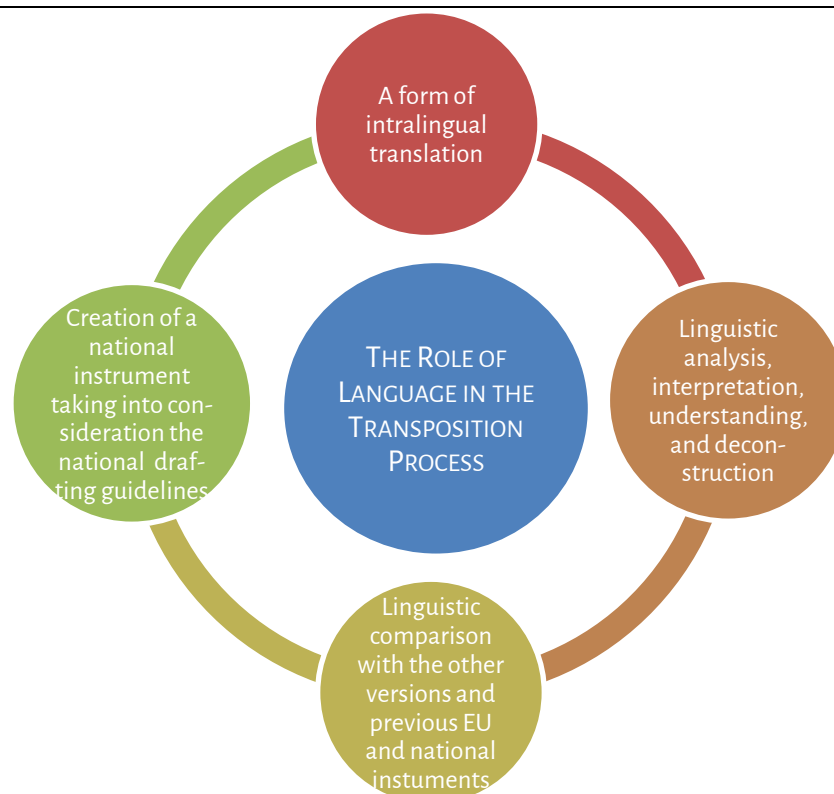
¹⁶ See the 2008 report on the obstacles concerning transpositions of directives by the *Consejo General del Poder Judicial (CGPJ)*, a constitutional autonomous body composed of Spanish judges and other legal professionals. Available at consejo-estado.es/pdf/europa.pdf (accessed 19 June 2019).

national rules on drafting” (*ibid.*). Furthermore, Robertson (*ibid.*) delves into the specific decisions involved in the transposition of directives from both a legal and a linguistic point of view:

The actual task of transposition is frequently complicated and involves many decisions. For example, whether simply to repeat the wording of a directive as a block of text embedded into national law, or whether to make a new detailed enactment which deconstructs every EU element and reconstructs them in specialised and technical ways, thereby departing radically from the appearance of the EU directive. Or something in between. Are the obligations already implemented in national law, so that no further action is needed? EU terms have EU meanings; can the same words be used? Do the same words have a sufficiently similar meaning so as to be capable of being used without attaching special definitions to them? Which language versions to work with? Do they all convey the same meaning? [...] The national drafter must think about many things. The national legal act must conform to the national styles, methods and procedures. [...] The national drafter has to decide on the structure of the national act and on its terminology, which must be adapted to the national legal system. EU terms and expressions have to be adapted and fitted into the national context.

Here, Robertson explains specific micro-linguistic decisions that need to be made in the transposition process. Although some of them may be applicable to all transpositions, it is obvious that depending on the instrument, the challenges—and, hence, the linguistic decisions—may differ. Whatever the case may be, Robertson (2012: 28) rightly concludes: “The implication is that national law drafters are translators as well as interpreters and drafters”. In Figure 3, we summarise the *main role of language* in the transposition process:

Figure 3: The role of language in the transposition process.



Note: Author’s own illustration.

