

MULTILINGUAL LAW AND JUDICIAL INTERPRETATION IN THE EU*

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Summary: The purpose of this article is to assess how multilingualism affects judicial interpretation of EU law. In the EU, the European Court of Justice is in the position of having the final say on what EU norms mean. Therefore, the article looks into the case law of that Court. It is well known that all official EU languages (23 of them at present) are authentic languages. Less known is what the related consequences are for interpretation in judicial proceedings. The first aim of the article is to find out what consequences the ECJ has drawn from this fact. Secondly, even though in some cases (eg CILFIT) the ECJ has postulated language comparison as a necessary step in construing the meaning of EU law, it is clear that such comparisons are not performed on a regular basis. Therefore, the article looks into when, on whose initiative, and for what purpose the Court performs a comparison of the same EU norm(s) expressed in different languages. The article then looks into what the Court does if discrepancies in different language versions are found, and concludes that such a problem is overcome by looking for the purpose of a legal norm. Finally, it is found that multilingualism does not significantly affect the manner and outcome of interpretation by the ECJ.

1. Introduction - on judicial interpretation

This article considers judicial interpretation, understood as the way in which the courts establish the meaning of legal rules. The use of the word 'establish' rather than 'find' is intentional in my description of what judicial interpretation is. It suggests that the meaning of legal rules is not given, but rather depends both on the context and the interpreter.¹

This article takes as given that law, even if expressed in a single language, always requires interpretation before it is applied. This is so because, if for nothing else, law is, in the great majority of cases, ex-

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¹ J Engberg, 'Statutory Texts as Instances of Language(s): Consequences and Limitations on Interpretation' (2004) 29 (3) *Brook J Intl L* 1135, 1149.

pressed in words. If words were simple carriers of a single meaning, then interpretation would not be an issue. Interpreting law would simply mean looking into dictionaries to find the single meaning of each word in the phrase, and we would have the legal truth. There are theories, such as the strong language theory, which believe in the objectivity of words, and therefore also of legal rules.² In contrast to this view, there are those who start from a different premise, according to which words do not have a single determinate meaning, either in everyday life or in legal rules.³ Just as in everyday life, the meaning of words in law depends on the context and the interpreter. This makes the job of judicial interpretation a complex exercise.

One big difference, though, between the words in everyday life and the words in legal norms is that legal norms do have a final interpreter of their meaning. Due to their institutional position in the legal systems, courts, or at least the highest courts, are in a position to determine the meaning of the words of a legal norm with binding authority, which no one can shake without changing the norm itself. This places a great deal of power in the hands of the courts. At the same time, given the indeterminacy of meaning, it is difficult to understand and, therefore, to control the process in the courts when they interpret legal rules. As stated by Brown and Kennedy in a description of the process of judicial interpretation in the European Court of Justice, 'interpretation of law is in no way an exact science but rather a judicial art. In the end, it is a matter of judicial instinct, and because the judge proceeds instinctively, the process cannot be reduced to a series of mechanical rules'.⁴

All this makes the topic of judicial interpretation an important and fascinating topic. There are many questions linked to the issue of judicial interpretation: what do the courts do when interpreting the law, what informs their final construction of meaning, what should inform their final construction of meaning, are there any boundaries to the judicial construction of law, and, if so, where are these boundaries, how is judicial interpretation legitimised in a democratic society? There are also many other such questions. However, as law is expressed in words, words are the very beginning of every judicial interpretation, and therefore an investigation into the topic of judicial interpretation must start from the significance of words in this process.

² Engberg (n 1) 1140.

³ M Rosenfeld, 'Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism' in D Cornell, M Rosenfeld and D G Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, New York & London 1992).

⁴ LN Brown and T Kennedy, *Brown&Jacobs: The Court of Justice of the European Communities* (Sweet & Maxwell, London 2000) 323.

Unlike most legal systems, the law of the European Union is written in many languages. At the moment, with 27 Member States, there are 23 official EU languages. The question raised in this paper is how does the fact that the words in EU law are expressed in many languages affect, if at all, the judicial interpretation of that law?

In the European Union, the European Court of Justice (ECJ) is in the position of final interpreter of the meaning of European legal norms. Even if this is not stated expressly anywhere in the Treaties, the ECJ has acquired the authority of final interpreter of EU law due to its role in the preliminary ruling procedure, as regulated in Article 234 TEC.⁵ In other words, it is this Court which construes the meaning of the words contained in EU legal norms with binding authority. This does not mean that others - citizens, businesses, other EU institutions, national institutions, including national courts - do not interpret EU law. They do so daily, as they cannot apply it without interpretation. However, their construction of the meaning of EU norms is valid only as long as someone else does not bring it into question. Contrary constructions of meaning attributed to the same EU legal norm can finally be resolved only by the ECJ.

