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**The Court of Justice of the European Union's case law on linguistic
divergences (2007-2013): interpretation criteria and implications for the
translation of EU legislation**

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*To my son, Martí,
my great companion
during thesis writing*

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Abstract

A distinctive feature of the European Union is that it is a multilingual legal order that relies on translation for its proper functioning. Legislation is available in all official languages and all versions are equally authentic. Since translators are incorporated into the legislative process, translation of EU legislation must be seen as part of lawmaking. Multilingual concordance, i.e. expressing the same meaning in all language versions, poses a big challenge to translators, who need both linguistic and legal competences to succeed in their task. Legal hermeneutics becomes a fundamental tool for translators because uniform interpretation and application of EU legislation are what ultimately determine the quality of translated EU legislation. The Court of Justice of the European Union resorts to multilingual interpretation when comparing different language versions of a text in order to interpret a certain provision.

This thesis pursues three main objectives. First, to elaborate on the role that translation has in the development and application of EU legislation. Second, to examine how the CJEU solves problems of divergences between different language versions, namely, how the CJEU applies methods of interpretation to reconcile diverging texts. Third, to assess whether divergences hinge on a translation problem or whether they are inevitable differences between different language versions. To address the second and third objectives, the study adopts a mixed methodology that combines both qualitative and quantitative analysis. We triangulate data in order to study which methods of interpretation are used for which problems, the types of legal instruments where divergences appear, and evaluate the causes for linguistic divergences.

Keywords: legal translation, drafting, EU legislation, multilingualism, interpretation, divergences.

Résumé

L'Union européenne se distingue notamment par son ordre juridique multilingue reposant sur la traduction pour assurer son bon fonctionnement. La législation est disponible dans toutes les langues officielles, et toutes les versions font également foi. Les traducteurs étant intégrés au processus législatif, la traduction de la législation de l'UE doit être considérée comme partie intégrante de la production de la législation. La concordance multilingue, qui consiste à conserver le même sens dans toutes les versions linguistiques, pose un grand défi aux traducteurs, qui ont besoin de compétences à la fois linguistiques et juridiques pour réussir leur tâche. L'herméneutique juridique est un outil essentiel pour les traducteurs, car l'interprétation et l'application uniformes de la législation de l'UE déterminent en fin de compte la qualité des textes juridiques traduits. La Cour de justice de l'Union européenne a recours à l'interprétation multilingue lorsqu'elle compare les différentes versions linguistiques d'un texte afin d'interpréter une disposition.

La présente thèse poursuit trois objectifs principaux. Tout d'abord, elle vise à expliquer en détail le rôle de la traduction dans le développement et l'application de la législation de l'UE. Ensuite, elle propose d'examiner comment la CJUE résout les problèmes de divergences entre les différentes versions linguistiques, à savoir comment la CJUE applique des méthodes d'interprétation pour harmoniser des textes divergents. Enfin, elle évalue si ces divergences proviennent d'un problème de traduction ou des différences inévitables entre les différentes versions linguistiques. Pour répondre aux deux derniers objectifs, la méthodologie adoptée propose une analyse à la fois quantitative et qualitative. Les données sont mesurées afin de déterminer quelles méthodes d'interprétation sont utilisées en fonction des problèmes, définir le type d'instruments juridiques où les divergences apparaissent et évaluer les causes des divergences linguistiques.

Mots-clés : traduction juridique, rédaction, législation de l'UE, multilinguisme, interprétation, divergences.

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Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
TFEU	Treaty on the Functioning of the European Union

We follow the Interinstitutional Style Guide for the abbreviation of the language versions:

ISO code	English title	Source language title
ES	Spanish	castellano/español In Spanish, the term <i>lengua española</i> or <i>español</i> substitutes <i>castellano</i> at the request of the Spanish authorities. The latter is the official designation of the language, but is only used to determine the place.
DE	German	Deutsch
EN	English	English
FR	French	français

When we compare the different language versions we follow the following order: ES, DE, EN and FR, which corresponds to the alphabetical order of the formal titles in their original written forms (Article 7.2.1. Interinstitutional Style Guide).

Method of citing the case law of the CJEU:

We follow the new format for citing the case law of the CJEU:
http://curia.europa.eu/jcms/jcms/P_125997/

INTRODUCTION

Definition of the problem and justification

The European Union is a unique endeavour consisting in the peaceful integration of a group of States that have voluntarily rendered part of their sovereignty to a supranational entity. EU institutions legislate within the framework of the competences conferred by the Member States (Article 5 TEU). The uniqueness of the EU lies in its specific legal nature since it is not just a cooperative body; it is not an ordinary international organisation. Most of its legislation is directly applicable and binding in every Member State. The EU addresses both Member States and individuals, who can invoke a provision of the EU before a national court under the principle of direct effect. Not only can EU treaties, regulations and decisions produce direct effect but also directives, under special requirements.¹

The fact that EU law produces rights and obligations for individuals justifies the rendering of its texts in all official languages. Multilingualism in the law can be effective only if the legal subjects affected by a given legal instrument are guaranteed equality before the law in all language versions (Šarčević 2010a:43). If this was not the case, the principle of legal certainty would be at risk, since ‘legal certainty expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly’ (Tridimas 2007:242).

Therefore, translation plays a fundamental role in the EU. With the passing of time, translation services have adapted to face the challenges of translating in an enlarged Union from its original six to its current twenty-eight Member States (with the last accession of Croatia on 1 July 2013). However, despite the crucial importance of translation, the term ‘language versions’ instead of ‘translations’ is used, because in the EU the texts in the different languages are equally authentic (Article 55 TEU). But is it possible to have twenty-four ‘authentic’ versions? Can rules carry identical normative implications in twenty-four languages?

Sometimes divergences between different language versions are inevitable (Kuner 1991:958; Schilling 2010:50), because each language shapes the world in a different way and each Member State has a different legal system. Kjaer and Adamo add that ‘the wording of

¹ See Case 41/74 *Yvonne van Duyn v Home Office*, EU:C:1974:133.

Community law will invariably differ from one language text to another as natural languages cannot by their nature be absolute copies of each other' (2011:7).

In this complex context of multiplicity of official languages and multiplicity of national legal systems, the Court of Justice of the European Union (hereinafter, the CJEU) carries out a fundamental role as the guarantor of uniform application and interpretation of EU legislation, because all language versions constitute part of the same legal instrument. Under Article 267 TFEU, the CJEU has 'jurisdiction to give preliminary rulings concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.'

Object of study

The EU constitutes a legal order with its own features, its own personality and its own legal capacity.² Therefore, it can be said that legal translators in this context do not really mediate between two legal systems, although they do mediate between two languages. This does not mean that translating in the EU context is easy; translators face other kinds of problems (Kjær 1999:66) and other factors come into play in the translation of legal texts (Šarčević 2010a:19). EU law and national law are interwoven. EU legislation has influence from the national laws of the Member States. At the same time, EU law influences the national legal systems because EU legislation is enacted at the supranational level but powers of application and enforcement are delegated to national authorities (Prechal & Van Roermund 2008:5). In addition, one of the sources of inspiration for EU law is international law and the EU is an actor on the international stage as well. Therefore, there is a constant interaction between EU law and national law, with some influence from international law, all of which poses a challenge for translators.

The importance legal translation has for the application and development of EU legislation has led us to focus the **object** of this project on divergences that emerge between different language versions of a text and the methods of interpretation the CJEU applies to overcome them.

² Case 6/64 *Flaminio Costa v ENEL*, EU:C:1964:66: 'By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.'

By **legal translation** we refer to translation that is done to create multilingual EU legislation, despite the fact that many instruments contain a lot of technical details because they regulate specific fields, such as the directive relating to the greenhouse gas emission allowance trading scheme. In this respect, we focus on the translation of EU legislation and we do not refer to the translation of other material such as information booklets, databases, websites, speeches or correspondence with the public.³

More specifically, this research deals with **instrumental translation** as defined by Nord: ‘an instrumental translation can have the same or a similar or analogous function as the ST [source text]’ (2005:80). Translators working in EU institutions elaborate texts that will be equally authentic and will become part of a single legal instrument. The translator then assumes the role of a text producer of binding rules in the target language (Šarčević 1997:55–56; Šarčević 2010a:19; Felici 2010:98; Prieto Ramos 2011:204). In other words, translators are expected to produce texts that are equal in legal effect.

Relevance of the research and motivation

In the last few decades, lawyers, linguists and translators have paid attention to translation in the EU context⁴ and some have provided an analysis from the perspective of certain institutions.⁵ However, the debate about how to tackle the translation of EU legislation is still open and we aim to provide a semiotic point of view.

From a legal perspective, a considerable number of scholars and professionals have dealt with the question of the methods of interpretation applied by the CJEU.⁶ However, not much research has been completed on the divergences that emerge in EU legislation, their causes

³ Emma Wagner explains that legislation and the preparatory work leading up to it account for a large part of EU translators’ work (about 40%, although there are wide individual variations). However, they translate a great deal of other material in addition to legislation, such as information booklets, databases, websites, speeches, conference proceedings, committee minutes, reports written in the institutions of the Member States and correspondence with the public (2001a:264).

⁴ Studies on translation in the EU include: Palacio González 1997; Kjær 1999; Kjær 2007; Stolze 2001; Schöffner 2001; Wagner et al. 2002; Correia 2003; Berteloot 2004; Burr & Gallas 2004; Gémar 2006; Šarčević 2001, 2006, 2010a; Biel 2007; Felici 2010; Grasso 2011.

⁵ For instance, on the European Commission: Koskinen 2000; European Commission 2009, 2012b. On the Court of Justice of the European Union: Berteloot 1987, 2000; Oddone 2006; Mulders 2008; McAuliffe 2009, 2011, 2012a; McAuliffe 2012b. On the Council of the European Union: Gallas & Guggeis 2005.

⁶ Among the authors who have studied the methods of interpretation applied by the CJEU we can highlight: Kutscher 1976; Bredimas 1978; Bengoetxea 1993; Buck 1997; Albors Llorens 1999; Schübel-Pfister 2004; Derlén 2009; Henninger 2009; Berends 2010; Baaij 2012; Sankari 2013.

throughout the text production chain and the hermeneutic principles applied by the CJEU to overcome these discrepancies.⁷

The initiative for this research started after studying Translation and Interpreting at the Universitat Pompeu Fabra, and completing my double Master's degree in European Integration (Universitat Autònoma de Barcelona) and European Law: Area of Freedom, Security and Justice (Université Toulouse Capitole). My interest in carrying out interdisciplinary research grew as it became increasingly obvious that law is at the core of legal translation. Law is expressed through language. The two are inseparable (Gémar 2001:117). Multilingualism is a transversal issue that has profound impact on the lives of European citizens because subtleties of language can result in complicated legal issues. Expressing the same reality in different languages is, therefore, crucial for the uniform interpretation and application of EU legislation.

Main objectives and methodological approaches

This project has three main objectives. The first one is to shed light on the **role of translation** in the creation and enforcement of EU legislation. We seek to understand translation as part of the set of procedures and expertise needed for the proper functioning of the EU. The second objective focuses on the analysis of how the CJEU solves problems of **divergences between different language versions**, namely, how the CJEU applies methods of interpretation to reconcile diverging texts. We do not aim at proposing a new category of the methods of interpretation since it can be argued that the methods applied by the CJEU are, in principle, the same as those a national judge may apply (Kutscher 1976:I-6; Bredimas 1978:xv). We seek to understand how the CJEU applies the different methods in order to reconcile diverging language versions. This study does not aim at assessing how Member States apply EU law either, i.e., how Member States transpose a certain directive into their legal system.

The identification of divergences helps us to examine the kinds of problems that hinder the uniform application and interpretation of EU law. We analyse patterns of divergences as reflected in judgments of the CJEU and explore the types, causes and potential remedies. In this respect, as a third major objective, we assess **whether divergences hinge on a translation problem** or whether they are inevitable differences between different language versions.

⁷ Some authors who have studied the problem of divergences are: Pescatore 1984; Loehr 1997; Engberg 2002; Solan 2005; Šarčević 2006; Dengler 2010; Schilling 2010; Baaij 2012; McAuliffe 2013.

In this project we build on the assumption that we cannot study drafting, translation and interpretation separately, as they all come into play in the creation of multilingual EU legislation. We adopt a mixed-method approach that combines both qualitative and quantitative analysis. The study is divided into two parts, corresponding to our main objectives:

1. Contextualisation and theoretical framework

The first part of the project addresses the legal nature of the EU and scrutinises where and how translation takes place in the process of elaborating EU legislation. We then analyse the nature of interpretation and the two main epistemological approaches in legal theory: positivism and interpretivism. This helps us address three significant aspects that are crucial to understanding how multilingual EU legislation actually works: i) how to address vagueness in the law, ii) how to construe meaning and iii) how to reconcile legal certainty and multilingualism. These three questions meet at the core of the **interpretivist approach** in which **semiotics** illuminates meaning negotiation and the constant interplay between EU law and national laws.

2. Applied study of divergences

The second part of this project addresses the analysis of divergences as they have emerged in the case law. We look for cases of divergence between different language versions of a piece of legislation. The corpus analysis combines both qualitative and quantitative approaches. The methodology for the applied study is described in Chapter 4.

These results lead to practical recommendations intended for professional translators, translation students and legal practitioners in order to help them have a better understanding of the challenges faced by translators of instruments of EU law. This can ultimately contribute to preventing some divergences in EU legislation, and in turn, to providing more legal certainty to the system. The study can also be valuable for legal linguistics and comparative legal linguistics (Mattila 2013).

Thesis layout

The structure of this dissertation is as follows. Within Part I (legal and theoretical framework), Chapter 1 serves as legal contextualisation for the project. By studying the legal system we will be able to understand the special legal nature of the EU, focusing on the principles of direct effect and primacy of EU law. This part explains the place EU law has between national and international law, highlighting that we cannot make a clear distinction

between public and private law because EU policies are diverse. This leads us to review the competences of EU law and its sources of law, with special attention to secondary sources (regulation, directive, decision and recommendation). Finally, this chapter provides an overview of the language regime in the EU institutions and discusses the possibility of reducing the language regime.

The legal contextualisation of the previous chapter allows us to understand the conditions under which translation of EU legislation takes place. Chapter 2 analyses translation within the process of elaborating EU legislation; we investigate drafting and translation as two complementary activities and include translators in the legislative process. For this reason, we describe the main procedure for the elaboration of legislation: the ordinary legislative procedure. In addition, we offer a semiotic perspective in order to understand how meaning is created in the EU and how we can deal with the interplay between EU concepts and national concepts.

Chapter 3, the last one of Part I, introduces the nature of interpretation and makes some remarks on other related concepts such as ‘construction’ and ‘adjudication’. This section contains a brief description of the two main epistemological approaches in legal theory: the interpretivist and the positivist. Finally, we explore three aspects that can help us understand how multilingual EU legislation actually works: i) how to address vagueness in the law, ii) how to construe meaning and iii) how to reconcile legal certainty and multilingualism.

In Part II (on the design and results of corpus analysis), Chapter 4 provides a detailed description of the methods and procedures used in the applied study. We classify cases according to the type of proceedings and according to the purpose of divergence. We also provide an overview of existing categories for the types of divergences and for the methods of interpretations. Chapter 5 develops three groups according to the purpose of comparison: divergences treated as a problem of interpretation, divergences not treated as a problem of interpretation and no divergences but comparison is used as a tool. We note whether divergences appeared at early or late stages. Special attention is paid to the methods of interpretation the CJEU applied in each group. Finally, Chapter 6 delves into the types of divergences: structural-grammatical, lexical-conceptual and lack of consistency. A fine-grained classification is also provided within each group. We triangulate quantitative and qualitative data in order to study the following questions: which methods of interpretation are used for which problems, the types of instruments where divergences appear, and the causes for divergences.

In the conclusions, a summary of the research results can be found, as well as recommendations for future developments on this research.

**PART I: CONTEXTUALISATION AND
THEORETICAL FRAMEWORK**

PART I: CONTEXTUALISATION AND THEORETICAL FRAMEWORK

CHAPTER 1: THE EU AS A MULTILINGUAL LEGAL ORDER

EU law cannot be understood without taking into account its multilingual character, and legal translation in the EU cannot be understood without taking into account the specific legal nature of the Union. In order to analyse its legal nature, we will describe two main principles — direct effect and primacy of EU law; in this way, one can analyse the place EU law has between national and international law. Consequently, we will study the competences of the EU and the sources of law, with an emphasis on the secondary sources.

Legal order or legal system

First of all, one must remark regarding on the terms ‘legal order’ and ‘legal system’. We use the two terms are used interchangeably in this study, but strictly speaking the two concepts can be differentiated. As Bengoetxea notes, ‘legal system’ implies some systemic properties such as closure, consistency or completeness, which the notion ‘legal order’ does not necessarily entail (1993:36). From a search in CURIA, we confirm that ‘legal order’ appears more frequently when discussing the ‘legal order of the European Union’ and ‘legal system’ more so when referring to the ‘national legal system’.⁸

Term	Number of documents in which it appears
‘legal order of the European Union’	133
‘legal system of the European Union’	14
‘national legal system’	613
‘national legal order’	301

1.1. Direct effect

This principle was enshrined by the Court of Justice in the judgment *Van Gend en Loos*.⁹ In 1960 the Dutch transport firm imported from Germany into the Netherlands a quantity of a

⁸ This search was done on 23/09/2013 in CURIA without filters, hence the documents include all types found in CURIA: judgments, orders, decisions, opinions, views, summaries and reviews.

⁹ Case 26/62 *Van Gend en Loos*, EU:C:1963:1.

certain chemical. On the date of importation the product in question belonged to a certain heading of the tariff of import duties and the *ad valorem* import duty applied was 8%. Van Gend en Loos lodged an objection with the Dutch customs authorities against the application of this duty. The firm argued that when the EEC Treaty entered into force on 1 January 1958, the chemical fell under a different classification, to which an *ad valorem* import duty of 3% applied. Van Gend en Loos claimed that the Dutch Government had breached Article 12 of the EEC Treaty which provided that Member States had to refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already applied in commercial relations with each other.

One of the questions posed to the Court was whether Article 12 of the EEC Treaty had ‘direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which national courts must protect’.¹⁰ The Court ruled that in order to decide whether Article 12 had direct effect it was ‘necessary to consider the spirit, the general scheme and the wording of those provisions.’ The Court examined the preamble to the Treaty that referred not only to governments but also to peoples and concluded that the object of the EEC Treaty -to establish a common market- meant that this Treaty did more than create mutual obligations between the contracting States. The establishment of institutions endowed with sovereign rights confirmed the objective of the Treaty.¹¹ The criterion used for interpretation was teleological, i.e., the Court took into account the purposes of the provisions and did not limit itself to the literal wording of Article 12.

The Court formulated that Article 12 met the criteria to produce direct effect since it was clear, negative, unconditional, contained no reservation on the part of the Member States, and was not dependent on any national implementing measure:

The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

¹⁰ *Ibid.* On the substance of the case, p. 11.

¹¹ *Ibid.* On the substance of the case, p. 12.

The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this article it is the Member States who are made the subject of negative obligation does not imply that their nationals cannot benefit from this obligation.

In addition, the Court considered its role to be that of securing uniform interpretation of the Treaty by national courts and tribunals under article 177 of the EEC Treaty (now 267 TFEU) and said that this confirmed that ‘the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals.’ In this sense, an important contribution of this judgment was to consider the Court as the responsible to decide whether specific provisions of the Treaty had direct effect.

The Court finally stated that ‘the conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, the subjects of which comprise not only Member States but also their nationals.’ It decided that ‘independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage’.¹²

The broad definition of direct effect derived from this judgment can be expressed as the *capacity of a provision of EU law to be invoked before a national court*. The narrower classical definition of direct effect is usually expressed in terms of the *capacity of a provision of EU law to confer rights on individuals which they may enforce before national courts* (Craig & de Búrca 2011:182).

Other judgments have shaped the doctrine of direct effect, which ‘applies in principle to all binding EU law including the Treaties, secondary legislation, and international agreements’ (Craig & de Búrca 2011:180). Article 288 TFEU makes it clear that regulations have general application, are binding in their entirety and directly applicable in all Member States. Similarly, decisions shall be binding in their entirety and a decision that specifies those to whom it is addressed shall be binding only on them. However, ‘a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’

¹² *Ibid.*

Therefore, the direct effect of directives is more controversial because they are instruments of indirect lawmaking. A directive represents only the first stage in a legislative operation; it does not create EU norms applicable as such but imposes an obligation of a result to be attained by the Member States through amending or supplementing the relevant national provisions in the manner appropriate to their respective legal orders (Dashwood, 2006:84).

1.1.1. Direct effect of directives

The first case that dealt with this issue was *Van Duyn*¹³ in 1974. Ms Van Duyn, a Dutch national, had been refused entry to the United Kingdom where she was to take up a secretarial post with the Church of Scientology, whose activities were considered harmful by the British authorities. In contesting her exclusion, Ms Van Duyn sought to rely upon a provision of the then Directive No 64/221, limiting the scope of national authorities' power to restrict the free movement of workers from another Member State on public policy grounds.

The Court of Justice held that the relevant provision conferred on Ms Van Duyn was an enforceable right. The Court gave the following reasons to recognise that Directive No 64/221 was capable of having direct effect:

If, however, by virtue of the provisions of [Article 249] regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects.

The Court remarked that directives are binding and that 'the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts'.¹⁴ It can thus be concluded that individuals may invoke a provision of a directive before their national courts.

The Court further developed the doctrine of direct effect in *Ratti*.¹⁵ Mr Ratti, a manufacturer of solvents, faced a criminal prosecution for not labelling his products in accordance with the applicable national standards because he had complied with the requirements of a Community directive that Italy had failed to implement. In *Ratti* the Court determined that 'a Member State which has not adopted the implementing measures required by the directive in the

¹³ Case 41/74 *Yvonne van Duyn v Home Office*, EU:C:1974:133.

¹⁴ *Ibid.*, paragraph 12.

