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LEGAL-LINGUISTIC ANALYSIS OF EU LAW AND ITS TRANSPOSITIONS: A USEFUL APPROACH TO EXPLORE HARMONISATION PROBLEMS?

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ABSTRACT

The fact that the application of EU law leads to uneven practices across the Member States gives rise to heated debates in the literature. Research tends to focus on how the constraints of the EU law-making process contribute to threatening harmonisation in practice; however, the constraints of the transposition process are often overlooked. To bridge this gap, here we will explore both the supranational and national factors that may threaten harmonisation, using a legal-linguistic approach that will reveal the overlap between the legal and linguistic meanings in EU law. In particular, drawing on Robertson's notions of "horizontal and vertical viewpoints" (Robertson, 2012a), we will perform a horizontal legal-linguistic analysis of Article 3(2) of the Spanish and English versions of Directive 2004/38/EC on freedom of movement and residence, and a vertical legal-linguistic analysis of said Article in both language versions and its transposition in Spain and in the UK. Our results suggest that, in our case-study, both EU law-making and transposition-related factors may influence EU harmonisation problems in practice; factors such as EU strategic ambiguity or indeterminacy, political negotiations and supranational and national drafting decisions.

Keywords: EU law-making; transposition; Directive 2004/38/EC; legal-linguistic horizontal and vertical analysis; harmonisation.

ANÀLISI JURÍDICA I LINGÜÍSTICA DEL DRET DE LA UE I DE LES SEVES TRANSPOSICIONS: UN ENFOCAMENT ÚTIL PER EXPLORAR PROBLEMES D'HARMONITZACIÓ?

Resum

El fet que l'aplicació del dret de la UE condueixi a pràctiques desiguals a tots els estats membres dóna lloc a debats acalorats en la literatura. La investigació tendeix a centrar-se en com les limitacions del procés legislatiu de la UE que contribueixen a una amenaçadora harmonització a la pràctica; tanmateix, sovint es passen per alt les restriccions del procés de transposició. Per salvar aquesta bretxa, aquí explorem els factors nacionals i supranacionals que poden amenaçar l'harmonització, mitjançant un enfocament jurídic i lingüístic que revela la superposició entre els significats jurídics i lingüístics del dret de la UE. En particular, basant-nos en les nocions de Robertson de "punts de vista horitzontals i verticals" (Robertson, 2012a), fem una anàlisi jurídica i lingüística horitzontal de l'article 3 (2) de les versions espanyola i anglesa de la Directiva 2004/38 / CE sobre llibertat de moviment i residència, i una anàlisi jurídica i lingüística vertical d'aquest article en les dues versions lingüístiques i la seva transposició a Espanya i al Regne Unit. Els nostres resultats suggereixen que, en el nostre estudi de cas, tant la legislació de la UE com els factors relacionats amb la transposició poden influir en els problemes d'harmonització de la UE a la pràctica; factors com ara ambigüitat o indeterminació estratègica de la UE, negociacions polítiques i decisions de redacció supranacionals i nacionals.

Paraules clau: legislació de la UE; transposició; Directiva 2004/38/CE; anàlisi jurídica i lingüística horitzontal i vertical; harmonització.

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Summary

1 Introduction

Given that uniform interpretation and application of EU law is a primary objective of EU legislative bodies in order to ensure legal certainty across the EU, when divergent practices arise, they trigger understandable debates concerning why this occurs. Previous research tends to focus on how the constraints of the EU law-making process contribute to threatening harmonisation across the EU. However, surprisingly, these debates barely address how transposition may influence the harmonisation problems identified in practice, even though this is a key stage in the implementation of an array of EU legal instruments.

Previous studies have shown that in order to address harmonisation problems not only do both the supranational and national levels need to be considered; both the linguistic and legal dimensions of the instruments involved need to be brought into the equation too (Font i Mas, 2017: 25-30). Thus, if we consider "EU legislative texts as linguistic creations that lie within the field of study of legal linguistics" (Robertson, 2010: 148), an approach that can explore the overlap between legal and linguistic meaning in EU law may prove useful in identifying which factors may lead to harmonisation problems. Based on this logic, here we contend that a legal-linguistic analysis of EU law and its transpositions will allow us to identify the "paradoxes, compromises and tensions" arising from the intersection of language and law in the EU context (Sosoni & Biel, 2018: 2) by revealing how the linguistic and legal dimensions of a given provision impact on "the meanings that are created and acted upon in practice" (Robertson, 2018: 115). In other words, the legal-linguistic approach proposed will allow us to analyse "practical legal-linguistic problems" (Font i Mas, 2017).

In this paper we will identify the abovementioned practical problems using Article 3(2) of *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* (hereinafter the Directive),[1] and its Spanish and British transpositions as our case study (see section 4). In Spain this Directive was transposed in *Real Decreto 240/2007* (hereinafter RD 240/2007) and in the UK in *The Immigration (EEA) Regulations 2006*.[2] Apart from this legal-linguistic approach, we will draw on Robertson's notions of "horizontal and vertical viewpoints" (Robertson, 2012a) in order to simultaneously view the Article analysed from both a horizontal and vertical viewpoint (Robertson, 2012a: 6) that reveals the interplay between the supranational and national instruments under study. Therefore, we will perform a horizontal legal-linguistic analysis of Article 3(2) of the Spanish and English versions of Directive 2004/38/EC and a subsequent vertical legal-linguistic analysis of the abovementioned Article in those language versions and its transposition in Spain and in the UK.[3]

In this paper our goal is twofold. Firstly, we seek to identify some of the EU law-making and transposition-related factors that may threaten harmonisation in our case study. And, secondly, we attempt to showcase the usefulness of the horizontal and vertical legal-linguistic analysis proposed to identify them and, hence, its practicality in exploring harmonisation problems in EU law by applying this model to Article 3(2) of this Directive. Thus, in sections 2 and 3 we will describe the complexity that surrounds the EU law-making process (section 2) and the transposition process of directives (section 3); which will be vital in understanding the subsequent identification of the problematic elements in the analysis. Later, in section 4, we will present our legal-linguistic horizontal and vertical analyses and our results will be discussed.[4] Finally, in section 5, our main conclusions will be presented.

