EU Law Concepts as Legal Transplants: Linguistic Difficulties of Transferring EU Consumer Law Concepts into Ukrainian Legal System

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Abstract
This article's purpose is to review certain EU legal concepts from a comparative law and linguistics perspective and to create guidelines for adapting these EU law concepts to the conceptual system of the member states. This article draws on comparative law studies for the theory of legal transplants and on linguistics for the methodology of terminology. After analyzing the EU legal concepts as a specific type of transplants, the article focuses on specific examples of legal transplantation from EU consumer protection law. In this process, the EU law is the source system and the Ukrainian law is the recipient. Based on the consumer protection law examples, this article identifies and explains the most common linguistic reasons for transplant failures, describes the possible legal outcome for the recipient legal system and proposes a possible solution using linguistic methods.

Key Words: EU law, legal harmonization, consumer law, legal concepts, legal transplantation.

As characterized by A. Evans, adjusting Ukrainian law to EU standards is a "voluntary harmonization" by which the harmonizing state "adapts its national law to EU law rules which have no binding force in relation to that state."[1] Ukraine chose the legislative form of voluntary harmonization; that is, it reproduced EU law in its national legislation.

Although Ukraine acted voluntarily, certain external factors stimulated Ukraine to adopt EU directives. Currently, Ukraine is a candidate for accession to the European Union. All candidates are obligated to implement and enforce all non-negotiable EU rules. The European Commission monitors this implementation and enforcement.[2] Ukraine and the EU have agreed that harmonizing Ukraine's consumer protection law with EU law, in particular, must be a priority for Ukraine.[3]

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1 Vyvyan Evans, "Lexical Concepts, Cognitive Models and Meaning Construction," *Cognitive Linguistics* 17. 4 (2006): 501.

2 Information from the official website of the European Commission, accessed May 19, 2013, http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm.

3 The documents of interest might be: Articles 51, 52, 75 of the Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine,

In addition to changing a state's national legislation, voluntary harmonization broadly effects and influences all levels of that state's legal culture. As "imports," the harmonized laws must be "tuned" during harmonization, and those who harmonize laws should strive to follow the state's linguistic rules. In other words, those who harmonize laws should use the appropriate linguistic methods as they conform their national law to the external law.

In focusing on the contract law principles within the EU consumer law, this article draws on the following directives:

1) The Doorstep Selling Directive 85/577/EEC (repealed[4]);
2) Consumer Credit Directives 87/102/EC (repealed), 90/88/EEC and 2008/48/EC;
3) The Package Travel Directive 90/314/EEC;
4) The Unfair Terms in Consumer Contracts Directive 93/13/EEC;
5) The Timeshare Directive 2008/122/EC;
6) The Distance Selling Directive 97/7/EC;
7) The Distance Selling of Financial Services Directive 2002/65/EC;
8) The Consumer Sales Directives 99/44/EC and 2011/83/EC.

On the Ukrainian side, this article's analysis relies on the official text of EU primary and secondary laws, official Ukrainian translations of EU directives and the corresponding articles of the Civil Code of Ukraine that implement the provisions of those directives. The Ukrainian laws analyzed here include the laws of Ukraine "On the Safety and Quality of Food Products," "On Protection from the Bad Faith Competition," "On Advertising" and, most importantly, the Law of Ukraine "On the Amendments to the Law of Ukraine 'On Protection of Consumers' Rights'." Central, however, to this article is the law "On Protection of Consumers' Rights,"[5] which

accessed May 19, 2013, http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=217; Chapter 5 of the All-State Program of Adoptation of Ukrainian Law to the EU Law, adopted by Zakon Ukrainy "Pro Zahalnoderzhavnu prohramu adaptatsii zakonodavstva Ukrainy do zakonodavstva Ievropeiskoho Soiuzu," [The Law of Ukraine "On All-State Program of Adoptation of Ukrainian Law to the EU Law"] (2004), accessed May 19, 2013, http://zakon0.rada.gov.ua/laws/show/1629–15.

4 Although the Directives 85/577/EEC, 87/102/EEC, 90/88/EEC have been repealed by now in the EU legal system, they are also taken as sources of terminology because provisions from these EU legislative acts are still effective in the revised in 2005 Law of Ukraine "On Protection of Consumers' Rights", with only slight amendments since the actual EU documents were repealed.

5 Zakon Ukrainy "Pro bezpechnist ta iakist harchovyh produktiv," [The Law of Ukraine "On the Safety and Quality of Food Products,"] (1997), accessed May 22, 2013, http://zakon3.rada.gov.ua/laws/show/771/97-%D0%B2%D1%80.

Zakon Ukrainy "Pro zakhyst vid nedobrosovisnoi konkurentsii," [The Law of Ukraine "On Protection from the Bad Faith Competition,"] (1996), accessed May 22, 2013, http://zakon2.rada.gov.ua/laws/show/236/96-%D0%B2%D1%80.

Zakon Ukrainy "Pro reklamu," ["The Law of Ukraine "On Advertising,"] (1996), accessed May 22, 2013, http://zakon2.rada.gov.ua/laws/show/270/96-%D0%B2%D1%80.

Zakon Ukrainy "Pro vnesennia zmin do zakonu Ukrainy 'Pro zahyst prav spozhyvachiv'," [The Law of Ukraine "On the Amendments to the Law of Ukraine 'On Protection of Consumers' Rights',"] (2005),

was adopted in 2005 and includes nine EU directives on consumer protection then in effect. This law's adoption was a special measure intended to ensure that Ukrainian consumer law generally meets the requirements of the corresponding EU legislation.

The EU directives used in this article were chosen because the EC Consumer Law Compendium contains a comparative overview of how most of the directives governing consumers' contractual relations were transposed to the EU member states. However, the Compendium excludes several directives included in this article's study — the Consumer Credit Directives (87/102/EEC, 90/88/EEC and 2008/48/EC) and The Distance Selling of Financial Services Directive (2002/65/EC).

Most of the directives issued before 2005 were considered in the new version of the Law of Ukraine "On Protection of Consumers' Rights." All of the changes in the 2005 version of the harmonized Ukrainian law are reviewed in the UEPLAC project,[6] which assessed the level of incorporation of the *acquis* into Ukrainian legislation.

Turning EU legal concepts into successful transplants is a process involving efforts from both sides — the source and the target legal systems. Difficulties can arise on both sides of this equation.

Distinguishing Features of EU Law Conceptual System

Scholars have frequently noted that the EU law's conceptual structure differs from the conceptual structure of other legal systems. Örücü describes all legal systems as either covertly or overtly mixed systems that can be divided into groups depending on the respective proportions of the mixed ingredients.[7] Taking Örücü's approach, we can say that the system of EU law is a system with a high mixture index, which is also true for its conceptual system.

This high mixture index follows from the origin of EU law. From its beginning, EU law was superimposed on the national laws of its member states. Founded exclusively on civil law, EU law was influenced by the common law after the accession of the United Kingdom in 1972. Thus, EU law constitutes a mixed law in which different European legal traditions — civil and common law — were combined.[8] In addition, the EU legal system has developed its own principles, doctrines, rules, codes, practices and the like through the interaction between the EU law institutions and the national legal orders of the EU's member states. On these bases, Heikke Mattila has identified three types of concepts within the conceptual system of EU law:

1) general legal concepts (such as *burden of proof*, *author's rights* and the like);
2) concepts known in one or more member states' legal systems;

accessed May 22, 2013, http://zakon2.rada.gov.ua/laws/show/3161–15.