¹⁵ Case 148/78 *Pubblico Ministero v Tullio Ratti*, EU:C:1979:110.

prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails'.¹⁶

1.1.2. Vertical direct effect

The *Marshall* judgment in 1986 was also an important step with regard to the direct effect doctrine. Ms M. H. Marshall was employed by South West Hampshire Area Health Authority from June 1966 to 31 March 1980. From 23 May 1974 she worked under an employment contract as senior dietician. On 31 March 1980, that is, approximately four weeks after she had attained the age of sixty-two, she was dismissed, although she had expressed her willingness to continue in the employment until she reached the age of sixty-five. According to the order for reference, the sole reason for the dismissal was the fact that the appellant was a woman who had passed the retirement age applied by this health authority to women.

The employer had applied a national policy, which stated that the age for retirement was the age at which social security pensions became payable. In this sense, the Social Security Act 1975 established that state pensions were to be granted to men from the age of sixty-five and to women from the age of sixty. But the legislation did not impose any obligation to retire at the age at which the state pension becomes payable. The employer waived the policy in respect of Ms Marshall by employing her for a further two years after she had attained the age of sixty.

The question here was whether the employer was to blame because it had not acted according to Directive No 76/207, which provided for equal treatment for men and women. In this preliminary ruling the first question addressed to the Court was whether the principle of equality of treatment laid down by Directive No 76/207 had been infringed. The Court answered in the affirmative in that the cause for her dismissal constituted discrimination on grounds of sex, contrary to that directive. The second question was whether an individual could rely upon Article 5(1) of Directive No 76/207 before national courts and tribunals.

This case shows the inconsistency between national law and Community law. The Court reminded that 'wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive

¹⁶ *Ibid.*, paragraph 22.

correctly'.¹⁷

However, the Court stated that directives can only have vertical direct effect, i.e., in a relationship between an individual and the state, since the binding nature of a directive exists only in relation to 'each Member State to which it is addressed':

With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.¹⁸

Then it was concluded that the respondent, Southampton and South West Hampshire Area Health Authority (Teaching), was a public authority. The Court gave an expansive interpretation to the concept of the state for the purposes of vertical direct effect.

*Faccini Dori*¹⁹ concerned the possibility of relying on a directive in proceedings between a trader and a consumer. The problem was that the Member State (Italy) had not taken any steps to transpose the directive into national law, although the period set for transposition had expired. Ms Dori used the *Francovich* principle²⁰ and relied on the directive to withdraw from an English language course. The directive allowed consumers to cancel contracts within seven days if the contract had been made away from business premises - in this case at a railway station. Ms Dori could not rely on the directive against a private body but she was able to claim compensation from the Italian state.

The Court repeated its ruling from *Marshall* stating that 'a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual':

¹⁷ *Marshall*, paragraph 46.

¹⁸ *Ibid.*, paragraph 48.

¹⁹ Case 91/92 *Faccini Dori v Recreb*, EU:C:1994:292.

²⁰ Principle of State liability developed in *Andrea Francovich and Others v Italian Republic*, Joined Cases C-6/90 and C-9/90, EU:C:1991:428: 'It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.'

The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.²¹

It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.²²

In *Foster*²³ the Court faced a similar situation as in *Marshall*. It restated that ‘a Member State which has not transposed the measures provided by the directive cannot claim against the individual its own failure to perform the obligations which the directive entails’.²⁴ So the state cannot take ‘advantage of his failure to comply with Community law’.²⁵

In addition, in *Foster* the notion of state was also discussed. As happened in *Marshall*, the Court adopted a wide interpretation of the notion of state for the purposes of vertical direct effect:

Article 5(1) of Council Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.²⁶

1.1.3. ‘Triangular’ direct effect

The CJEU made it clear that vertical direct effect is not precluded even if the application of the directive against the Member State can have adverse consequences for another individual. This is known as the triangular situation.

²¹ *Ibid.*, paragraph 24.

²² *Ibid.*, paragraph 25.

²³ Case 188/89 *Foster v British Gas plc*, EU:C:1990:313.

²⁴ *Ibid.*, paragraph 16.

²⁵ *Ibid.*, paragraph 17.

²⁶ *Ibid.*, resolution of the Court.

The *Wells* case²⁷ was a clear situation in which an individual challenged the validity of a national measure on the ground that it conflicted with an obligation imposed on the Member State concerned by a directive, and that this implied that another individual would stop enjoying a right under national law.

To be more precise, the owners of a quarry in Wales which had been dormant for many years were granted permission to recommence mining operations. Ms Wells sought to have the permission revoked or modified on the ground that it had been given without due consideration as to whether there had been an environmental impact assessment, as provided for by Directive No 85/337.

The United Kingdom claimed that accepting that an individual is entitled to invoke an article of the directive ‘would amount to “inverse direct effect” directly obliging the Member State concerned, at the request of an individual, such as Ms Wells, to deprive another individual or individuals, such as the owners of Conygar Quarry, of their rights’.²⁸

The Court rejected this argument and immediately stated that ‘mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned’.²⁹ So Ms Wells was held to be entitled to rely upon the Environmental Impact Assessment Directive, in spite of the ‘adverse repercussions’ that the quarry owners would suffer.

1.1.4. Indirect effect and consistent interpretation

The Court has developed a number of ‘doctrinal devices’ that have reduced the impact of there not being horizontal direct effect of directives (Craig & de Búrca 2011:200), that is to say, when there is a relationship of individual against individual (instead of individual against the state). Although the Court denied the possibility of horizontal direct effect, other ways of encouraging the effectiveness of directives came to light, for instance, by developing a principle of harmonious interpretation that requires national law to be interpreted in the light of directives.

In *Von Colson*,³⁰ the Court dealt with the requirement of national courts to implement the directives taking into account the purpose of the legislation. The case revolved around the interpretation of Council Directive No 76/207/EEC of 9 February 1976 on the implementation

²⁷ Case 201/02 *Wells v Secretary of State for Transport, Local Government and the Regions*, EU:C:2004:12.

²⁸ *Ibid.*, paragraph 55.

²⁹ *Ibid.*, paragraph 57.

³⁰ Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen*, EU:C:1984:153.

of the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions. In 1982 two vacancies for social workers arose at the Werl prison. The officials responsible for recruitment justified their refusal to engage women by citing the problems and risks connected with the appointment of female candidates and for those reasons appointed instead male candidates who were, however, less well-qualified. Two women candidates claimed compensation for damages, but under German legislation the only sanction for discrimination in recruitment was compensation for *Vertrauensschaden* (negative interest), meaning that compensation was limited to the travel expenses the candidates incurred in applying for the post.

The Court did not hesitate to confirm that Member States were obliged to achieve the result envisaged by the directive in accordance with Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation. Additionally, the Court noted that ‘national courts are required to interpret their national law in the light of the wording and the purpose of the directive’.³¹

The Court explained that although Directive No 75/207/EEC leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained and must, therefore, amount to more than purely nominal compensation (travel expenses). Most importantly, the Court ruled that national courts must interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.³²

Furthermore, *Marleasing*³³ concerned a horizontal situation involving disputes between private parties before a domestic court, where the interpretation of national law in the light of an unimplemented directive would not impose a penal liability but was likely to affect its legal position in a disadvantageous way. The judgment confirmed that an unimplemented directive could be relied on to **influence the interpretation of national law** in a case between individuals (Craig & de Búrca 2011:201).

So the Court of Justice emphasized the national court's duty of consistent interpretation:

³¹ *Ibid.*, paragraph 26.

³² *Ibid.*, paragraph 28.

³³ Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA.*, EU:C:1990:395.

... in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.³⁴

All these cases of indirect effect turn out to be significant for our study since the criteria of interpretation of the Court can be elucidated. The duty of harmonious interpretation became a very important criterion of interpretation for the Court, as well as the need to interpret a provision in accordance with the general scheme and the rules of which it forms a part. The hermeneutical principles become important not only when dealing with linguistic divergences but also when interpreting EU law in general, when EU principles are defined through the case law.

1.2. Primacy: the relationship between EU law and national law

The doctrine of primacy³⁵ of EU law had no formal basis in the treaty but was developed by the Court on the basis of its conception of the ‘new legal order’ (Craig & de Burca, 2011:256). In *Van Gend en Loos* the Court stated that the Community constituted a new legal order of international law and the primary focus was on direct effect, but in *Costa v ENEL*³⁶ the Court firmly established the primacy of Community law. In this case, Mr Costa, a shareholder of a private electrical company in Italy, saw himself affected by the nationalisation of the production and distribution of electrical energy (the organisation ENEL had been created to manage electricity). He refused to pay an electricity bill sent to him by ENEL as he objected to the nationalisation of the electrical industry. ENEL sued him, and in his defence, he pleaded that the nationalisation was both unconstitutional under Italian law and in breach of Community law.

One of the important issues in this judgment was the interaction between national and Community law. The Court stated that where two sets of rules, national and community, can apply to a situation, one must take precedence. The question was which one prevailed and who decided. The problem also arose as to the effect of national laws that came into effect after the treaty and which conflicted with it. The Court stated that, in contrast to

³⁴ *Ibid.*, paragraph 8.

³⁵ As De Witte comments, ‘primacy’ and ‘supremacy’ are used interchangeably in the English literature, but the Court of Justice normally refers to ‘primacy’ (2011:323), hence, we use the term ‘primacy’ in this study.

³⁶ Case 6/64 *Flaminio Costa v ENEL*, EU:C:1964:66.

ordinary international treaties, the EEC Treaty had created ‘its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply’.³⁷

The Court explained the particular legal nature of the Union:

By creating a Community of an unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.³⁸

The Court considered that the law stemming from the treaty was an independent source of law and could not, because of its special and original nature, be overridden by domestic legal provisions. To do this would be to deprive Community law of its character and call into question the legal functions of the Community. Article 177 was to be applied regardless of any domestic law. The Court’s view on the primacy of Community law was extended in other cases such as *Internationale Handelsgesellschaft*³⁹ and *Simmenthal*.⁴⁰

In *Internationale Handelsgesellschaft*, the Verwaltungsgericht Frankfurt-am-Main (administrative court) referred to the Court two questions on the validity of a system of export licenses and deposits established by a Council regulation on the common organisation of the cereals market and a Commission regulation on import and export licenses. The referring court took the view that the contested measures were incompatible with certain fundamental principles contained in the German Constitution which had to be protected within the framework of the Community. The national provisions in dispute were adopted before the treaty entered into force. Moreover, they had constitutional status. By contrast, the rules of Community law at issue were contained, not only in the treaty itself, but in acts of the Community institutions. The Court, however, stated that Community law takes primacy over the constitutions of Member States:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect

³⁷ *Ibid.* On the submission that the court was obliged to apply the national law, p. 593.

³⁸ *Ibid.*

³⁹ Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:114.

⁴⁰ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal*, EU:C:1978:49.

on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore, the validity of a community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.⁴¹

In *Simmenthal*, the Court further developed its primacy doctrine by making clear that the primacy of EU law applied irrespective of whether the national law pre-dated or post-dated the EU law. *Simmenthal S.p.A.* was a company that imported beef for human consumption from France and was charged for an inspection on imported beef. *Simmenthal* was of the opinion that the veterinary and public health inspections of the beef when it crossed the frontier and the fees charged for such inspections were obstacles to the free movement of goods and as such were forbidden under Community law. In *Simmenthal* the question arose as to whether a national court had the power to refuse the application of conflicting provisions of national law in favour of Community law. The Court decided that every national court was obliged to apply Community law, and if necessary, to refuse the application of conflicting national law:

This principle of the precedence of Community law does not spring from the various constitutions of the Member States, which would involve clear danger that the solutions would vary according to the wording of those constitutions, but from Community law itself. The principles of the precedence and of the direct effect of Community law imply that inconsistent national laws can *ipso jure* not be set up against it without its being necessary to await their repeal by the national legislature or their annulment by a constitutional court.

Community provisions having direct effect cannot be affected by conflicting national legislative provisions, whether prior or subsequent to them.⁴²

⁴¹ *Ibid.*, paragraph 3.

⁴² *Ibid.*, page 638.

The consequences of direct effect and primacy of EU law

The main conclusions that can be derived from the analysis of these two principles, direct effect and primacy, are as follows:

- 1) The EU constitutes its own legal order and its powers stem from a limitation of sovereignty or a transfer of powers from the States to the EU.
- 2) EU law is to be considered by national courts as a source of law to be applied in its entirety to individual cases and controversies (De-Witte 2011:339).
- 3) Consistent interpretation entails that national courts must interpret the legislation in the light of the object and purpose of the instrument, thus assuring the uniform application of legislation.
- 4) Any provision of national law which is in conflict with EU law must be ‘set aside’.⁴³ For the national legislator, this implies the prohibition to adopt laws that are inconsistent with the rules of the EU.
- 5) The principle of primacy of EU law does not spring from the various constitutions of the Member States but from the Community itself.⁴⁴

Individuals in the EU are directly involved in the European integration process. The situation is completely different in ‘other regimes of international cooperation, where individuals are mainly looking from the side-lines at the action taken on their behalf by governments and international institutions’ (De-Witte 2011:358). And this has been possible, in large part, thanks to the principles of primacy and direct effect (*Ibid.*).

1.3. EU law between national and international law

1.3.1. Is EU law a branch of international law?

As we have seen in the previous section, EU law is in constant interaction with national law. But it is also necessary to see which place EU law has in the international plane. It is clear that national or internal law is so called because it is the law in force in a particular State, and because it governs social relations that take place within the State without the intervention of a foreign element (Terré 2012:85). However, there are international relations between States or between individuals and that is where international law and EU law intervene.

⁴³ See Case C-213/89 *The Queen v Secretary of State for transport, ex. P Factortame and Others*, EU:C:1990:257.

⁴⁴ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal*, EU:C:1978:49.

In *Van Gend en Loos*, the Court stated that the Community constituted a ‘new legal order of international law’. De Witte confirmed the nature of EU law as that of a ‘branch of international law, albeit a branch with some unusual, quasi-federal, blossoms’ (2011:362). In this sense, the EU can be thought of as acquiring a status similar to that of an individual State. In particular, the Member States’ partial surrender of sovereign rights can be considered to be a sign that the EU is already structured along the lines of a federal State (Borchardt 2010:33). However, in later judgments the Court avoided making any reference to international law and made it clear that the EU constitutes a legal system of its own.⁴⁵

1.3.2. Public or private law

Moreover, if we try to make a distinction between the branches of law we are going to deal with, it is difficult to classify EU law according to the classic distinction of public and private law because EU legislation covers a wide range of policies. In addition, if we look at international law, we may highlight that, on the one hand, **public international law** governs the relations between the subjects of international law, that is to say, mainly the States and more recently international organisations.⁴⁶ The international society is heterogenous since it comprises many different countries. It is decentralised because international law is marked by the principle of sovereignty of the independent States, and because there is not a superior authority to impose a common policy on them (Roche 2010:3).

On the other hand, **private international law** typically governs the relations between individuals that comprise a foreign element, for example, marriage between people of different nationalities or the relation between the perpetrator and victim of an accident caused by an individual in a different country. In these cases the question is to determine which court and which national law is applicable in an international legal relation (Terré 2012:86). Should the court apply its own law or foreign law? If foreign law is to be applied, which of the legal systems involved is to take precedence?

The legal provisions determining the national legal system to be applied are therefore commonly called conflict rules, hence the frequent name for this matter: Conflict of Laws.⁴⁷ Conflict rules do not deal with the substance of a dispute but merely with the procedural question of which national legal system is to be applied to the substance. The word

⁴⁵ Case 6/64 *Flaminio Costa v ENEL*, EU:C:1964:66.

⁴⁶ Roche adds that ‘Même si les individus ont fait une apparition dans la société internationale, ils ne restent des simples acteurs, et ne sont toujours pas de véritables sujets de droit’ (2010:3).

⁴⁷ Some authors also refer to the ‘choice of law’. See for instance Kadner Graziano (2005).

‘international’ in ‘private international law’ may be somewhat misleading, as it does not refer to the nature of the sources of law, but rather to the character of the legal relationship (Bogdan 2012:3).

1.3.3. Extension of harmonisation from public to private law in the EU

In the EU context, it cannot be denied that there is a constant relationship between individuals from different Member States. In that sense, private law in Europe has undergone rapid transformation during the last two decades. Originally, it was a branch of law that was scarcely affected by EU legislation, but with the pass of time, it has become the object of different harmonisation measures. When the European Economic Community (EEC) was founded in 1957, the Treaty of Rome focused on the creation of a common market based on the freedom of movement of goods, persons, services and capitals, and the rules intended to achieve this result were almost exclusively rules of administrative and other public law, such as rules regarding customs duties, qualitative and quantitative import restrictions, residence and labour permits, prohibition of anti-competitive behaviour, etc. (Bogdan 2012:6).

However, there is no doubt that differences in the field of private law may constitute obstacles hindering the creation of a truly common market. The EU has therefore attempted, with some success, to harmonise substantive rules of the Member States regarding some limited questions of private law, such as rules concerning certain aspects of consumer contracts and companies.

In addition, as Ajani and Rossi remark, EU action has extended from sporadic sectors to wider areas, such as, for instance, e-commerce and financial services, characterised by the joint presence of rules for undertakings and for legal relations with consumers. Sector regulation methods have also changed over time, from minimum harmonisation to intensive harmonisation, where there is limited room for legislative freedom for the States (Ajani & Rossi 2006:87).

The consequence of this harmonisation is that the scope of a concept may vary depending on whether the instrument applies to the internal market or to aspects of private law. For example, the concept of ‘services’ in Article 5(1) of the Brussels I Regulation⁴⁸ and Article

⁴⁸ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

4(I)(b) of the Rome I Regulation⁴⁹ is a much narrower concept than ‘services’ in Article 56 TFEU⁵⁰ (Bogdan, 2012:16).

In *Falco* case the Court interpreted ‘services’ narrowly.⁵¹ The case revolved around the interpretation of Article 5(I) of the Brussels I Regulation (Article 7 of the recast Regulation (EU) No 1215/2012⁵²). According to this article on special jurisdiction, a person domiciled in a Member State may be sued in another Member State (emphasis added):

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of **services**, the place in a Member State where, under the contract, **the services** were provided or should have been provided;

The main jurisdictional principle in Articles 2 and 3 of the Regulation, protecting the defendant by forcing the plaintiff to sue in the defendant’s *forum domicilii*, is subject to some important exceptions, like the one provided in Article 7. The latter does not deprive the plaintiff of his right to sue in the Member State of the defendant’s domicile, but give him rather an additional, alternative choice (Bogdan 2012:43). The special jurisdictional rules, being derogations from the main rule, are supposed to be interpreted with restraint (Bogdan

49 Article 4 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations:

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of **services** shall be governed by the law of the country where the service provider has his habitual residence;

⁵⁰ Article 56 TFEU:

Within the framework of the provisions set out below, restrictions on freedom to provide **services** within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

⁵¹ Case C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst*, EU:C:2009:257: ‘The second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters, is to be interpreted to the effect that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services within the meaning of that provision.’

⁵² Article 81 of Brussels I *bis*: ‘It shall apply from 10 January 2015, with the exception of Articles 75 and 76, which shall apply from 10 January 2014.’

2012:44).

This overall picture allows us to illustrate two aspects: i) that EU law is in constant interplay with international law and national laws from the Member States and ii) that there has been an extension of the EU competences, touching new areas of private law.

For this study no division between public and private law is made since the focus is on divergences between different language versions, for which the distinction between public and private law is less pertinent. Nevertheless, this shows that context plays a fundamental role when interpreting concepts. The example of how to interpret ‘services’ highlights the fact that a concept may be interpreted narrowly or broadly depending on the context in which it is used (see section 3.4.4.).

1.4. Competences

In order to understand the competences of the EU, it is worth making a brief overview of the institutional structure of the Union.

1.4.1. The three-pillar structure after Lisbon

The Treaty of Maastricht, which entered into force on 1 November 1993, introduced the three-pillar institutional structure:

1	2	3
<p>COMMUNITY PILLAR</p> <p>Corresponded to the three Communities:</p> <ul style="list-style-type: none"> - European Community, - European Atomic Energy Community (Euratom) - European Coal and Steel Community (ECSC) 	<p>COMMON FOREIGN AND SECURITY POLICY</p> <p>Visa, asylum, immigration and other policies related to free movement of persons</p>	<p>JUSTICE AND HOME AFFAIRS</p> <p>Treaty of Amsterdam (1999)</p> <p>↓ renamed</p> <p>POLICE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS</p>
<p>Decision-making Community procedure</p>	<p>Intergovernmental procedure</p>	<p>Intergovernmental procedure</p>

The **Treaty of Lisbon**, which entered into force on 1 December 2009, made sweeping reforms. It abolished the three-pillar structure in favour of creating the European Union (EU) and it made a new allocation of competencies between the EU and its Member States.

Common Foreign and Security Policy (CFSP)

The Common Foreign and Security Policy, which belonged to the second pillar, is set out in Title V of the Treaty on European Union (General Provisions on the Union's External Action and specific provisions on the Common Foreign and Security Policy). The merging of the pillars did not affect the decision-making procedures for CFSP matters, which continue to be more intergovernmental and less supranational in comparison with other areas of Union competence. Unanimous voting remains the rule of principle for decisions taken in this area.⁵³

Article 24 TEU makes it clear that 'the common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously.' Article 25 TEU establishes that the Union defines the general guidelines, strengthens cooperation between Member States to conduct this policy, and adopts decisions defining:

- (i) actions to be undertaken by the Union;
- (ii) positions to be taken by the Union;
- (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii);

The EU cannot adopt any legislative act in the field of the CFSP: 'The adoption of legislative acts shall be excluded' (Art. 24 TEU). This is an important aspect because it shows the limited competences of the EU in this area. This reflects, in turn, that the Court of Justice of the European Union does not have jurisdiction with respect to the provisions in this area with the exception of certain cases.