This article, therefore, looks into the case law of the ECJ to answer the question how multilingualism influences the interpretation of EU law. It analyses the cases in which the Court undertook a comparison of different language versions, and considers how the conclusion that they differed or did not differ influenced the outcome - the final meaning given to the terms.

2. The starting point - all EU languages are authentic

According to Article 33 of the Treaty on European Union (TEU), and Article 314 of the Treaty on the European Community (TEC), all languages in which the Treaties are written are original languages.

Of course, in reality, the text of the Treaties was not negotiated and written in all these languages, but at most in the languages of the States that were members of the EC/EU at the time of the adoption of the relevant text. Languages of the new Member States are made original languages by legal fiction. Technically, this is done through the Accession Treaties, which add new languages to the lists enumerated in the Founding Treaties. In the last two waves of enlargement, this was done through Article 61/2 of the Act of Accession (2003), which added 10 new languag-

⁵ T Čapeta, *Sudovi Europske unije - nacionalni sudovi kao europski sudovi* (IMO, Zagreb 2002) 179-296.

es,⁶ and Article 60/2 of the Protocol on Conditions for Admission (2005), which added Bulgarian and Romanian.⁷

Secondary law of the EC/EU is also authentic in the languages of all Member States. This is stated in Article 4 of Regulation No 1 which determines the languages to be used by the European Economic Community, as amended by all Acts of Accession. Article 58 of the Act of Accession of ten states, signed in 2003, is an example of how new languages are added as authentic:

The texts of the acts of the institutions, and of the European Central Bank, adopted before accession and drawn up by the Council, the Commission or the European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of accession, be authentic under the same conditions as the texts drawn up in the present eleven languages. They shall be published in the Official Journal of the European Union if the texts in the present languages were so published.

Thus, the law of the European Union is, at present, authentic in 23 official languages in its 27 Member States. What does that mean for the European Court of Justice when interpreting legal norms belonging to this legal order?

Firstly, the fact that law is expressed in 23 different ways does not mean that it may have 23 different meanings. The EU legal norms are norms common to all Member States and in all of them they need to have the same consequences. Thus (even if this probably does not need a separate statement), in its interpretive effort, the ECJ has the task of finding one single meaning for all 23 linguistic versions of EU legal norms. In a way, especially if there are semantic differences between different language versions, the Court's task is to 'transcend the written text'⁸ or, in the EU context, the written texts.

Secondly, as wittily noticed by the Advocate General Lagrange, the statement that all languages are authentic means that no single one of them is authentic.⁹ This consequently means that in establishing uni-

⁶ Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded [2003] OJ L236/33 of 23 September 2003.

⁷ Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union [2005] OJ L157/29 of 21 June 2005.

⁸ T Klimas and J Vaiciukaite, 'Interpretation of European Union Multilingual Law' (2005) 3 *International Journal of Baltic Law* 1, 10.

⁹ Opinion of Advocate General Lagrange in Case 13/61 *Kledingverkoopbedrijf de Geusen Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* [1962] ECR 47, 70.

form meaning, no language may be given preference in relation to any other language, notwithstanding the size of the State or the number of people in Europe who understand that language. The practice of the ECJ has confirmed this position.

One example is case C-296/95 *EMU Tabac and Others*.¹⁰ It concerned the interpretation of Council Directive 92/12/EEC related to excise duties.¹¹ The question was whether a person who bought cigarettes in Luxembourg and imported them through an agent into the UK for private consumption should pay UK excise duties (which were higher) or excise duties under Luxembourg regulations (which were lower). The Directive provided that if goods were for private consumption, only the excise duties of the state of purchase were payable. However, this was conditioned by the requirement that goods were bought and transported by the person who needed them for private consumption. The question arose about whether this could be done through an agent. The applicants, who were the person who bought the cigarettes and the companies involved in the scheme, enumerated several language versions of the Directive - English, French, Italian, Spanish, German, Dutch and Portuguese - claiming that they did not exclude the possibility of buying and transporting goods through an agent.¹² The Court found that two language versions - Danish and Greek - used wording which clearly required that transportation be effected personally by the purchaser of the products subject to duty in order for the duty to be payable in the country of purchase.¹³ Since this was not in their favour, the applicants claimed that if

those versions are not consistent with the other versions they are to be disregarded, on the ground that, at the time when the Directive was adopted, those two Member States represented in total only 5% of the population of the 12 Member States and their languages are not easily understood by the nationals of the other Member States.¹⁴

The Court rejected such arguments, stating, among other things:

[...] all the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size

¹⁰ Case C-296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* [1998] ECR I-1605 (*EMU Tabac*).