1 This Directive is a relevant object of study since, although freedom of movement and residence is one of the cornerstones of Union citizenship, obstacles to the right appear to persist in national contexts. See the report "Obstacles to the Right of Free Movement and Residence for EU Citizens and their Families: Comparative Analysis (2016)" (hereinafter the 2016 Report).

2 The UK law currently in force is *The Immigration (European Economic Area) Regulations 2016.* The UK is subject to Directive 2004/38/EC until 1 January 2021.

3 Since studying the 24 language versions in this paper is impossible due to space limitations, we have chosen two language versions that have proven to be problematic in institutional reports (see the 2016 Report), although we recognise the need to expand the analysis to other language versions in the future.

4 In Ruiz-Cortés (2019a) we performed a succinct vertical analysis of Article 5.2. of this Directive and its British transposition. In this paper we seek to go one step further, performing both a horizontal and a vertical analysis that allows us to compare two language versions and two different transposition measures.

2 The EU Law-making process[5]

In order to describe the EU law-making process, we will focus on what Robertson (2018: 116) calls "procedural aspects" with the aim of determining how the processes by which EU texts are produced impact on the language versions studied.

Almost all EU legislation starts life as a proposal from the Commission. As argued by Robinson (2014: 249), the proposal "is a complete, fully worked out draft text of an act" by the competent Directorate General (DG) for the field in question. Robinson (2014: 255) also contends:

> The first drafts are generally produced by technical experts in the department responsible. […] They are not specialists in legislative drafting and generally have had little or no drafting training. […] Almost all first drafts […] now have to be produced in English. It is a real challenge for technical experts to have to draft complex texts in a language which is not their mother tongue.

Currently English is the *de facto lingua franca* (Felici, 2015) of EU legislation, although the original *lingua franca* was French.[6] In this context, the *lingua franca* is used mostly by non-native speakers (Felici, 2015: 124) in a multilingual context or by native speakers that lose touch with their native language in this multilingual context (Felici 2015: 124). Thus, the above may have linguistic implications that should be taken into consideration, as suggested by Frame (2005: 21) below:

> The result is that the raw document produced by the originating department in the Commission will in most cases display a reasonably good standard of English [*lingua franca*] but there will be errors of style and vocabulary, and many other imperfections in need of tidying up.

At this stage different bodies within the DG in question are consulted, including the Legal Service:

> In the team responsible for the quality of legislation lawyers specialising in drafting, known as legal revisers, check whether the text is well drafted, clear and precise and in accordance with the various drafting rules. […] While at this stage the draft exists in just one language, almost always English, the legal revisers also seek to ensure that the draft will be capable of being translated into all the other official languages (Robinson, 2014: 259).

Furthermore, all the above should be approached considering the drafting guidelines applicable:[7]

> EU law is a legal order in its own right, with its own drafting standards and conventions. Consequently, EU legislation should comply with these rules. In other words, it should look and read like EU law, irrespective of whether the drafting conventions of EU law correspond to the different drafting conventions of the national legal order (Strandvik, 2013).

However, while these guidelines are vital to improve clarity and transparency, at times using them is not an easy task for the actors involved in the law-making process. In other words, the guidelines are not always straightforward themselves (Strandvik, 2018), which may also influence the production of the legislative text. Consequently, the elaboration of the proposal could be described as a multistage collaborative process in which a variety of actors share the responsibility of producing a legislative proposal—both using a *lingua franca* (Felici, 2015) and complying with the institutional drafting guidelines (Strandvik, 2013)—that (in theory) results in a clear and unambiguous legislative text for its subsequent (and reiterated) translation.

When the proposal is completed, it is sent to the Directorate General for Translation (DGT).[8] The "unique" EU policy of language equality (Šarčević, 2018: 10) presupposes accessing legislation in the 24 official

5 The description that follows does not claim to be exhaustive, but instead seeks to present the main actors and processes involved in the EU law-making process.

6 There is no consensus on the date this change took place. It seems to be connected with the 2004 enlargement, which may imply that the *lingua franca* of our Directive was in fact French.

7 "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). We will use the JPG in our analysis.