6 Management Information System on Legal Approximation. Ukrainian-European Policy and Legal Advice Centre, 2007, last modified March 28, 2012, accessed April 2, 2012, http://mis.ueplac.kiev.ua/en/acquis/consumer/.

7 E. Örücü, "What is a Mixed Legal System: Exclusion or Expansion?" *Electronic Journal of Comparative Law* 12.1 (2008).

8 Heikki Mattila, *Comparative Legal Linguistics* (Aldershot: Ashgate Publishing, Ltd., 2006), 102.

3) original concepts (created within the frame of the EU).[9]

At the EU law's conceptual core are the concepts used in the different European domestic legal systems. When developing EU law, the European Court of Justice (the "**ECJ**") has been borrowing concepts from different domestic legal orders. For example, the concept *principes généraux* with constitutional weight was adopted from the French legal order; the principle of *proportionality* was taken from the German legal order; the *audi alteram partem* principle comes from the English legal system.[10] Thus, the ECJ "borrows" across national legal systems when it seeks solutions for various problems confronted on the EU level. Consequently, even within the EU, harmonization is not homogeneous — some member states have to change their laws more than others do when they harmonize their laws and procedures to those of the EU. These changes must account for multilinguistic terminology and often require linguistic compromises in addition to economic and political compromises.

In addition to the concepts originating from the domestic legal systems, there are original concepts created by the EU.[11] Terminological units created the new EU law concepts often are neutral and complex,[12] apparently to avoid any associations with the content of the legal order of any member state.

Dividing the various sources of EU law's concepts into three categories does not mean there are three different approaches to interpreting EU law concepts. Instead, the principle of autonomous interpretation applies. Kjaer calls this interpretive method the "technique of autonomous concepts." It is based on the hypothesis that the concepts of EU law always "enjoy semantic independence."[13] The terminological unit in a national piece of law of any domestic legal system within the EU may not have the same interpretation as the same unit in the EU directive. Thus, this approach holds that EU law concepts are free from the meaning "that the same concepts possess in domestic law,"[14] which is especially true for concepts taken into EU law from the member states' legal systems.

The ECJ is ultimately responsible for interpreting EU law and its concepts. The judgment in *Océano Grupo Editorial SA v Roció Murciano Quintero* showed how the concept of "good faith" long used in several domestic legal systems acquired a new meaning under EU law.[15] In cases when the interpretation in the domestic legal system differs from that of the ECJ, the ECJ's

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9 Mattila, *Comparative Legal Linguistics*, 119.

10 Carol Harlow, "Voices of Difference in a Plural Community," *American Journal of Comparative Law* 50 (2002): 339.

11 This layer of EU terminology is presented in Volodymyr Iermolenko, ed., *English-French-German-Ukrainian Dictionary of EU Terminology* (Kyiv: K.I.S., 2007).

12 Supra 2, 118.

13 Anne Lise Kjaer, "European Legal Concepts in Scandinavian Law and Language," *Nordic Journal of International Law* 80 (2011): 331.

14 *Kjaer,* "European Legal Concepts," 331.

15 Judgment of the Court of Justice 27 June 2000. Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98), accessed September 20, 2013, http://curia.europa.eu/juris/liste.jsf?num=C-240/98.

version prevails, which should serve as a signal for a member state to take actions and update its definition of the term accordingly.

Presumptively, legal concepts have a generally accepted meaning.[16] However, the ECJ uses them "instrumentally," as though they do not have a fixed, generally accepted meaning. This leads us to the third particularity of EU law's conceptual system. EU law concepts have only "some pre-determined content,"[17] which allows judges to transform and develop them. The role of the ECJ is not to apply legal concepts but to interpret them. Thus, no matter how anomalous this may sound to a terminologist, it is common for a EU legal concept to be non-exhaustively defined. Allowing room for further interpretation, the ECJ leaves much of the concept's content for the domestic legal system to supply.[18] This practice adds a certain flexibility to EU law and makes it more easily acceptable in different domestic legal orders. The result is a form of "communication" between the ECJ and the national courts that influences the development of EU law.

Thus, we have outlined the three main distinguishing features of the EU law conceptual system:

1) the high mixture index resulting from the homogenous origin of the EU law;
2) the principle of autonomous interpretation as an obligatory approach to interpretation of the EU law concepts practiced by the ECJ;
3) the non-exhaustive definition of the EU law concepts that tend to acquire concretization later within the particular conceptual system of a member state.

This third peculiar nature of the EU law's conceptual system prompts treating EU concepts as a special type of transplanting. As will be demonstrated below, the transposition of the concepts within the EU legal order is followed by an interesting linguistic process, i.e., a *change of the level of concept's abstraction*. But first, it is necessary to qualify this transplantation in terms of the extant typologies presented by legal theorists who are working with the notion of legal borrowing and migration of law. These typologies of legal transplants represent an attempt to classify the phenomena of legal transplantation. Therefore, they serve as a good complex of criteria for describing EU transplants.

Typology 1: Pragmatic Cause of Transplantation

This pragmatic cause of transplantation typology, as its name suggests, considers the transplantation's pragmatic elements. As Cohn presents it, the key factor in this typology is the "degree of freedom of choice," which leads to distinguishing between the two types of transplants: imposed (externally dictated) and voluntary.[19]

16 Dorota Leczykiewicz, "Why Do the European Court of Justice Judges Need Legal Concepts?" *European Law Journal* 14.6 (2008): 744.

17 Leczykiewicz, "Why Do the European Court," 775.

18 Leczykiewicz, "Why Do the European Court," 782.

19 Margit Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality in the United Kingdome," *American Journal of Comparative Law* 58 (2010): 584.

Thus, a transplant dictated by the EU would be — pragmatically — an imposed or externally dictated transplant. The EU potentially can be an "external dictator" under the doctrines of supremacy, irreversibility, direct applicability and the binding force of EU law. This is true for higher-level transplants as, for instance, when a state transplants specific laws. However, the adoption of concepts, a form of lower-level transplants, is a more flexible process. To some extent, EU concept transplants can be both voluntary and imposed.

For concept transplants, ideally only the choice of the linguistic form (the term) is voluntary; the semantic content should remain unchanged as the EU legislators have prescribed. Terminologists should have a good arsenal of linguistic methods to assign the best possible term representing the transplanted EU concept. However, in reality, the outcome is often different, and the definition of the same EU legal concept varies, sometimes significantly. This variability can only be justified by the necessity to adjust the interpretation in the new legal environment to ensure the proper functionality of EU directive in the national legal system. This leads us to the second typology, which deals with degree of conformity with the original transposed rule and its conformity with the original concept.

Typology 2: Degree of Conformity with Original Concept

As previously mentioned, ideally there should be no difference between the original EU term and its equivalents in the legal systems of the member states. However, some important transplanted concepts have led to pluralism and diversity rather than the desired harmonization.

This variation can be detected on two levels:

1) the horizontal level, as revealed by variations in definitions among different Community law acts;
2) the vertical level, as revealed by further semantic variations of concepts in different national legal systems.

The linguistic notion of *core characteristics* can draw the necessary distinction between acceptable variations and non-acceptable variations.