¹¹ Council Directive (EEC) 92/12 of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [1992] OJ L76/1, as amended by Council Directive (EEC) 92/108 of 14 December 1992 [1992] OJ L 390/124.

¹² *EMU Tabac* (n 9) para 28.

¹³ *EMU Tabac* (n 9) para 33.

¹⁴ *EMU Tabac* (n 9) para 34.

of the population of the Member States using the language in question.¹⁵

Even though the wording “in principle” which found its way into the Court’s decision is puzzling, the quoted lines still reflect the Court’s position that all languages have equal value. This is so, notwithstanding whether the State is big or small, or whether or not the language is one of the more widely spoken languages. Such a position has been confirmed by subsequent case law of the Court of Justice.¹⁶

Thirdly, it does not matter whether some language versions are in reality translations. In fact, many legal rules contained in both primary and secondary EU law expressed in the languages of the countries that joined the EU after the adoption of such rules are translations. However, this is legally irrelevant. When interpreting EU law, the Court disregards that some versions are translations. This does not give lower value to such a language version.

Thus, for instance, in case C-63/06 *Profisa*,¹⁷ the Lithuanian Supreme Administrative Court noticed that the Lithuanian version of Council Directive 92/83/EEC on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages¹⁸ differed from other language versions. Lithuanian accession to the EU occurred in 2004, and the Directive at issue had been adopted in 1992. Thus, the Lithuanian version was certainly a translation. However, the ECJ did not discard this language version on account of its being only a translation. Even though, in the end, the meaning attributed to the legal rule at issue differed from the meaning as interpreted by the Lithuanian Court in the Lithuanian language, this was because the meaning was construed in the light of the purpose of the Directive, and not because the Lithuanian language was ignored and that other language versions prevailed.

Finally, as the Court cannot give preference to any one language version, it can likewise not assume that the meaning as attributed to the majority of language versions is correct. Thus, even if all the languages but one point to a certain meaning, the Court does not conclude that the meaning streaming from the majority of the language versions is the correct one. It can even happen that the meaning as it exists under the minority of language versions turns out to be the appropriate meaning of

¹⁵ *EMU Tabac* (n 9) para 36.

¹⁶ See, for instance, Case C-257/00 *Nani Givane and Others v Secretary of State for the Home Department* [2003] ECR I- 345 para 36.

¹⁷ Case C-63/06 *UAB Profisa v Muitin s departamentas prie Lietuvos respublikos finans ministerijos* [2007] ECR I-3239.

¹⁸ Council Directive (EEC) 92/83 of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages [1993] OJ L 316/ 21.

the EU legal rule. This is especially so if other language versions do not preclude the meaning attributed to the provision by one language version. This, for instance, was the situation in case 100/84 *Origin of Fish*.¹⁹ Comparing the texts, only the German version of the Regulation at issue in this case clearly meant that what was significant for the purpose of determining the origin of goods for customs purposes was that the fish had been caught in the net, and not that they had been taken from the sea. Even though this was the only language version conclusively imposing such a meaning, the Court found that this was the 'correct' understanding of the given Regulation. However, again the reason why the Court concluded thus was not because the German version so suggested, but because the Court considered that such meaning was in accordance with the purpose of the Customs Regulation at issue.

Even though the meaning attributed to the majority of languages does not necessarily have to prevail over the meaning attributed to a minority of languages, it will often be the case that the majority meaning will be the one that the Court finds 'correct'. The reason is not that this constitutes a majority meaning, but rather because such meaning conforms with the purpose of the rule as understood by the Court or with the actual intention of the person who drafted the rule and the objective which that person wanted to achieve. The Court sometimes justifies the discarding of one or more minority language versions simply by stating that 'one language version of a multilingual text of Community law cannot alone take precedence over all other versions'.²⁰

3. The CILFIT case and the obligation to compare all languages

What follows from the fact that all languages have equal value is that in interpreting EU law courts cannot rely on one single version. This has indeed been confirmed by the ECJ on several occasions. Thus, as far back as 1969, in the case C-29/69 *Stauder*,²¹ the Court stated:

When a single decision is addressed to all the Member States the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in particular of the versions in all four languages.²²

¹⁹ Case 100/84 *Commission v UK* [1985] ECR 1169 (*Origin of Fish*).

