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# **Guided “LegislEUlab” on the Drafting of Multilingual Legal Provisions in the EU:**

## **Concept of the Cologne Summer School for European Legal Linguistics**

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## ABSTRACT ENGLISH

Legal training at German universities does not cover the practicalities and challenges of lawmaking. The innovative concept of the Cologne Summer School for European Legal Linguistics “LegisEUlab” encompasses the transdisciplinary teaching, simulation and analysis of the EU legislative procedure. The participants are students of law and translation from various EU Member States. In mixed teams, they prepare their own drafts, implementing the materials of a current proposal for an EU legislative act. They develop an awareness and deeper understanding of linguistic structure, multilingual drafting and its legal effects, comprehensibility of legal provisions and their interpretation and application.



## ABSTRACT DEUTSCH

Die juristische Ausbildung an deutschen Universitäten vermittelt nicht Techniken und Herausforderungen der Rechtsetzung. Das innovative Konzept der Cologne Summer School der Europäischen Rechtslinguistik “LegisEUlab” umfasst die Lehre, Simulation und Analyse des EU-Gesetzgebungsverfahrens von einem transdisziplinären Ansatz aus. Die Teilnehmenden sind Studierende von Rechts- und Translationsstudiengängen aus verschiedenen EU-Mitgliedstaaten und arbeiten am Material eines aktuellen Vorschlags für einen Rechtsakt der EU in gemischten Teams eigene Entwürfe aus. Dabei entwickeln sie ein Bewusstsein und tieferes Verständnis für sprachliche Strukturen, die mehrsprachige Abfassung von Rechtsakten und deren Rechtswirkung, Verständlichkeit von Rechtsvorschriften sowie deren Auslegung und Anwendung.



## ABSTRACT FRANZÖSISCH

La formation juridique aux universités allemandes ne couvre pas les techniques et les défis que pose le processus législatif. Le concept innovant de la Cologne Summer School de Jurilinguistique Européenne « LegisEUlab » englobe l’enseignement, la simulation et l’analyse de la procédure législative de l’UE selon une approche transdisciplinaire. Les participants sont des étudiant(e)s en droit et en traduction de différents États membres qui, au sein d’équipes mixtes, élaborent leurs propres propositions basées sur les matériaux d’une proposition actuelle d’un acte juridique de l’UE. LegisEUlab vise à faire naître une prise de conscience et une compréhension plus approfondies des structures linguistiques, de la rédaction multilingue et de ses effets juridiques, ainsi que de la compréhensibilité des dispositions juridiques, de leur interprétation et de leur application.

## Contents

- 1 Conceptualization of the Cologne Summer School for European Legal Linguistics
  - 1.1 Background and Motivation
  - 1.2 Concept of LegisLEUlab
  - 1.3 Examples of tasks
- 2 Discussions and results
  - 2.1 Legal issues
  - 2.2 Linguistic issues
- 3 Benefits of LegisLEUlab
- 4 Resume
- 5 References

# 1 Conceptualization of the Cologne Summer School for European Legal Linguistics

## 1.1 Background and Motivation

<1>

Simulations of legal practice in the education of lawyers and lawyer-linguists typically focus on court proceedings in the form of Moot Courts<sup>1</sup>. By contrast, lawmaking plays a minor role as only basic procedural rules are taught and (occasionally), political arguments discussed.<sup>2</sup> But the practicalities of lawmaking, i. e. the intricacies of carefully drafting clear and comprehensible laws, debating legal texts sentence-by-sentence, having regard to intertextuality and verbalising the level of compromise among a diverse set of political parties and institutions are largely unknown to students of law or legal linguistics.<sup>3</sup>

<2>

This is all the more true for the specific challenges of the European Union legislative procedure with its multitude of political stakeholders from different Member States and its inherently multilingual approach. Therefore, in 2020, the 2<sup>nd</sup> Cologne Summer School for European Legal Linguistics devised an innovative concept to teach, simulate and analyse the EU legislative procedure from a transdisciplinary perspective: LegisEUlab.

## 1.2 Concept of LegisEUlab

<3>

In LegisEUlab, students from different Member States and academic backgrounds work on a current proposal for a new EU Regulation or Directive. In 2020, the recast of the Directive on the return of illegally staying third-country nationals was chosen<sup>4</sup>. In 2021, the instruction and tasks revolved around the proposal for a Data Governance Act (DGA)<sup>5</sup>.