Each concept transferred within an EU legislative act will have a number of characteristics that are the same in different legal systems. Among these is a certain semantic "common denominator." This common denominator is a group of properties a legal concept must possess in the domestic law for the EU legislative act to be treated as a successful transplant.

Further in this research it will be shown how modification of the concept after it has been transplanted from EU law crosses the border line and becomes unacceptable due to the loss of one of its core characteristic, and therefore failing to perform its function assigned by the EU legislator.

But what happens to the EU legal concept when its core characteristics are preserved, but variation is still observed? What makes the concept vary from one legal system to another? These queries lead to a very interesting linguistic phenomenon that further reveals conditions under which the vertical variation is acceptable.

The concepts tend to have different levels of abstraction, which is a result of their ability to "stretch." "Stretching" happens when the concept is modified without becoming another concept, and its major properties — its core characteristics — are preserved. The level of

abstraction directly depends on the number of properties a concept possesses. A concept with many definitive properties, such as an extensive definition, would necessarily have a low level of abstraction, while a concept with several properties would belong to the high-level type. Overall, there are three levels of abstraction: high level (for universal conceptualizations), medium level (for general categorizations) and low level (for configurative conceptualizations).[20]

Most of the concepts in domestic legal systems have the low level of abstraction. They have specific semantics, often contextually dependent definitions (as in case of concepts functioning in the various areas of law within the same legal system), stressing on the peculiarities of the concepts rather than their similarities. However, the concepts in the EU legal system are not ordinary in this respect. Their intension is purposefully lowered in order to achieve broader applicability. Thus, they would instead fall under the type of concepts with the medium level of abstraction, for their description is still close to generalization. Only after the EU legal concept is integrated into the domestic legal system and obtains a narrower applicability typical for this legal system does it then acquire the low level of abstraction.

Thus, when one discovers that there is a difference in a definition in the EU directive and in the national act of a member state one should not be surprised why the legislator in the domestic legal system has not copied the definition from the directive. The concepts in the EU legal system and the domestic legal system simply may have the different levels of abstraction. Moving down the ladder of abstraction from the medium to the low level during the transplantation process is a normal and desirable process. Changing the level of abstraction in the domestic legal system is important so as not to leave the concept with a high abstraction level. Instead, it should have a high "explanatory power and a relatively precise descriptive content."[21]

When there is another, second concept emerging after the source concept loses one of its core characteristics, linguists identify the situation as one of terminological polysemy, a negative result that is one of the difficulties of transplanting concepts into the target legal system. Moving from linguistics to comparative law, and linking again these two perspectives, we can claim that what is called terminological polysemy in linguistics (resulting from the divergence between the original concept and the outcome concept) is in fact what legal theorists have called transplant failure, or, to be more accurate, a type of transplant failure.

Typology 3: Formal and Informal Transplantation

The third typology considers whether a transplant is formal or informal. A *formal* transplantation occurs when a transplant is 'introduced as such' in the target legal system. An *informal* transplantation occurs when the transplant indirectly influences domestic law. As noted by Cohn, this classification of transplants resembles Bell's distinction between legal transplantation per

20 Giovanni Sartori, "Concept Misformation in Comparative Politics," *The American Political Science Review* 64.4 (1970): 1033–53.

21 Sartori, "Concept Misformation in Comparative Politics," 1053.

se and the process that theorists call cross-fertilization. The latter is a stimulus that "promotes an evolution within the receiving legal system."[22]

This division between transplantation and cross-fertilization can be well correlated and explained using linguistic tools. Linguistically, we can explain this differentiation by drawing a line and placing formal and semantic impact on one side and semantic-only impact on the other. There are two ways the new concept can appear in another language system. Linguists distinguish between borrowing new legal concepts along with a term and borrowing a concept when only the properties of the concept are transferred.[23] The first way is followed by semantic and formal changes in the recipient system, which means that one more terminological item appears in the system with its unique set of semantic characteristics and newly acquired formal cover (term). The most common example is borrowing a concept either together with a term (through transliteration) or creating a term later. On the other side of this dichotomy is semantic borrowing, which means that only the semantic characteristics of the new term are transferred. These characteristics are then expressed in the recipient language system within the extant formal cover.

The outcomes of semantic borrowing can differ. Semantic borrowing may result in polysemy if the newly transplanted concept finds its place alongside another concept within one term; thus, both concepts continue to function, albeit in different contexts. For example, the term *supremacy* contains two concepts. One concept is that found in EU law and signifies the whole principle of the supremacy of the EU legal order over domestic legal orders. The other concept is found in the general philosophical principles of law, according to which law is above a person, and no one can be convicted unless he or she has acted unlawfully. Alternatively, semantic borrowing can modify an already existing concept, similar to the one in the source legal system; this happens through adding and/or removing semantic characteristics. This is exactly what should happen with the concept of *consumer* in the Ukrainian legal system, for "consumer" still lacks one core characteristic to match the EU law concept.

This third typology requires identifying which EU law concepts will be called concept-transplants. An EU legal concept-transplant is any concept that enters a domestic legal system embedded in transplanted EU law. This is either a concept completely new for the domestic legal system after EU law was adopted, or a concept native to the domestic legal system, the characteristics of which, however, were modified and equalized with the core characteristics of the EU law concept following the transplant.

But even these typologies, although well elaborated, are incomplete. EU concept-transplants possess features that simply do not fit within the basic idea of transplantation and therefore cannot be viewed solely within these typologies.

Cohn identifies two specific characteristics of EU transplants that distinguish EU concepts from other concept-transplants. First and foremost is the idea of a linear relation between the transplant's "exporter" and its "importer." Usually, transplantation is viewed as a one-way

22 John Bell, "Mechanisms for Cross-Fertilisation of Administrative Law in Europe," in *New Directions in European Public Law*, ed. J. Beatson and T. Tridimas (Oxford: Hart Publishing, 1998).

23 Uwe Kischel, "Legal Cultures — Legal Languages," in *Translation Issues in Language and Law*, ed. F. Olsen, A. Lorz and D. Stein (New York: Palgrave Macmillan, 2009), 12.

process in which one system (the exporter) influences another system (the importer). However, in case of EU law, the long-term process of moving laws from one legal system into another gives a new picture. Legal systems within the EU share a common core — EU law. Moreover, none invariably dominates, and, over time, one system can be either the exporter or the importer of a new law. These circumstances place EU law transplants in a "form of reciprocal interaction [...], in which systems share, trade or barter concepts."[24]

The second distinctive feature of EU transplants is that transplantation is not always a movement from a single exporter to a single importer. There are a multiplicity of importers when a concept is transplanted within the EU. There also can be several exporters. As already mentioned, the concept of *proportionality*, which is effectively used by the ECtHR and ECJ in its autonomous meaning and in this way transferred across EU member states comes from 19th century German public law. The autonomous interpretation of this concept in the EU legal system does not mean that this concept lost its connection to the German public law "ancestor."

The three typologies presented above, together with the three specific characteristics of the EU law concept-transplant, show what makes the EU legal concept movable from one system into another. Primarily, it is the non-exhaustive interpretation, capable of variation depending on the needs of a domestic legal order. Indeed, the most common way to make a concept travel is applying *conceptual stretching.*[25] EU law concept's origins in some domestic legal systems also favor these concepts' movement across legal systems. In addition, EU legal concepts' malleability allows importing legal systems to change their level of abstraction. Most importantly, their stable set of core characteristics makes their transfer more likely to be successful. When importing states deviate from these core characteristics, the transplant's failure is almost certain. Why and how this sometimes happens is discussed in the next part of this article. In any case, expanding a concept's meaning and therefore extending its applicability is not desirable because the expanded concept will not have the necessary precision to harmonize with EU law.

