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Talking law in the EU: Clear language, rule of law and legitimacy in the European legal space

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Corina Andone
University of Amsterdam, the Netherlands

Candida Leone
University of Amsterdam, the Netherlands

Corina Andone is an Assistant Professor of Language and Communication and research leader of the PERSUADE group at the Amsterdam Centre for Language and Communication, the Netherlands. She carries out interdisciplinary research into the persuasive use of language in the legal and political contexts. Email address: c.andone@uva.nl

Candida Leone is an Assistant Professor of Private Law at the Amsterdam Centre for Transformative Private Law, University of Amsterdam, the Netherlands, where she focuses on European Private Law and different paradigms in, in particular, contract law and theory. Email address: c.leone@uva.nl

From 21 to 22 January 2021 the University of Amsterdam hosted an interdisciplinary conference organised by Corina Andone (Faculty of Humanities) together with Candida Leone, Anna van Duin and Iris Domselaar (Faculty of Law) on Talking law in the EU: Clear language, rule of law and legitimacy in the European legal space. The main rationale behind this conference rests on the idea that clear legal language is seen as a precondition, or an instrument, to bridge the gap between citizenry and governments, particularly in an increasingly dense legal space, such as the European Union (EU).

The organisers sought to bring together legal and linguistic perspectives on language in EU law. Accordingly, the conference reunited a number of contributions from these two perspectives which helped explain the essential factors affecting the working and effectiveness of EU legal language, and look for appropriate ways to address them. Academics interested in ethical and societal aspects of legal communication, legal scholars, judges and policy-makers from all over Europe – including the European Commission and policy experts from several

national governments – attended the event and contributed through presentations, comments and questions to the discussions.

First, a general panel concentrated on the conceptual question of what "clear language" means in law – within national contexts and that of the EU – and discussed the conditions under which it can perform a legitimising function. Zsolt Ződi (National University of Public Service, Hungary) discussed some considerations for comprehensible law. Based on a brief history of comprehensibility in law, Ződi demonstrated that the increasing complexity of law – due to factors such as, for example, technical language, its interpretative character, the heterogeneous character of interconnected texts – makes it practically almost impossible to achieve the ideal of comprehensible language. On this basis, he submitted that a more differentiated approach, such as a problem-oriented explanation, example or checklist, are a better option than rewriting the text of the law itself. Hanneke van Eijken (University of Utrecht) used examples from case law on free movement and EU citizenship to exemplify how the law can feel as a labyrinth to citizens. Language is the bridge to the outer world; it gives citizens the opportunity to express themselves, to analyse information. In a world of misinformation, with different voices that want to be heard, it can be difficult to understand one's own position. Van Eijken argues that the right to language and cultural diversity might sometimes challenge the right to free movement as well.

Second, four successive panels brought to light the role, practices and challenges of clear language in different institutional constellations, including legislation, adjudication, non-legislative rule-making and transparency and comprehensibility as a regulatory tool. Helen Xanthaki (University College London) argued for reforming EU legislation to regain a sustainable EU. She pleaded in particular for the 'easification' of EU language, i.e. the manner of expression and presentation of legislative communication that enhances accurate receipt by tailoring different formats to different target audiences. In her view, legislation can re-establish the lost channel of communication between EU citizens and the EU, and can render EU citizens participants to EU regulation and ultimately to the EU's long-term vision. Laura Tafani, (formerly at Senato della Repubblica Italiana), started from the observation of an increasingly poor quality of legislation, in Italy as in other European countries, which has led to citizens experiencing disaffection towards regulatory instruments and, at the same time, mistrust in the institutions responsible for producing, implementing and enforcing legislation. Speaking of a crisis of law, she pleaded for an increase in transparency of the legislative process and enabling citizens and stakeholders to take part in it, thereby restoring confidence in legislation. In order to achieve concrete results, it is necessary to bring together in the legislative rule-making

process different professional skills and knowledge: legal, linguistic, economic-financial, statistical, social and even behavioural sciences. This will shape legislative intervention geared towards making regulatory acts as capable as possible of producing a phenomenon of spontaneous compliance with the objectives set by the legislation.