²⁰ See Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8615 para 47.

²¹ Case 29/69 *Erich Stauder v City of Ulm - Sozialamt* [1977] ECR 419.

²² Case 29/69 (n 20) para 3.

Even if it seems to an interpreter, such as a national court, that the version of some legal rule in the language which it usually uses is clear in meaning, this is not necessarily so if the provision is assessed in the light of other language versions. Thus, in the case C-219/95P *Ferriere Nord*,²³ the applicant company, which would benefit from the Italian version of Article 81 of the TEC, claimed that '[...] other language versions should be called in aid only where the meaning of one version of a provision is not clear',²⁴ which, according to the applicant, was not the case. The Court replied by saying that one language version could not be considered on its own, in isolation of other language versions.²⁵ That, in turn, may be understood to mean that if one language version seems clear when read in isolation, this might not in fact be so. If other versions indicate a different meaning, this is a signal that the first version might not be as clear as was first claimed.

The question arising is whether this should be read that language comparison is required in every instance of interpreting EU law. Some cases decided by the Court, or at least, their wording, seem to suggest so. In case 283/81 *CILFIT*,²⁶ the Court quite persuasively stated the following:

To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.²⁷

One could conclude from this passage that the proper way of construing the meaning of an EU legal provision always involves a comparison of different language versions. If this were so, one would expect the European Court of Justice itself always to compare different language versions. This, however, is not so. Whoever follows case law regularly knows that different language versions are in most cases not mentioned in the Court's Judgments, or indeed in the Opinions of the Advocates General. It is, of course, possible that language comparison was performed, but no differences were discovered, and therefore the entire exercise was not mentioned in the Judgment/Opinion as reported publicly. However, my personal experience acquired during a few shorter stays at the Court did not reveal that the Court compares language versions as a default step in the process of interpretation.

²³ Case C-219/95P *Ferriere Nord SpA v Commission* [1997] ECR I-4411.

²⁴ Case C-219/95P (n 22) para 13.

²⁵ Case C-219/95P (n 22) para 15.

²⁶ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.

²⁷ Case 283/81 (n 25) para 18.

What, then, does the statement in *CILFIT* mean? Like all other legal propositions, the statements of the Court also need interpretation and this may differ depending on the interpreter. So, the interpretations of what the *CILFIT* case meant also differ.²⁸ What follows is, therefore, my own interpretation. The *CILFIT* statement might be explained by placing the case in its context. It was given in answer to a reference by the Italian *Corte suprema di Cassazione*, the highest court in the judicial hierarchy in that country. Article 234 TEC which regulates the preliminary ruling procedure creates an obligation for courts against whose decision there is no judicial remedy to refer preliminary reference on interpretation to the ECJ, if a question of interpretation of Community law is necessary for solving a case. In order to avoid references to the ECJ, the highest courts in some countries have developed the so-called *acte clair* doctrine, according to which sometimes legal provisions can be so clear that they do not require interpretation, but can be simply applied. In such cases, it was claimed there was no need to refer. The ECJ wanted, on the one hand, to prevent this developing practice of the highest courts and sought to make them refer, and on the other, it was aware of the sensitivity of the situation and wanted to avoid any conflict with the highest courts. Thus, the Court accepted in principle the *acte clair* doctrine, but qualified it by exposing all the difficulties which stood in the way of the conclusion that EU law was clear. Thus, among other things, the Court also warned that due to its multilingualism, interpretation of EU law requires a comparison of all language versions. This statement must be read in the context of the Court's efforts to persuade the courts of the highest Member States to refer, pointing out that linguistic comparison is useful, and that it can be more easily performed in the ECJ which has the resources to take all languages into consideration. Thus, the statement was not given as a rule that language comparisons were always required when interpreting EU law.

4. Why and on whose initiative is language comparison performed?

Language comparison does not happen regularly in the ECJ. Even though such a comparison could indeed be useful since it could reveal a multiplicity of possible meanings, the efficiency of judicial process, as well as the costs of such language comparison, do not in practice allow for such an exercise on every single occasion. An interesting question that arises is when, then, is language comparison performed by the ECJ?