Difficulties of Transferring Legal Concepts Detected in a Source Legal System

In many cases, difficulties of transferring concepts of EU law have their roots in EU legislative acts.

Susanne Baer adds the quality of legal idea/concept to the group of factors that allows its later transferability.[26] Quality here is not a "value judgment" of a legal norm, but (1) its potential "to inscribe itself in the broader legal traditions" and (2) its potential "to alter conceptual underpinnings" of this tradition. This suggests that the EU concept, before any transfer begins, should demonstrate ability to travel. Baer argues that it is exactly the quality of MacKinnon's legal ideas and concepts (the concept of substantive equality is among them) that made them easily travel across European legal systems. Taking this idea into focus for the study of concept-

24 Supra 13, 37.

25 Supra 14, 1034.

26 Susanne Baer, "Traveling Concepts: Substantive Equality on the Road," *Tulsa Law Review* 46 (2010): 59–79.

transplant, we can come from the opposite side and observe cases when the drawbacks in the quality of the concept (not the processes around it) prevent its successful transferability.

It is reasonable to start observing difficulties hiding in a source legal system from examples of polysemy and semantic variability, since these two types of semantic relations seem to be the most critical in the context of *acquis communautaire* and the problem of equivalence, which is always lingering over practitioners working with EU law terminology.

Polysemy and Semantic Variability in a Source Legal System

Unexpectedly, the key concept of consumer law itself becomes a 'victim' of such unfavorable for any terminological system processes as polysemy and horizontal semantic variability.

Semantic changes in the concept of ***consumer*** can be studied taking the definition in Directive 90/314/EEC[27] where this concept is defined differently comparing to other EU directives of consumer protection. Typically defined in most EU legislative acts as a "natural person acting for purposes outside his/her business activity,"[28] the definition of this term in Directive 90/314/EEC is comprised of three parts, providing that a *consumer* may be:

1) any person who takes or agrees to take the package (the *principal contractor*);
2) any person on whose behalf the principal contractor agrees to purchase the package (the *other beneficiaries*);
3) any person or any person to whom the principal contractor or any of the other beneficiaries transfers the package (the *transferee*).[29]

The obvious deviation in this definition from the standard interpretation lies in the fact that it does not provide a limitation to *natural* persons and, in contrast to other directives, includes *legal* persons. Deviation is so critical that one can claim the situation of polysemy; that is emergence of a new, second, concept within the same terminological unit.

Broadening the concept of consumer thorough adding legal persons to its scope entails illogical legal consequences: the concept can encompass traders, sellers, suppliers etc., in such a way embracing both parties to consumer contract.

Perhaps this inconsistency with the rest of the directives, and irrational interpretation and consequential loss of legal certainty prompted different member states to apply terms with much narrower semantic field to substitute the EU law term consumer when transposing Directive 90/314/EEC. In particular, the term *traveler* was used in the national laws of Austria, Estonia, Germany, the Netherlands, Sweden, the term *purchaser* in the national laws of France, Luxembourg, Slovakia, *client* in Latvian law, whilst the term *tourist* is used in Lithuanian law.

Given the above mentioned drawbacks, it is recommended to bring the definition of the concept of consumer in line with other definitions in EU consumer law.

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27 Package Travel Directive 90/314/EEC, Art. 2(4).

28 See, e.g. Directives 2008/48/EU, 93/13/EEC.

29 Directive 90/314/EEC, Art. 2(4).

Indistinct Semantic Relations between the Concepts

Polysemy and semantic variations are constant "companions" of harmonization drawbacks that can be observed on the semantic level of terminology. However, except for polysemy and semantic variation appearing in one concept and between the concepts, but always within one terminological unit, there are other semantic relations fixed exclusively between different terminological units in a certain context.

The problem of unclear semantic relations between the legal concepts appears in the formulation of Art. 3(1) of Directive 93/13/EEC. The provision reads as follows:

> A contractual term that has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of *good faith*, it causes a significant *imbalance* in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[30]

The concepts of our interest in the above cited provision are ***imbalance*** and ***good faith*** that in this case both perform a role of decisive factors for the *unfairness* of a contractual term.

Analyzing Art. 3(1) the authors of the Consumer Law Compendium call wording of the provision misleading and require clarification "whether the criteria *good faith/imbalance* are to be understood cumulatively, alternatively or in the sense that any clause which generates a significant imbalance is always contrary to the principle of good faith."[31]

Further on in this subsection it will be shown that the formulation is not misleading at all and is perfectly subject to interpretation based on linguistic (in this case syntactic) analysis.

Prior to analysis, it must be noted that this example escorts us from the issues of terminology (where almost all concern on concepts and their signification are concentrated) back to the subject matters of syntax, since relations between the concepts are also determined by syntagmatic connections, which can also be called *syntactic bounds*.

In order to provide the right interpretation, the legal clause should be treated as a complex sentence and divided into hierarchical segments (clauses). Applying the rules of clause segmentation, we receive the structure as follows. The provision is a complex sentence consisting of four predicative centers ("sub-sentences"[32]) forming one conditional and one subordinate adverbial clause, embedded in the conditional clause, as it is shown further:

[1] **A contractual term** / [2] that has not been individually negotiated / [1] **shall be regarded as unfair*** / [3] if, / [4] *contrary to the requirement of good faith*, / [3] it causes a significant imbalance...

[1] main clause
[3] conditional clause
[2] subordinate adjective clause
[4] subordinate adverbial clause

30 Directive 93/13/EEC, Art. 3.

31 *EC Consumer Law Compendium*, accessed September 20, 2013, http://www.eu-consumer-law.org.

32 Jake Chandler, *Elements of Deductive Logic. Sentential Form* (KUL, 2012).

Such syntactic structure declares that the first criteria to determine *unfairness* should be *imbalance*. Only then, after *imbalance* is noticed, the following step should be deciding whether this imbalance is contrary to the requirement of *good faith*, for it can be assumed from this structure that a contractual term can cause *imbalance* without contradicting the principle of *good faith*.

Misleading Verbal Form of a Concept in a Source Legal System

Taking semantics as the only source of difficulties of transferring legal concepts would be a misrepresentation of reality. Concepts do not function without their verbal forms. Moreover, as it will be shown in the next paragraphs, there is always a direct relation between a concept and its verbal form, and an inappropriate form of the term can significantly affect the semantic side of a term.

Every concept has a designation, represented phonologically and orthographically, that, as any other lexical unit, can be broken into constituent parts, morphemes and lexemes (in case of compound terms). Concept as a meaningful content of the term depends on how it is named. As Sartori follows up, the names tend to "provide in and by themselves guidelines of interpretation and observation."[33] Every designation is formally motivated. A term (as a word) is not a random sequence of sounds. There is always an interrelation between the meaning and the form. A meaning of the compound term can consist of the meanings of its parts. In the meantime morphemes, that possess grammatical meaning, can also modify semantics of the whole terminological unit. They show whether the concept is an object, a process, a state or relationship.[34]

In addition to that, cognitivists spotted a certain relation (that seems quite vague, though) between the level of abstraction the concept has and the impact of verbal form on its meaning. In particular, language has less impact on the concepts with the higher level of abstraction,[35] and verbal forms of such concepts resemble a metaphor, i.e., when the impact of the verbal form on the intension resembles that of any figure of speech (use of language, altering its meaning). Another linguistic study has showed that terms formed through transliteration tend to have a narrower scope of applicability due to the narrow semantic field of the transliterated verbal form that preserves its foreign features.