8 Not all EU texts are translated in-house, although genres such as legislation are more likely not to be outsourced. However, Strandvik (2018: 53) highlights that the recent outsourcing increase has affected "first […] 'less important' documents but gradually also […] policy documents and legislation".

languages of the EU. This entails that all legal instruments need to be *drafted in* 24 equally-authentic language versions, which in practice, for 23 of them, means *translated into*. Even though this policy "guarantees the equality of EU citizens before the law and prevents linguistic disenfranchisement" (Biel, 2014: 60), while situating translation as "the predominant means of producing multilingual legal instruments" (Prieto Ramos, 2014: 313) in the EU context, it also poses several practical obstacles for EU translators. In other words, this language policy entails that all languages versions are supposed to have the same meaning (known as the principle of equal authenticity), therefore the EU translator's main task "is to preserve the unity of the single instrument with the ultimate aim of promoting its uniform interpretation and application in practice" (Šarčević, 2018: 13). This notion of equivalence has been largely contested in the literature (Biel, 2014; Pozzo, 2014) with several experts considering equivalence in this context simply a "myth" or a "chimera" (Pozzo, 2014: 38). In the end, as rightly argued by Šarčević (2000: n.p.): "While it is generally acknowledged that translators cannot be expected to produce parallel texts that are equal in meaning, they are expected to create texts that are equal in legal effect". In any event, once the translations are finished, the 24 language versions are sent to the Council and the Parliament for scrutiny, negotiation and amendments.

When the language versions reach the Council and the Parliament the negotiation process begins (see Robinson, 2014). In the negotiation process different legal tactics are used, such as ambiguity or vagueness (Robinson, 2005: 7; Prieto Ramos, 2014: 321-322) either to show a political agreement has been reached or to show the inability to reach one. According to Frame (2005: 23) at this stage:

> Member States' representatives often make changes for political reasons which override linguistic considerations. Particularly in the case of directives, Member States often prefer ambiguity to clarity since this enables them to implement a measure in a way that suits their domestic agenda.

Robinson (2005: 8) wonders if the lack of clarity and precision resulting from this process may not be just "unfortunate side effects but an essential aspect that enables the system to work by giving the Member States the leeway they need to adapt it to their own legal systems". However, as Robinson underscores (*ibid.*): "Whatever the answer, the acknowledged need for some leeway or 'wriggle room' cannot be treated as licence to be sloppy". In the negotiation process competing interests of the different stakeholders collide, which means that these interests need to be debated and negotiated to produce an instrument that can be ratified by all of them. In procedural terms this means that an instrument goes through several amendments, and hence drafting, as well as reiterated translations, since "the drafting of EU legislation and its translation often take place concurrently and are intertwined" (Biel, 2014: 67). In this multistage and multilingual drafting process lawyer-linguists, both of the Council and the Parliament, play a vital role 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" (Robinson 2014: 268-269).

Once a compromise is reached—after long negotiations and contested amendments—the Parliament and the Council adopt the final versions. After undertaking the Herculean task of producing 24 equally-authentic language versions whose success is determined by producing harmonised legal effects across the EU, the EU law-making process ends with the authentication of translations as language versions of equal force by publication in the Official Journal.

3 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. As rightly explained by Prechal (1995: 5), transposition can be defined as the: "Process of transforming directives into provisions of national law by the competent national legislative body or bodies". Consequently, the national legislator needs to transpose the provisions correctly while making them effective in the specific legal culture of the Member State in question. This process is far from simple and it is organised differently depending on the Member State's standpoint. In the case in point, 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*"[9] (hereinafter TGUK, 2018). Clear instructions can be

9 See: https://www.gov.uk/government/publications/implementing-eu-directives-into-uk-law.

found in this guide, while it also prescribes the two main transposition approaches that may be used: copy-out, i.e. adopting the same wording as that of the Directive, or elaboration, i.e. using language that differs from the wording of the Directive (TGUK, 2018: 11). On the other hand, the Spanish authorities do not provide any guidance, as criticised by Spanish legal professionals,[10] and there is some obscurity surrounding how the process actually works. As for the transposition process itself, as Robertson (2011: 63) highlights:

> Transposition implies: first, analysing the directive, interpreting it, understanding the intentions, objectives and methods, deconstructing it, discarding purely EU elements […]; 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.

In Robertson's words (2012b: 28): "The implication is that national law drafters are translators as well as interpreters and drafters". As for the transposition of our Directive in Spain and in the UK, the aforementioned 2016 Report on obstacles to the right to freedom of movement and residence points out that several transposition problems persist in both countries, some of which will be addressed in the following section.

4 Legal-linguistic analyses from a horizontal and vertical viewpoint

In this section we will perform our legal-linguistic analysis drawing on Robertson's notions of "horizontal and vertical viewpoints" (Robertson, 2012a: 6):

> We can express the relationships between and within languages in spatial terms. If we imagine all the language versions laid out side by side like soldiers in an army marching in step, text by text, article by article, sentence by sentence, term by term, then we can look across the texts horizontally, as it were, and ask if they all march in step and whether the information contained in each unit of meaning is the same across all the language versions. We can call this a 'horizontal' view. On the other hand, we can step inside any language version and consider it exclusively from the point of view of being one text in a sea of other legal texts expressed in that same language code (English, French, German, etc.). Then we look for consistency between the texts within the same language. We can call this a 'vertical' dimension.

Considering that the 2016 Report suggests that implementation obstacles to this right seem to persist, especially in the case of family members of EU nationals, we will study an article that regulates their right to freedom of movement and residence. In particular, under Articles 2 and 3 of this Directive, third-country family members of EU nationals are entitled to the right to freedom of movement and residence across the EU. Specifically, while Article 2 of the Directive only refers to direct family members (such as spouses, children and dependent parents), Article 3 refers to all other cases of family members entitled to this right commonly known as *extended family members*. After a prior in-depth study of the Directive and its transpositions (Ruiz-Cortés, 2020: 270-341), we have specifically chosen Article 3(2) to be presented in this paper since this particular Article and its transpositions will allow us to illustrate different ways in which EU law-making and the transposition processes impact on the legislation studied simultaneously.[11] In Table 1 the horizontal comparison of Article 3(2) in the Spanish and the English versions of Directive 2004/38/EC and the vertical comparison of said language versions and the Spanish and British transpositions are presented. The elements subsequently analysed are highlighted in bold:

10 See the Report by the Council of State on the integration of European law into the Spanish legal system (2008).

11 Our prior analysis showed that problems related to other Articles of this Directive are solely linked to supranational or national factors, but not to both at the same time. Thus, we believe that the analysis of Article 3(2) is relevant to our study since it shows how both supranational and national factors impact on the application of the same provision in practice.