²⁸ For an overview, see F Mancini and DT Keeling, 'From *CILFIT* to *ERT*: the Constitutional Challenge Facing the European Court' (1991) 11 *YEL* 1-13. See also H Rasmussen 'The European Court's *Acte Clair* Strategy in *CILFIT*' (1984) 9 *EL Rev* 242-261.

My research revealed that the initiative to undertake language comparison comes from the parties to the case, national judges or, sometimes, the Court itself, most usually from its Advocates General.

It is not surprising that parties to the case use 'language strategy' to try to win the case. If the meaning attributed to the EU norm in the language of the court does not suit a party, one way to shake the established meaning is to find divergences in different language versions. Therefore, in numerous cases in which language comparison has been undertaken, it is clear that the initiative came from one of the parties to the case, or from the intervening parties. Sometimes, this can be read from the case, as reported.²⁹ Sometimes, it is clear from the reported case that the initiative came from the national court that referred the question.³⁰ However, it is not always revealed whether the national court undertook language comparison on its own initiative or on the initiative of the parties, the latter case being more probable. National courts should, according to the ECJ, perform language comparison if they interpret EU law themselves. It is, therefore, encouraging to realise that there are courts which have left behind the worlds as defined by only their language, and embraced multilingualism. However, of the enumerated cases, the courts that have referred to the ECJ with language issues come from a small number of Member States - Germany, the Netherlands, UK, and Lithuania.³¹

As already mentioned, sometimes the parties or the national court do not raise the language issue in the European Court, but comparison is undertaken by the Advocate General, and/or the Court.³² It is possible that this practice will increase on account of the changes that are taking place in the internal functioning of the ECJ. For example, every member of the Court has its cabinet, consisting of four legal advisers (*référéndaires*) in the case of Advocates General, and three in the case of Judges (in practice, the post of administrative secretary is often turned into the post of

²⁹ See, eg, Case C-149/97 *The Institute of the Motor Industry v Commissioners of Customs and Excise* [1998] ECR I-7053; and Case C-36/98 *Spain v Council* [2001] ECR I-779.

³⁰ See, eg, Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403; Case C-420/98 *WN v Staatssecretaris van Financiën* [2000] ECR I-2847; Case C-63/06 *Profisa* (n 16); Case C-300/05 *Hauptzollamt Hamburg-Jonas v ZVK Zuchtvieh-Kontor GmbH* [2006] ECR I-11169 (*Animal Transport*); or Case C-306/06 *Telecom GmbH v Deutsche Telekom AG* [2008] ECR I-1923.

³¹ My research did not cover a large number of cases (only the cases mentioning 'language' and 'version' according to the web search on Eur-lex <www.eur-lex.europa.eu> and which were decided in the last few years, together with some older representative cases in this field). It is therefore possible that there are other courts in European states that are prepared to take into consideration the fact that EU is multilingual. However, this issue requires further research.

³² See, eg, Case C-1/02 *Privat-Molkerei Borgmann GmbH & Co. KG v Hauptzollamt Dortmund* [2004] ECR I-3219; Case C-251/04 *Commission v Greece* [2007] ECR I-67; Case C-239/07 *Julius Sabatauskas*, not yet published; Case C-298/07 *Deutsche Internet Versicherung*, not yet published.

legal secretary, adding a fourth *référéndaire* to the Judge's cabinet). It has recently become more usual for cabinets to be multinational. The function of the legal advisers is to help the Judge or the AG in drafting Judgments or Opinions. They, therefore, perform the necessary research. Given that their mother tongue is often different from that of the Judge or Advocate General, it is likely that they would look up the version of the EU law in their own language if the interpretation of certain terms used is at issue. This increases the possibility that language differences are discovered.

The ECJ usually trusts its AGs in terms of the language comparison performed,³³ but sometimes it conducts its own comparison, possibly including more languages,³⁴ sometimes arriving at different conclusion.³⁵ On the other hand, occasionally important language differences revealed by the Advocate General end up completely ignored by the Court.³⁶

An examination of the case law therefore provides several reasons for language comparison to be undertaken by the courts. They may be systematised as follows. Firstly, the language comparison might be undertaken when the meaning of the wording in one language is not clear at face value. In such situations, other language versions are used as an aid in revealing the meaning of the legal norm. Alternatively, it is possible that meaning as expressed in one language seems clear, but unless compared to other versions it may no longer seem so certain. The initiative for a comparison for such a reason would more probably come from the party who is not happy with the meaning of a norm in one language, rather than from the court, either a national or European one. Sometimes, however, such an initiative might come from the Court itself. In any case, looking into other language versions might shake the apparently clear meaning attached to one language version.