In short, from Figure 3 it can be deduced that language is clearly present through the transposition process of directives. However, as stated by Haverland & Romeijn:

Transposition is just a first step towards implementation. Subsequent to transposition (sub-national) implementation agencies need to become familiar with their monitoring and supervising tasks, the target groups of the policies must be informed about their rights and obligations, their behaviour needs to be monitored and, in cases of non-compliance, sanctioned. But transposition predetermines the subsequent moves in implementation. (2007: 760)

In fact, language also plays a vital role in those subsequent steps in implementation. For instance, Member States' authorities will need to apply the national legislation transposed in practice and, therefore, they also need to understand it and interpret it. In many cases, they are required to create (internal or external) instruments and administrative documents relating to the transposed national instrument(s) that will be applicable at the national level.¹⁷ Furthermore, if we shift the focus to the judicial arena, nationally or internationally, language is undeniably also present (see, for instance, McAuliffe, 2015)¹⁸. Therefore, to a greater or a lesser extent, language is present not only in law-making but also in later stages—a subject that is worth exploring in the future.

5. Exploring the *Conformity Deficit*: The Case of Directive 2004/38/EC

The monitoring of transpositions has been an objective of the European institutions through the years. However, it has not been explored as much in the literature, at least from the *conformity deficit* perspective. In fact, the transposition of directives has been far more neglected in the literature than the EU law-making process. When the latter has been addressed, however, incorrect transposition has been constantly referred to when divergences or problems in the language versions have arisen. This gap undeniably calls for further research on transposition in general and, particularly, on specific directives' transpositions into Member States' national law. In other words: “The topic of transposition is a very large subject in its own right which takes up a lot of the time of EU and national officials as it lies at the heart of the EU system. It merits special attention” (Robertson, 2010: 5).

¹⁷ This is to say that the administrative level should not be taken for granted in the context of EU law implementation. In fact, in a recent study (Ruiz-Cortés, 2019) in the context of the right to freedom of movement and residence, we have demonstrated that language is also crucial for the enjoyment of EU rights in the Spanish and British administrative contexts by analysing the importance of Public Service Translation for citizens' enjoyment of said rights granted by Directive 2004/38/EC.

¹⁸ McAuliffe (2015: 65) starts her paper by highlighting that “[t]he object of this paper is to demonstrate that language plays a key role in the development of a unique method of reasoning used by the Court of Justice of the European Union (CJUE), which has impacted on the development of EU law”.

In Translation Studies (TS), horizontal analyses (Robertson, 2015) of language versions of directives have been previously performed (see Robertson, 2011 or Felici, 2015).¹⁹ However, not many studies have been focused on vertical analyses (Robertson, 2015) of directives and their transpositions in order to analyse their correct transpositions. In order to start to bridge this gap, this is precisely what we intend to do in this final section. To this end, we will use Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and its transposition into UK legislation (The Immigration (EEA) Regulations 2016)²⁰ as a case study. Particularly, we will focus on Article 5.2 of this Directive on right of entry, and its UK transposition, as presented in Table 1:

Table 1: Right of entry in Directive 2004/38/EC and its transposition in The Immigration (EEA) Regulations 2016.

Directive 2004/38/EC, Article 5.2	Immigration (EEA) Regulation 2016, Section 11 (2)
2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.	11.— (2) A person who is not an EEA national must be admitted to the United Kingdom if that person is— (a) a family member of an EEA national and produces on arrival a valid passport and qualifying EEA State residence card , provided the conditions in regulation 23(4) (family member of EEA national must accompany or join EEA national with right to reside) are met
Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure	

As can be deduced from Table 1, the family members of EEA and Swiss citizens²¹ will be exempted from acquiring an entry visa if they possess a valid residence card referred to in Article 10, which in practice means a valid residence card from a Member State. Furthermore, in cases of non-exemption, the article determines that Member States should facilitate the process through, at least, two measures: the visa should be free of charge, and it should be processed through an accelerated procedure.

If we shift our focus to the British transposition, instead of the phrase *valid residence card*, what we find is *qualifying EEA State residence card*. This last version of the UK transposition is the result of an amendment following the EU Court of Justice's McCarthy judgment,²² and it is relevant since as highlighted by an EU report: "Previously the UK only

¹⁹ It should also be noted that members of the Eurolect Observatory Project have used directives to study the so-called Eurolect in 11 languages within the EU context (see Mori, 2018).

²⁰ The previous law was The Immigration (EEA) Regulations 2006. Both laws are available at legislation.gov.uk/uksi/2016/1052/made (accessed 21 October 2019).