DIRECTIVE 2004/38/EC - ARTICLE 3(2)	
Spanish version	English version
2. Sin perjuicio del derecho personal de los interesados a la libre circulación y a la residencia, el **Estado miembro de acogida facilitará**, de conformidad con su legislación nacional, la entrada y la residencia de las siguientes personas: a) cualquier otro miembro de la familia, sea cual fuere su nacionalidad, que no entre en la definición del punto 2 del artículo 2 que, **en el país de procedencia**, esté **a cargo** o viva con el ciudadano de la Unión beneficiario del derecho de residencia con carácter principal, o […] b) La **pareja** con la que el ciudadano de la Unión mantiene una **relación estable, debidamente probada.** […]	2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the **host Member State shall**, in accordance with its national legislation, **facilitate** entry and residence for the following persons: (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, **in the country from which they have come**, are **dependants** or members of the household of the Union citizen having the primary right of residence, or […] (b) the **partner** with whom the Union citizen has a **durable relationship, duly attested**. […]
SPANISH AND BRITISH TRANSPOSITIONS OF ARTICLE 3(2) OF DIRECTIVE 2004/38/EC	
RD 240/2007- Artículo 2.bis.1. a) y b) Otros familiares	The Immigration (EEA) Regulations 2016 - Section 8 -"Extended family member"
a) Los miembros de su familia, cualquiera que sea su nacionalidad, no incluidos en el artículo 2 del presente real decreto, que acompañen o se reúnan con él y acrediten de forma fehaciente en el momento de la solicitud que se encuentran en alguna de las siguientes circunstancias: 1.º Que, en el **país de procedencia**, estén **a su cargo** o vivan con él. […] b) La **pareja de hecho** con la que mantenga una relación estable debidamente probada, de acuerdo con el criterio establecido en el apartado 4.b) de este artículo	(2) The condition in this paragraph is that the person is— (a) a relative of an EEA national; and (b) **residing in a country other than the United Kingdom** and **is dependent upon the EEA national** or is a member of the EEA national's household; and either— […] (5) The condition in this paragraph is that the person is the partner **(other than a civil partner)** of, and in a durable relationship with, an EEA national, and is able to prove this to the decision maker.

Table 1. Horizontal and vertical comparisons.

Taking Table 1 as the starting point, firstly, we will delve into our horizontal analysis and, subsequently, into our vertical analysis.

4.1 Legal-linguistic horizontal analysis of Article 3(2) of the Spanish and English versions of Directive 2004/38/EC

The first aspect that stands out when comparing the versions is their "surface-level similarity" (Šarčević, 2018), which derives from what Robertson (2011, 2012a) coined as the "synoptic approach":

> From the point of view of controlling meaning across languages, in EU legislation one can note the adoption of a 'synoptic approach'. This implies using structures and methods which compartmentalise texts, dividing them into segments of meaning so that the 'same' (or 'equivalent') information in each language is conveyed on the same page number, in the same article number, in the same paragraph, and in the same sentence, down to the lowest level of unit. This 'synoptic approach' facilitates the shared legal-linguistic revision (Pacho Aljanati, 2017: 78).

As can be observed in Table 1, the synoptic approach is adopted in the section studied. In particular, punctuation is used to divide the text into segments of meaning with the same or equivalent information (Pacho Aljanati, 2017: 78) in each paragraph of the section. These versions also have an evident syntactic, terminological and structural similarity, even though the Spanish and English styles are maintained (note the use of punctuation and capitals). *Verbatim* reproductions can also be observed throughout both language versions of this Directive in phrases such as *Sin perjuicio de/Without prejudice to*, or even in complete sentences such as in the example below:

Facilitará, de conformidad con su legislación nacional, la entrada y la residencia de las siguientes personas:	Shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

Table 2. Verbatim reproductions.

This would ratify "the belief that interlingual concordance promotes uniform interpretation" (Šarčević, 2018: 14), even if, at times, it results in slightly unnatural renderings (such as separating shall and facilitate in the English version above). One should also note the compliance with provision 2.3.2. of the Joint Practical Guide (JPG) in the use of the future (specifically the *futuro legislativo)* in Spanish and the auxiliary *shall* in English to convey general obligations. The abovementioned general obligation at the beginning of Article 3(2) is of utmost importance in terms of freedom of movement and residence since, as suggested by the Report (2016: 28): "Incorrect transposition of this provision could result in specific conditions not provided in the Directive for TCN [Third Country National] family members to obtain the right of residence". Bearing this in mind, below we will first analyse how the EU law-making process influences specific terms, phrases and sentences with relevant legal-linguistic implications from a horizontal viewpoint. This prior analysis will allow us to subsequently examine how the supranational elements highlighted have been transposed in our vertical analysis (section 4.2.). Lastly, in the light of our findings, we will assess if freedom of movement is in fact "facilitated" to these family members in our discussion (section 4.3).