In addition, it follows from Article 46 of the EU Treaty that the Court of Justice has

⁵³ Article 31 TEU nevertheless sets out four exceptions to this rule – the Council shall adopt by a qualified majority:
decisions defining Union actions or positions on the basis of a European Council Decision;
decisions defining Union actions or positions proposed by the High Representative of the Union for Foreign Affairs and Security Policy;
decisions implementing Decisions which define Union actions or positions in the area of the CFSP;
the appointment of a special representative proposed by the High Representative.

virtually no competence over the Common and Foreign Security Policy. A preliminary reference on one of the provisions on the CFSP is therefore very likely to be declared inadmissible. Nevertheless, it cannot be completely excluded that situations might arise in which the Court of Justice will admit a preliminary reference relating to the CFSP. This might occur when the reference concerns interaction between the EC Treaty and the CFSP (Broberg & Fenger 2010:13).

Justice and Home Affairs/Police and Judicial Cooperation in Criminal Matters

Initially, Justice and Home Affairs belonged to the third pillar. With the Treaty of Amsterdam, which entered into force on 1 May 1999, the ‘judicial cooperation in civil matters’ (visas, asylum, immigration and other policies related to free movement of persons) was transferred to the first pillar; it was ‘communitarised’. However, the provisions on police and judicial cooperation in criminal matters remained in the third pillar, hence the change of name to ‘Police and Judicial Cooperation in Criminal Matters’. With the Treaty of Lisbon this third pillar was merged with the first pillar and it was included in the ‘Area of Freedom, Security and Justice’. The inclusion of criminal law and police co-operation in the competences of the EU has been one of the central achievements of the Treaty of Lisbon.

Area of Freedom, Security and Justice

The Treaty of Functioning of the European Union, under Title V (Area of Freedom, Security and Justice) regroups asylum policy, immigration policy, judicial cooperation in civil and criminal matters, and police cooperation.

The Treaty of Lisbon considerably reinforces the area of freedom, security and justice established by the EU. Measures taken in this area were generally adopted by unanimity by the Council. The ordinary legislative procedure now applies to many such measures. The objective is to improve attachment to fundamental social rights and reinforce the legitimacy of the EU’s action in this area through the intervention of the European Parliament and the extension of voting by qualified majority. After the disappearance of the pillars and the restrictions imposed by Articles 35 EU and 68 EC, the Court widened the scope of its jurisdiction to give preliminary rulings in the area of freedom, security and justice (Court of Justice of the European Communities 2009:2).

As regards visas, asylum, immigration and other policies related to free movement of persons (in particular, judicial cooperation in civil matters, recognition and enforcement of judgments), any national court or tribunal – no longer just the higher courts – is now able to

request preliminary rulings. The Court has jurisdiction to rule on measures taken on grounds of public policy in connection with cross-border controls. Consequently, the Court of Justice has general jurisdiction in this area from the date the Treaty of Lisbon entered into force (Court of Justice of the European Communities 2009:2)

However, as regards police and judicial cooperation in criminal matters, Article 10(2) of Protocol (No 36) on Transitional Provisions Annexed to the Treaty of Lisbon provides that, as a transitional measure, full jurisdiction will not apply until five years after the Treaty of Lisbon's entry into, i.e. until November 2014. Thus, from December 2014, the jurisdiction of the Court of Justice to give preliminary rulings became binding; it is no longer subject to a declaration by each Member State recognising this jurisdiction and specifying the national courts that may request a preliminary ruling.

Furthermore, Article 23a⁵⁴ of the Statute of the CJEU provides that 'the Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.' As a consequence, the Rules of Procedure include the provisions on the Urgent Preliminary Ruling Procedure (PPU) in Chapter 3 (Article 107-114). The PPU came into effect on 1 March 2008 and applies to the area of freedom, security and justice.

1.4.2. Allocation of competences

Exclusive competence

The EU has exclusive competences on certain areas listed in Article 3 of the TFEU. The fields comprise the customs Union, the establishment of competition rules necessary for the functioning of the internal market, the monetary policy for Member States that use the euro, common trading policy and parts of the common fisheries policy.

This list is small because the consequence of handing over all the competence to the EU is that Member States have no autonomous legislative competence and they cannot adopt any legally binding acts. Only the EU is able to legislate and adopt binding acts in these fields and the Member States' role is therefore limited to applying these acts, unless the Union authorises them to adopt certain acts themselves (Article 2(1) TFEU). The principle of proportionality is used to control the exercise of the Union's legislative powers:

⁵⁴ Article inserted by Decision 2008/79/EC, Euratom (OJ L 24, 29.1.2008, p.42).

The principle of proportionality

Article 5 TEU states that ‘under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the treaties.’

Shared competence

The EU has shared competences with the Member States in areas where action at EU level will add value over action by Member States (Article 4 TFEU). There is shared competence for internal market rules; social policy with regard to specific aspects defined in the Treaty; economic, social and territorial cohesion; agriculture and fisheries (except for the conservation of the biological resources of the sea); environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns with regard to aspects of public health.

Article 2(2) TFEU expressly provides for the possibility that the EU might cease to exercise competence in any of these areas, the consequence being that competence then reverts to the Member States. In other words, Member States exercise their competence to the extent that the EU has not exercised, or has decided to cease exercising, its competence. The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular to respect the principles of subsidiarity and proportionality.

In the areas of research, technological development and space (Article 4(3) TFEU) as well as in development cooperation and humanitarian aid (Article 4(4) TFEU), the Member States can continue to exercise power even if the EU has exercised its competence within these areas.

The principle of subsidiarity regulates the shared competences and acts as a control valve to indicate the extent to which the EU can act:

The principle of subsidiarity

According to Article 5 TEU, in areas which do not fall within the EU’s exclusive competence, ‘the EU shall take action in accordance with the principle of subsidiarity only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved by the EU.’

Supporting, coordinating or supplementary action

Apart from the exclusive and shared competences, under Article 6 TFEU, the Union has competence to carry out actions to support, coordinate or supplement the actions of the

Member States. The areas covered by this category of competence are protection and improvement of human health, industry, culture, tourism, education, youth, sport and vocational training, civil protection and administrative cooperation. The EU cannot harmonise national law in the areas concerned (Article 2(5) TFEU). Responsibility for drafting legislation, therefore, continues to reside with the Member States, which thus have considerable freedom to act.

Economic, employment and social policy

In the areas of economic, employment and social policy, the Member States explicitly acknowledge that they shall coordinate their economic and employment policies with the EU (Article 2(3) TFEU). The detailed rules are set out in Article 5 TFEU. The explanation for this separate category was political. There would have been significant opposition to the inclusion of these areas within shared competences (Craig & de Burca 2011:88).

As way of summary, the Treaty of Lisbon distinguishes three main types of competences:

EXCLUSIVE	SHARED	SUPPORTIVE
<ul style="list-style-type: none"> • Only the EU has competence to legislate in areas of its exclusive competence. The principle of proportionality applies but not the principle of subsidiarity. 	<ul style="list-style-type: none"> • In the areas of shared competences both the EU and the Member States can legislate. The principles of subsidiarity and proportionality apply. 	<ul style="list-style-type: none"> • In the areas of supportive competences Member States have exclusive competence but the EU can provide support and co-ordination.

*

NOTE: Special rules apply to economic, employment, social policies and the CFSP.

* Chart taken from Kaczorowska (2013:191).

1.5. Sources of EU law

In the Treaties there is no explicit outline of the hierarchy of the sources of EU law. Following the order proposed by Kaczorowska (2013:108–109) we can structure them as follows:

- 1) Primary sources
- 2) General principles of law
- 3) External sources (the EU's international agreements)
- 4) Secondary sources
 - Legislative acts

- Non-legislative acts (delegated and implementing acts)

5) Case law of the CJEU

Craig and de Búrca propose that there are five principal tiers to the hierarchy of norms in EU law, which are, in descending order: the constituent Treaties and Charter of Rights, general principles of law, legislative acts, delegated acts, and implementing acts (2011:103).⁵⁵

1.5.1. Primary sources: Treaties and Charter of Fundamental Rights

The founding Treaties⁵⁶ as amended (now contained in the Treaty on European Union and in the Treaty on the Functioning of the European Union) are considered to be the ‘constitutional Treaties’ (Kaczorowska 2013:111). The Protocols and Annexes attached to the TEU and the TFEU form an integral part of them. The Protocols could have been incorporated into the Treaties but their existence saves the Treaties themselves from being too lengthy. The Acts of accession of new Member States also belong to the primary sources.

The Charter of Fundamental Rights became binding with the entry into force of the Treaty of Lisbon. Article 6 TEU states that the Charter has the same legal force as the Treaties.

1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The Charter evidences the importance attached to languages and linguistic diversity in the EU. Article 21 of the Charter prohibits discrimination on the ground of language and according to Article 22, the Union shall respect linguistic diversity.⁵⁷

1.5.2. General principles of law

General principles of law are unwritten sources of law developed by the case law of the Court of Justice.⁵⁸ Some general principles have been codified in the Treaties and the Charter of Fundamental Rights and they have thus become primary sources (Kaczorowska 2013:110).

⁵⁵ Borchardt (2010:80) provides a very similar classification but the order changes: 1) Primary legislation, 2) The EU’s international agreements, 3) Secondary legislation (Legislative acts, Non-legislative acts) 4) General principles of law, and 5) Conventions between Member States.

⁵⁶ The Treaty of Rome establishing the European Economic Community (EEC) and the Treaty of Rome establishing the European Atomic Energy Community (Euratom).

⁵⁷ For further discussions on Art. 22 of the Charter of Fundamental Rights, see Eritja (2002); Milian i Massana (2002); Arzoz (2008) .

⁵⁸ http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114533_en.htm [last consulted on 30/062015].

Article 340(2) TFEU expressly allows judges of the CJEU to apply general principles common to the laws of the Member States to determine non-contractual liability of the EU. However, the CJEU has not limited the application of the general principles to this area, but has applied them to all aspects of EU law (Kaczorowska 2013:115). The CJEU draws inspiration from other sources, such as international public international law and its general principles and national laws of the Member States by identifying general principles common to the laws of the Member States (*Ibid.*).

1.5.3. External sources

By virtue of Article 216(2) TFEU international agreements entered into by the EU with third countries or international organisations are binding upon the EU institutions and the Member States.

1.5.4. Secondary sources

Article 288 TFEU describes the instruments that constitute the secondary sources: regulations, directives, decisions and recommendations and opinion. In some languages, secondary legislation is commonly referred to as ‘derived law’, for example: *droit dérivé* in French *abgeleitetes Recht* in German or *derecho derivado* in Spanish. Regulations, directives and decisions are legally binding instruments, while recommendations and opinions have no binding force. (Kaczorowska 2013:123). Regulations, directives or decisions can be legislative or non-legislative acts (Article 289(1)(2)(3) and Article 297(2) TFEU) (see sections 2.2.1. and 2.2.2.).

1.5.4.1. Regulation

ES	EN	DE	FR
El reglamento tendrá un alcance general. Será obligatorio en todos sus elementos y directamente aplicable en cada Estado miembro.	A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.	Die Verordnung hat allgemeine Geltung. Sie ist in allen ihren Teilen verbindlich und gilt unmittelbar in jedem Mitgliedstaat.	Le règlement a une portée générale. Il est obligatoire dans tous ses éléments et il est directement applicable dans tout État membre.

Regulations are sometimes compared with legislation made by Member States because they

are directly applicable. But they are not called *leyes*, *lois* or *Gesetze*, which are terms that are reserved for national norms. The phrase ‘directly applicable’ means that regulations are part of the national legal systems, without the need for transformation or adoption by separate legal measures (Craig & de Burca 2011:105). However, if the national legislation is not in line with the objective of a regulation Member States need to modify their law in order to comply with the regulation. This does not alter the fact that the regulation itself has legal effect in the Member States independently of any national law.⁵⁹

1.5.4.2. Directive

ES	EN	DE	FR
La directiva obligará al Estado miembro destinatario en cuanto al resultado que deba conseguirse, dejando, sin embargo, a las autoridades nacionales la elección de la forma y de los medios.	A directive shall be binding , as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.	Die Richtlinie ist für jeden Mitgliedstaat, an den sie gerichtet wird, hinsichtlich des zu erreichenden Ziels verbindlich , überlässt jedoch den innerstaatlichen Stellen die Wahl der Form und der Mittel.	La directive lie tout État membre destinataire quant au résultat à atteindre, tout en laissant aux instances nationales la compétence quant à la forme et aux moyens.

Directives differ from regulations in two ways. They do not have to be addressed to all Member States, and they are binding as to the aim to be achieved. There are areas where it is difficult to devise regulations with the requisite specificity, which are suited to immediate effect in the Member States, especially because the Member States have differing legal systems, and there are variations in the political, administrative and social arrangements within the Member States (Craig & de Búrca 2011:106). In this respect, directives are useful under certain conditions, or to introduce complex legislative change. This is because discretion is left to the Member States as to how to implement the directive. As mentioned

⁵⁹ Case 34/73 *Variola v Amministrazione delle Finanze*, EU:C:1973:101: ‘10. The direct application of a regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law. By virtue of the obligations arising from the treaty and assumed on ratification, member states are under a duty not to obstruct the direct applicability inherent in Regulations and other rules of Community Law.’

before, directives can have direct effect, enabling individuals to rely on them at least in vertical relations (actions against the state), and Member States can be liable in damages for non-implementation of a directive.⁶⁰

When Member States transpose a directive, the transposition into national law ‘does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision; a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner’.⁶¹ Some authors argue, however, that copying the exact text can be a way to avoid disputes.⁶²

Member States must provide the European Commission with a list of measures that have been taken in order to implement the directives. This facilitates the task of the Commission regarding the determination of conformity of national law with EU law in the area covered by the directive. When a Member State does not notify the Commission or provides an incomplete notification, it is in breach of Article 4(3) TEU even if it has taken all measures. The Commission is empowered to bring action before the CJEU by virtue of Article 258 TFEU (Kaczorowska 2013:127).

1.5.4.3. Decision

ES	EN	DE	FR
La decisión será obligatoria en todos sus elementos. Cuando designe destinatarios, sólo será obligatoria para éstos.	A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.	Beschlüsse sind in allen ihren Teilen verbindlich. Sind sie an bestimmte Adressaten gerichtet, so sind sie nur für diese verbindlich.	La décision est obligatoire dans toutes ses éléments. Lorsqu'elle désigne des destinataires, elle n'est obligatoire que pour ceux-ci.

In most cases, decisions have specific addressees, as exemplified by the many decisions made in the context of competition and state aid. Nevertheless, some decisions are of a more generic

⁶⁰ Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Others v Italian Republic*, EU:C:1991:428.

⁶¹ See, for instance, Case 247/85 *Commission v Kingdom of Belgium*, EU:C:1987:339 or Case 252/85 *Commission v France*, EU:C:1988:202.

⁶² See Hartley (1996:284) on the discussion about the ‘copy-out’ technique when transposing directives.

nature, setting out the legal rules to govern an inter-institutional issue such as comitology, or providing the legal foundation for Community programmes (Craig & de Burca 2011:107). It is worth remarking that in German there is some confusion as regards the term *Beschluss*. First of all, before the Treaty of Lisbon, when referring to the three main types of legal acts, the term *Entscheidung* was used instead of *Beschluss* (emphasis added):

Article 249 EC Treaty	Article 288 TFEU
<p>Zur Erfuellung ihrer Aufgaben und nach Maßgabe dieses Vertrags erlassen das Europäische Parlament und der Rat gemeinsam, der Rat und die Kommission Verordnungen, Richtlinien und Entscheidungen, sprechen Empfehlungen aus oder geben Stellungnahmen ab.</p> <p>Die Verordnung hat allgemeine Geltung. Sie ist in allen ihren Teilen verbindlich und gilt unmittelbar in jedem Mitgliedstaat.</p> <p>Die Richtlinie ist für jeden Mitgliedstaat, an den sie gerichtet wird, hinsichtlich des zu erreichenden Ziels verbindlich, überlässt jedoch den innerstaatlichen Stellen die Wahl der Form und der Mittel.</p> <p>Die Entscheidung ist in allen ihren Teilen für diejenigen verbindlich, die sie bezeichnet.</p> <p>Die Empfehlungen und Stellungnahmen sind nicht verbindlich.</p>	<p>Für die Ausübung der Zuständigkeiten der Union nehmen die Organe Verordnungen, Richtlinien, Beschlüsse, Empfehlungen und Stellungnahmen an.</p> <p>Die Verordnung hat allgemeine Geltung. Sie ist in allen ihren Teilen verbindlich und gilt unmittelbar in jedem Mitgliedstaat.</p> <p>Die Richtlinie ist für jeden Mitgliedstaat, an den sie gerichtet wird, hinsichtlich des zu erreichenden Ziels verbindlich, überlässt jedoch den innerstaatlichen Stellen die Wahl der Form und der Mittel.</p> <p>Beschlüsse sind in allen ihren Teilen verbindlich. Sind sie an bestimmte Adressaten gerichtet, so sind sie nur für diese verbindlich.</p> <p>Die Empfehlungen und Stellungnahmen sind nicht verbindlich.</p>

The change may be due to a correction, because the terminology used within the EC Treaty was not consistent. The case *C-370/07 Commission v Council*⁶³ reveals the discrepancy between Articles 249, 253 and 300 of the EC Treaty.

As we have seen above, Article 249 EC Treaty (now 288 TFEU), which provided the types of legal acts, used the term *Entscheidung*. Article 253 EC Treaty (now 296 TFEU) also used the term *Entscheidungen*:

Die Verordnungen, Richtlinien und **Entscheidungen**, die vom Europäischen Parlament und vom Rat gemeinsam oder vom Rat oder von der Kommission angenommen werden, sind mit Gründen zu versehen und nehmen auf die Vorschläge oder Stellungnahmen Bezug, die nach diesem Vertrag eingeholt werden müssen.

In these two articles (Art. 249 and 253 EC Treaty), the terms used in the other languages were also consistent:

EN: decision

FR: *décision*

ES: *decisión*

However, Article 300 EC Treaty (now 218 TFEU) used the term *Beschluss*:

(2) Vorbehaltlich der Zuständigkeiten, welche die Kommission auf diesem Gebiet besitzt, werden die Unterzeichnung, mit der ein **Beschluss** über die vorläufige Anwendung vor dem Inkrafttreten einhergehen kann, sowie der Abschluss der Abkommen vom Rat mit qualifizierter Mehrheit auf Vorschlag der Kommission beschlossen. Der Rat beschließt einstimmig, wenn das Abkommen einen Bereich betrifft, in dem für die Annahme interner Vorschriften Einstimmigkeit vorgesehen ist, sowie im Fall der in Artikel 310 genannten Abkommen.

The German version used *Beschluss* instead of *Entscheidung* and the terms used in the other languages were consistent with the ones used in Art. 249 and 253 EC Treaty:

EN: decision

FR: *décision*

ES: *decisión*

The case *Commission v Council* revolved around this confusion. The fact that the Treaty on the Functioning of the EU uses the term *Beschluss* in a consistent way may indicate that the

⁶³ Case C-370/07 *Commission v Council*, EU:C:2009:590.

confusion has been clarified. Burr (Burr 2009:756) also points out that the German, Danish and Dutch language versions used two different terms: *Entscheidung – Beschluss* (DE); *beschikking – besluit* (NL) and *beslutning – afgørelse* (DA). The author also confirms that after Lisbon, the use of these terms is consistent:

In der geplanten Änderung des EU- und EG-Vertrages durch den Vertrag von Lissabon wird eine Vereinheitlichung der Terminologie, zumindest im Dänischen, Deutschen und Niederländischen, hinsichtlich *Entscheidung* und *Beschluss* vorgenommen.

To conclude, *Beschluss* is used to refer to one of the types of legal acts (Art. 288 TFEU) and *Entscheidung* has been left to refer to one of the types of documents of the CJEU.

1.5.4.4. Recommendation and opinion

The last instruments mentioned in Article 288 TFEU are recommendations and opinions:

ES	EN	DE	FR
Las recomendaciones y los dictámenes no serán vinculantes.	Recommendations and opinions shall have no binding force.	Die Empfehlungen und Stellungnahmen sind nicht verbindlich.	Les recommandations et les avis ne lient pas.

It must be pointed out that in English the term ‘opinions’ is used in Art. 288 TFEU, which coincides with the term used when an Advocate General expresses what he thinks in a determinate case (‘Opinion of the Advocate General’). However, in the other languages use two different terms are used. To refer to a type of legal act (Art 288): *Stellungnahmen* (DE), *dictámenes* (ES) and *avis* (FR). And to refer to the ‘Opinion of the Advocate General’: *Schlussantrag des Generalanwalts* (DE), *Conclusiones del Abogado General* (ES) and *Conclusions de l’avocat general* (FR).

Moreover, as regards the instruments mentioned in Art. 288 TFEU, there is no formal hierarchy between them. Although Regulations are directly applicable, this does not mean that they are superior to, say, directives. However, regulations, directives and decisions can take the form of legislative or non-legislative acts. Their place within the hierarchy of norms depends on that, but this does not alter their nature. For details on the difference between legislative acts and non-legislative acts, see 2.2.1. Legislative acts and 2.2.2. Non-legislative acts.

1.5.5. Case law of the CJEU

Case law merits special attention because it is not regarded as a formal source of EU law. Under EU law there is no doctrine of precedent: previous case law is neither binding on the General Court, nor on national courts, nor on itself (Kaczorowska 2013:140). However, for many reasons, the most important being legal certainty, the CJEU is reluctant to depart from the principles laid down in earlier cases (Kaczorowska 2013:109). Thus, previous case law is important as it provides guidelines for subsequent cases that raise the same issues. Moreover, the CJEU has established constitutional principles and important concepts of EU law in its judgments, which have subsequently become sources of EU law, thus case law is indeed a significant source of EU law (*Ibid*). Many authors have confirmed this premise, even arguing that case law is often the most important source of EU law (Derlén 2014:298, citing Schermers & Waelbroeck 2001).

1.6. Overview of the language regime in the EU institutions

Discussions about the language regime started at the beginning of 1958 in the Committee of Permanent Representatives. On 15 April 1958, the Councils of the EEC and the Euratom passed Regulation No 1 determining the languages to be used by both Communities (Commission 2009:11). Negotiations were carried out in French and a group of expert linguists were in charge of the German, Italian and Dutch version of the Regulation.⁶⁴

The founding Treaties do not determine the official and working languages of the institutions of the Union. In fact, they limit themselves to listing the languages in which versions are equally authentic and specifying the institution authorised to determine the rules governing the languages of the institutions and to establish the procedure to follow according to those specifications (Milian i Massana 2008:193, 2012:151). Article 342 TFEU (ex Article 290 TEC) provides that:

The rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations.