²¹ Although in the name of the Directive only EU nationals are mentioned, afterwards it specifies that it is a text with EEA relevance and that it is also applicable to Swiss nationals.

²² Available at eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0434 (accessed 21 October 2019).

admitted TCN [third country national] family members who had an EEA family permit issued by the UK”.²³ Even more, after the amendment: “Initially [...] only Germany and Estonia were categorised as ‘qualifying EEA States’”.²⁴ It could be argued that the UK has benefited from the strategy used by the drafters here, i.e. referring to another article of the Directive instead of specifying word by word what they meant, to restrict their interpretation. Furthermore, it should also be noted that we find no reference in The Immigration (EEA) Regulations 2016 to the two above-mentioned measures to facilitate the visa application process. Although the UK is not part of the Council Regulation on “Listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement” (EC 539/2001 of 15 March 2001), and therefore no reference to this Regulation should be made, this explicit omission in the transposition raises the question of what would happen to all the family members of EEA or Swiss citizens that are not exempted from the visa requirement in the UK. Once again, the report (26–27) clarifies how this omission translates into practice:

The main obstacles regarding the entry rights of family members of Union citizens relate to excessive delays and documentary burdens during the visa application process [...] Moreover, there is some suggestion that visas are not processed free of charge or that individuals are required to pay for a premium service in order to make sure they receive their visa on time. These findings are supported by empirical research. Shaw et al remark that ‘UK authorities routinely take longer than they are permitted to decide upon applications by TCN family members, have erred in the manner in which they have applied the rules relating to evidencing family relationships, and have been less than careful in their management of documentation and correspondence’.

In this second case, it could be argued that the use of the auxiliary *shall* in the Directive to convey a general obligation, which is prescribed in provision 2.3.2 of the JPG²⁵ and is a clear example of how language guidelines impact on law-making, has not been interpreted by British national authorities as such (although clearly stated in the guidelines). Consequently, in both cases British authorities seem to have implemented this measure “in a way that suits their domestic agenda” (Frame, 2005: 23) by interpreting the Directive restrictively: in the first case, given the non-explicit mention of what a valid residence card meant (although clearly specified in Article 10); and in the second case, by a restrictive interpretation of “shall grant such persons every facility” and the omission of specific facilities stated.²⁶ Therefore, it can be concluded that these two examples from Article 5.2 highlight the key role that language plays not only in directives’ law-making but also in their transposition and subsequent implementation.

²³ Obstacles to the right of free movement and residence for EU citizens and their families: Country report for the United Kingdom (47). Available at europarl.europa.eu/RegData/etudes/STUD/2016/556967/IPOL_STU%282016%29556967_EN.pdf (accessed 21 October 2019).

²⁴ Same source as previous note. According to the report (7), the UK only recognises residence cards issued by an EEA State but not by Switzerland.

²⁵ Available at op.europa.eu/en/publication-detail/-/publication/3879747d-7a3c-411b-a3a0-55c14e2ba732 (accessed 21 October 2019).

²⁶ The non-participation of the UK in the above-mentioned Regulation does not exempt this country from complying with this general obligation.

In conclusion, this brief analysis demonstrates that transposing a directive before the deadline expires (as occurred in the UK case presented) does not directly imply a correct transposition. This fact once more justifies the need to address the *conformity deficit*, considering that not transposing this Directive correctly in this case has resulted in practical obstacles to the right to freedom of movement and residence in the UK—or, in other words, in unequal treatment of citizens based on the State where they are exercising their right.

6. Concluding Remarks

Although the EU policy of language equality situates language at the core of EU law-making, language seems to be regarded as a mere “assisting device” (Trklja, 2019: 10) rather than an integral part of the process. In this paper, as an initial attempt to tackle the role of language in law-making, we have highlighted that language plays a vital role in directives’ law-making and their subsequent transpositions. We have also shown that linguistic decisions in supranational and national law-making may also influence the following steps towards implementation, as showcased in section 5. At the same time, our scholarly literature review has revealed a research gap, or at least a clear imbalance compared to the EU law-making process, concerning studies specifically focused on the complex process of correct transposition of EU directives. This gap in the literature undeniably contrasts with the high importance attributed to correct transposition not only by the EU institutions but also by academia and the public, which calls for further research from both a linguistic and a legal perspective in the near future.

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