4.1.1 En el país de procedencia – The country from which they have come

In this extract from the second paragraph of Article 3(2), a different strategy has been used to express the same idea in these versions: while in Spanish a phrase has been used, in English they have opted for a sentence. It should be noted that the Spanish version is a *verbatim reproduction* of the French version (*dans le pays de provenance)*, which may be interpreted either as a coincidence or as an indicator of French being the *lingua franca* used in this case. From an interpretative stance, choosing *procedencia* in Spanish and *from which they have come* in English may lead to ambiguities and different interpretations by national actors in the transposition process. On the one hand, in the Spanish version, the use of *proceder* referring to people may be interpreted differently (see Dengler, 2010: 87). It may either mean the origin of a person (country of nationality) or a country that the person in question is coming from, but not necessarily the country of origin. On the other hand, English native speakers have diverging opinions on the English phrase, since while some argue that there is no ambiguity (considering that *to come from*, which implies nationality, is not the same as *from which they have come*, which implies coming from a country which is not necessarily the country of origin), others contend that the same ambiguity present in Spanish applies to the English version. In our vertical analysis, we will reveal how national authorities have interpreted this in the transposition process.

4.1.2 Miembro de la familia a cargo – Dependant/dependent

This term is an indeterminate legal concept, which is "emblematic of EU law" (Bajčić, 2017: 41) and is applicable to different kinds of family members in the Directive. From a terminological stance, it is noticeable that the term used at EU level is the same as the one used in the national immigration law system in both cases. This may be justifiable given its indeterminacy and, in principle, it is not problematic since it will be specifically interpreted depending on the family member to whom the term is applicable.[12] This indeterminacy also explains why there is no definition of the term, which leads us to think that this is a deliberate strategic ambiguity. However, in general, the lack of definitions is not a trivial problem in EU law as pointed out by Pozzo (2014: 39):

12 However, it may be a problem when terms which are too specific to a particular language or national legal system are used, since they may limit the interpretation of the term in the EU context. This is why the JPG (5.3) recommends avoiding this.

> One of the problems which need highlighting arises from the *lack of definitions*[13] for legal terms in directives, which then are given different meanings in the various national systems. Similar problems, relating to the difficulty in achieving a harmonised result, can be met in cases where the Community draftsmen opt for a deliberately *non-technical definition*.

This is why the JPG (14) recommends that, in cases of ambiguity, a definition needs to be provided. In Article 3(2) we find an example of a term, *Estado miembro de acogida/Host Member State,* that has been defined in another part of the Directive—Article 2(3)—although this obviously responds to the need to define this key term. However, not many definitions are found in this instrument (Ruiz-Cortés, 2020). This makes the case of *recursos suficientes/sufficient resources*[14] worth mentioning, although the term is present in Article 8(4). As can be observed below, in both language versions, an EU term was created for it, and a definition was also provided:

	Spanish version	**English version**
EU term (Directive)	Recursos suficientes	Sufficient resources
National term in immigration law in Spain and in the UK	Medios económicos suficientes	Sufficient funds

Table 3. *Recursos suficientes* and sufficient resources.

From a terminological stance, the EU terms used in the Spanish and English versions are *verbatim* reproductions of the French (*ressources suffisantes*)—or the French and Spanish of the English if the latter is considered the *lingua franca.*[15] Regardless of this, the strategy used with this term in the drafting process (clarifying that this is an EU concept/term) has a clear implication in the transposition process: national actors will understand that it differs from the one used, if any, in their national immigration law. We will then see what occurs with *dependant* as an indeterminate legal concept in the transpositions.

4.1.3 Pareja/Partner

Partner is undoubtedly one of the essential terms in this Directive. To understand its relevance, it is vital to locate the specific political context in which this instrument was shaped. At the time when the Directive was created, between 2001 and 2004, the recognition of the condition of partner in terms of freedom of movement by EU law was pivotal. Directive 2004/38/EC intended to acknowledge the evolution of family models, models that are now common in the vast majority of Member States, but were not at the time. Marín Corsanau (2017: 425) argues that, given the divergent conceptions of the family in Member States at the time, this was not exactly an undisputed issue in the process of negotiating the Directive. Heated debates and compromises can be traced back to the text if we analyse the changes that the original proposal suffered in the negotiation process (*ibid.*), which means that negotiation was central to the final formulation of this concept. Two kinds of partners can be found in the Directive; one regulated in Article 2 and the other regulated in Article 3 (which we are studying here). The differences between them are complex, although different legal scholars have strived to clarify them (Marín Corsanau, 2017; Soto Moya, 2018). Broadly speaking, it can be argued that their main difference is related to the way in which the condition of partner is proved. While in Article 2 the relationship needs to be proved by being registered as partners, in Article 3 it may be proved by other means (Recio Juárez, 2016: 116). Now, shifting the focus to the terms used to express these two concepts, we find:

Kind of partners according to Article 7(4) of Directive 2004/38/EC[16]	**Spanish version**	**English version**
Article 2(2) b)	*Pareja* ***registrada***	***Registered*** *partner*

13 Both emphases appear in the original version.

14 Member States shall grant the right of residence to nationals of Member States and to members of their families, provided that they are covered by sickness insurance and have **sufficient resources** to avoid becoming a burden on the social assistance system of the host Member State.

15 However, other versions have opted for a slightly different term (see the Italian *risorse economiche sufficienti*).

Kind of partners according to Article 7(4) of Directive 2004/38/EC[16]	Spanish version	English version
Article 3(2) b)	*Pareja de hecho* ***registrada***	***Registered*** *partner*

Table 4. *Pareja* and Partner in Articles 2 and 3.