⁶⁴ EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, Official Journal 017 , 06/10/1958 p. 0385 – 0386.

Thus, it is the Council that is responsible for determining the rules, which must be adopted unanimously, with the consent of all Member States.

Regulation No 1 has been amended after each enlargement, incorporating the new official languages up to the current number of twenty-four with the last accession of Croatia; this is subject to increase depending on the next accessions.⁶⁵ The Regulation refers to the written use of languages; no mention is made of oral communication. It establishes a series of core principles that govern the use of languages in the EU institutions (Nic Shuibhne 2012:126). Article 1 mentions ‘the official languages and the working languages of the institutions’, but it makes no distinction between them. Thus, all the languages listed in Article 55 TEU are both (and the only) official and working languages. In addition, Article 4 envisages that ‘regulations and other documents of general application shall be drafted in the four official languages.’ Therefore, when dealing with binding texts no text can prevail over another one and all language versions are authentic. Moreover, what is remarkable is that Article 6 of Regulation No 1 gives EU institutions some freedom as to the applicability of this language regime:⁶⁶

ES	EN	DE	FR
Las instituciones podrán determinar las modalidades de aplicación de este régimen lingüístico en sus reglamentos internos.	The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.	Die Organe der Gemeinschaft können in ihren Geschäftsordnungen festlegen, wie diese Regelung der Sprachenfrage im einzelnen anzuwenden ist.	Les institutions peuvent déterminer les modalités d'application de ce régime linguistique dans leurs règlements intérieurs.

It is interesting to remark that the wording of the Spanish, French and German version state how or the different ways in which to apply the ‘language regime’ (*las modalidades de aplicación de este régimen lingüístico, les modalités d'application de ce régime linguistique, wie diese Regelung der Sprachenfrage im einzelnen anzuwenden ist*). The English version,

⁶⁵ For acceding and candidate countries see: <http://goo.gl/oepDU>

⁶⁶ For an in-depth study on the language regime in the EU, see Fabeiro Fidalgo (2014:251–314).

however, does not mention ‘language regime’ and states directly *which of the languages are to be used in specific cases*. In spite of this modulation, thus far, this wording has posed no problems and the effect has been the same in all languages.

Since the Treaty of Lisbon, there are seven EU institutions and each of them has applied the language regime differently.

1.6.1. European Commission

The European Commission is the body that proposes legislation, implements EU policy and the budget, and makes sure the treaties are properly applied. It shares executive powers with the Council of the EU. The Commission was composed of twenty-seven commissioners chosen on the ground of their general competence and European commitment. Article 17(5) TEU states, however, that as of 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the total number of Member States, unless the European Council acting unanimously decides to alter this number. Each commissioner is assigned responsibility for specific policy areas by the president.

According to Article 249 TFEU ‘the Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate. It shall ensure that these rules are published.’ The rules⁶⁷ consist of 29 articles and set out the institution's administrative organisation, its internal decision-making procedure, provisions for security and access to legal documents. Article 25 establishes that ‘the Commission shall, as necessary, lay down rules to make these Rules of Procedure effective. The Commission may adopt supplementary measures relating to the functioning of the Commission and of its departments which shall be annexed to these Rules of Procedure.’ That means that the language choice may vary according to the situation.

Although it is not set out explicitly in the Rules of Procedures, English, French and German are the main working languages⁶⁸ of the European Commission (even if German is used far less than the other two) (Gazzola 2006:5).

1.6.2. Council of the European Union

The Council of the European Union (‘the Council’) exercises legislative and budgetary functions jointly with the European Parliament. It carries out policy-making and has

⁶⁷ European Commission, Rules of Procedure, 8.12.2000, L 308/26.

⁶⁸ The webpage on traineeship establishes that the working languages of the European Commission are English, French and German: <http://goo.gl/GN8yO>

coordinating functions as established in the treaties (Art. 16 TEU). At each Council meeting, each country sends the minister for the policy field being discussed, e.g. the minister of education for a meeting dealing with matters on education.

Article 14 of the Council Decision adopting the Council's Rules of Procedure⁶⁹ states that:

1. Except as otherwise decided unanimously by the Council on grounds of urgency, the Council shall deliberate and take decisions only on the basis of documents and drafts drawn up in the languages specified in the rules in force governing languages.

This means that before a meeting, ministers should have the documents in all language versions for the participants. Moreover, ‘any member of the Council may oppose discussion if the texts of any proposed amendments are not drawn up in such of the languages referred to in paragraph 1 as he or she may specify (Article 14(2) Council’s Rule of Procedure).’

However, when ministers have informal meetings they normally work with two or three languages: French, English and German, or French, German and the language of the country that has the presidency in a given term (Siguan 2004:6). At a lower level, the Committee of Permanent Representatives (COREPER), which is responsible for preparing the work of the Council (Article 16(7) TEU), normally works in German, English and French.

1.6.3. European Parliament

EU citizens directly elect the members of the European Parliament (MEPs) every five years; therefore, the MEPs represent the people. The Parliament is one of the EU’s main lawmaking institutions, along with the Council of the European Union.

As the most democratic institution, the Parliament firmly defends multilingualism. It has reaffirmed ‘its commitment to the equality of the official languages and the working languages of all the countries of the Union’⁷⁰ and considers it a cornerstone of the concept of a European Union, of its philosophy and of the political equality of its Member States. It asserts that diversity of languages is one of the characteristics of European culture and it is an important aspect of European cultural wealth.

The Parliament has also opposed any attempt to discriminate between the official and the working languages of the European Union and urges that citizens use their own languages, both orally and written, in their communication with all European institutions.

⁶⁹ Council Decision adopting the Council's Rules of Procedure, 11.12.2009, L 325/35.

⁷⁰ European Parliament, Resolution on the use of the official languages in the institutions of the European Union, 20/02/1995, C 043, p. 0091, Article 1.

It has adopted its own Rules of Procedure⁷¹ pursuant to Article 232 (TFEU). One article is devoted to the question of languages:

Rule 146: Languages

1. All documents of Parliament shall be drawn up in the official languages.
2. All Members shall have the right to speak in Parliament in the official language of their choice. Speeches delivered in one of the official languages shall be simultaneously interpreted into the other official languages and into any other language the Bureau may consider necessary.
3. Interpretation shall be provided in committee and delegation meetings from and into the official languages used and requested by the members and substitutes of that committee or delegation.
4. At committee and delegation meetings away from the usual places of work interpretation shall be provided from and into the languages of those members who have confirmed that they will attend the meeting. These arrangements may exceptionally be made more flexible where the members of the committee or delegation so agree. In the event of disagreement, the Bureau shall decide.

The Parliament considers the possibility of having discrepancies between the different language versions and states that if after the result of a vote it is announced that there are discrepancies, ‘the President decides whether the result announced is valid pursuant to Rule 171.5. If he declares the result valid, he must decide which version is to be regarded as having been adopted. However, the original version cannot be taken as the official text as a general rule, since a situation may arise in which all the other languages differ from the original text.’ In other words, no version can be taken as the only official version. What is striking here is the use of the term ‘original text’, which is normally avoided because, as we said before, all language versions are equally authentic.

Controlled full multilingualism

The Parliament, in its resolution of 14 May 2003 on its 2004 estimates, stated its intention to develop the concept of ‘controlled multilingualism’ and called on the Bureau to submit

⁷¹ Rules of Procedure of the European Parliament, 7th parliamentary term, July 2012.

practical proposals concerning a more effective use of resources whilst maintaining equality among languages.⁷²

The linguistic services offered by the European Parliament are managed according to the principles of ‘controlled full multilingualism’. Members have the right to use the official language of their choice, pursuant to Parliament’s Rules of Procedure. The Code of Conduct makes it clear that resources to be devoted to multilingualism shall be controlled by means of management on the basis of users’ real needs, a measure to make users more aware of their responsibilities and to allow for more effective planning of requests for language facilities.⁷³ Article 1(5) provides that the services will be provided according to the needs:

The management of language resources shall be based on a system providing for the exchange of information between users and the language services. Users shall determine and update their language needs by means of an ‘interpretation language profile’ and quarterly forecasts of translation requirements designed to facilitate medium- and long-term management of language resources. Users shall notify the language services of their real needs by the deadlines laid down in this Code of Conduct. The language services shall inform users of any shortage of resources.

Another measure is that texts submitted for translation have maximum lengths (Article 14 of the Code of Conduct).

The European Parliament often needs to make use of the documents in all official languages at short notice. In order to address this demand, it has set up a system based on six pivot languages: English, French, German, Italian, Polish and Spanish. That means that a document in Slovakian or Swedish is not directly translated into all 24 languages, but first into pivot languages and then into the other languages (Pozzo 2006:4).

1.6.4. Court of Justice of the European Union

Regulation No 1 establishes that the Court has a specific language regime: ‘The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.’ Chapter 6 of the Rules of Procedure⁷⁴ (Art. 29-31) is devoted to the language regime.

First of all it is necessary to distinguish between the working language and the language of a case.

⁷² Code of Conduct on multilingualism adopted by the Bureau, November 2008.

⁷³ *Ibid.*, Article 1.2.

⁷⁴ Court of Justice of the European Union, consolidated version of the Rules of Procedure, 2.7.2010. C177/1.

1.6.4.1. Working language

Since the beginning of the Community's functioning, the six judges of the founding Member States saw the need to have a working language for the deliberations. One particularity of the deliberations is that judges are on their own, that is they do not have the assistance of interpreters (Berteloot 1987:11). French was set as the working language and, according to Berteloot, there are two elements that explain this choice of language: i) the political prestige of France at that time and ii) the regime for direct actions before the Court which were largely influenced by the French procedural system.⁷⁵

As a result, procedural documents written in a language other than French are all translated into French for internal work purposes.

1.6.4.2. Language of the case

The language of a case can be any of the official languages. It is the language used in the written and oral pleadings of the parties and in supporting documents as well as in the minutes and decisions of the Court. Any supporting documents expressed in another language must be accompanied by a translation into the language of the case (Article 35(3) of the Rules of Procedures of the Court).

Article 37 of the Rules of Procedures provides how to determine the language of the case. In direct actions, the language of a case shall be chosen by the applicant, except:

- (a) where the defendant is a Member State or a natural or legal person having the nationality of a Member State, the language of the case shall be the official language of that State; where that State has more than one official language, the applicant may choose between them;
- (b) at the joint request of the parties, the use of another language mentioned in paragraph 1 for all or part of the proceedings may be authorised;
- (c) at the request of one of the parties, and after the opposite party and the Advocate General have been heard, the use of another of the languages mentioned in Article 36 may be authorised as the language of the case for all or part of the proceedings by way of derogation from subparagraphs (a) and (b); such a request may not be submitted by

⁷⁵ Sans doute existe-t-il deux éléments qui, au départ, ont commandé le choix de cette langue : le prestige politique de la France à l'époque et, ensuite, le régime même des recours directs devant la Cour de justice qui sont largement influencés par le recours pour excès de pouvoir devant le Conseil d'Etat français (Berteloot 1987:11).

one of the institutions of the European Union.

In preliminary ruling proceedings, however, the language of the case shall be the language of the referring court or tribunal. At the duly substantiated request of one of the parties to the main proceedings, and after the other party to the main proceedings and the Advocate General have been heard, the use of another language mentioned in Article 36 may be authorised for the oral part of the procedure. Where granted, such authorisation shall apply in respect of all the interested persons referred to in Article 23 of the Statute.

Authentic texts

Article 41 of the Rules of Procedures of the Court establishes that the only authentic language version is the one of the language of the case:

The texts of documents drawn up in the language of the case or, where applicable, in another language authorised pursuant to Articles 37 or 38 of these Rules shall be authentic.

What happens in the CJEU is that *de iure* the authentic version is the language of the case, but *de facto*, it could be argued that it is the French version, since French is the working language.

1.6.5. European Council

European Council meetings are essentially summits where EU leaders meet to decide on broad political priorities and major initiatives. Typically there are around four meetings a year chaired by a permanent president. The European Council brings together the heads of state or government of every EU country, the Commission president and the European Council president, who chairs the meetings. The EU's High Representative for Foreign Affairs and Security Policy also attends.⁷⁶

The Treaty of Lisbon transformed the European Council into an institution of the European Union having to adopt its own Rules of Procedure.⁷⁷ As happens in the case of the Parliament, the European Council deliberates and takes decisions only on the basis of documents and drafts drawn up in the languages provided for by the language rules in force.⁷⁸ In addition, 'any member of the European Council may oppose discussion where the texts of any

⁷⁶ http://europa.eu/about-eu/institutions-bodies/european-council/index_en.htm [last consulted on 30/01/2014].

⁷⁷ European Council Decision adopting its Rules of Procedure, December 2009.

⁷⁸ *Ibid.*, Article 9.1.

proposed amendments are not drawn up in the languages referred to in paragraph 1 as he or she may specify'.⁷⁹

1.6.6. European Central Bank

The European Central Bank (ECB), based in Frankfurt, Germany, manages the euro and safeguards price stability in the EU. The ECB is also responsible for framing and implementing the EU's economic and monetary policy.

The ECB also became an institution with the Treaty of Lisbon and adopted its Rules of Procedure.⁸⁰ The language question is mentioned in Article 17. Multilingualism is ensured by the publication of the documents in all language versions:

‘...any ECB guideline that is to be officially published shall be translated into the official languages of the European Communities’ (Article 17(2)).

‘... any ECB instruction that is to be officially published shall be translated into the official languages of the European Communities’ (Article 17(6)).

Moreover, Article 17(7) states that the Executive Board shall take steps to ensure publication in the Official Journal of the European Union in all the official languages for ECB regulations, ECB opinions on draft Community legislation and those ECB legal instruments whose publication has been expressly decided.

A complaint was submitted to the ombudsman⁸¹ regarding the multilingual publication of documents by the ECB. The ECB explained that it develops its ‘multilingual communication’ taking into account the recipients of the information.⁸² The ECB communicates with the European citizens and their representatives in their own languages whilst its communication with financial markets is made in English. It seems the ECB has opted for multilingualism *à la carte*, making a distinction between lay people and specialists.

The ombudsman noted that the ECB has a dual structure: on the one hand, it is a specialised EU law organisation, and on the other, it is the decision-making centre of the European system of central banks. Therefore, the ombudsman understood that the language used by the ECB in its external contacts with the public through its website could reasonably differ depending on the nature of the information concerned.

⁷⁹ *Ibid.*, Article 9.2.

⁸⁰ European Central Bank Decision adopting its Rules of Procedure, 18.03.2004, L 080/33.

⁸¹ Case: 1008/2006/(BB)MHZ, Opened on 07 Jun 2006; Decision on 31 Oct 2007.

⁸² It must be noted that the aforementioned decision dates in 2007, when the ECB was not an EU institution. Thus, it did not have to comply with the rules of Regulation No 1.

1.6.7. Court of Auditors

The European Court of Auditors audits EU finances. Its role is to improve EU financial management and report on the use of public funds. It was set up in 1975 and is based in Luxembourg. Also an EU institution since the Treaty of Lisbon, the Court of Auditors adopted its own rules of procedure.⁸³ One article is devoted to the language question:

Article 28

Languages and authentication

1. The reports, opinions, observations, statements of assurance and other documents, if for publication, shall be drawn up in all the official languages.
2. The documents shall be authenticated by the apposition of the President's signature on all the language versions.

Once again, publication in all official languages guarantees multilingualism. All of the documents stemming from the Treaty, in particular the Annual Report, Special Reports, Special Annual Reports, Opinions, letters from the president and observations are translated into the Union's official languages. The same is true of documents officially forwarded to the European institutions and a number of other documents such as certain competition notices, vacancy notices, Court Decisions and staff notices. The same rule also applies to documents for general circulation, such as Court brochures, documents providing information on the Court's work and documents for internal use and circulation to the national audit institutions, such as the Audit Manual. The Court's Translation Directorate, consisting of one language unit for each official language, is responsible for the related translation work. However, for internal purposes (Court, Chamber and Administrative Committee meetings), the European Court of Auditors has adopted 'limited multilingualism' as a solution, i.e., using two key drafting languages: English and French.⁸⁴

As a way of summary, in the EU there are twenty-four official languages but Article 6 of Regulation No 1 gives the EU institutions some margin as to how to apply the language regime.

EU INSTITUTIONS	Main working languages
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⁸³ Court of Auditors of the European Union, Rules of Procedure, 23.04.2010, L 103/1.

⁸⁴ See The Court's Communication Policies and Standards: <http://goo.gl/8BVUTN> [last consulted on 30/01/2014].

European Commission	English, French, German
Council of the European Union	All 24 official languages Informal meetings & COREPER: English, French, German
European Parliament	All 24 official languages
Court of Justice of the European Union	French
European Council	All 24 official languages
European Central Bank	English
Court of Auditors	English and French

1.7. Reduction of the language regime?

Many scholars have challenged the sustainability of the EU's current language regime. Radical views against multilingualism are, for example, those of Philippe Van Parijs (2007) and Abram de Swaan (De-Swaan 2007; 2004; 2001). Van Parijs is very confident that we should all be using English as the lingua franca for the purposes of efficiency and fairness. Abram de Swaan goes beyond that and has even stated that multilingualism is a 'damned nuisance'⁸⁵ affirming that 'the more languages that compete, the more English will take hold'. Let us examine some of the main arguments against multilingualism in the EU.

1.7.1. Lingua franca

Multilingualism is an obstacle in the EU and of course communication would be simpler if we spoke a single language. After the great enlargement in 2004 the language regime came to be a greater hindrance for the EU. 'The intellectual exchange is hampered by the barriers of language and by the constraints of the national framework' (de Swaan 2007:9). This author affirms that the coexistence of all official languages is an obstacle to cultural opportunities.⁸⁶ Van Parijs states that 'we need a way of communicating directly and intensively across the borders drawn by the differences of our mother tongues, without the extremely expensive and constraining mediation of competent interpreters' (2004:219).

⁸⁵ <http://euobserver.com/9/26742> [last consulted on 30/01/2014].

⁸⁶ This inadequate cultural opportunity structure is coupled with a most persistent cultural obstacle structure: the coexistence of a dozen languages within the European Union (de Swaan 2007:5).

It is commonly agreed that if we have to use a single language it would be English: ‘the lingua franca is inevitably English,⁸⁷ as carrier of globalization, imperialism, capitalism, consumerism and commercialization’ (de Swaan 2001:153). English has become the predominant medium of international communication in the EU. When mentioning globalisation, Van Parijs claims that we need a single language ‘in particular if we do not want Europeanisation, and beyond it globalisation, to be the exclusive preserve of the wealthy and the powerful who can afford quality interpretation’ (2004:219).

However, upon closer analysis, these arguments seem unsustainable. First, the use of a single official language, most probably English,⁸⁸ would imply moving backwards in the process of European integration. There are strong legal and political arguments that justify multilingualism. Moreover, if we do not want ‘globalisation to be exclusively for those who can afford quality interpretation’, then we should think about the cost of learning English. One could argue that only the wealthy and the privileged can afford to learn English as a foreign language. Besides, what about those who do not have the gift of readily learning languages?⁸⁹ The only way of achieving monolingualism in the EU would be through linguistic imperialism, by imposing a single language on the peoples of Europe, which seems far-fetched.

Van Parijs reiterates that ‘we definitely need convergence to a single lingua franca. Those saddened by the fact that it is not the one they learned as infants will have to come to terms with it. Their narcissism should not jeopardise the satisfaction of our urgent communicative needs, in Europe and in the world’ (2004:224). This argument amounts to ‘come to terms with it’! Van Parijs has even expressed the joy of being in a monolingual situation: ‘if a powerful language were to drive all others into gradual extinction, not only would we all enjoy the convenience of being able to use our mother tongue in all the conference rooms and hotel lobbies of the world, but incomparably more would be within our reach’ (Van Parijs 2007:12). De Swaan also stated ‘there is no good reason why people should not switch to another, more viable language’ (2001:188).

From these arguments we see a contradiction that is quite worrying. On the one hand, these authors endorse the use of a lingua franca but they seem not to take into account the

⁸⁷ See also Moréteau (1999).

⁸⁸ Shilling also mentions the possibility of having only one authentic version of EU legislation based on a system of rotation of the authentic language between all the official languages (2010:65) but he recognizes the impracticability of such a mechanism.

⁸⁹ De Swaan has recognized that ‘not everyone is endowed with the gift in which linguists take such pride’ (2004:8).

consequences of losing a language. By switching to a more viable language the use of other languages would be at risk of falling into disuse. De Swaan has even recognised that the disappearance of a language ‘is an irreversible loss of culture. A language is a piece of cultural heritage comparable to the Egyptian pyramids or to medieval cathedrals, to African polyrhythm or European polyphony’ (de Swaan 2004:3). So why would we want to put languages in danger?

1.7.1.1. Seize English!

De Swaan was involved in a debate on multilingualism in Europe and some of the arguments given in favour of a lingua franca are worth examining. He stated that we should seize the English language and dispossess the Anglo-Saxons of the monopoly of distinction:

De Swaan: je rejoins là Pierre Bourdieu – s’approprient l’anglais comme langue européenne et qu’ils déposèdent les Anglo-Saxons du monopole de la distinction, du bon et mauvais usage, de la bonne et mauvaise prononciation, comme les Indiens et les Nigériens sont finalement en train de s’approprier l’anglais dans leur propre version, au lieu d’être gênés de ne pas parler un bon anglais (Bourdieu et al. 2001).

This argument seems to be illusory; only a tyrant can take this measure. In the debate, Claude Hagège argued against de Swaan’s proposal stating that seizing English is utopian, unfair and even extremely dangerous.⁹⁰ As Flesch argued, ‘Si l’Europe s’uniformise sous une langue ou une culture “dominante”, elle perdra son âme’ (1999:99).