<4>

Participants are Bachelor or Master students of national and bi-national law, European Legal Linguistics and translation. They form four transdisciplinary teams of three members each in order to peer-teach their fellow members knowledge and methods of their discipline. In addition, the teams are mixed as to the languages the participants have command of, e.g. German, French, Spanish, Polish, Hungarian, Czech, Italian, Portuguese, Finnish, Dutch and

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1 See SIEFERT (2014) for a German-British perspective; DALY/HIGGINS (2011) for an Irish study. Earlier German reflections on Moot Courts include BAUM (1993) and date back to WEGEN (1978).

2 Cf. STEINHOFF (2018) for examples of legal policy debates in education and KLAFFKI (2019) on the need of more innovative teaching methods in public law.

3 For positive examples, HAMANN (2020: 74-80); cf also the upcoming "Brussels' World Simulation", <https://bws-game.eu>.

4 Commission proposal (submitted on 12.9.2018) for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) (COM(2018)0634).

5 Commission proposal (submitted on 25.11.2020) for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act) (COM(2020)0767).

English, with an international student in each team. Each team is assigned the role of one party in the EU's legislation procedure: Commission, Council, Parliament and Member States.

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The summer school is dispersed over three phases; in total it takes about six months.

The first remote phase starts with introductory courses in legal linguistics as well as the legislative procedure of the EU, the stakeholders involved in it and the materials produced in the course of the procedure. The former comprises an introduction to General Linguistics with basic morphology, syntax, semantics and pragmatics, and uses comparative examples from the EU's official languages, EU legal acts and Opinions of the Advocates General.

In the ensuing supervised preparatory phase, the students familiarize themselves with the materials, take on their role in order to work online on the tasks given to them and prepare a presentation of their results.

During the attendance phase in Cologne, Bonn and Brussels, professionals from different EU institutions provide further input from their daily practice in legal translation and revision as a lawyer-linguist. The students collaboratively work on additional tasks, develop their own multilingual text proposals and discuss issues of translation, comprehensibility and divergences in the language versions. They experiment with different wordings, debate political stances and accept or reject potential solutions. Arising legal and linguistic issues are recorded for further analysis. The team's results are discussed in plenary.

In the second remote phase, the participants prepare their results for publication and hand in an essay, for which they are awarded a certificate of participation.

### 1.3 Examples of tasks

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1. Evaluate the Commission proposal for the Recast Directive, as compared to the current Directive 2008/115/EC. Why does the Commission think that a new text is necessary? Does the new text reflect the lessons learned from the application of Directive 2008/115/EC (based on the Commission's own findings; stakeholder and/or expert input; Court cases etc.)?
2. You are representing the European Commission in the trilogue negotiations with the European Parliament and the Council and have been asked to come up with a compromise proposal on Article 6 (Risk of absconding).
3. Compare the terminology used in the Directive to national terminology in the Member States. Are the legal definitions congruent? Could misinterpretations occur?
4. Analyse the divergences arising from the use of the connectors 'and', 'or', 'and/or' and their corresponding expressions in different official languages, especially the broader range used in Hungarian and Polish. Do they have any legal effects?

5. Look for corresponding expressions of conflicting provisions in the DGA. Paraphrase in your own words what exactly the expressions mean. See also the *Joint Practical Guide*<sup>6</sup> and national drafting guidelines on that topic.

## 2 Discussions and results

### 2.1 Legal issues

<7>

During the LegisEUlab 2020 and 2021, a multitude of legal issues were discussed. Some of those issues were taken from the existing legislative materials, others were discovered only during the Summer School. This merited further research, which is being published on a continuing basis in the *Kölner Publikationsreihe Europäische Rechtslinguistik*.<sup>7</sup>

Some salient examples from both Summer Schools will be sketched in the following:

<8>

Regarding the Commission's proposal for a new Return Directive (COM(2018)0634), teams analysed the interplay between legislation and the case law of the Court of Justice of the European Union (ECJ) and the European Court of Human Rights (EtCHR). The analysis of several judgments of the ECJ on the preceding Directive 2008/115/EC showed that the Commission did not take all the issues discussed by the Court into account. While the problems that were brought to the fore in Cases C-18/19 and C-180/17<sup>8</sup> were arguably resolved in the recast directive, the divergent German wording that gave rise to the Joined Cases C-473/13 and C-514/13<sup>9</sup> remains unchanged in the Recast proposal, Art. 19 (see < 12 >).