Thus, one of the barriers is inappropriate verbal form chosen to designate the concept. As it will be seen from the illustrations below, verbal forms can be misleading in the process of interpretation, either narrowing or broadening its scope.

Directive 93/13/EEC is a type of consumer law directives applicable to consumer contracts of all kinds. However, from the consumer protection perspective, the term ***goods and services*** may be considered as too narrow for this purpose.

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33 Supra 14, 1040.

34 Maria Teresa Cabre, *Terminology: Theory, Methods and Applications* (Barcelona: Universitat Pompeu Fabra, 1999), 85–86.

35 Supra 14, 1044.

Firstly, donations or subscriptions to (charitable and other) associations are not covered.[36] Secondly, referring only to *goods and services,* immovable property has been excluded from the scope of Directive 93/13/EEC since the EU law concept of *goods* encompasses only movable items of property. It is established in various EU law directives that define the concept of *goods*. As an illustration, Directive 1999/44/EC and Directive 2011/83/EU provide almost the same definition, stating that

> *consumer goods* shall mean any tangible movable item, with the exception of — goods sold by way of execution or otherwise by authority of law,— water and gas where they are not put up for sale in a limited volume or set quantity,— electricity.[37]

Thus, the use of the concept of *goods and services* in Directive 93/13/EC can significantly limit its applicability. Aimed to ensure protection against unfair contract terms in all possible consumer contracts, this directive is not likely to cover *timeshare contracts*, the focus of which is *immovable property*.

These semantic borders of the concept of *goods and services* were obviously taken into account by other legislators. Thus, the concept of *product* was introduced instead of *goods and services* in Article 2 of Directive 2005/29 that reads as follows: "*Product* means any goods or services including immovable property, rights and obligations."[38]

National courts also make attempts to give Directive 93/13/EEC its due applicability to all consumer contracts. For example, in *Khatun & Others v. Newham*[39] the national court in the UK ruled that Directive 93/13/EC and English acts cover contracts of selling land thus making immovable property a subject matter of Directive 93/13/EC.

The term *produktsiia* used in Ukrainian consumer law will not work in the same way as the term *product* in Directive 2005/29, since it encompasses goods, services and works[40] and does not include immovable property. Yet, exactly this concept is used in Art. 18 on unfair contract terms, which means that after thorough interpretation of each concept, provisions of this article do not have the designed extension. In all other cases it is used in the same way as the EU law term *product*, i.e., in Art. 11 on consumer credit contracts where it has been practical to speak about goods, services and works in the same concept.

Timeshare directives have not been transposed into the Ukrainian legal system, but if there will be a necessity to introduce the concept that would be equivalent to the EU concept of *product* and have in itself the concept of *goods and services* combined with *immovable property,* the concept of *ekonomichni blaha* (*economic goods*) can be introduced. Although this term has been known from the realm of economics and has not been used in consumer protection law,

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36 Supra 31.

37 Directive 1999/44/EC, Art. 1.

38 Directive 2005/29.

39 CA judgment of 24 February 2004, *Khatun & Others v. Newham LBC,* [2004] EWCA Civ. 55.

40 Zakon Ukrainy "Pro zahyst prav spozhyvachiv," [The Law of Ukraine "On Protection of Consumers' Rights"] 2005, No. 3161-IV.

its concept seems very broad, as it covers practically everything "that can be purchased in the process of trade for a certain price [...] in a limited amount."[41]

Thus, for the cases of necessity to create the verbal form for the domestic terminological equivalent to the EU term, it is essential to take the comparative approach, keeping in mind that the majority of EU law terms were formed on the basis of terms and concepts taken from different domestic legal systems within the EU. Therefore, it can be helpful to compare versions of translation of the EU term in several languages (at least English, French and German) before coming up with the new term in the Ukrainian legal system. This comparison of different language versions often prompted the choice of a Ukrainian equivalent in the already cited English-French-German-Ukrainian dictionary of EU terms.[42]

Lexical Parallelism in a Source Legal System

Another hazard in the source legal system is lexical parallelism that results in terminological inconsistency.

Inconsistency within the EU law can be observed with the concept of *operator of a means of communication* in the directives 97/7/EC and 2002/65/EC. In the later Directive 2002/65/EC the lexical form of this concept was changed to *operator or supplier of a means of distance communication*, whereas the concept itself remained, which can be seen from the copied definition in the initial directive: "...any public or private natural or legal person whose trade, business or profession involves making one or more means of distance communication available to suppliers."[43]

The fact that the same definition was applied to different lexical forms means that both terms have the same concept as their meaningful content, i.e., they are terminological duplets. However, perfectly suitable for the term of *operator of a means of communication,* the definition above is inappropriate for the second verbal version of the same concept, since it violates the main rule of definition formulation. The rule states that the same terminological element cannot be repeated in the definition of its term. Thus, explanation of *operator or **supplier** of a means of distance communication* as "making [...] means of distance communication available to *suppliers*"[44] does not make sense and gives bizarre results in the attempt of interpretation.

The situation starts clearing up after observing the other terms from the two directives in focus. In addition to the concepts of *operator of a means of communication* (*operator or supplier of a means of distance communication* in Directive 2002/65/EC) both directives contain the concept of *supplier*, a separate terminological unit defined as "...any natural or legal person,

41 Information from Navchalno-metodychnyi kompleks dystsypliny "Mikroekonomika" dlia pidhotovky mahistriv napriamu 8.000007 "Administratyvnyi menedzhment," accessed September 20, 2013, http://elibrary.nubip.edu.ua/3420/2/%D0%9D%D0%9C%D0%9A.pdf.

42 Volodymyr Iermolenko, ed., *English-French-German-Ukrainian Dictionary of EU Terminology* (Kyiv: K.I.S., 2007).

43 Directives 97/7/EC, 2002/65/EC.

44 Directive 2002/65/EC.

public or private, who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts."[45]

The core difference between the previously observed concept expressed by two synonymic terms and the second concept of *supplier* is that the first one is a maker, when the latter is a provider of means of distance communication. Nevertheless, the puzzle lingers and lays in the fact that in one case *supplier* is an element of a term, and in another it is a whole term.

The Ukrainian translator of Directive 2002/65/EC searched for a way to avoid repetition of the same lexeme *supplier* in the term and its definition and provided different equivalents for the term *supplier* on the one hand and the terminological element *supplier* on the other: *postachalnyk* (*supplier*) for the EU *supplier*, and *provaider* (*provider*) in the term *operator abo provaider dystantsiinoho zviazku*[46] for the EU law term *operator or supplier of a means of distance communication.*

Difficulties of Transferring Legal Concepts Detected in a Target Legal System

It has been shown how important the quality of legal concept is in ensuring its successful transfer. However, it is not the only prerequisite and certain adjustments on the side of the recipient legal systems should also take place.