The second panel discussed transparency as a policy tool, that is as a requirement for non-government parties to operate their (market) activities. Marissa Ooms (Tilburg University) had as a primary concern the operation of transparency in practices of mineral supply chain due diligence reporting and auditing. In this context, "transparency" is produced through the language of the risk-management system – a language that is inherently abstract and likely unclear to most citizens. Although the stated purpose of reporting and auditing is to generate public confidence in ethical mineral supply chains, the public plays a passive role in this transparency exercise. She argued that this suggests that practices of due diligence reporting and auditing have an internal orientation, which is to say that transparency functions primarily to disclose the corporation to itself. Joasia Luzak (University of Exeter) focused on transparency in consumer law and provided guidelines for such transparency. She discussed the role of transparency in relation to the regulatory aims which it is attached to. In certain cases it is possible that transparency will operate as a "vaccine", by allowing consumers to react to the disclosure of noxious corporate practices. Sometimes, transparency operates in practice as a cure-all, a signpost which only serves to reinforce the regulator's intention to clean up a certain area of market action, or ultimately as a placebo. Luzak argued that each of these functions, ultimately, have a role to play towards the pursuit of better-informed citizens. Sometimes, however, as also highlighted by Ooms, compliance-oriented transparency serves at best some internal purpose and has no effect on its intended audience or beneficiaries.

Alexander Flückiger (University of Geneva) turned to soft law, and asked whether such law can, should or must be clear. He argued that the notion of soft law is unclear, as it is a notion which cannot be clear. At the same time, soft law instruments should be drafted in such a way that they are not unnecessarily ambiguous as to their own legal nature. In soft law, like in traditional law, the notion of clarity also presents intrinsic challenges: clarity, in this context, entails a need to ensure a fair balance between linguistic clarity and normative clarity. Corina Andone (University of Amsterdam) and Florin Coman-Kund (Erasmus University Rotterdam) turned to the European Commission's soft law instruments during crisis, and started from the premise that EU soft law instruments should presumably be effective mainly due to the argumentation employed to persuade addressees to comply. By pointing at a number of significant legal problems and concerns for the quality of EU law-making deriving from the

Commission's 'hardened' soft law instruments, the presenters argued for an approach that goes beyond a purely legal account. In an attempt at solving the current legally problematic ambiguities arising from the use of soft law instruments, a normative approach was proposed focusing on soft law instruments as highly persuasive instruments. Danai Petropoulou Ionescu and Mariolina Eliantonio (Maastricht University) drew some lessons from linguistics on the bindingness of soft law in EU environmental regulation. Relying on a survey of different soft law instruments, their use of language and declared non-bindingness, the presentation explored how EU soft law instruments convey authority and influence the behaviour of their addressees establishing, *de facto*, a perception of bindingness beyond legal obligation. Overall, the panel conveyed a strong impression that law-like language in soft law instruments is a popular feature (or a shortcut) that deserves closer scrutiny and possibly reconsideration in light of the limited democratic and political legitimacy enjoyed by soft law instruments.

André Verburg, judge and legal scholar at Utrecht University, discussed plain language in court decisions. He discussed three societal changes: responsiveness by the judge as a professional being asked to make a decision who needs to address all reasonable requests; procedural justice, that is the need for parties to experience proceedings as fair and just; personal – rather than institutional – legitimacy, requiring the establishment of effective communication with the citizens. Finally, Iris van Domselaar (University of Amsterdam) engaged with the notion of the judge as a "civic friend" of the parties. Judgments can be framed, and termed, as a communicative act addressing real existing people. Addressing those affected by a judgment in a more direct form can help address the moral remainder implied in (some) judgments, thus enhancing its legitimation or perceived legitimacy, but it can also be seen as a loss of impartiality. Much as with legislation, the question of changing audiences seems crucial to linking language and legitimacy in contemporary rule-based democracies.

Building on the presentations and fascinating discussions with the audience on topics as the Scandinavian plain language projects and the motivation style in judicial decisions rejecting the former US president's attempts to undo the November 2020 election results, the event marked a moment of real interdisciplinary exchange and cooperation. It enriched the debate on plain legal language and informed this debate, with both theoretical and practical insights from the areas of law and linguistics. We hope that, together with the output it will generate, the conference will contribute to the understanding of law as a discursive and socially grounded practice in the EU legal space. In line with this ambition, a selection of the contributions in this event will be included in a special issue of the journal *The Theory and Practice of Legislation*.