Several aspects are worth mentioning here. Firstly, while the Spanish version uses different terms for two different concepts, the English version contravenes formal consistency (point 6.2. of the JPG) by using the same term to express two different concepts. Secondly, it is revealing that in both language versions the common denominator between the terms used for these two concepts is precisely the fact that these citizens are registered as partners, which according to experts appears to be their main difference (Recio Juárez, 2016; Soto Moya, 2018). And thirdly, these facts call into question the extent to which these terms, derived from the negotiation process (Marín Corsanau, 2017: 425), are conducive to their desired regulatory effects in the national contexts: recognising divergent situations of partners across the EU. We hope to shed more light on this in our vertical analysis.

4.2 Legal-linguistic vertical analysis of the Spanish and British transpositions of Article 3(2) of Directive 2004/38/EC

In this section we will unravel how the elements identified in section 4.1. were transposed in the Spanish and British transposition laws. Generally, if we compare the language versions and their transpositions, it seems that the Spanish transposition has opted for a "copy out" approach with wording closer to the Directive, while the British transposition has opted for the "elaboration approach", since more information has been included (TGUK, 2018: 11). It should be noted that it was not until 2015 that Spanish law correctly transposed Article 3(2) of the Directive[17] in Article 2 bis of RD 240/2007; and although the British authorities transposed it at once, some amendments have been made, as highlighted in the subsequent analysis.

4.2.1 En el país de procedencia – The country from which they have come and their transpositions

ARTICLE 3(2) OF DIRECTIVE 2004/38/EC	
Spanish version	English version
En el país de procedencia	The country from which they have come
SPANISH AND BRITISH TRANSPOSITIONS OF ARTICLE 3(2) OF DIRECTIVE 2004/38/EC	
RD 240/2007- Artículo 2 bis 1 a) 1.º	The Immigration (EEA) Regulations 2016-Section 8 2(b)
En el país de procedencia *At the end of RD 240/2007 they clarify: país de origen o procedencia.	Residing in a country other than the United Kingdom. *This was not the first interpretation but an amended version. In the first version of this law this was transposed as "the person is residing in an EEA State in which the EEA national also resides".

Table 5. *En el país de procedencia* – The country from which they have come and their transpositions.

Observing the transpositions, it could be argued that this segment was ambiguous for both national authorities. This ambiguity was solved in RD 240/2007 by clarifying that the country referred to in the Directive was both the country of origin and non-origin. However, at the same time, this vagueness allowed the UK authorities to transpose this section restrictively in the initial transposition as "*The person is residing in an EEA State*

16 Article 7(4) refers to both partners as follows: "By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or **registered partner**".

17 Real Decreto 987/2015, de 30 de octubre, por el que se modifica el Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo.

in which the EEA national also resides", making the right of residence of these family members conditional upon their prior lawful residence in another Member State. This approach was found to be contrary to the Directive by the Court of Justice of the European Union in the Metock ruling[18] and forced the UK to change the wording to the more general and accurate "*Residing in a country other than the United Kingdom*".

4.2.2 Miembro de la familia a cargo – Dependant/dependent and their transpositions

ARTICLE 3(2) OF DIRECTIVE 2004/38/EC	
Spanish version	English version
Familiares a cargo / estén a cargo	Dependant / dependent
SPANISH AND BRITISH TRANSPOSITIONS OF ARTICLE 3(2) OF DIRECTIVE 2004/38/EC	
RD 240/2007- Artículo 2 bis 1 a) 1.º	The Immigration (EEA) Regulations 2016- Section 8 2(b)
Estén/ vivan a su cargo (del ciudadano comunitario)	*Dependant / dependent*

Table 6. *Miembro de la familia a cargo* – Dependant/dependent and their transpositions.

In this case, since this is an indeterminate legal concept (Bajčić, 2017: 41), the wording of both transpositions is exactly the same as the Directive. Once again this was foreseeable given its indeterminacy, since it could be specifically interpreted depending on the family member to whom the term is applicable. However, this discretion seems to have created some inequalities in practice, especially in those States where "the criteria of what constitutes 'dependency' is non-existent. In those States, the transposing measure gives leeway to the national authorities to apply very different interpretations of the term" (Report, 2016: 42). On the one hand, no reference has been made to the term in the UK transposition, however at the administrative level it establishes that "'Dependent' means that you need the financial help of your sponsor to meet your essential needs".[19] On the other hand, Article 2.bis 4a) of the Spanish transposition states that "the degree of financial or physical dependence of the family member will be considered". Thus, it could be argued that, given the discretion granted, both national authorities have chosen not to include a definition of the term in the transposition. However, the statement in Article 2.bis 4a) of the Spanish transposition, and the administrative definition of the term in the UK, seem to suggest a different understanding of the scope of the term. While in Spain it appears not to be connected only to financial matters, in the UK this seems to be the case.

4.2.3 Pareja/Partner in Article 3(2) and their transpositions

ARTICLE 3(2) OF DIRECTIVE 2004/38/EC	
Spanish version	English version
La pareja con la que el ciudadano de la Unión mantiene una relación estable, debidamente probada./ Pareja de hecho registrada -Article 7 (4)	The partner with whom the Union citizen has a durable relationship, duly attested./ Registered partner Article 7 (4)
SPANISH AND BRITISH TRANSPOSITIONS OF ARTICLE 3(2) OF DIRECTIVE 2004/38/EC	
RD 240/2007 Artículo 2 bis. 1.b)	The Immigration (EEA) Regulations 2016-Section 8 (5)
b) La pareja de hecho con la que mantenga una relación estable debidamente probada, de acuerdo con el criterio establecido en el apartado 4.b) de este artículo.	(5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national, and is able to prove this to the decision maker.