The participants experienced the underlying conflict between an effectiveness-oriented and a rights-based approach to the return of foreign citizens, which was also evident during the simulated negotiations, and is still unresolved.<sup>10</sup>

<9>

The seemingly interchangeable indefinite legal terms "public policy" and "public order" and their history and intertextuality came to our attention (cf. HEINEMANN/DILLMANN 2021; DILLMANN 2021; KESSEDJIAN 2007: 26) due to the striking substitution of "public policy" to "public order" by the Council in its partial general approach<sup>11</sup> and the central role of the

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6 European Parliament/Council of the European Union/European Commission (2016): *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* [in the versions of all official languages].

7 For LegisEUlab 2020, see BURR-HAASE/DILLMANN/HEINEMANN/MATTISSEN (eds.) (2021).

8 Judgment of 2 July 2020, Case C-18/19, *Stadt Frankfurt am Main*, ECLI:EU:C:2020:511; Judgment of 26 September 2018, Case C-180/17, *Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2018:775.

9 Judgment of 17 July 2014, Joined Cases C-473/13 and C-514/13, *Bero and Bouzalmate*, ECLI:EU:C:2014:2095.

10 See DIAZ CREGO (2021); for a recent criticism of the proposal see MAJCHER/STRIK (2021).

11 Partial general approach, agreed on 7.6.2019, document 10144/19, <https://data.consilium.europa.eu/doc/document/ST-10144-2019-INIT/en/pdf>.

terms in the ECJ case C-554/13.<sup>12</sup> As the Court chose not to make any reference<sup>13</sup> to the semantic analysis by Advocate General SHARPSTON in her Opinion,<sup>14</sup> one may hypothesize that this is paradigmatic of two general interpretive strategies (cf. VAN DER JEUGHT 2018: 12). One sees the wording as crucial for the meaning of a legal term and consequently a clear definition of the term in question as critical for application. The other finds a provision's object and purpose (or context) to be decisive. In a final twist, in some cases it is the latter strategy that *decides* how relevant the former is (cf. KRAMER 2019: 203): sometimes the purpose of a legal term is to be (maximally) open for evaluative interpretation, sometimes its purpose is to (clearly) describe the object or situation to be regulated (as is typical in criminal law).

<10>

During the 2021 Summer School, similarly complex issues were uncovered and discussed, among them the compatibility of legal acts in a complex regulatory environment and the difference and effects of delegated vs. implemented acts.

## 2.2 Linguistic issues

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The participants of LegisEUlab 2020 and 2021 started an engaged research on terminological, morphological and syntactic issues of the respective proposals and related texts. The results of 2020 are documented in the summer school proceedings (BURR-HAASE/DILLMANN/ HEINEMANN/MATTISSEN (eds.) 2021).

In particular, the multilateral translational equivalents of the essentially non-legal concept of 'compassionate reasons' and their transpositions into national law (Directive 2008/115/EC, Art. 6(4); MATTISSEN/FERRING 2021) were discussed, as well as the non-legal concept and term 'altruism' in the DGA.

<12>

The analysis of the use of modal expressions (such as 'can', 'may') showed, on the one hand, that modal verbs, modal suffixes (as in Hungarian) and periphrases are distinct in form, but congruent in function, and on the other, the different ways they are used in the two text genres within a legal act, the recitals and the enacting terms, as well as some inconsistencies in the corresponding expressions.

In Directive 2008/115/EC, Art. 16 the **existential** expression "sind [...] solche speziellen Hafteinrichtungen nicht vorhanden" (lit.: 'where such specialised detention facilities do not exist') in the German version diverges from the **capacity** expression ('cannot provide accommodation') in all other language versions because of the presupposition missing from

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12 Judgment of 11 June 2015, Case C-554/13, *Zh. and O.*, ECLI:EU:C:2015:377.

13 C-554/13, para. 29-36; in contrast, the Court did at least take note of a difference between language versions regarding the terms "risk" and "danger, see para 58.

14 Opinion of Advocate General SHARPSTON of 12 February 2015, Case C-554/13, *Zh. and O.*, ECLI:EU:C:2015:94, para. 29, 31.

the **existential** expression that Member States are expected to create such special facilities (cf. MATTISSEN 2021b). This linguistic analysis could have helped to explain the difference between the versions in the ECJ Joined Cases C-473/13 and C-514/13. Although the issue had been known prior to the recast proposal, the latter continues the German wording without a correction (which would have had to be issued before the recast proposal was drafted).