Professor Bruno de Witte makes an interesting analysis on the current linguistic situation and compares the adoption of a single language with the adoption of a single currency. He admits that the adoption of a single language would be inconceivable and states that the change could take at least two generations (De-Witte 2004). The adoption of a common language is implausible because each language has a history; each language shows the way in which people see the world from different perspectives. A currency is something invented, the Euro was created in order to have an economic and monetary union. It is subject to fluctuations of the global economy and its existence may be at risk, depending on financial markets.

In addition, Grin and Gazzola (2013) make an in-depth analysis on whether English as a lingua franca (ELF) is more effective and fair than translation. Their conclusion is that ‘a

⁹⁰ ‘Le point de vue qui a été ici développé consiste à dire qu’il nous faut précéder les anglophones, Américains comme Britanniques, en les déposédant de leurs privilèges, de leur usage autochtone de la langue, pour devenir nous-mêmes de parfaits anglophones. Cela me paraît totalement utopique et injuste, voire extrêmement dangereux’ (Bourdieu et al. 2001:55).

multilingual, translation-based language regime is both more effective and more fair than a unilingual regime based on English' (2013:104).

Finally, apart from the use of English as a lingua franca, other alternative models are possible. In this study, we do not aim at examining the different language regimes discussed in the literature. For further details see, for example, Grin (2008; 2004), who analyses seven different regimes: the 'monarchic' (English), the 'synarchic' (Esperanto), the 'oligarchic', the 'panarchic', the 'hegemonic', the 'technocratic' and the 'triple symmetrical relay'.

1.7.2. The cost of multilingualism

De Swaan has also stated that 'one argument against the use of multiplicity of languages and in favour of a single vehicular language meets broad agreement in all multilingual constellations: the costs of translation and interpretation from and into all recognized languages are prohibitive' (de Swaan 2001:191).

Those expecting an exorbitant expenditure will be surprised by the small percentage the cost of multilingualism represents in the EU's overall budget. In 1999, the Joint Interpreting and Conference Service estimated that the cost for translation and interpretation for all EU institutions was 0.8% of the total EU budget⁹¹ (€686 million out of a total of € 85,557,748,703).⁹² From this, the press office of the Commission's language service concludes that multilingualism costs each EU citizen just €2 per year (Kraus 2008:123). Moreover, according to a study published by the European Commission in 2009, the cost of multilingualism is about 1% of the EU budget:

Tous coûts des services linguistiques inclus. La traduction et l'interprétation coûtent environ 1 milliard d'euros par an, ce qui est moins de 1% du budget de l'EU. Pour mémoire, le budget de l'UE représente 1% du PIB agrégé des 27 Etats membres (European Commission-DGT).

Leonard Orban, former commissioner for multilingualism, declared in an interview with EurActiv in 2008 that 'if we divide [the €1.1bn] by population, we see that it is about €2.5 per citizen per year'.⁹³

⁹² Source: European Commission. Joint Interpreting and Conference Service, 2001: Info/Web/Media – 6 March 2001 (internal fact sheet), cited in Kraus (2008:123).

⁹³ <http://goo.gl/mgI.9n> [last consulted on 30/01/2014].

A more recent evaluation of the EU's multilingual regime confirms that 'EU institutions currently spend around €1.1 billion per year on language services, that is, less than 1% of the budget of EU institutions (€147.2 billion in 2012) and 0.0087% of European GDP (€12,784.1 billion in 2012)' (Gazzola & Grin 2013:100). Moreover, 'if we take into account that the EU's population in 2012 was about 503.7 million, the annual per-person expenditure for the current EU language regime can be estimated at €2.2 or at €2.7 (supposing that the cost is spread only over citizens aged 15 or above, on the grounds that a language regime mainly serves people old enough to read and write' (Gazzola & Grin 2013:100).

The cost of multilingualism turns out to be a weak argument. Claiming that the language regime of the EU after the last two enlargements 'has become economically unsustainable' (Cogo & Jenkins 2010:272) is, from an economic point of view, an invalid argument. The European Parliament has clearly stated that 'technical and budgetary arguments can in no circumstances justify a reduction in the number of languages'.⁹⁴

In this respect, the author Stéphane Lopez claimed that the cost of multilingualism is the worst argument: 'Le coût du plurilinguisme est le pire des arguments. Chacun a compris que au global la chiffre qui passe le milliard d'euros est impressionnante mais que rapporté au nombre de citoyens, il parait comme ridicule, entre deux et trois euros par an' (2010:13).

To conclude, we do not perceive multilingualism as a problem, difficulty or obstacle. Rather, when approached reasonably, multilingualism is an asset that must be preserved (Luttermann 2009:335; Derlén 2011:143). Derlén argues that it is not multilingualism per se that is excessively difficult but the conflicting and unclear directions concerning the relationship between multilingualism and the interpretation of Union law emanating from the Court of Justice of the European Union (2011:143). For this reason, we devote the second part of this study to the Court's methods of interpretation.

⁹⁴ Resolution on the use of the official languages in the institutions of the European Union, 20.02.1995, C 043. p. 0091.

CHAPTER 2: DRAFTING AND LEGAL TRANSLATION IN EU INSTITUTIONS

2.1. Legal translation in the EU

Translation of multilingual EU legislation presents such specific features that it has been considered as a distinct sub-category of institutional translation (Biel 2007; Kjær 2007). Most importantly, translation is carried out within the EU legal order, which is a legal order in its own right⁹⁵ in constant interaction with the national legal systems. Translators face semantic instability because terms can acquire an independent EU meaning.⁹⁶ For this reason, some authors claim that it is not only much more complex than appears from existing theories, but it is also qualitatively different from translation in other contexts due to the special character and organisation of the legal system (Kjaer 2007:70). Kjaer claims that ‘legal translation in the EU is a field in search of a new approach.’ Or rather, we would say that we need to adopt a flexible non-positivist approach that allows us to understand how legal translation and interpretation actually work in the EU.

With this approach we can take into account the constant interaction between the EU legal order and the national legal systems. We might adopt a semiotic approach to meaning that is inscribed within the weak language theory based on the ‘weak language theory’ (*schwache Theorie der Sprache*) (Christensen & Sokolowski 2002; Engberg 2002; Engberg 2004; Engberg 2012). The focus is on the role played by translation in the development of multilingual legislation.

In this respect, translation of EU legislation shares common challenges with translation in other international settings, where the production of multilingual legal instruments relies on translation (Prieto Ramos 2014). One of the common challenges is that the drafting language undergoes a certain degree of deculturation or cultural detachment (Biel 2007:149; Prieto Ramos 2014:6, citing Van Els 2001:329). In a way, a certain semantic and syntactic simplification takes place in drafting EU legislation to make it translatable into all language versions. The Joint Practical Guide provides that country-specific terms must be avoided (Guideline 5.3.2.). In this vein, national legal languages are less dependent on national legal systems, and translation is no longer a culture-bound activity. Šarčević argues

⁹⁵ Case 6/64 *Flaminio Costa v ENEL*, EU:C:1964:66.

⁹⁶ See, for instance, Case 32/82 *Ekro*, EU:C:1984:11. On the discussion about autonomous EU concepts, see Engberg (2015).

that ‘EU translators have the task of deculturalising their national languages in order to create a common EU legal terminology to express uniform concepts Union-wide’ (2015:3).

Regarding the drafting language in the EU, English is the main language of negotiation and drafting in the EU. As such, it sets the bar for translation and terminological innovation (Prieto Ramos 2014:5). In its role as vehicle language, English has undergone a certain ‘neutralization’. Megale (2015) also calls it ‘hybrid English’ detached from culture, emerging from globalization and digitalisation: ‘Cet anglais est « langue de service » plutôt que « langue de culture » (Megale 2015:40)’.

2.1.1. Translation as an act of communication

Translation theorists originally regarded the translator as a mediator whose primary task was to transcode the message into a linguistic code that could be understood by the receiver. Seen this way, translation is the process of transcoding a message from one language into another, whereby the primary goal is to preserve the meaning of the message. However, legal translation is no longer regarded as a process of linguistic transcoding but as an **act of communication in the mechanism of law** where situational factors are important (Šarčević 1997:55, 2010:22). The legal translators’ passive role in the communication process became an active one, and they finally emerge as **text producers** with new authority and responsibility (Šarčević 1997:87). Gawron-Zaboroska affirms the active role of translators.

Le traducteur doit être un agent actif ; en premier lieu, il doit être interprète du texte et l’interprète non seulement de la « couche linguistique » de celui-ci, mais aussi de tout le contexte juridique et culturel, dans lesquels le texte traduit doit fonctionner avec effet utile (Gawron-Zaborska 2010:184).

With the emergence of approaches centred on communicative and pragmatic factors, there is growing emphasis on translation as a communicative and intercultural action, abandoning all approaches focusing exclusively on linguistic aspects (Garzone 2000:2). The translator no longer bases his choices on strictly linguistic criteria but also on extra-linguistic considerations. ‘The very literal norm is being challenged, or at least nuanced, to take into account not only linguistic but also communicative and pragmatic aspects’ (Strandvik 2012:27). According to Prieto Ramos, one can explore the extra-linguistic considerations can be studied following three parameters (type of legal system, branch of law and textual typology), which provide for the ‘macro-textual coordinates’ (Prieto Ramos 2009:1). This contextualization provides the appropriate basis for addressing microtextual aspects of

comprehension and reformulation in legal translation (Prieto Ramos 2013:93). Thus, translators start with the macro-textual strategy and then move on to the micro-textual strategy (procedures).

What is fundamental for the proper choice of a **translation strategy** is the context, the ‘environment’ in which the translation is made, and the goal that should be attained thereby. Each legal architecture may require specific elements to suit its singularities (Prieto Ramos 2014:14). The multilingual legal environment of the EU, along with its goal to harmonise the legal systems of all Member States built upon the declared principles of equal authenticity and absolute equivalence of legislative instruments in all official languages, shifts the attention much more to the pragmatic, or recipient-oriented approach to translation as analysed by Šarčević (Chromá, 2012: 115). Yankova also notes this need to focus on a recipient-oriented approach: ‘translators produce a new text and the primary concern are the target text receivers’ (2007:100).

2.1.2. Translators as text producers

As we mentioned before, in this study we deal with instrumental translation (Nord 2005). Texts of a single instrument always have the same communicative function⁹⁷ (Šarčević 1997:21; Stolze 2001:302).

The status of a text, i.e., whether it is authoritative or non-authoritative,⁹⁸ primarily determines the *skopos*⁹⁹ of a translation of a legislative text is determined primarily by its status, i.e., In the case of EU legislation, we deal with authoritative translations that are legally binding instruments with force of law. From the legal point of view, they are not translations but all equally authentic texts that cannot be taken individually but as part of the same legal instrument (Lautissier 2011:93, citing Gallas 2006).

⁹⁷ The **text type** and **skopos** are the same (Šarčević, 2010:21).

⁹⁸ From the classification of text according to genre that Borja Albi (2000:85) proposes (*textos normativos, textos judiciales, jurisprudencia, obras de referencia, textos doctrinales* and *textos de aplicación del derecho*), the text we will deal with fall within the category of normative texts. Normative texts include all legislative texts, whose main function is to regulate social order.

⁹⁹ [...] Hans J. Vermeer postulated his *skopos* theory which has modernised translation theory by offering an alternative to meaning-based translation (Šarčević, 1997:18). [...] Vermeer’s *skopos* theory departs from tradition by recognising translations in which the function of the target text differs from that of the source text (*Funktionsveränderung*). Pursuant to the *skopos* theory, the translator’s main task is to reproduce a new text that satisfies the cultural expectations of the target receivers for a text with that particular function. Thus Vermeer shows that the same text can be translated in different ways depending on its function (Šarčević, 1997:18).

⁹⁹ From the classification of text according to genre that Borja Albi (2000:85) proposes (*textos normativos, textos judiciales, jurisprudencia, obras de referencia, textos doctrinales* and *textos de aplicación del derecho*), the text we will deal with fall within the category of normative texts. Normative texts include all legislative texts, whose main function is to regulate social order.

Translators then assume the role of **text producers** of binding rules in the target language (Šarčević 1997 and 2010; Felici 2010:98; Prieto Ramos 2011b:204). In other words, translators ought to produce texts that are equal in legal effect. For this reason, some authors avoid using the concept of **source text** in the EU context. Stolze, for instance, claims that all language versions constitute a single instrument, and thus the traditional meanings of 'source text' or 'target text' are less valid (Stolze 2001:304).

In the EU context, the concern is to render multilingual legislation whose content is defined by reference to a **particular legal order**: the EU legal order (Lautissier 2011:93).¹⁰⁰ In spite of this, when studying translation in the EU, some authors are reluctant to consider it as an **independent legal order**. For instance, Kjaer considers that 'EU law is not and will never be an independent legal system' (2007:76), arguing that it owes its existence to the national legal systems in which it is applied. On this point, Šarčević states that 'at first glance, it may appear that translating EU legislation into the official languages is an act of translation within the same legal system' (2010a:36). However, she then challenges the possibility of the EU constituting an independent legal order:

De Groot (1999:14) describes EU law as a supranational law which is an independent legal system with its own conceptual system, thus suggesting that the terms in all official languages of EU legislation derive their meaning from a uniform conceptual system. Unfortunately, such an ideal system does not yet exist (Šarčević 2010a:36).

In this respect, although national legal systems can influence EU law, it is necessary to recall that the CJEU stated that the law stemming from the Treaty is an independent source of law¹⁰¹ and that the principle of primacy of EU law does not spring from the various constitutions of the Member States but from the Community itself.¹⁰² As highlighted in Chapter 1, the EU constitutes 'a legal order with its own features, its own personality and its own legal capacity'.¹⁰³ Of course, it is a **legal order under development, hence** dynamic in nature, (Robertson 2010:161) and there is **constant interplay between EU law and national laws**

¹⁰⁰ 'Il n'existe plus une version originale accompagnée de traductions mais une série de versions linguistiques faisant foi, non pas individuellement mais prises dans leur ensemble. Il s'agit de l'expression multiple d'une même règle dont le contenu se définit par rapport à une ordre juridique unique, l'ordre juridique communautaire' (Lautissier, 2011:93).

¹⁰¹ Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:114.

¹⁰² Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal*, EU:C:1978:49.

¹⁰³ Case 6/64 *Flaminio Costa v ENEL*, EU:C:1964:66, states: 'By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.'

(and to a certain extent international law) (Robertson 2010:154), but this does not mean the EU does not constitute a legal order of its own. Furthermore, as the EU is a legal order in its own right, it has its own legislative drafting rules, conventions and style guide (Strandvik 2012:35).

2.2. Translation in the legislative process

The process of elaborating legislation includes the activity of translation; drafting and translation cannot be considered separately but rather are two complementary activities whose aim is the quality of the legislation (Lautissier 2011:90). Translators of EU legislation are part of the legislative process. The production of the multilingual EU legislation is not per se co-drafting in the usual sense of the term;¹⁰⁴ it is ‘translation’,¹⁰⁵ although Article 4 of Regulation No 1 states that texts are ‘drafted’ in all official languages.

In this respect, Burr and Gallas recognize that the activity of elaborating multilingual EU legislation lies between the typical notion of translating (with a definite source text as the original) and co-drafting:

Die für das Gemeinschaftsrecht angewandte Methode liegt zwischen den beiden Extremen, d.h. zwischen reiner Übersetzung, die den Ausgangstext als den authentischen Text wertet, und der Korektion, bei der die Übersetzungsvorgänge als gestalterisches Vorgehen in der Textproduktion der authentischen Text fungieren (2004:199).

The TFEU establishes two categories of legal acts: legislative acts (adopted either by the ordinary legislative procedure or the special legislative procedure) and non-legislative acts (delegated or implementing acts adopted by the Commission). The term ‘legal acts’ is used as the hypernym since it includes both legislative and non-legislative acts:

Article 289(3) TFEU states:

ES	DE	EN	FR
Los actos jurídicos que se adopten mediante	(3) Rechtsakte, die gemäß einem Gesetzgebungsverfahren	Legal acts adopted by legislative procedure shall constitute	Les actes juridiques adoptés par procédure législative

¹⁰⁴ In fact, co-drafting in the EU would not be feasible because of the number of official languages. Already in 1996, Garrido Nombela admitted co-drafting would not be viable (1996:39).

¹⁰⁵ For this point, see ‘Drafting or translation-Production of Multilingual Texts’ (Doczekalska 2009b).

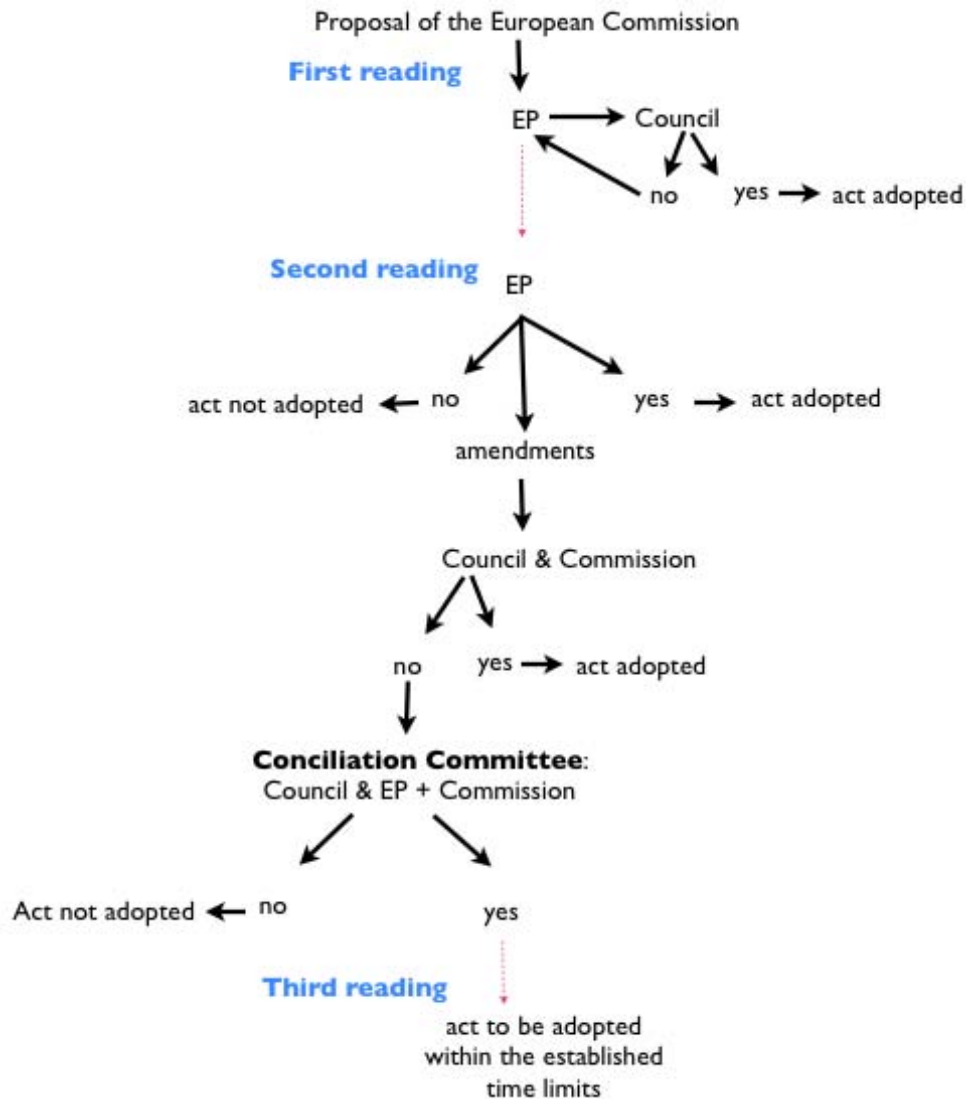
procedimiento legislativo constituirán actos legislativos.	ren angenommen werden, sind Gesetzgebungsakte.	legislative acts.	constituent des actes législatifs.
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2.2.1. Legislative acts

As mentioned in section 1.5.4., directives or decisions can be legislative or non-legislative acts. Article 289(3) TFEU states that ‘legal acts adopted by legislative procedure shall constitute legislative acts’. Therefore, acts adopted under the ordinary legislative procedure and special legislative procedures are to be regarded as legislative acts. From the entry into force of the Treaty of Lisbon, most of the legislative acts of the European Union are the joint product of the Commission submitting the proposal and the European Parliament and the Council adopting the act under the ordinary legislative procedure (formerly called the co-decision procedure). The role of this procedure seems to have gained an ever growing significance since it applies to eighty-three areas of EU policies (Kaczorowska 2013:155). It is worth describing the different stages of the procedure in their order so that one understands where translation takes place.

2.2.1.1. Ordinary legislative procedure

The ordinary legislative procedure is described in Article 294 TFEU. The summary of the overall process is as follows:



2.2.1.1.1. The proposal of the European Commission

The following section is articulated around different questions that help identify the main factors affecting the elaboration of EU legislation. In accordance with Article 294(2) TFEU, the Commission shall submit a proposal to the European Parliament and the Council.

Who drafts the text? The administrators of the Directorate-General (DG) competent in the subject area concerned draft the proposals. French was the predominant drafting language until the 1990s, but this changed considerably with the accession of Eastern European countries (Prieto Ramos 2014:5). Now English has replaced French as the principal drafting language in the Commission (European Commission 2012a:6–7).¹⁰⁶

¹⁰⁶ For an ethnographic study of EU translation, see Koskinen (2008).

Problems? Time pressure is an important factor. Further, legal experts do not draft these texts; experts in a certain policy draft them, who rarely have specific drafting expertise (Robinson 2008). These experts are not always native speakers of the language in which the draft is prepared (Lautissier 2011:100). For this reason, in order to guarantee the quality of the legislation, draft proposals undergo what is known as ‘inter-service consultation’.

Inter-service consultation

In the framework of the inter-service consultation, a draft proposal is sent to the Secretariat-General of the Commission and the Legal Service (*Ibid.*). Only from 2001 onwards did the examination of the initial draft at the inter-service consultation phase become established as the norm (Dragone 2006:101). In fact, a Legal Revisor Group was created intentionally to ensure concordance between the different language versions of Commission acts. However, the policy of the Group then shifted to concentrate on the correct legal drafting of the original, i.e., the language to draft the document in a particular version of the act at issue (Prechal et al. 2008:26).