Table 7. *Pareja*/ Partner in Article 3(2).

As can be observed, a different strategy has been followed to transpose this key term into Spanish and British legislation. On the one hand, Spanish authorities have opted for "pareja de hecho" (similar to the terminology used in Article 7(4) of the Directive) while the British authorities have defined this partner by opposing it to "civil partner", given that "civil partner" is the transposed term for "the registered partner" regulated in

18 Case C-127/08 Metock [2008]. See: http://curia.europa.eu/juris/liste.jsf?language=es&num=C-127/08.

19 See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786258/eea_fm_-03-19.pdf.

Article 2(2) of Directive 2004/38/EC. Broadly speaking, in Spain, before the inclusion of Article 2 bis in the RD 240/2007, only partners who were registered were considered partners under EU law. This practical application could be linked to the fact that, in the Directive, the fact that these family members were registered was the common denominator between partners in Article 2 and Article 3 (section 4.1.3), which could have led to the non-transposition of this case and, hence, to a restrictive application in the initial transposition measure. On the other hand, although in the UK the term was transposed correctly, the British authorities also restricted freedom of movement with the restrictive transposition of "*The country from which they have come*" (section 4.1.1). As for the "*relación estable debidamente probada*" or the "*durable relationship, duly attested*" of these partners, while Spanish law prescribed what it meant in the 2015 amendment of the RD 240/2007 in Article 2bis, UK law generally stated that these family members must be able "*to prove this [the relationship] to the decision maker*". This implies that the final decision will be in the hands of the immigration officers at the administrative level (Ruiz-Cortés, 2019b).

4.3 Discussion

In the light of our exploratory findings, it could be argued that both EU law-making and transposition-related factors appear to pose a threat to harmonisation in our case study, as summarised below.

4.3.1 EU law-making factors: drafting, translation and political negotiation

Several EU law-making factors appear to be linked to harmonisation problems in the case presented throughout section 4. It is worth starting with the impact of the *lingua franca* on the language versions studied. As highlighted in section 2, we believe that in the case of this Directive, the *lingua franca* is French.[20] On that understanding, it could be argued that this *lingua franca* has influenced the ambiguous *verbatim* reproduction *país de procedencia* in the Spanish language version, following the *pays de provenance* of the French language version (4.1.1). However, interestingly, even if a diverging translation decision has been adopted in the English version, turning this phrase into a sentence (*the country from which they have come*), it has also resulted in ambiguity; reinforcing our belief that this is a case of EU strategic ambiguity. It is also worth mentioning the case of *dependant* (4.1.2). In this case, the EU drafting decisions to use the Spanish and British immigration law terms in the Directive, and not to provide a definition in the EU instrument, indicate that this is deliberate EU indeterminacy. However, said indeterminacy has resulted in divergent applications of *dependant* across the EU, as highlighted in the following section. Lastly, regarding partners, it is relevant to note that while the drafting decision to keep "registered" for both partners in the English and Spanish versions has only led to transposition problems in Spain (4.1.3); the contravention of formal consistency, only present in the English version (4.1.3), has not resulted in a transposition problem in the UK (4.2.3). Regardless of this, it seems clear that the formulation of partners in this EU instrument is a product of political negotiation within the Union due to a lack of common family models (4.1.3), just as other related terms in this Directive were, such as *spouse.*[21]

Broadly, our findings also show the general surface-level similarity (Šarčević, 2018) between the language versions studied and how the synoptic approach (Robertson, 2012a) is applied for this purpose (4.1). However, despite this general surface-level similarity throughout both language versions, it seems clear that interlingual concordance does not always result in uniform interpretation and application of EU law, as will be highlighted below.

4.3.2 Transposition factors: what to keep, what to add and what to omit

In our analyses it was also apparent that some transposition-related factors could be impacting negatively on harmonisation in the context studied. The first relevant decision to analyse is the general approach used by these Member States when transposing this Directive. Our results in this case study suggest that, generally, different transposition approaches have been used by these countries. While Spain seems to have favoured the copy-out approach, the UK appears to have generally favoured the elaboration approach. However, as can

20 This could also be inferred from our findings in an in-depth study of this Directive (Ruiz-Cortés, 2020). Therefore, throughout this section, we will work with the premise that French is the *lingua franca.*

21 For further discussion see Ruiz-Cortés (2020: 279-281).

be expected, both countries have used both approaches throughout the Directive.[22] Obviously, the elaboration approach, which allows for the rewording of what the Directive prescribes, gives more leeway to transpose a given provision into national legislation. However, our results suggest that, at times, both the UK and Spain have used this approach to restrict citizens' rights. On the one hand, the UK transposed *the country from which they have come* restrictively by adding information which was not present in the Directive (4.2.1). On the other hand, Spain restricted the transposition of partners under Article 3 of the Directive by omitting information in the Spanish transposition (4.2.3). Whatever the case, the end result is that, by adding or omitting, both transposition decisions have caused harmonisation problems in practice. Likewise, in the case of *dependant*, the Spanish and British authorities' transposition decisions have also impacted on the national application of the term. While the UK legislators decided not to make any clarifications of this term by keeping the term undefined, the Spanish legislators included some clarifications to specify how dependency should be understood in terms of EU freedom of movement in Spain (4.2.2). As confirmed by the 2016 Report, this has led to different applications of this term at national level, due to different understandings of what it entails. These different interpretations are permitted, given the leeway required in the transposition process, which entails that harmonisation of transpositions is both a necessity and a contradiction in itself. So how do we strike the balance? Possibly, the red line is crossed when these divergent interpretations restrict citizens' rights, as the 2016 Report (42) suggests is occurring across Member States in the case of *dependency*.