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The main linguistic insights gained by the participants can be summarized as follows:

- There are four-fold language levels of concepts and terminology, viz. common language, national legal language, supranational legal language and the language for special purposes of the field regulated by EU provisions.
- Syntactic and lexical structures (including verbalisation of concepts) are language-specific. Etymologies never have an explanatory value in legal interpretation, as the meaning of a term is what it meant at the point of time the provision containing it was written.
- Ambiguities arise from syntactic structure and can be avoided by restructuring the sentence.
- There are more than just the cumulative and the alternative senses of the conjunctions 'and' and 'or' -- a frequent source of divergences -- as well as a larger choice of coordinating conjunctions cross-linguistically (cf. also MATTISSEN 2019, 2021a).
- There are various translational strategies for documents of the ECJ: the translation of a citation from a legal act within an Opinion may respect the original wording of the underlying legal act in the language analysed, or the respective wording in the language the interpretational text is written in, or the respective wording in the language translated into (cf. MATTISSEN 2020: 63f).

### 3 Benefits of LegisEUlab

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LegisEUlab offers the participants the opportunity to develop an awareness for the structural differences of the official languages of the EU that pose difficulties for formulating semantically convergent provisions, an awareness for linguistic constructions and the legal effect that may emanate from them, and the different interpretational approaches by legal professionals in the Member States. Such awareness is the foundation of clear and comprehensible drafting.

< 15 >

In addition, the participants get into contact with practice and professionals with a view to their own professional opportunities. As the results of LegisEUlab are shared with the experts of the EU institutions involved, relevant findings can be used for further drafting.



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Knowledge of the practical aspects of lawmaking also improves the participants' abilities to meet the challenges of the legal profession. A key aspect of working with laws is understanding legislative intent and, in the course of that, legislative history.<sup>15</sup> Whether a recourse to it is permissible in the interpretation of law is subject to a long-standing debate among legal theorists.<sup>16</sup> Regardless of this debate, legislative history merits study: its analysis often reveals that many debates among courts and academics are mere continuations of those among lawmakers, e.g. the use of vague or precise wording. Because lawmakers engage (at least tacitly) in an "anticipation of interpretation"<sup>17</sup> or may even deliberately choose to let courts settle debates the legislature could not, legislative history and material are required reading for the judge and rich sources of creative arguments for the lawyer.<sup>18</sup>

< 17 >

This is all the more true for the law of the EU. Its complex legislative procedure is typically seen as an explanation for the scant use of arguments from legislative history in the case law of the ECJ (WEGENER 2016: pt. 14). For such arguments to be of any use, a deeper understanding of the Union's legislative process is necessary (cf. RIESENHUBER 2021: 303-310). The Cologne Summer School for European Legal Linguistics is both evidence of this and an attempt to foster it.

## 4 Resume

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The Summer School for European Legal Linguistics LegisLEUlab is a concept aiming at enhancing legal training by providing insights into the European Union's legislative procedure and into the challenges of multilingual lawmaking. The results of the three Summer Schools for European Legal Linguistics that have been conducted to date show that the participants benefited a great deal from the format. In addition, the organisers themselves drew thought-provoking impulses for further research from them. As the results are shared with the professionals in the European institutions who generously shared their expertise with the participants, they foster the dialogue and exchange of knowledge between theory and practice in the interest of the quality of drafting and interpreting law.

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15 KRAMER (2019: 203); see also FRÜH (2021) and CESARINI-SFORZA (1966: 4).

16 Only examples can be pointed out here. For the standard view taught in German law faculties, see MUTHORST (2020: 106-117), the *locus classicus* is perhaps LARENZ/CANARIS (1995: 149-153). See SCALIA/GARNER (2012: 369-390) for the powerfully argued, albeit conservative American view that legislative materials are useless for any interpretation, and THOMALE (2013: 423-424) for a criticism. Cf. also FRIELING (2017) and SEHL (2019) for contemporary German research on the issue.

17 For an interesting study on such anticipation in the drafting of the European Central Bank (ECB) opinions, see ELDERSON (2005: 112-114); cf. also SEHL (2019: 157-168).

18 FRIELING (2017: 120); for evidence of this in the Commission's proposal for a Digital Services Act (COM(2020) 825 final) see JANAL (2021: 237).

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Cologne Summer School for European Legal Linguistics websites

<https://erl.phil-fak.uni-koeln.de/css-erl2>

<https://erl.phil-fak.uni-koeln.de/css-erl3>