Who revises the draft?

Lawyer-linguists, also known as ‘legal revisers’ (*jurist-reviseur, Jurist-Überprüfer*) monitor the quality of legislative proposals of the Commission (Dragone 2006:100). They check the ‘legality of the proposal, legal content of the text and drafting quality’ (Dragone 2006:101). By intervening in all legislative proposals at an initial stage, lawyer-linguists ensure certain measure of coherence and that the language is clear, precise and translatable into the other languages (Šarčević & Robertson 2013:187).

Translation

As a general rule, after finalising the draft proposal, it is submitted to the Commissioner’s College for approval. Then it is sent to the DGT Translation, which produces all language versions of the text. Language versions of Commission proposals submitted for ordinary legislative procedure are called COM final documents.

Who are the translators at the DGT?

Although the DGT has a certain number of jurists, most of the translators are generalists or have a degree in other disciplines (Lautissier 2011:101).¹⁰⁷ Lawyer-linguists at the Commission do not translate; they are directly linked to the Legal Service.

Il existe un service de traduction généraliste, alors que des juristes linguistes, dont la formation est d'abord juridique, sont directement rattachés aux services juridiques et supportent la responsabilité finale du texte dans ses diverses versions linguistiques (Berteloot 2008:15).

Who revises the translations?

When texts are translated, lawyer-linguists ensure consistency, in terms of both legal terminology and legal implications. In fact, the aim of this stage is to guarantee the exactness of the legal terminology of the legislative acts in all the official languages and to ensure the legal content is identical (Dragone 2006:101).

Correction mechanism? Lawyer-linguists identify the texts that require further examination in all the official languages. This makes it possible to check 'whether the way in which a rule has been formulated is suited to the needs arising from the differences in languages and legal systems' (*Ibid.*).

2.2.1.1.2. First reading and the shared legal-linguistic revision

The Commission's proposal then moves to the Parliament and the Council. Article 294 TFEU provides the following steps:

First reading

3. The European Parliament shall adopt its position at first reading and communicate it to the Council.
4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.
5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.
6. The Council shall inform the European Parliament fully of the reasons which led it

¹⁰⁷ See Tranchant (Tranchant 2011; European Commission 2009) for more details on organisational aspects at the Directorate General for Translation.

to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.

After the change introduced by Article 294(4) TFEU the text voted by the plenary now constitutes the ‘position’ of the Parliament and cannot be altered after that vote. Therefore, the lawyer-linguists of the Parliament and of the Council can no longer carry out their work after the vote in Parliament but must finalize the text before that vote (Guggeis & Robinson 2012:68).

Shared linguistic revision and quality teams

It may be useful to recall that there is no single centralised service responsible for the quality of the legislation; several bodies participate.

Both translators and lawyer-linguists are key actors in the drafting process but they do not participate in the in Parliamentary debates and negotiations (Doczekalska 2005:9) nor in the Council working group meetings (European Commission 2010:22). For this reason, at this stage, translators may receive a text without being aware of how, why and for what purpose a certain wording was chosen during the negotiations (*Ibid.*) or what the drafter’s actual intention was (Doczekalska 2005:9).

In order to bridge this information gap and to contribute to enhancing the quality of the text, in 2007, the Parliament, the Council and the Commission adopted a Joint Declaration on practical arrangements for the co-decision procedure. Since then, it was decided that as soon as the Council receives a proposal from the Commission, the Council designates a ‘quality team’ to follow the proposal as it passes through the procedures. The quality team is composed of a lawyer-linguist as ‘quality adviser’ and a legal adviser who work closely together. In the case of non-legislative procedures and international agreements, quality teams are designated only upon request of the Presidency of the Council, of the Directorate-General concerned or of the Legal Service (Guggeis & Robinson 2012:61). During the ordinary legislative procedure a process of shared legal-linguistic revision is carried out between teams of lawyer-linguists from the Parliament and the Council, with the aim of achieving convergence of their positions on the formal text of a particular act, without altering its substance (Guggeis & Robinson 2012:70).

As soon as a proposal arrives from the Commission, the Parliament appoints a file coordinator and the Council a *chef de file* or *quality advisor* to coordinate the work of the lawyer-linguist

teams of the two institutions; the two must collaborate closely to agree on a final text within six to eight weeks. At this stage the text is passed to and fro between the Parliament and the Council.

1) Within the Parliament, the proposal is assigned to the relevant committee and a rapporteur is chosen. The rapporteur is given mandate by the committee and represents the Parliament in the negotiations with the Council and the Commission. The rapporteur presents to the committee a draft report comprising a draft legislative solution and amendments to the draft act, if any, although in most cases the Parliament proposes amendments to the Commission's proposal (Guggeis & Robinson 2012:65).

The Parliament is responsible for translating into all official languages all amendments to the Commission's proposal that its members have proposed (Guggeis & Robinson 2012:67).

During the first reading, the **European Parliament** lawyer-linguists, also called 'reviser lawyer-linguists' (*jurist-linguiste reviseur, jurist-lingüista revisor*), proofread those amendments translated into all official languages (Šarčević & Robertson 2013:189). Lawyer-linguists work in the Legislative Quality Units in the Legislative Acts Directorate of the Directorate-General for the Presidency of the Parliament. Once they check the amendments proposed by the members of the European Parliament and other texts submitted to parliamentary processes, they send their revisions to the Council lawyer-linguists, tracking their changes to the text (Šarčević & Robertson 2013:190). At this stage, 'the key element of legal-linguistic revision is essentially a question of linguistic trimming and alignment, plus checking for accuracy and ensuring that each text complies with the requirements as to form and style for the particular text' (Šarčević & Robertson 2013:189).

2) Within the Council, a working party competent for the field in question that is composed of national experts from all the Member States and chaired by a representative of the country holding the presidency at that time examines the proposal. The Chair will be given a mandate for the negotiations with the Parliament and the Commission; these negotiations between the three institutions are called trilogues (Guggeis & Robinson 2012:65). The treaties do not provide for but they have proved to be so effective that in 2007, the Parliament, the Council and the Commission formalised their use in the 'Joint declaration on practical arrangements for the codecision procedure of 13 June 2007' (Guggeis & Robinson 2012:66). While initially associated with the preparation of the conciliation committees, trilogue procedures have spread throughout the legislative process and have been extensively used in first and second

readings. The rise of trilogue procedures has led to an increase in early agreements under first reading and fast-tracked legislation (Kardasheva 2012:3).

The lawyer-linguists in the Council, also referred to as ‘jurist-linguists’ or ‘legal-linguistic experts’, accept or reject the revisions made by the Parliament’s lawyer-linguists with the help of policy experts, and they propose their own suggestions that they return to the Parliament for the ‘rereading’ stage. If the Council proposes amendments, the translators at the Council are responsible for translating the amendment into all language versions.

A ‘pre-meeting’ is called to coordinate the work before the final revision meeting (Guggeis & Robinson 2012:69). The pre-meeting is attended by:

- Parliament representatives: the file coordinator and the English lawyer-linguist.

- Council representatives: the *chef de file*, the English lawyer-linguist and the administrator for the Directorate-General concerned in the Council Secretariat who liaises with the Member States.

- Commission representatives: the experts who drafted the Commission’s proposal (*Ibid.*).

Proposed changes in the base text are agreed at this pre-meeting and incorporated into the revised text which is circulated to the Member States as the basis for the final revision meeting, known as the ‘jurist-linguist meeting’ (Guggeis & Robinson 2012:68). The participants at this meeting are:

- Member States representatives: the representative from each Member State.

- Parliament representatives: the file coordinator and the English lawyer-linguist.

- Council representatives: the *chef de file*, a lawyer linguist for each language and the administrator for the Directorate-General concerned in the Council Secretariat.

- Commission representative: the experts who drafted the Commission’s proposal (Guggeis & Robinson 2012:69).

The jurist-linguists meeting goes through the whole text in English and agrees on the final English text which is then distributed to the Council lawyer-linguist for all the other languages. By this stage, it is difficult to improve the quality of drafting significantly because of the risk of undoing delicate political compromise (*Ibid.*).

After the jurist-linguists meeting, each Council lawyer-linguist reviews the text in his or her

own language with the national experts for the Member States that use that language in order to produce the final version, which they send to their Parliament counterparts for final checking. Once finalized, the text is sent to Parliament for adoption. After Parliament has voted, the text goes to the Council and to COREPER and to the Council for formal adoption (*Ibid.*).

To sum up, lawyer-linguists intervene at the end of the decision-making process and before the adoption of the act; their main task is to supervise the final stages of preparation of legislative texts, including verification of the content and the linguistic alignment (linguistic concordance) of the language versions (Gallas & Guggeis 2005:110). They also have to verify whether the particular interpretation of the text in the drafting language corresponds to the real will of the law-makers and that it is identical in all the versions (Guggeis 2006:115). However, as we have already remarked, at this stage the policy is already agreed and the final revision is essentially technical; it is difficult to improve the quality of drafting significantly because of the risk of undoing delicate political agreements.

The following chart summarises the shared legal-linguistic mechanism:

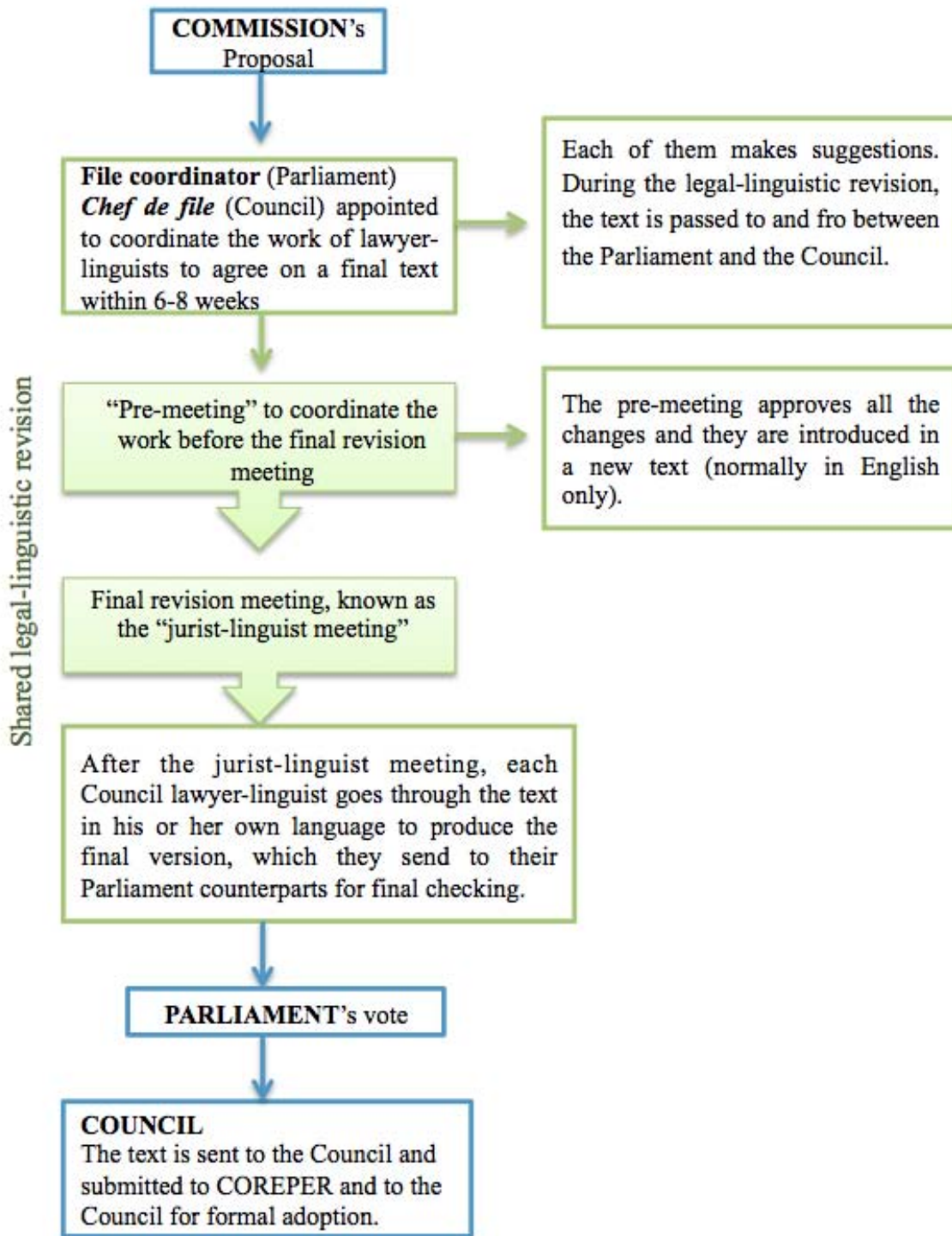


Figure 1: Shared legal-linguistic mechanism

2.2.1.1.3. Second reading

In some 70% of cases, the acts are adopted after the first reading. But in some 30%, the proposal goes to a second reading (Guggeis & Robinson 2012:52). A report from the Parliament affirms that in recent years, there has been a growing trend towards agreements at

first reading: ‘in the last parliamentary term (2004 - 2009), 327 codecision procedures (72% of the total) were concluded at first reading, 104 (23%) at second reading and 23 (5%) at third reading after conciliation’ (European Parliament 2012:14).

Article 294 TFEU describes the steps for the second reading:

Second reading

7. If, within three months of such communication, the European Parliament:

(a) approves the Council’s position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;

(b) rejects, by a majority of its component members, the Council’s position at first reading, the proposed act shall be deemed not to have been adopted;

(c) proposes, by a majority of its component members, amendments to the Council’s position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

8. If, within three months of receiving the European Parliament’s amendments, the Council, acting by a qualified majority:

(a) approves all those amendments, the act in question shall be deemed to have been adopted;

(b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

Unlike the first reading, the second reading is subject to strict time limits. Within three months (or four, if an extension has been agreed) of the announcement of the Council common position in the plenary, the Parliament must approve, reject or amend it at second reading. If the Parliament takes no decision by the expiry of this deadline, the act is deemed to have been adopted in accordance with the common position (European Parliament 2012:12).

MAIN DIFFERENCES BETWEEN FIRST AND SECOND READING	
First reading	<ul style="list-style-type: none"> • No time limits • Commission proposal considered by committee responsible and by opinion-giving committees • Broad admissibility criteria for amendments • Parliament decides (to approve, reject or amend the Commission proposal) by a <i>simple</i> majority (i.e. majority of Members voting)
Second reading	<ul style="list-style-type: none"> • Strict time limits of 3 - 4 months • Common position considered only by the committee responsible • Strict admissibility criteria for amendments • Parliament approves the common position by a <i>simple</i> majority, but rejects or amends it by an <i>absolute</i> majority (i.e. majority of all Members of Parliament)

Chart taken from *Codecision and Conciliation. A Guide to how the Parliament co-legislates under the Treaty of Lisbon*. January 2012. Directorate-General for Internal Policies of the Union Directorate for Legislative Coordination and Conciliations Conciliations and Codecision Unit.

2.2.1.1.4. Conciliation

Article 294 TFEU details the conciliation procedure, described here:

Conciliation

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.

11. The Commission shall take part in the Conciliation Committee's proceedings and

shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

Conciliation consists of direct negotiations between the two co-legislators (Parliament and Council) in the framework of the Conciliation Committee, with a view to reaching agreement in the form of a 'joint text' (European Parliament 2012:15).

When the Council is ready to present its position on the Parliament's amendments, even if it has not yet formally concluded its second reading, the Parliament, the Council and the Commission meet in the trilogue mentioned before. Trilogues are restricted access meetings. In order to maximise their effectiveness, attendance is restricted to the negotiating team plus essential support staff, normally no more than ten persons from each institution (European Parliament 2012:19).

With the agreement of the President of the Parliament, the President of the Council convenes the Conciliation Committee, consisting of the representatives of the twenty-eight Member States and an equal number of Members of Parliament. This must happen no later than six weeks (or eight, if an extension has been agreed) after the conclusion of the Council's second reading in order to open the conciliation procedure formally. The Committee then has another six weeks (or eight, if an extension has been agreed) to reach an overall agreement for the joint text (European Parliament 2012:21).

2.2.1.1.5. Third reading

Third reading

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.

14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

Both the full Parliament and the Council have to confirm the agreement reached in the Conciliation Committee. The two institutions vote separately on the joint text as it stands, without any possibility of further amending it (European Parliament 2012:23).

Following the successful conclusion of the conciliation procedure a draft joint text, known as 'PE-CONS', is prepared on the basis of the joint working document and any modifications agreed in conciliation. It is first established in one language and subsequently translated into the other official languages. The draft joint text in the original language then moves to the Members of the delegation (European Parliament 2012:23).

Once the conciliation secretariats and the lawyer-linguists of the Parliament and the Council have finalised the joint text, the co-chairs of the Conciliation Committee send it, together with a covering letter, to the President of the Parliament and the President-in-office of the Council. Any declarations by the institutions accompany this letter (European Parliament 2012:23).

The final joint text, the report drawn-up by the rapporteur and the Chair of the delegation, the covering letter, and any declarations by the institutions go to the Parliament's plenary services (DG Presidency). At this point, the different language versions of the text of the agreement are published on the website of the European Parliament (European Parliament 2012:23).

Concluding remarks

The EU legislative process has permitted the EU to face the on-going challenges of a supranational organisation. A centralised approach, including interinstitutional services for drafting and translation, might be a possible solution to improve the coherence of the legislation. However, such a system could turn out to be too rigid and incompatible with the current distribution of powers between the EU institutions (Lautissier 2011:105). Of course, close cooperation between the institutions and the different language services is key to improve the quality of legislation.

2.2.1.2. Special legislative procedures

Some special legislative procedures involve the participation of the Parliament. Special procedures that involve the Parliament are the **consent** and the **consultation** procedure (Kaczorowska, 2013:158). Due to the length restrictions of this study, we will not develop each procedure in detail. For further details see, for instance: Chalmers et al. (2010:110). The President of the institution that adopts a legislative act under the special legislative procedure must sign it (Article 297(1) TFEU).

2.2.2. Non-legislative acts

A legislative act may delegate to the Commission the power to adopt non-legislative acts. The main justification for the Council and the European Parliament to delegate to the Commission the power to adopt non-legislative acts is that this eases their workload (Kaczorowska 2013:129). Non-legislative acts are divided into delegated acts and implementing acts.

2.2.2.1. Delegated acts

Article 290(1) TFEU provides that the role of delegated acts is to supplement or amend certain non-essential elements of a legislative act. The objectives, content, scope and duration of the delegation of power are explicitly defined in the legislative act concerned.

The delegation is subject to two conditions (Article 290(2) TFEU), which are that:

- (a) the Council or the European Parliament can revoke this delegation of power at any time.
- (b) a delegated act may enter into force only if the European Parliament or the Council raise no objection within the period set by the legislative act.

This means that delegated acts are subject to ex ante and ex post controls by the Council and the Parliament (Craig & de Búrca 2011:118). However, when exercising their control, the Council and the Parliament do not have an influence on the formulation and wording of the text that remains exclusively in the hand of the Commission. Availability of all language versions is a procedural requirement (European Commission 2010:32). The adjective 'delegated' shall be inserted in the title of delegated acts (Article 290(3) TFEU).¹⁰⁸

2.2.2.2. Implementing acts

The role of implementing acts is to set out uniform conditions for implementing EU legally binding acts (Article 291(2) TFEU). Article 291 TFEU does not provide any role for the Parliament and the Council to control the Commission's exercise of implementing powers. Only Such Member States can exercise such control. Implementing acts are subject to a revised version of the comitology procedure. Documents adopted under the comitology procedure are generally of a highly technical nature (European Commission 2010:35).

Implementing acts are purely executive (Kaczorowska 2013:130). For example, there might be a complex primary act dealing with agriculture and a secondary measure specifies in

¹⁰⁸ For an in-depth study on delegated acts, see Garzón Clariana (2010; 2011).

greater detail one part of the primary act relating to the requirement for the independence of agencies that pay money pursuant to the primary regulation (Craig & de Búrca 2011:117).

The word ‘implementing’ is inserted in the title of implementing acts (Article 291(4) TFEU).

2.3. Corrigenda of EU acts

‘A corrigendum of a legislative text is conventionally thought of as a mere rectification of obvious typing mistakes’ (Bobek 2009:950). In the EU, however, corrigenda go from mere corrections to substantial rewriting (Bobek 2009:951).

Corrigenda adopted by the institution(s) concerned are published accordingly in the Official Journal of the European Union in the same OJ series as that in which the initial document was previously published. The corrigenda do not contain any provisions on the validity or entry into force, and their authority derives from the text they rectify (European Commission 2010:141–142).

In the case of EU acts, errors can appear in the language version in which the document is drafted (‘the drafting language version’), for example, because the act is not in line with the will of the legislators, or errors can appear during the translation phase and concern different language versions.

Bobek distinguishes two types of corrigenda: (i) purely formal corrigenda; and (ii) meaning-changing corrigenda:

(i) ‘Purely formal corrigenda’ are what one could call genuine corrigenda. They correct typographic mistakes and omissions, obvious flaws in writing and type-setting. For example: omitted letters,¹⁰⁹ small instead of capital letters at the beginning of a sentence, incorrect internal references caused by a typing mistake, wrongly type-set sentences or paragraphs, and so on. They typically occur in the publication process itself, i.e. after the adoption of the measure but before its publication (*Ibid.*).

(ii) ‘Meaning-changing corrigenda’ are those that introduce substantial changes to the content of the legal norm. Their scope is very broad. They might include the narrowing or broadening of notions in a legal text, changing the nature of a list of conditions to be fulfilled (from enumerative to exhaustive), turning positive sentences into negative ones, or even plainly rewriting substantive parts of a piece of EC legislation. Meaning-changing corrigenda are typically caused by incorrect translations

¹⁰⁹ EC instead of EEC.

of EU legislation in the legislative process prior to the adoption of the legal act; unlike purely formal corrigenda, they are not the consequence of a typing or type-setting mistake (Bobek 2009:952).