In fact, all difficulties in this category come from what can be called 'incomplete harmonization' on the level of terminology. Obstacles observed here usually emerge after the concept has been brought to the target legal system, but has not been completely adjusted there. Contrary to the above listed difficulties in a source system that hinder *transferability* of a piece of foreign law, the number of linguistic difficulties presented further in this subsection influence the *applicability* of this piece of law, as the functionality of law in a new legal system directly depends on the functionality of its concepts.

Different linguistic difficulties in a target legal system come into play with the newly represented equivalents in a target legal system on the one hand, and already existent equivalents in a target legal system that was to be adjusted to the EU law concept on the other. In case of newly introduced concepts the types of equivalents misrepresentation involve:

1) malfunctioning placing of a new concept among other terminological units in the target legal system, the outcome of which is indistinct or non-harmonized semantic relations with other legal concepts, terminological polysemy etc.;
2) ineffective description of the concept in its definition;
3) misrepresentation of an EU law concept, which has been overlooked or disregarded when the foreign law was being transposed.

Whereas difficulties coming up with adjustments of native national law equivalents can be:

4) semantic deviations in a target language from the EU law equivalent, when the national law concept can have a broader or a narrower scope;
5) exical parallelism in the target legal system.

45 Directives 97/7/EC, 2002/65/EC.

46 Official translation of Directive 2002/65/EC into Ukrainian.

Difficulties related to deviation of the semantic scope of the concept (intension) are especially easy to let occur without special attention to depicting properties of the concept-transplant.

Broader Intension of Equivalent Concept in Domestic Legal System

Intension of a legal concept is comprised of its properties. Properties can be classified into typical, defining and accompanying.[47] Defining properties are of particular interest, since they play a crucial role in concept formation and therefore are necessary in the transplanted concept. Accompanying properties only narrow the concept's extension and do not cause direct effect on the concept's semantic scope as they do not serve to distinguish a concept among others in the system.

Taken rather dramatically in the common law reality of the United Kingdom, the concept of *good faith* is not new in Ukrainian legal system and was used without any reservations in a respective provision of Art. 18 of Law No. 3161-IV representing Directive 93/13/EEC.

The Ukrainian equivalent *dobrosovisnist* (*good faith*) was initially introduced in Art. 3 of the Civil Code of Ukraine. Along with the concepts of *spravedlyvist* (*justice*) and *rozumnist* (*cleverness*), *good faith* is used in the Civil Code[48] to set requirements each obligation must be based on. Lately, in addition to the Civil Code, the concept of *good faith* can be found in many other legislative acts, such as the laws "On Protection of Consumers' Rights," "On Protection from the Bad Faith Competition," "On Securities and the Stock Market" and others. It therefore can be stated that the notion of *good faith* has become a general legal category, not belonging exclusively to any particular field of law.

Some legal practitioners took the occurrence of these three obscure notions in the Civil Code rather critically, anticipating their flexible use in the judicial system. Others have been warning that ignoring these notions in civil law practice may turn them into 'dead norms' to the detriment of all civil law relations.[49] In any way, the principle of good faith caught the attention of many Ukrainian scholars who examined it in the context of international law (Smitiuh), contract law (Majdanyk) and civil law in general (Pavlenko, Kuznetsova, Bodnar). These studies were used in this paper to make up the overall interpretative picture of the concept of *good faith* in the Ukrainian legal system.

Thus, the notion of *good faith* had been already functional in Ukrainian civil law before the provisions of the Unfair Contract Terms Directive were taken into consideration in the amended 2005 Law No. 3161-IV.

Analyzing the specific use of this concept in different legal acts, the following general interpretation of *good faith* in the Ukrainian legal system can be accumulated. In its nature, *good faith* is a category with two sides: subjective and objective. The subjective side refers to the

47 Oliver Brand, "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies," *Brooklyn Journal of International Law* 32 (2007): 405–65.

48 Civil Code of Ukraine, Art. 509.

49 G. H. Pavlenko, "Pryntsyp dobrosovisnosti u dohovirnyh zoboviazanniah" ["The Good Faith Principle in Contractual Obligations"] (PhD diss., Kyiv, 2008), 174.

persons' attitude to their acts, assessment of their own behavior. Here *good faith* is an evaluative category as are the issues of morality and ethics alike. Due to its obscurity, this side can hardly be grasped in a legal reality, always tending to be so strict and precise. Contrary to that, the objective side of *good faith* is strictly fixed in Ukrainian law as generally adopted standards of *good faith* behavior that appear as a list of rules of business conduct, judicial practice etc. In this second nature, *good faith* behavior is divided into certain stages: (1) *good faith* during the negotiations on a pre-contract stage; (2) *good faith* in negotiating the terms of a contract; and (3) *good faith* on the stage of obligation fulfillment. On this objective side, the concept of *good faith* in Ukrainian law acquired rather concrete semantic characteristics that enable to recognize a particular expression of *good faith* in reality. However, as will be seen later, the national law equivalent is much broader compared to the EU law concept.

The principle of *good faith* is not an abstract construct in EU legislative acts. It is realized in concrete norms and requirements of European contract law. Therefore it makes sense to compare the concept of *good faith* as used in EU law with its functional counterpart in the Ukrainian legal system. Although the concept of *good faith* is not defined in the text of Directive 93/13/EC, from the context it is clear that the principle of *good faith* in this particular EU document covers only the behavior on the stage of deciding on contractual terms and partially on the stage of pre-contractual negotiations, which is only the second stage in the general definition in the Ukrainian legal system. This fact must be taken into account in the process of adoption and interpretation of Directive 93/13/EC. In this overlap between the EU concept coming within Directive 93/13/EC and the already native Ukrainian concept, the principle of *good faith* is aimed to "govern conclusion of consumer contracts and standard/typical contracts with the patterns and forms prepared in advance."[50] Thus, keeping in mind the broadness and complexity of the concept of *good faith* in EU law and Ukrainian law, it should be always interpreted in consumer law with the reference to the characteristics of unfair terms and the list of terms that are regarded as unfair in Law No. 3161-IV.

Narrower Intension of the National Law Equivalent

The key concept of the Unfair Contract Terms Directive is illustrative as regards terminological equivalents in national law that can have a narrower scope.

The concept of *unfair terms* appeared for the first time in EU law in the first EEC Commission program in the area of consumer rights protection in 1976: a project of the Directive on the Standard Terms Used in Consumer Contracts. In 1984 the Commission of the European Union proposed new regulations on the Community level that defined the concept of unfair terms and listed those terms that could be treated as unfair. In 1990 the Commission issued a Directive that established control against abuse of the general terms in consumer contracts.[51] However, there was no difference between *previously negotiated terms* and *pre-formulated terms* that was later distinguished more effectively in Directive 93/13/EEC. Consequently, characteristics of unfair terms appear as follows.

50 Pavlenko, "Pryntsyp dobrosovisnosti," 71.

51 More on history of the documents see http://ec.europa.eu/consumers/.

The first characteristic of the EU law concept of *unfair terms* is (1) its relation to consumer contracts. Directive 93/13/EC[52] expressly states that these terms can occur only in consumer contracts, i.e., those concluded between a consumer on the one side and a seller or supplier on the other. Thus, the concept of *unfair terms* cannot be applied to any other possible type of contracts. According to other characteristics, unfair terms are: (2) only those terms that were not individually negotiated with a consumer; (3) contradicting to the principle of good faith; (4) causing significant imbalance between the rights and obligations of the parties, which is (5) in favor of the seller or supplier for the detriment of consumer.