4.3.3 Facilitating or hindering entry and residence?

Bearing all of the above in mind, the question that remains unanswered is: is entry and residence of these family members facilitated in the British and the Spanish contexts in compliance with the general obligation (*facilitará/shall facilitate*) prescribed in the Directive? In the light of our findings, even if the "practical legal-linguistic problems" (Font i Mas, 2017) identified appear to be connected with practical harmonisation problems that occasionally impede said facilitation in both countries (Report, 2016: 41-50), in general, Spain has been more flexible in facilitating them than the UK.[23] This in turn entails that, given the current Brexit situation, these findings have broader implications beyond just harmonisation. In other words, our findings appear to suggest that the UK has had a restrictive approach towards EU immigration over time, even before Brexit was in the picture. Undeniably, this restrictive implementation of EU freedom of movement appears to be connected with the pro-Brexit trend in UK public discourse that depicts EU freedom of movement as an abuse that only benefits EU citizens, while being detrimental to British citizens. However, our findings appear to reject the aforementioned trend, showing that the UK has strived to restrict EU migration since the initial transposition process in 2006 and not as a result of it being an "abuse". Furthermore, as highlighted by Marin Corsanau (2019: 279), those who argue that EU freedom of movement promotes reverse discrimination of British citizens conveniently forget to acknowledge that it was the UK authorities who decided not to benefit their own nationals in terms of freedom of movement in their transposition, as, for instance, Spain did.[24] Whatever the case, this decision by the UK authorities is indeed symbolic, since together with the findings above, it shows that favouring EU freedom of movement has not been a priority for the UK authorities for a long time.

In short, in section 4 we have addressed "practical legal-linguistic problems" (Font i Mas, 2017) that appear to threaten the achievement of harmonised results in the application of the right of freedom of movement in the countries involved. Our analyses have ultimately allowed us not only to draw theoretical conclusions about how the characteristics of EU law and its transpositions may impact on harmonisation, but more importantly, to showcase this by analysing authentic legal instruments that impact on citizens' lives.

22 For further discussion see Ruiz-Cortés (2020: 278-286, 306-312).

23 This could be inferred from the Spanish clarification of what the "the country from which they have come" means or the more flexible Spanish interpretation of the scope of "dependent".

24 For further discussion see Marín Corsanau (2019).

5 Conclusions

Harmonised EU laws extend across different jurisdictions and fields of law, which justifies exploring which factors may hinder achieving harmonised legal effects across the EU. The case study presented above has initially attempted to do so, and even if it shows neither exhaustive nor definite findings, it certainly provides us with data that may be relevant to future studies.

On the one hand, our case study corroborates that an array of supranational and national procedural factors may impact on harmonisation problems in the EU context (our first goal). This has two relevant implications for future studies: (1) that reductionist approaches, such as systematically blaming EU translators (Frame, 2005), should be avoided when addressing this matter, and (2) that transposition-related aspects should not fade into the background compared to EU law-making aspects when studying harmonisation. On the other hand, our case study also illustrates the convenience of the horizontal and vertical legal-linguistic analysis proposed to identify the factors that may pose a threat to harmonisation (our second goal). This entails that, in the future, further collaboration between researchers, from both a linguistic and a legal background (and from both the EU law-making and transposition processes), will be beneficial when addressing harmonisation matters. Undeniably, our initial findings also pave the way for related lines of research to be pursued in the future, some of which may be: (1) to explore the extent to which the problems that lead to a lack of harmonisation are common to the EU official languages; (2) to analyse the extent to which the problematic elements identified are present in directives in other policy fields; (3) to address how our findings may impact on other EU instruments that regulate a number of private law situations with cross-border repercussions, such as Regulations 2016/1103 and 2016/1104 (Gómez Urrutia, 2017; Rodríguez Benot, 2019); or (4) to examine the impact of the administrative application of EU law on harmonisation problems.[25]

In conclusion, since EU law currently "affects most areas of the citizens' daily lives" (Strandvik, 2018: 52) exploring harmonisation problems in practice is indispensable to actually determine how citizens exercise their rights. The right to move and reside freely across the EU is a clear example, since despite being one of the cornerstones of Union citizenship, harmonisation problems result in citizens exercising this right unequally based on the State in which they intend to reside. Therefore, our results suggest that the implementation of freedom of movement and residence appears to remain a challenge in the EU context and that, currently, the severe consequences of the abovementioned unequal treatment are suffered by an already vulnerable group of society, i.e. migrants. These facts call for future studies to foreground the need to strengthen this right, at least if we seek to work towards a real EU integration policy that guarantees that citizens may exercise their right to freedom of movement and residence on an equal footing.

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25 In fact, the 2016 Report highlights that several administrative obstacles to the right to freedom of movement appear to persist in the EU context. In our case study, it will be relevant to examine, for instance, how partners prove their relationship to the decision makers in the administrative sphere (4.2.3.).

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