The procedures for corrigenda vary depending on the institution that initiates the corrigenda. **At the Commission**, for example, the procedure will be different depending on whether the error is purely formal (obvious) or meaning changing (substantial). The study published by the European Commission (2010:144) *Lawmaking in the EU multilingual environment* summarises the procedures as follows:

Errors in the original language version

Obvious errors: correction procedure of 1977 (Secretariat General)¹¹⁰

Substantial error: corrected in a procedure similar to that followed for the adoption of the initial act.

Errors in a language version other than the original

Minor translation error: Corrigendum procedure of 2008 (DGT)¹¹¹

Substantial translation error: corrected in a procedure similar to that followed for the adoption of the act (rectifying act).

At the Council and at the European Parliament

The Manual of precedents for acts established within the Council of the European Union describes the mechanism of adopting corrigenda and the standard forms used for such purposes. It distinguishes between corrigenda issued before adoption (in French *corrigenda*) and corrigenda issued after adoption (in French *rectificatifs*).

The procedures can be summarised as follows (European Commission 2010:145):

Obvious error in the text introduced after signature: corrigendum

Obvious error in one or two language versions: corrigendum

Non-obvious error: corrigendum or adoption of a new act

In cases where the error is not obvious, the General Secretariat makes suggestions to the

¹¹⁰ COM(77) PV 438.

¹¹¹ SEC(2008) 2397, Memorandum to the Commission from the President in Agreement with Mr. Orban: Empowerment to correct errors, including minor errors, in translation of acts adopted by the Commission. See point 3 'Framework for the empowerment' of the Memorandum (SEC(2008)2397).

delegations as to the procedure followed in each case. The General Secretariat might suggest (i) that the correction be done by way of a corrigendum or the adoption of a new act; (ii) that the corrigendum has retroactive effect (Annex II, (2) (c) Manual of Precedents).

According to the Comments of the Manual, a corrigendum is necessary if the legal act in question is so faulty regarding its format as to be incomprehensible or when the errors are liable to produce undesired legal effects. However, obvious typing or language errors that are unimportant should not be corrected by a corrigendum.

In cases of acts adopted under the ordinary legislative procedure, the European Parliament conducts its own procedure simultaneously to the Council's General Secretariat and the publication of a corrigendum is always subject to agreement by the European Parliament (European Commission 2010:146).

Legal consequences of corrigenda

Meaning changing corrigenda can lead to a complete alteration of the act. They can involve narrowing or broadening the scope of the application of a rule, sometimes generating something quite different and sometimes even the opposite (Bobek 2009:952). Bobek mentions the example of the corrigendum of the Czech version of Regulation 865/2006. The corrigendum contains no fewer than 122 correction points which include, inter alia, changing singular forms into plural, turning positive statements into negative ones, and changing the nature of a list of conditions to be fulfilled (Bobek 2009:953). One of the changes concerned the conditions under which a specimen of an animal species shall be considered to be born and bred in captivity. This particular article contains four conditions. The introductory part of the article reads in English (emphasis added):

specimen of an animal species shall be considered to be born and bred in captivity only if a competent management authority, in consultation with a competent scientific authority of the Member State concerned, is *satisfied that the following criteria are met.*

The Czech version of the same provision read for more than a year that (emphasis added):

specimen of an animal species shall be considered to be born and bred in captivity only if a competent management authority, in consultation with a competent scientific authority of the Member State concerned, is *satisfied that at least one of the following criteria are met.*

One of the many changes carried out by the corrigendum of the Czech version of this Regulation thus changed the nature of the list of criteria: from at least one condition to be fulfilled to all conditions to be fulfilled. Bobek poses the question: ‘What should now happen with the tens or perhaps even hundreds of administrative decisions that the Czech authorities had issued before the corrigendum was published?’ (Bobek 2009:958).

The legal consequences of meaning changing corrigenda can be very significant.¹¹² As Bobek contends, when the corrigenda change the meaning of the published act, they can no longer be treated as mere rectifications. They should be viewed as amendments and their application should only be prospective (Bobek 2009:951).

2.4. EU legislative drafting rules

Since the Edinburgh European Council in 1992, the need for better lawmaking has been one of the main concerns of the EU. In 1997, the Amsterdam Intergovernmental Conference adopted Declaration No 39 on the quality of the drafting of Community legislation, annexed to the Final Act of the Amsterdam Treaty.¹¹³ As a result of this Declaration, the three institutions involved in the procedure for the adoption of Community acts, the European Parliament, the Council and the Commission, adopted the Interinstitutional Agreement of 22 December 1998 which provides common guidelines intended to improve the quality of drafting of Community legislation.¹¹⁴

Two years later, the Legal Services of the three institutions drew up the Joint Practical Guide,¹¹⁵ which develops the content of the Agreement of 1998 and explains the implications of those guidelines, by commenting on each guideline individually and illustrating each with examples (see the Preface of the Joint Practical Guide).

The Preface of the Joint Practical Guide also mentions that other more specific instruments need to be used together with the Guide:

- **The Council’s Manual of Precedents:** The aim of this manual is to harmonise the finalisation of texts of final legal acts drawn up in the official languages of the institutions of the EU as well as to provide those responsible for drafting acts or proposals for acts with a guide to Council practice (see Foreword of the Manual of precedents).

¹¹² For the economic impact of corrigenda, see (European Commission 2012c:31).

¹¹³ Declaration No 39 on the quality of the drafting of Community legislation (OJ C 340, 10.11.1997, p.139).

¹¹⁴ Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation of 22 December 1998 (OJ C 73, 17.3.1999, p.1).

¹¹⁵ Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation: <http://goo.gl/pEioXO> [last consulted on 30/01/2014].

- **The Commission’s Manual on Legislative Drafting:** It provides drafting rules for authors of legislation proposals and other legal acts. The Commission drafted the Manual in 1985 and revised it in 1991 and 1997 (see Foreword of the Commission’s Manual).
- **The Interinstitutional style guide of the Publications Office:** This guide’s aim is to guarantee a coherent and consistent image to the citizens of Europe: ‘Respecting the conventions set out in the style guide guarantees the image of a Europe dedicated to serving its citizens’, providing a service in each of their languages while overseeing the harmony and unity of the message (see Foreword of the style guide). Although the Interinstitutional style guide focuses mainly on rules concerning the presentation of texts, it also includes sections touching on legislative matters (Guggeis & Robinson 2012:57).
- **The models in LegisWrite:** Legiswrite ensures that documents that European Commission distributes to the other Institutions are well presented and consistent. It is a tailor-made tool that is incorporated into Word and is used for drafting (and translating) Commission's official legislative and non-legislative texts. It produces properly structured documents with a uniform presentation, making subsequent amendments or conversions easier. LegisWrite can also display different language versions side-by-side, aligned (3.5. Guide for external translators).¹¹⁶

This section does not aim at describing in detail all drafting rules and conventions. It just provides some of the main rules that are useful for drafters, translators and lawyer-linguists.

The Joint Practical Guide provides guidelines taking into account the type of act and its legal effect (whether it is binding or not). The following tables summarise the main points:

TYPE OF ACT	DRAFTING STYLE
Regulations	Their provisions should be drafted in such a way that the addressees have no doubts as to the rights and obligations resulting from them (Guideline 2.2.1.).
Directives	They should be drafted in a less detailed manner in order to leave Member States sufficient discretion in their implementation. If the enacting terms are too detailed they do not leave such discretion, the appropriate instrument will be a regulation, rather than a directive

¹¹⁶ Guide for external translators, updated - September 2008: <http://goo.gl/Pjf3HB> [last consulted on 30/01/2014].

	(Guideline 2.2.2.)
Decisions	They should be drafted to take into account their addressee, but still essentially comply with the formal rules of presentation of acts of general application (Guideline 2.2.3.).
Recommendations	The language of recommendations must take account of the fact that their provisions are not mandatory (Guideline 2.2.4).

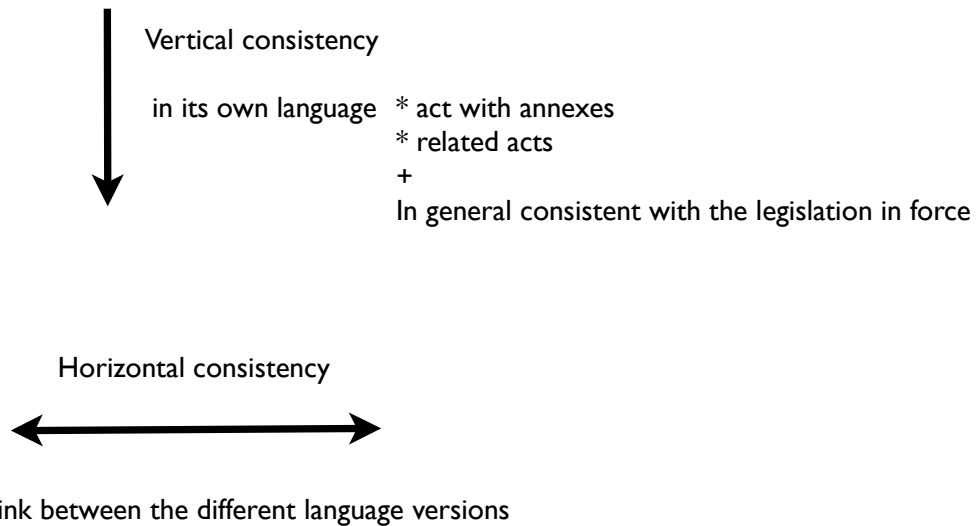
WHETHER THE ACT IS BINDING OR NOT		
Enacting terms of binding acts	French	English
The choice of verb tenses varies between different types of act and the different languages, and also between the recitals and the enacting terms.	Present tense	Auxiliary 'shall'
Non-binding acts	Imperative forms must not be used nor structures or presentation too close to those binding acts.	

2.4.1. Consistency

Another important guideline is that of consistency. Guideline 6.2. of the Joint Practical Guide provides as follows:

‘Consistency of terminology means that the same terms are to be used to express the same concepts and that identical terms must not be used to express different concepts. The aim is to leave no ambiguities, contradictions or doubts as to the meaning of a term.’

The terminology has to be consistent throughout a single act, including its annexes, but also with related acts in the same area. In general, the terminology has to be consistent with the whole legislation in force. Robertson calls this ‘vertical consistency’, i.e., consistency in the language of each act. But he also adds ‘horizontal consistency’, which would be the semantic link between the different language versions of the act:



This horizontal consistency would be what some authors call ‘multilingual concordance’, i.e., expressing the same meaning in all language versions (Biel 2007:154).

2.4.2. Approach to equivalence

Šarčević argues that multilingualism requires a change of approach to equivalence: ‘the principle of fidelity to the source text is losing ground to the principle of fidelity to the single instrument’ (Šarčević, 1997:112). Equivalence would be to achieve this horizontal consistency so that all language versions have the same legal equivalence.

Beaupré (1986), Gémár (2006) and Šarčević (2010b:29) all used the term ‘legal equivalence’. Šarčević explains that neither Beaupré nor Gémár have provided a definition for ‘legal equivalence’ and she states that ‘legal equivalence can be regarded as a synthesis of content, intent and legal effect, with the emphasis on the latter’ (2010:20).

According to Gémár, the problem of achieving equivalent legal effects in the translated text is not the same for the translator and the jurist. The translator generally strives for linguistic equivalence, the lawyer for legal equivalence. Then he concludes that in both cases, it is the meeting and the harmonious fusion of the two constitutive ingredients of the text – form and content- that produce the desired equivalence. It is definitely a combination of different factors that allows for equivalence. The translator looks for linguistic equivalence but should also think of the legal consequences of translating a text in one way or another, which is why hermeneutics is so important in legal translation. **‘Translators need training in legal hermeneutics.** Although they do not interpret texts as judges do, they must foresee how the text will be interpreted by the competent court’ (Šarčević 1992:304).

2.4.3. National terms and the role of comparative law

We have already argued that the EU constitutes a legal order of its own. So we may ask whether comparative law serves any purpose in translating EU legislation. European Law brings comparative law into a new perspective (Prechal & Van Roermund 2008:6). Although translators of EU legislation work within the EU's legal order, a comparative approach is very useful in the conception of EU legislation (Lautissier 2011: 96).

Indeed comparative law turns out to be highly important because an examination of the national legal systems allows interpreters to find acceptable solutions when translating. The translator must avoid confusions with national law and **'should avoid using terms which are too closely linked to national legal systems'** (Guideline 5.3.2.). As Berteloot affirms, the Court follows this guideline very closely by resorting to neutral terms:

La Cour tente le plus possible de recourir à des termes neutres, à un langage simple, et non pas à des concepts juridiques susceptibles d'évoquer trop précisément dans l'esprit du lecteur une certaine institution d'un droit national (Berteloot 1987:14).

Le juge communautaire préférera se distancer de notions nationales et user de termes plus généraux susceptibles de viser dans chacun des ordres juridiques des circonstances déterminées (Berteloot 2000:7).

When translating legal concepts recommended or imposed at the EU level, it may be misleading to translate a generic term with the 'correct' specific term used at national level, even if an exact equivalent exists. Using a correct but nationally specific term could lead to confusion; a supranational term which has no immediate national meaning may be preferable (Wagner et al. 2002:64). Concepts that have no equivalent at national level may be convenient because they avoid confusion. For example, 'subsidiarity', taking decisions and action at the lowest feasible regional, national or central level, is probable preferable to 'devolution', which means the same in the UK when talking of the relations with Scotland, Wales and Northern Ireland (Wagner et al. 2002:64).

When the Court creates new terms, it tends to use relatively simple vocabulary. For example, the terms 'direct effect' or 'White Book' (Berteloot 2000:8).

2.5. Translation at the CJEU

The case law of the CJEU consists primarily of judgments drafted by judges and their référendaires (legal secretaries) (McAuliffe 2012a:203,2010). It is important to study the intervention of translation in the judicial process.

Who translates at the CJEU? Unlike the lawyer-linguists of the Commission, the Parliament and the Council who carry out tasks as ‘legal revisers’ but do not translate, the lawyer-linguists of the Court are the ones who translate at the Court.¹¹⁷

As Berteloot points out, it is necessary to distinguish between translation of **procedural documents** (from the language of the case into French) and that of the **judgments** (from French into the language of the case and into the other languages):

Sans doute faut-il distinguer entre les problèmes que pose la traduction des pièces de procédure (de la langue de procédure vers le français) et celle des arrêts ensuite (du français vers la langue de procédure et les autres langues officielles). Il faut distinguer entre les problèmes généraux et les problèmes matériels que pose la traduction juridique (Berteloot 1987:16).

The **procedural documents** are mainly applications, pleadings, and observations (Mulders 2008:49). Lawyer-linguists translate all documents into French so that judges can work in French.¹¹⁸ That means that documents in a dossier will always exist in the language of the case and in French (Berteloot 1987:12).

In order to understand the text typologies it is worth revising the type of cases the Court deals with and the procedure before the Court.

2.5.1. Types of proceedings

On the one hand, indirect actions are the ones originating and terminating before national courts, which is the case of **requests for a preliminary ruling** (Art. 267 TFEU). On the other hand, direct actions are the ones originating and terminating before the Court and there are four main types:

1. **actions for failure to fulfil an obligation** – brought against EU governments for not applying EU law (Art. 258, 259 and 260 TFEU). Under Articles 258 and 259 TFEU (ex Articles 226 and 227 EC), respectively, the European Commission and Member States

¹¹⁷ For more details on the role of lawyer-linguists at the CJEU, see McAuliffe (2012a:211; 2009:102).

¹¹⁸ Berteloot remarks the work of the French division: ‘Une place particulière revient à la division de traduction française: elle est chargée de traduire vers le français l’ensemble des recours et mémoires présents dans la langue de procédure de sorte que les juges en prennent connaissance en français’ (Berteloot 1987:12).

may bring enforcement proceedings against a Member State in breach of Treaty obligations. Article 260 TFEU (ex Article 228 EC) requires compliance with the Court's judgment.

2. **actions for annulment** – against EU laws thought to violate the EU treaties or fundamental rights (Art. 263 TFEU).
3. **actions for failure to act** – against EU institutions for failing to make decisions required of them (Art. 265 TFEU).
4. **damage actions** – brought by individuals, companies or organisations against EU decisions or actions. Under Article 340 TFEU (ex Article 288 EC) individuals who have suffered loss as a result of EU action can recover damages.

Code in judgments	ES	DE	EN	FR	Competence
C-	Tribunal de Justicia	Gerichtshof	Court of Justice	Cour de justice	<ul style="list-style-type: none"> - Requests for a preliminary ruling (Art. 267 TFEU) -Actions for failure to fulfill an obligation (direct enforcement actions against the Member States) (Art. 258 and 259 TFEU)
T-	Tribunal	Gericht	General Court	Tribunal	<ul style="list-style-type: none"> -Actions for annulment (Art 263 TFEU) -Actions for failure to act (Art. 265 TFEU) -Damages actions (Art. 340 TFEU) - Requests for a

					preliminary ruling in specific areas only.
F-	Tribunal de la Función Pública	Gericht für den öffentlichen Dienst	Civil Service Tribunal	Tribunal de la fonction publique	Art. 270 TFEU

2.5.2. Procedure before the Court

The procedure before the Court of Justice shall consist of two parts: written and oral (Art. 20 Statute). The written part of the procedure is normally more important than the oral, which is limited and short (Mangas Martín & Liñán Nogueras 2010:431).

Indirect actions start with a reference for preliminary ruling from a national court and direct actions start with an application by a competent party, which the Registry notifies to the defendant (Bengoetxea 1993:16).

In the written procedure, all applications, statements of case, defences and observations are communicated to the parties and to the institutions of the Union whose decisions are in dispute (Art. 20 Statute).

The oral procedure shall consist of the reading of the report presented by a Judge acting as rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts (Art. 20 Statute). The legal representatives may make oral submissions to the Court, which can question them. This has become an important part of the oral proceedings since it clarifies the issues which the Court considers of significance in the case (Craig & de Búrca 2011:62).

The procedures are summarized as follows:

Indirect actions (References for preliminary ruling)		Direct actions and appeals
WRITTEN PROCEDURE		
National court's decision to make a reference		Application
Translation into the other official languages of the European Union	Designation of the Judge-Rapporteur and Advocate General	Service of the application on the defendant by the Registry
Notice of the questions referred for a preliminary ruling in the Official Journal of the European Union (Series C)		Notice of the action in the Official Journal of the European Union (Series C): are written in French and translated into the other languages
Notification to the parties to the proceedings, the Member States, the institutions of the EU, the EEA States and the EFTA surveillance authority		[interim measures] [intervention]
Written observations of the parties, States and institutions		Defence/response [objection to admissibility]
		[reply and rejoinder]
<p>The Judge-Rapporteur draws up the preliminary report</p> <p>Consideration of the case, in a general meeting, by all the Judges and Advocates General</p> <p>Assignment of the case to a formation</p> <p>[measures of inquiry]</p>		
ORAL PROCEDURE		
[Hearing; Report for the hearing]		
[Opinion of the Advocate General]		
Deliberation by the Judges		
Judgment		
<p>Optional steps in the procedure are indicated in brackets.</p> <p>Cases disposed of by order do not include all the steps indicated above.</p> <p>Words in bold indicate a public document.</p>		

Chart taken from (Court of Justice of the European Union 2010)

As the aim of this study is not to provide a thorough analysis of the procedure; the focus is on the types of documents that are public and that are published in all language versions:¹¹⁹

1) Notice of the action: This is written in French and translated into the other languages.

2) Report for the hearing: The report for hearing summarises the facts, arguments and pleas, also in the language of the case and in French.

3) Opinion of the Advocate General, deliberation and the judgment: Formally, the Opinion of the Advocate General belongs to the oral procedure (Art. 20 Statute) but the practice has evolved and the Opinions of the AG are placed in a later stage of the procedure (Mangas Martín & Liñán Nogueras 2010:432). In fact, Advocate Generals only indicate in the hearing the date of delivery of their Opinion, which is written and distributed among the Members of the Court before being read in a later hearing. The reading of the Opinion finishes the procedure and the judges start to deliberate in order to deliver the judgment (*Ibid.*).

As provided in Article 252 TFEU, the Advocate General's most important task is to produce the 'reasoned submissions' with an analysis of the case and suggestions as to how the Court might decide. The written opinion of the Advocate General does not bind the Court, but is very influential, and is often followed by the Court (Craig & de Búrca 2011:62). In the past, it was an exception for an Advocate General to give his Opinion in a language other than his mother tongue. Nowadays, some Advocates General regularly present their Opinions in another language (usually French, English or Spanish), in particular effort to accelerate procedures before the Court (Mulders 2008:48). The Opinion of the Advocate General and the judgments and orders of the Court are translated into all the Community languages for publication (Mulders 2008:49).

Deliberations are intense because there are no dissents or separately concurring judgments, and therefore divergent judicial views may be contained within the judgment. The judgments of the Court of Justice and the General Court are collegiate, representing the single ruling of all judges hearing the case.

3) Judgment: The judgment gives a brief history of the proceedings, presents the facts of the case, and sums up the arguments of the parties. Finally comes the *dispositif*, which is usually only one or two paragraphs long (Bengoetxea 1993:16).

¹¹⁹ For details on the types of documents to be translated in direct actions and in references for a preliminary ruling, see McAuliffe (2012a:215)

Who revises the judgment in French? The *lecteurs d'arrêt* ensure the quality of the document in French and check the coherence in the terminology used (Mulders 2008:47).

In general the national Judge or the Judge of the language supervises the translation into the authentic version (if a language other than French) of a judgment or an order (Mulders, 2008:48). This supervision consists mainly in verifying of the legal aspects of the authentic version since the translators are not present at the deliberations between the Judges and may therefore not be aware of all the nuances and intricacies of the reasoning underlying the decision (Mulders 2008:48).