These characteristics can basically be viewed as criteria necessary for a term to be called *unfair*. For a linguist these criteria are characteristics of the concept that, when laid together, form a definition. It is an intension of the concept; whilst a list of all possible terms that can be called *unfair* is an extension.

The concept of *unfair terms* appearing in Directive 93/13/EC is entirely new for Ukrainian law. It was a niche in the conceptual system that should have been filled. It was first introduced in 2005 when the Ukrainian law "On Protection of Consumers' Rights" was amended in accordance with the new EU legislation.

Law No. 3161-IV provides that "[t]he contract terms are unfair if, contrary to the principle of good faith, it leads to the significant imbalance in contractual rights and obligations to the detriment for consumer."[53]

Hence, analyzing this definition the following characteristics can be outlined:

1) contradiction to the principle of good faith;
2) significant imbalance in contractual rights and obligations between the parties;
3) detriment to the consumer.

In a majority of conceptual characteristics, the concept of *unfair terms* in Ukrainian law corresponds to the equivalent concept in Directive 93/13/EC. The only conceptual feature not mentioned in Ukrainian legislation is a prerequisite that unfair terms must necessarily be in a contract that has not been individually negotiated. As Khanyk-Pospolitak R. reasonably remarks about the legal consequences of the absence of this characteristic,[54] by excluding this characteristic from the scope of the concept Ukrainian legislators created more favorable legal conditions for concluding the so called standard/typical contracts containing terms consumers can rarely reject. Despite this move in favor of the seller, Law No. 3161-IV contains the inexhaustible list of terms that are considered unfair in Ukrainian national law.

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52 Directive 93/13/EC.

53 Zakon Ukrainy "Pro zahyst prav spozhyvachiv" No. 3161-IV, 1991 roku zi zminamy vid 01.12.2005 [Law of Ukraine "On Protection of Consumers' Rights'" of 12.05.1991, amended from 01.12.2005], further in the references referred to as the "**Law**."

54 R. Iu. Hanyk-Pospolitak, "Poniattia 'nespravedlyvi umovy v dohovorah'," ["The Concept of Unfair Terms in Contracts,"] *Naukovi zapysky: Iurydychni nauky* 64 (2007): 102–05.

Non-harmonized Semantic Relations with other Legal Concepts

Each concept-transplant, appearing in a new terminology system, enters in different semantic relations with other concepts in the system, for "…no transplant is an island."[55]

Legal experts in EU law stress the importance of distinguishing the concept in focus from other legal concepts, both in the source legal system and in the target, which is crucial to conduct before using the EU concept in the domestic legal system. Identifying conceptual relations in the source system helps to define the 'potentials and limitations' of the concept-transplant. As an example, this is exactly what authorities from the European network of legal experts in the non-discrimination field do when writing about relations of the concept of indirect discrimination with the concepts of direct discrimination, discrimination by associations, positive action, and positive obligations.

It is frame semantics that studies a concept in its *frame,* a group of related concepts in which one concept can impact an entire system and *vice versa*.

Not isolated from one another, concepts form logical relations of subordination, coordination or opposition through similarities and differences in characteristics they are comprised of. For this reason, when the concept is transferred to the new conceptual system, it becomes surrounded by new concepts with which it would have to set a new system of relations: paradigmatic (with subordinate concepts) and syntagmatic (with non-subordinate concepts).

In the context of legal adaptation it is rational to separately have a look at relations between newly introduced concepts in a target system as equivalents to EU law concepts. In essence, hazards connected with semantic relations between such concepts remain the same as in a source system. However, lack of distinction in semantic relations between the newly introduced equivalents usually has subjective grounds. It is either because of insufficient preliminary research done before introducing the new concepts or because of the imprecise representation of the new concepts in a system of terms. As a result, indistinct semantic relations affect the smooth applicability of legal provisions in judicial practice.

In Ukrainian legislation the concept of *ofisni abo torhovelni prymishchennia*[56] (*business or trading premises*) was introduced as an equivalent of the concept of *business premises* from Directive 85/577/EEC. Although *business or trading premises* is used throughout the whole Art. 12 as one non-divided terminological unit, Art. 1 contains definitions for *ofisne prymishchennia* (*business premises*) and *trading premises* as separate terms. Nonetheless, even with these separate definitions, a correlation between the concepts of *ofisne prymishchennia* (*business premises*) and *torhovelne prymishchennia* (*trading premises*) remains blurred.

As stated in Law No. 3161-IV,

> "*business premises* are any premises (building etc.) where economic entity or its branch, or its subdivision, or its representative office, is situated;"

55 Supra 13, 7.

56 The Law, Art. 12.

> "*trading premises* are a real estate complex that occupies a separate building (business premises) or is situated in the installation specially equipped for commercial activity, where the economic entity undertakes the selling of goods."

In order to provide a demarcation between the given concepts, each definition can be split into separate conceptual characteristics that can later be compared. Both types of premises are occupied by *subiekt hospodariuvannia* (*economic entity*); but *torhovelni prymishchennia* (*trading premises*) serve specifically *commercial activity*, meaning *trading*, and among other places can be positioned in *business premises*. Thus, according to these definitions, *business premises* in some cases can function as *trading premises*.

Partially overlapping, definitions of the terms are not being helpful in investigating what actually motivated introduction of the complex term *trading or business premises* instead of *business premises*, for they do not point out the differential conceptual features. The only way to shed some light on semantic relations between these concepts is inferring from the context of a respective piece of law. For instance, one of the potential versions is built upon accordance with the relations between other similar terminological pairs used in the text, namely *tovary ta robota/posluha* (*goods and work/service*), *prodavets ta vykonavets* (*seller and executer*).

Throughout the entire legal act there is a tendency to make a clear distinction between

1) the seller or (rarely) manufacturer who sells goods;
2) the executer who (1) executes work or (2) provides services.

It can be assumed that trading premises is a complex exactly where the seller or manufacturer *sells* goods, whereas other activities of *manufacturing* of goods, *execution* of work and provision of services are performed in business premises. This version is, however, is built on mere inferences. What is clear in this situation is that the EU concept of business premises appears to be much broader than its Ukrainian direct counterpart *ofisni prymishchennia*. The reason may lie deeper, in the much broader semantic field of the terminological element *business* in comparison to the significantly narrower semantic field of the element *ofisnyi* (*office*). This remark can justify the use of a complex term instead of using the EU concept of business premises. More clear justification as to the use of such a term should have been given in the definitions of the terms, which would have brought immediate clarity to the text of Art. 12. These are examples when the law fails to completely specify the semantics of a term occurring in legal norms.

Polysemy and Semantic Variability in a Target Legal System

Coming back to the changes in the scope of applicability of EU law in national law, due consideration must be given to polysemantic terminology.

Directive 85/577/EEC governs contracts negotiated away from business premises. In a respective article of Law No. 3161-IV the term negotiated is translated as *ukladenyi*. After consulting with a dictionary it becomes clear that *ukladenyi* is a polysemantic legal term that in the context of contract law encompasses two English concepts: (1) *concluded* and (2) *negotiated*. It is critical to interpret the Ukrainian term in a right way and choose the correct concept of those two listed that would correspond to the concept in Directive 85/577/EEC. The

strategy is to indicate which meaning of the polysemantic term functions in this particular case. To be specific, correct interpretation can be ensured in a definition of the term, which, however, has not been done in Law No. 3161-IV. There is no definition that will explain what constitutes *ukladenyi* in this law. When directly translating the definition as it is, without any presuppositions, it looks as follows: "contract [*ukladenyi* = *concluded/negotiated*?] outside of trading or business premises means a contract [*ukladenyi* = *concluded/negotiated*?] personally by the consumer at a place other than the trader's business premises."