Finally, studying other language versions might also serve the purpose of justifying or proving the correctness of the meaning attributed to the norm.³⁷ Of course, the latter purpose would be achieved only if no differences are revealed in different language versions.

³³ Eg Case C-173/07 *Emirates Airlines - Direktion für Deutschland v Diether Schenkel* [2008] ECR I-5237 para 25.

³⁴ Eg Case C-420/98 *WN v Staatssecretaris van Financiën* (n 29).

³⁵ As in Case C-72/95 *Kraajieveld* (n 29).

³⁶ As in Case C-265/03, *Igor Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005] ECR I-2579. See in this respect C Hillion, Comment on Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005] ECR I-2579 (2008) 48 *CML Rev* 815, 824.

³⁷ As in Case 19/67 *Bestuur der Sociale Verzekeringsbank v JH van der Vecht* [1967] ECR 445; Case 19/83 *Knud Wendelboe and others v LJ Music ApS, in liquidation* [1985] ECR 457; Case C-251/04 *Commission v Greece* (n 31); Case C-62/06 *Fazenda Pública - Director Geral das Alfândegas v ZF Zefeser - Importação e Exportação de Produtos Alimentares Lda* [2007] ECR I-11995. See also A Arnall, *The European Union and its Court of Justice* (OUP, Oxford 2006) 611.

5. How is language comparison undertaken?

The language comparison can end in two outcomes: either all language versions mean the same, or they do not. The difficult question is how we can come to either of these two conclusions. The difficulty comes from the following: if there is no determinate, literal meaning of language, how do we know the meaning in one particular language to be able to compare it with the meaning in another language? Or, in other words, if a provision in one language can have different meanings, how do we conclude that there are differences?

We have started from the premise that a literal meaning of words does not exist, but rather depends on the context and the interpreter. This, we believe, is also true in a unilingual legal environment. However, it seems that sometimes the Court and its AGs understand language comparison to mean looking for the literal meaning, or the usual meaning, of the words used in different languages. Thus, for example, in case C-298/07 *Deutsche Internet Versicherung*,³⁸ Advocate General Colomer performed a comparison of the dictionary meanings of a word used in one Council Directive, and concluded that the meaning of the English word 'details' or the German 'Angaben' is broader than the Spanish 'señas' or the French 'coordonnées'.³⁹ AG Cosmas did the same in respect of the English term 'trade-union', or the French 'syndicelle' in case C-149/97 *Institute of the Motor Industry*.⁴⁰ On the other hand, the meaning attributed to these words by the mentioned Advocates General may also be considered subjective, since using a dictionary was their personal choice to derive meaning. If someone else were asked about the meaning of the same words, that person might come to a different conclusion. The way out of this puzzle is to accept that, depending on the interpreter, there might be different conclusions about whether or not language versions differ.

One already mentioned case can nicely serve to explain that words in one language version, taken in isolation from other language versions, might have different possible 'literal' meanings. In case 100/84 *Origin of Fish*,⁴¹ the dispute arose between the UK Government and the Commission about when fish become a product for custom purposes. The English language used the term 'taken from the sea' and the French 'extraits de la mer'. Arguing the case, the Commission claimed that the literal interpretation of the terms used in English and French was 'caught in the

³⁸ Case C-298/07 *Deutsche Internet Versicherung* (n 31).

³⁹ Point 21 of the AG Opinion in Case C-298/07 (n 31).

⁴⁰ Points 33-34 of the AG Opinion in Case C-149/97 *Institute of the Motor Industry* (n 28).

⁴¹ *Origin of Fish* (n 18).

net', as the fish were thus 'separated from the sea where they lived before being caught'.⁴² At the same time, the UK Government claimed that the literal meaning of the same terms was 'raising the nets out of water and swinging them on board ship'.⁴³ There were two contrary claims as to the 'literal' meaning of the same wording in the same language. Depending on which of these two meanings was accepted by the Court, there would be differences, or no differences, from the German wording which, as it seems, was conclusively pointing to the meaning suggested by the Commission.

The Court is aware of these problems. Thus, for example, in case C-296/95 *EMU Tabac*,⁴⁴ the applicants claimed that all language versions, except for the Greek and Danish versions, allowed for the goods to be bought through an agent for personal use, and still be exempted from excise duties. In paragraph 35 of the Judgment, the Court stated the following:

In that regard it must be observed that the contradiction between the Danish and Greek versions on the one hand and the other language versions on the other only arises if the argument put forward by the applicants in the main proceedings is accepted.