To gain some comprehension of how the meaning of a single term can affect the meaning and applicability of the whole article, both plausible interpretations may be examined. At this point it is interesting to note that *ukladenyi* (*concluded, negotiated*) is not even a key term, but functions as a regular terminological unit. If the whole Art. 12 deals with *negotiated* contracts only, it means that its provisions will extend to those contracts that are *signed* no matter where, which does not make sense at all. Thus, Directive 85/577/EEC specifically governs contracts *concluded*, i.e., *signed* away from business premises. The place where the contract terms were *negotiated,* or whether *negotiation b*etween the parties preceded *conclusion* at all, does not matter.

In the meantime, Directive 85/577/EEC is not at all helpful in identifying the right concept in this case of the polysemantic Ukrainian term. On the contrary, in the title of Directive 85/577/EEC one reads about "contracts *negotiated* away from business premises," whereas Art. 1 states, that "the Directive shall apply to contracts […] *concluded* [away from business premises]." The legal terms *concluded* and *negotiated* are not synonyms, which can be verified referring to Black's Law Dictionary,[57] where in relation to contracts *to conclude* means (1) to ratify or formalize (a treaty, convention, or contract), or (2) to sign (a contract, letter, etc.); and *to negotiate* means (1) to communicate with another party for the purpose of reaching an understanding, or (2) to bring about by discussion or bargaining. As it can be seen, these terms do not coincide in either of their meanings.

Several general remarks as to all definitions can be made at this stage. Firstly, a legal definition of a term must not contain other indefinite terms within itself; it is supposed to be a clarifying measure, not a source of other ambiguities. Secondly, definition must be self-explanatory; it is definition, which is aimed to be used for further interpretation of legal provisions where this term appears, and not legal provisions to interpret a definition, which is exactly what has happened with the Ukrainian Art. 12 and definition of the term *ukladenyi* (*concluded, negotiated*). It is suggested to use a more precise term *pidpysanyi* (*signed*) instead of *ukladenyi* (*concluded*) when defining the concept of *contract concluded away from business premises.* This slight improvement in formulation of definition can ensure the right functionality of the EU law directive in the national legal system.

57 Susan Ellis Wild, ed., *Webster's New World Law Dictionary* (Wiley Publishing, Inc., 2006), 329, 1136.

Lexical Parallelism in Terminology of a Target Legal System

Usually lexical parallelism emerges when a new concept has started functioning in a legal system. It is a normal process almost each new concept undergoes in the beginning when adjusting in a terminological system.

In addition to the right (corresponding to EU law) interpretation in national law, filling the niche also requires nomination of the concept. Up to now, four versions of translation of *unfair terms* have been used in Ukrainian scholarly texts: *nesumlinni umovy*, *nedobrosovisni umovy*, *nechesni umovy* and *nespravedlyvi umovy*. Two of these versions — *nedobrosovisni umovy* and its synonymic form *nesumlinni umovy* can be confused with the Ukrainian equivalent of *good faith* introduced in the Civil Code (*dobrosovisnist*). In the official Ukrainian translation of the Directive *good faith* is translated as *sumlinnist* and *unfair terms* as *nesumlinni* умови. This choice of word forms for the concepts of *good faith* and *unfair terms* is highly unfavorable. Although a certain relation indeed exists as, according to the Directive, *unfair terms* in the contract indeed contradicts the principle of *good faith*, this particular translation of terms gives rise to additional confusion in defining conceptual relations between *good faith* and *unfair terms*: the choice of Ukrainian equivalents suggests that the concepts in focus have generative relations and *unfairness* is the antonym (direct opposite) to *good faith*. Thus, an equivalent *nesumlinni umovy* for *unfair terms* can be dropped from the four possible Ukrainian terms. The linguistic forms *nechesni umovy* and *nespravedlyvi umovy* fully correspond to the English form of *unfair terms*. Thus, it is recommended to maintain the word form *nespravedlyvi umovy* used in Law No. 3161-IV (Part II Art. 18).

After the due amendments had been made under the influence of Directive 2002/65/EC the concept of *dohovir, ukladenyi na vidstani* (*contract signed at distance*) was introduced into the Ukrainian legal system with no substantial semantic modifications. Yet, the formal representation of the concepts has not been standardized, since another term, different from those in the Law "On Protection of Consumers' Rights," is used in other legal texts: *dystancyinyi dohovir*[58] (*distance contract*).

This lexical parallelism is observable in texts of Ukrainian laws on the one side and scholarly commentaries and translations on the other side. It must be noted that lexical parallelism is a normal process in all terminological systems, as it takes some time until the concept requires a stable form in a system of terms of a specific field. However, with time, newly adopted terms used in commentaries to legal materials must be correlated with their verbal forms in law to avoid incoherency and to make the EU concepts recognizable in the Ukrainian legal system. Parallelism cannot be an excuse in cases of native concepts that have been functioning in the legal system for a long period of time and acquired a standard form.

It is only through analysis of legal concepts using linguistic methods together with comparative law strategies that we can study the process of the transplantation of legal concepts. Legal perspective that is interesting in a concept as an accurate reflection of legal reality helps to obtain a deeper understanding of semantic and functional features of a legal concept, its relation to context. In the meantime, linguistic perspective explains which semantic qualities

58 Official Ukrainian translation of Directive 2002/65/EC.

make a legal concept travel and which processes take place when a concept moves from one legal system to another. Moreover, it reveals causes of different pitfalls in the harmonization of law, i.e., those that are related to languages, as well as suggesting solutions for each type of negative effect.

When it comes to the adoption of EU law, there are precautions for not transferring law, but there is no measure for not transplanting a term. Therefore, legislators are quite free in their choice: they may omit a concept if it is not the key one; they may use a native concept as an equivalent, changing its semantic structure by adding or removing properties; finally they may bring a EU term along with the concept-transplant, which usually happens when the national system does not have a concept at least slightly reminding the foreign one in its characteristics or functions. The two last versions should both be treated as transplantations that require harmonization actions at the national level.

The linguistic reasons for transplantation failures of legal concepts are detected in both source EU and target Ukrainian legal systems in consumer protection legislation. They are polysemy and semantic variability, lexical parallelism, non-harmonized semantic relations with other legal concepts, narrower or broader intension of an equivalent in national law than that of the source concept, misleading verbal form of the source legal concept, indistinct semantic relations of the concepts.

In order to prevent the cause of these linguistic factors the following checklist for a legal linguist can be proposed in work with legal concepts-transplants:

1) identifying the core characteristics of the legal concept to be transplanted;
2) comparing the linguistic forms this concept has in different languages;
3) defining the concept in national legislation, consistently transposing its core characteristics (if any are missing);
4) checking the definitions and forms of other concepts from the same semantic field against the newly transplanted concept;
5) monitoring the consequences of the use of the concept in a legal provision in order to check whether its function corresponds to the one assigned by the legislator.

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