The argument the Court is referring to in the quoted lines is the interpretation that other language versions allow an agent to be involved. The Court is thus aware that discrepancies in different language versions might exist in one interpretation, and be absent in another interpretation.

However, it is true that most often differences will be found because the most common meaning that the majority would attribute to a certain word in a certain language differs from the most common meaning the majority would attribute to the word in a different language, with the same place in the legal provision as the former.

6. The legal certainty problem

If we admit that there is such a thing as the common, or the most common, meaning of a word as used in a certain language, we must also briefly address the issue of legal certainty. If legal rules contain prescriptions about which behaviour is acceptable and which is not, then often people act in a way that they believe is allowed by the legal rules, or in such a way, according to their understanding of the legal rules, that leads

⁴² *Origin of Fish* (n 18) para 9.

⁴³ *Origin of Fish* (n 18) para 11.

⁴⁴ *EMU Tabac* (n 9).

to certain consequences. A problem arises if the common understanding of a rule in a certain language differs from what the Court establishes as the proper meaning of that rule. In such a case, a person would be punished for following the legal rules.

A similar argument of legal certainty was used by the Dutch Government in case C-72/95 *Kraaijeveld*⁴⁵ in order to uphold the claim that only the Dutch version of a Directive was authentic in the Netherlands. Any other solution would be contrary to the legal certainty requirement, as people in the Netherlands relied on the Dutch version.⁴⁶ The Court realised the possible problem, but has never properly addressed it. Thus, in case 80/76 *North Kerry Milk Products Ltd*,⁴⁷ it stated:

The elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the concern for legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words.⁴⁸

However, apart from noticing this, the Court did not discuss the issue any further (and it has, likewise, not answered the Dutch Government's arguments given in the *Kraaijeveld* case). In the *North Kerry Milk Products* case, the Court wrongly, in my opinion, used the fact that reliance on language can cause legal uncertainty to support its claim that preference should therefore not be given to any language version. Even though this sends the message that meaning is not in the text, it still does not address properly the fact that a party relies on a certain meaning given by the words chosen in the text in one language.

The issue of legal certainty that arises in the described situations does not differ from the problem of legal uncertainty that exists on account of the indeterminacy of language, including legal language, in general. So, the problem is not confined to a multilingual environment, but is an issue that should be addressed in relation to legal interpretation as a whole, although it is too complex to be addressed in this article. I wish, however, to point out one fact that is often neglected in discussions on legal uncertainty. In disputes that end up in the courts, there are always two parties. Often, these disputes are about the meaning of law. This means that in the end one party might end up being punished because he or she followed the law as he or she believed it needed to be followed. However, the other party understood the law differently. Therefore, legal

⁴⁵ *Kraaijeveld* (n 29).

⁴⁶ *Kraaijeveld* (n 29) para 25.

⁴⁷ Case 80/76 *North Kerry Milk Products v Minister for Agriculture* [1977] ECR 425.

⁴⁸ *North Kerry Milk Products* (n 46) para 11.

certainty cannot exist until the case is resolved by the court which has the power to give authoritative constructions of its meaning.

In the EU multilingual context, the problem of legal uncertainty on account of the indeterminacy of language might have an additional dimension. Namely, it is possible that the two meanings of the same word - 'national' and 'EU' - will differ only in some languages and not in others, which will bring some EU citizens into a worse position than others, only because of the language they use when reading legal rules. Indirectly, this would mean their discrimination on the basis of nationality, which is prohibited in the EU. Such an issue has, however, never arisen before the ECJ.

7. What happens if differences are found in language versions?

If there are differences in language versions, the Court would conclude that therefore 'no legal consequence can be based on the terminology used'.⁴⁹ The language thus becomes, if not irrelevant, then less important in finding an adequate meaning of a legal norm.

The way the Court then looks for the appropriate meaning is by referring to the purpose that is to be achieved by the rules at issue. The standard formulation by which the Court expresses this is:

The different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.⁵⁰

In the case of linguistic differences, the Court determines meaning in the light of the purpose not only when EU legislation is at issue, but also when an interpretation of the Treaty is required.⁵¹

⁴⁹ Case 30/77 *Régina v Pierre Bouchereau* [1977] ECR 1999 para 13.

⁵⁰ *Régina v Pierre Bouchereau* (n 48) para 14. This formula was repeated in many cases, and it has stayed unchanged up to today (for example, *Origin of Fish* (n 18) para 17; Case C-372/88 *Milk Marketing Board of England and Wales v Cricket St. Thomas Estate* [1990] ECR I-1345 para 19; Case C-449/93 *Rockfon A/S v Specialarbejderforbundet i Danmark* [1995] ECR I-04291 para 28; *Kraajieveld* (n 29) para 28; *Institute of the Motor Industry* (n 28) para 16; Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien & Co. HandelsgesmbH v Oberösterreichische Landesregierung* [2000] ECR I-1157 para 42; Case C-187/07 Criminal proceedings against Dirk Enderdijk [2008] ECR I-2115 para 24; *Animal Transport* (n 29) para 16; Case C-426/05 *Tele2 Telecommunication GmbH v Telekom-Control-Kommission* [2008] ECR I- 685 para 25.

⁵¹ *Spain v Council* (n 28) para 49.

Of course, what then becomes crucial for the construction of the meaning of EU legal rules is how the ECJ finds or construes such a purpose. As interesting and important as this issue may be, it is not the object of this article. Therefore, I will make only a few observations in that regard. Sometimes, when legislation is at issue, one way to find the purpose is to look into the intention of the legislator, either by consulting the *travaux préparatoires*, if there are any and if they reveal any such intention, or by looking in the Preamble of the legislative act. Sometimes, the choice of the proper word was part of the discussions in the legislative bodies. In such cases, the legislator's opinion about the meaning of the word used is important for discovering its meaning.⁵² However, in most cases the ECJ will not look into preparatory documents, or try to find the intention of the legislator in any other way. This is especially true in relation to the Treaties. The purpose of a legal rule and of the act in which it finds its place will, therefore, depend much on the ECJ's own view of it. This confirms once again that the courts, in this case the ECJ, have an important role in the creation of legal rules.

8. Conclusions - How much does multilingualism matter?

If the Court finds that a difference in meaning as expressed in different language versions exists, it will then, as explained above, try to understand what the legal rule stands for by looking into its purpose within the more general scheme in which it exists. However, the ECJ uses the same method to find the proper meaning of the rules if it analyses only a single language version.⁵³ Thus, the purposive or teleological approach used in the interpretation of EU law is the dominant way for the ECJ to establish legal meaning.⁵⁴ It is not confined to solving situations when language versions differ.

Multilingualism, therefore, does not significantly influence interpretation at the ECJ. Even if Europe were unilingual, the Court would still in the first place be looking for the purpose of the legal rules in order to establish their consequences for different parties in legal disputes. The choice made by the ECJ in its approach towards legal interpretation is a fortunate development for European integration. Claiming that legal norms carry predetermined meaning, whether expressed in one or many

⁵² *Telecom* (n 29) para 25.

⁵³ This has been so ever since Case 26/62 *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I. A fine example is Case C- 56/90 *Commission v United Kingdom (Bathing Water Directive)* [1993] ECR I-4109.

⁵⁴ N Fennelly, 'Legal Interpretation at the European Court of Justice' [1997] 20 *Fordham Int'l LJ* 656.

languages, risks transforming law into a closed system, detached from reality, and accessible only to specialists - lawyers. This may happen if lawyers claim that a literal meaning of words exist, and omit the purpose of the legal norms from the formula for understanding them.

In this light, the fact that Europe is legally multilingual might be a European blessing rather than a curse, since it does not allow the conclusion to be drawn that there is a predetermined meaning of words in legal norms.

I am also convinced that multilingualism does not make the exercise of legal interpretation more difficult. On the contrary, and as evidenced earlier in this article, the same legal rule expressed in other languages might be of great help in understanding its intention, and therefore, in establishing its meaning.

It seems to me that linguists have fewer problems accepting the indeterminacy of words than lawyers do. Consequently, there is much that lawyers might learn from research on languages and meaning. In this sense, it seems important for more interdisciplinary efforts to be undertaken in research on legal interpretation.⁵⁵

⁵⁵ Several conferences bringing together lawyers and linguists have been organised recently. The Conference 'Law and Languages', for which this paper was prepared, was held in Dubrovnik from 18 to 20 September 2008. The 2005 Conference that took place in Italy ended up with a useful publication edited by B Pozzo and V Jacometti, *Multilingualism and the Harmonisation of European Law* (Kluwer Law International, Alphen a/d Rijn 2006).