CHAPTER 3: LEGAL INTERPRETATION

3.1. The nature of interpretation

The interpretation of the law as an intellectual activity belongs to the general notion of hermeneutics,¹²⁰ which refers to all intellectual creations and seeks to ascertain their meaning (Bredimas 1978:2). ‘Generally speaking, “interpretation” is called the form of activity that aims at explaining and expounding the meaning and scope of an utterance (statute, treaty, judgment) as well as the outcome of this activity’ (*Ibid.*). Similarly, Guastini (Guastini 2010:61) also highlights the fact that interpretation can refer to either the activity or to the result/product of that activity.¹²¹ Combacau and Sur also mention that to interpret is to define or determine the meaning and scope of laws: ‘interpréter c’est définir ou déterminer le sens et la portée des règles de droit en vigueur’ (2012:170).

Depending on the perspective adopted, the nature of ‘interpretation’ can be perceived in different ways. It can be envisaged in a broad or narrow sense. The term ‘interpretation’ is used in the broad sense in which it means the process of understanding and applying a given text, a piece of legislation (Conway 2012:13). In addition, Bredimas argues that ‘interpretation *lato sensu* (*Rechtsfinden*) indicates the creative activity of judges in extending or limiting the scope of the language, strengthening or weakening its operation, correcting its shortcomings, responding to new problems, and filling the gaps’ (1978:2).

In the narrow sense, interpretation is to understand and apply the meaning of a text when that meaning is less than straightforward or requires some more considerable input from the interpreter than ordinary textual apprehension (Conway 2012:13). ‘Interpretation *stricto sensu* (*Auslegung*)¹²² denotes the process by which judges ascertain the meaning of words or phrases and elucidate obscurities originally inherent in the law’ (Bredimas 1978:2).

3.1.1. Interpretation and construction

Some scholars distinguish between ‘to interpret’ and ‘to construe’. Greenwalt explains that some authors differentiate ‘interpretation’ as discerning obvious meaning from **creatively filling in content** by ‘construction’ (2010:12). Similarly, Alcaraz Varó bases the explanation

¹²⁰ For more details on hermeneutics and judicial review see, for instance, Couzens Hoy (1985).

¹²¹ The author explains that one of the ambiguities of the term is that it can be the activity or the outcome of that activity: ‘Con il vocabolo ‘interpretazione’ ci si riferisce talvolta ad una attività, talaltra al risultato, all’esito, o al prodotto di tale attività.’

¹²² *Auslegen allgemein bedeutet, sich den Sinn eines problematischen Textes zum Verständnis zu bringen* (Loehr 1997:30).

on a difference of degree rather than kind as if ‘to interpret’ is to ascertain meaning scientifically and ‘to construe’ implies going beyond words:

To interpret quiere decir desvelar el significado subyacente de una expresión aplicando conocimientos científicos o culturales. En cambio, *to construe* tiene el sentido de asignar un significado a aquellos términos o expresiones ambiguos, vagos o poco precisos (Alcaraz Varó 2005:52).

The American legal theorist Lawrence B. Solum distinguishes two different moments or stages that occur when an authoritative legal text is applied. The first one is ‘interpretation’, which is the process (or activity) that recognises or discovers the linguistic meaning or semantic content of the legal text. The second moment is ‘construction’, the process that gives legal effect, either by translating the linguistic meaning into legal doctrine or by applying or implementing the text (Solum 2010:96).

It may be useful to examine the usage of ‘construe’/‘interpret’ by the CJEU. A frequent use of these terms appears in passive voice. We find that ‘interpret’ has more frequent occurrences:¹²³

be construed as	812 judgments
be interpreted as	5092 judgments

When the English version uses ‘construe’, the other versions analysed normally use the following terms: *verstehen* (DE), *entender* (ES) and *comprendre* or *entendre* (FR). For example:

Case C-648/11

ES	DE	EN	FR
entenderse be	verstanden werden	construed as	être comprise

53 Infolgedessen kann der Ausdruck „der Mitgliedstaat, in dem der Minderjährige seinen Asylantrag gestellt hat“ nicht als „der erste Mitgliedstaat, in dem der Minderjährige seinen Asylantrag gestellt hat“ **verstanden werden**.

¹²³ The search was done on 14/01/2014 and the type of document was filtered to ‘judgment’ only.

53 Por consiguiente, la expresión «el Estado miembro en el que el menor [...] haya presentado [la solicitud de asilo]» no puede **entenderse** en el sentido de que indique «el primer Estado miembro en el que el menor haya presentado la solicitud de asilo».

53 Partant, l'expression «l'État membre [...] dans lequel le mineur a introduit sa demande d'asile» ne saurait **être comprise** comme indiquant «le premier État membre dans lequel le mineur a introduit sa demande d'asile».

Case C-562/11

ES	DE	EN	FR
entenderse	zu verstehen	be construed as	être entendue

32 The concept of *force majeure* in the sphere of agricultural regulations **must be construed as** referring to abnormal and unforeseeable circumstances beyond the control of the trader concerned, whose consequences could not have been avoided in spite of the exercise of all due care (*Käserei Champignon Hofmeister*, paragraph 79 and the case-law cited).

32 Im Bereich der Agrarverordnungen sind unter „höherer Gewalt“ ungewöhnliche und unvorhersehbare Ereignisse **zu verstehen**, auf die der betroffene Wirtschaftsteilnehmer keinen Einfluss hatte und deren Folgen trotz Anwendung der gebotenen Sorgfalt nicht hätten vermieden werden können (Urteil *Käserei Champignon Hofmeister*, Randnr. 79 und die dort angeführte Rechtsprechung).

32 El concepto de «fuerza mayor» en el ámbito de los reglamentos agrícolas **debe entenderse** en el sentido de circunstancias ajenas al operador de que se trata, anormales e imprevisibles, cuyas consecuencias no habrían podido evitarse aunque se hubiera empleado la máxima diligencia (sentencia *Käserei Champignon Hofmeister*, antes citada, apartado 79 y jurisprudencia citada).

32 La notion de «force majeure» dans le domaine des règlements agricoles **doit être entendue** dans le sens de circonstances étrangères à l'opérateur concerné, anormales et imprévisibles, dont les conséquences n'auraient pu être évitées malgré toutes les diligences déployées (arrêt *Käserei Champignon Hofmeister*, précité, point 79 et jurisprudence citée).

When the English versions uses ‘interpret’, the other versions analysed normally use the following terms: *auslegen* (DE), *interpretar* (ES) and *interpréter* (FR). For example:

Case C-558/11

ES	DE	EN	FR
debe interpretarse	auszulegen	be interpreted as	doit être interprété

3. Article 1 of Council Regulation (EC) No 1601/2001 of 2 August 2001 imposing a definitive anti-dumping duty and definitively collecting the provisional anti-dumping duty imposed on imports of certain iron or steel ropes and cables originating in the Czech Republic, Russia, Thailand and Turkey **must be interpreted** as meaning that cables such as those at issue in the main proceedings, on the assumption that they are covered by subheading 7312 10 98 of the Combined Nomenclature in Annex I to Regulation No 2658/87, as amended by Regulation No 1549/2006, fall within the scope of that provision.

3. Art. 1 der Verordnung (EG) Nr. 1601/2001 des Rates vom 2. August 2001 zur Einführung eines endgültigen Antidumpingzolls und zur endgültigen Vereinnahmung des vorläufigen Antidumpingzolls auf die Einfuhren bestimmter Kabel und Seile aus Eisen oder Stahl mit Ursprung in der Tschechischen Republik, Russland, Thailand und der Türkei ist dahin **auszulegen**, dass Seile wie die im Ausgangsverfahren streitigen unter der Annahme, dass sie in die Unterposition 7312 10 98 der Kombinierten Nomenklatur in Anhang I der Verordnung Nr. 2658/87 in der durch die Verordnung Nr. 1549/2006 geänderten Fassung einzureihen sind, in den Anwendungsbereich dieser Bestimmung fallen.

3) El artículo 1 del Reglamento (CE) nº 1601/2001 del Consejo, de 2 de agosto de 2001, por el que se establece un derecho antidumping definitivo y se percibe definitivamente el derecho antidumping provisional establecido sobre las importaciones de determinados cables de hierro o de acero originarias de la República Checa, Rusia, Tailandia y Turquía, **debe interpretarse** en el sentido de que unos cabos como los controvertidos en el litigio principal, suponiendo que se clasifiquen en la subpartida 7312 10 98 de la Nomenclatura Combinada que figura en el anexo I del Reglamento nº 2658/87, en su versión modificada por el Reglamento nº 1549/2006, están incluidos en el ámbito de aplicación de esta disposición.

3) L'article 1^{er} du règlement (CE) n° 1601/2001 du Conseil, du 2 août 2001, instituant un droit antidumping définitif et portant perception définitive du droit provisoire institué sur les importations de certains câbles en fer ou en acier originaires de la République tchèque, de Russie, de Thaïlande et de Turquie, **doit être interprété** en ce sens que des câbles tels que ceux en cause au principal, à supposer qu'ils relèvent de la sous-position 7312 10 98 de la nomenclature combinée figurant à l'annexe I du règlement n° 2658/87, telle que modifiée par le règlement n° 1549/2006, sont compris dans le champ d'application de cette disposition.

There are no clear boundaries between the two concepts, to interpret and to construe, and they overlap in some way. Interpretation inevitably leads to assigning meaning to a piece of legislation, whether that process is more or less straightforward. For this reason, in this study we use 'interpretation' to refer to either the broad or narrow sense of the term.

3.1.2. Application and adjudication

Interpretation can also be distinguished from 'application' which is the process of determining the consequences of such an interpretation in a concrete case, the operation seeking to carry into effect a provision of a statute, a treaty or a declaration (Bredimas 1978:2). Greenwalt remarks that 'someone first interprets meaning and then renders an application to specific circumstances. Critics to this approach argue that application is part of how one interprets, filling out the meaning of the text that is being applied' (Greenawalt 2010:12).¹²⁴

As a general proposition, it may be stated that interpretation must be of an abstract nature whilst application is concrete, that is to say, it refers to a specific case. In other words, 'while interpretation defines and clarifies the meaning of the provision, application settles a dispute turning on the provision so interpreted. The former operation necessarily precedes the second' (Dumon 1976:23).

Furthermore, another term that is frequently used in legal theory is 'to adjudicate' and its derivatives (adjudication, adjudicative bodies, adjudication proceedings, adjudication processes, etc.). Some authors highlight this aspect of justice in that 'adjudication is the effort to resolve a dispute by determining, amid the clamour of rival claims, what is just' (Barden & Murphy 2011). In general terms, Paunio and Lindross-Hovinheimo note that 'in adjudication,

¹²⁴ Chiassoni, for instance, refers to 'interpretazione in concreto' when talking about the actual application: 'L'interpretazione in concreto presuppone che si sia già identificata una norma, in esito a un'interpretazione in astratto, e consiste nello stabilire se un caso individuale (una fattispecie concreta) sia, o no, suscettibile nel caso generico (fattispecie astratta) al quale la norma riconnette una determinata soluzione normativa.'

a court has to assess the meaning, significance, and consequences of the legal text in a particular case' (2010:397). Similarly, Prieto Ramos mentions 'adjudication, through which international courts or adjudicative bodies address problems of application or interpretation as they surface in the implementation of legal instruments' (2014:4). In this respect, it seems that adjudication concerns interpretation, application to a concrete case and consideration of the consequences.

But 'interpretation' and 'adjudication' are slippery concepts that are subject to the epistemological approach one adopts. Epistemology is about how we know things. It is a branch of philosophy that addresses the question of the 'nature, sources and limits of knowledge' (Klein 2005) cited in (Della-Porta & Keating 2008a:22).

Epistemological debates often pit positivists or realists against constructivists or interpretivists (Della-Porta & Keating 2008b:7).

3.2. Positivists & interpretivists

Between the two poles of positivists and interpretivists there is a spectrum of positions, but understanding the two main approaches will help us deal with the following issues:

- How to address vagueness in the law
- How to construe meaning
- How to reconcile legal certainty and multilingualism

Positivists or realists believe in the concrete reality of social phenomena, whereas constructivists or interpretivists emphasize human perception and interpretation (Della-Porta & Keating 2008b:7).

The traditional approach in **positivism** is that social sciences are in many ways similar to other (physical) sciences. The world exists as an objective entity, outside of the mind of the observer, and in principle it is knowable in its entirety. The task of the researcher is to describe and analyse this reality (Della-Porta & Keating 2008a:23).

In the **interpretivist** approach the objective and subjective meanings are deeply intertwined. This approach also stresses the limits of mechanical laws and emphasizes human volition. 'Since human beings are "meaningful" actors, scholars must aim at discovering the meanings that motivate their actions rather than relying on universal laws external to the actors' (Della-Porta & Keating 2008a:24). 'Interpretive analyses keep a holistic focus, emphasizing cases (which could be an individual, a community or other social collectivity) as complex entities

and stressing the importance of context’ (Della-Porta & Keating 2008a:30).

Moreover, the cleavages of opinion between positivists and interpretivists are also present in legal theory. On the one hand, **positivists** consider that ‘legal rules can be understood more directly without the need for a more involved interpretative enterprise to mediate how one comes to know the rules’ (Conway 2012:13).

On the other hand, ‘**interpretivists** conceive of virtually all adjudication as interpretative in the sense of going beyond a straightforward literal application’ (Conway 2012:13). Owen Fiss, for example, claims that ‘adjudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text’ (West 1987:204, citing Fiss 1982:739).¹²⁵

From an interpretivist perspective, ‘judges cannot be sure that the semantically correct reading of the legal text is not at odds with the semantically correct reading of other relevant legal texts (which they should have taken into account), nor that some basic legal principle may set a goal requiring a different reading of that legal text’ (Chiassoni 2005:268 cited in Conway 2012:13).

These two approaches are also related to how vagueness is perceived in law.

3.2.1. Indeterminacy in the law

Normative texts have to meet two requirements that mutually exclude each other: on the one hand, they have to be maximally determinate and precise, so that the meanings of all the words in a statute are as clear as possible. On the other hand, the text has to cover every relevant situation, i.e., it has to be all-inclusive. However, as Conway argues, all law entails some generality; it is not possible to predict every factual scenario to which laws of general applicability may in future be applied (2012:12). It is necessary to strike a balance between being determinate and being all-inclusive (Bhatia et al. 2005:10). Open texture provisions do not lead to clear incontestable interpretation. Consequently, the language used in legislation can contain elements that may lead to indeterminacy (Bhatia et al. 2005:14).

Indeterminacy can refer to legal or linguistic indeterminacy. **Legal indeterminacy** covers such cases where a question of law, or of how the law applies to facts, has no single right answer. **Linguistic indeterminacy** refers to lack of clarity in the application of linguistic expressions that could lead to legal indeterminacy (Endicott 2000:9).

¹²⁵ For the debate about objective and subjective interpretivists, see West (1987:207).

Semantic indeterminacy includes both *ambiguity* and *vagueness*. A word or phrase is **ambiguous** when it is susceptible to more than one meaning (Chromá 2005:400). For example, the phrase ‘Flying planes can be dangerous’ (Solan 2005:73–74) is ambiguous. However, a **vague** word has one meaning but its application is unclear in some cases (Endicott 2000:54). ‘Vagueness occurs when distinctness or preciseness in the true meaning is lacking’ (Chromá 2005:401).

An expression is vague if there are borderline cases for its application (Endicott 2000:31). If the vague word is ‘tall’, we should say that a borderline case is one in which, even if we do know *how tall someone* is, we do not know whether to say that they are tall or not tall (Endicott 2000:32).

Not knowing whether to apply an expression may mean (i) not knowing whether a statement applying it would be true (semantic vagueness), or (ii) not knowing whether it would be appropriate in the circumstances to make such a statement (pragmatic vagueness). Endicott illustrates the difference with a very clear example: if there is only a little coffee in the coffee pot and you ask me if it is empty, it would be clearly true, in a sense, to say, ‘it’s not empty’, but it may be unclear whether it is appropriate (if there is only a drop of coffee, it would be clearly inappropriate) (Endicott 2000:32). The author also highlights that Hart introduced the term ‘open texture’ for jurisprudence, possibly to look for another term to refer to vagueness in a broad sense that would include both semantic and pragmatic vagueness (Endicott 2000:37).

3.3. How to address vagueness in the law

From a positivist perspective, in interpreting statutory texts the judge should not seek what may be meant by a legal text but what the text actually says. The intent of the legislature is not a legitimate object of statutory interpretation (Scalia 1997: 16-18). Underlying this is the assumption that ‘words do have a limited range of meaning and no interpretation that goes beyond that range is permissible’ (Scalia 1997: 24).

This has an impact on how to perceive indeterminacy.¹²⁶ It would imply that it poses no real problem, as it will usually be possible to find out the original and unambiguous meaning of the statute (Scalia 1997: 45). So in this approach semantic indeterminacy does not usually give rise to legal indeterminacy, as it may be solved by looking thoroughly for the original

¹²⁶ Endicott claims that there are two approaches to vagueness: one approach accepts the indeterminacy claims and the other approach rejects indeterminacy (2000:58).

meaning (i.e. the meaning contained in the text) stated in the normative text. From this perspective, vagueness can be overcome in concrete situations by reasonable decisions taken by judges on the basis of the formulation of the text in question. In German the term *Wortlautgrenze*, the limit imposed by the wording, expresses the idea that one can foresee the legal consequences of a law only by looking at the formulation (Schilling 2010:53).

In this respect, **textualism** can be associated with a more positivistic approach. Scalia, however, argues that textualism is not wooden. He draws a very important difference between textualism and so called strict constructivism. ‘A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means’ (Scalia 1997:23). It is worth mentioning the example he provided to illustrate this difference. The statute at issue provided for an increased jail term if, ‘during and in relation to ... [a] drug trafficking crime,’ the defendant ‘uses ... a firearm.’ The defendant in this case had sought to purchase a quantity of cocaine; and what he had offered to give in exchange for the cocaine was an unloaded firearm, which he showed to the drug-seller. The Court held that the defendant was subject to the increased penalty, because he had ‘used a firearm during and in relation to a drug trafficking crime.’ Scalia expressed his clear disagreement with this decision and he contends that a proper textualist would surely have voted against it because the phrase ‘uses a gun’ connoted use of a gun for what guns are normally used for, that is, as a weapon. In this way, the author claims that a good textualist is neither a literalist nor a nihilist (Scalia 1997:24).¹²⁷ However, he does affirm that words have a limited range of meaning.

On the contrary, for interpretivists, such as the German legal scholars Christensen and Sokolowski (2002), the idea of words having only a limited semantic range is not valid: every word may change its meaning. ‘Indeterminacy is the prime feature in the language of law’ (Wagner 2005:174). **Vagueness** is a general characteristic of language (Bathia et al. 2005:16). Consequently, saying that words can have specific, bounded meanings is not quite so simple in law, since if this were the case, laws would be too rigid and only one single meaning would exist (A. Wagner 2005:176).

All textual elements are inherently vague. Consequently, there is no such thing as the original meaning of words in a statute, for the text bears no meaning in itself (Christensen & Sokolowski 2002 69-70). This means that the judge cannot turn to, for example, a dictionary

¹²⁷ See Greenawalt (2013:43–58) for further discussion on textualism.

in order to find the correct solution for a legal problem. Instead, the judge must present a reasonable and convincing argumentation for his decision and lay down the exact grounds for this (Bhatia et al. 2005:15). Interpretivists also suggest overcoming vagueness by reasonable decisions, but allow a much wider variety of factors influencing the decision, as they rule out text formulation as a possible guideline.

3.3.1. Translators vis-à-vis vagueness and ambiguity

Sometimes ambiguity is deliberate. In some circumstances, reaching agreement on the terms of a certain instrument may have necessitated the use of constructive ambiguity. Negotiators sometimes leave unresolved particular issues by agreeing on language that does not resolve the issue and is capable of more than one interpretation. Constructive ambiguity can serve as a placeholder marking an area where negotiators accept that it may be appropriate to agree on disciplines but where further negotiation is necessary before those disciplines can be specified.¹²⁸

Translators **need to transmit the same degree of ambiguity** (Biel 2007:158; Prieto Ramos 2011:208; Prieto Ramos 2014:10); they need to maintain, where possible, ‘the multi-valence of ambiguous formulations’ (Guggeis 2006:115). When faced with a problem, they need to study the blurry parts of texts. They need to take into account the effects that each way of interpreting a certain provision can have. They ‘should be able to foresee how the translation will be interpreted and applied by the receivers’ (Šarčević 2010:24).

In this respect, contrary to what some authors think,¹²⁹ **translators do interpret: *le traducteur est condamné à l’interprétation*** (Gawron-Zaborska 2010:184). In order to be able to find the intended meaning, they have to interpret the text. They should, of course, respect the skopos of the text and the macrotextual factors (Prieto Ramos 2011: 208). Needless to say, they have to be objective and follow the same hermeneutic rules that the CJEU would follow. They must grasp all the shades of meaning in order to reformulate text in the most reliable way possible. In other words, they need to scrutinise the text not only as linguists, but also through the prism of legal hermeneutics (Prieto Ramos 2014:10) In this sense, Engberg notes that interpreting texts is predominantly ‘a quest for the contextual meaning of the texts in order to discover what consequences the text has in the legal situation in which the interpretation is carried out’ (Engberg 2002:375). The translator may find him or herself in the

¹²⁸ TN/DS/W/82/Add.1, 25 October 2005.

¹²⁹ See, for example, Felici (2010).

middle of a ‘subjective struggle’: which of the more apparent meanings should I choose? (Chromá 2012:120).

As a consequence, the translator needs a well-developed awareness of the **communicative indicators** of changes in the meaning of specific words, if word **meaning is a dynamic entity** subject to change in connection with the argumentative battle concerning meaning (Engberg 2002:382).

The work of the legal translator necessarily shares features with the work of the interpreting legal specialist, for in order to create such a target language text, the translator must be able to evaluate the different possible legal interpretations laid down in the legal text. He must be able to determine not only one of the possible contextual meanings of a text, but the relevant legal meaning of the text, i.e. the meaning that a legal practitioner would reach when reading the text (Engberg 2002:376).

3.4. How to construe meaning: A semiotic perspective

For a better understanding of EU legal order, the process of translation and the interpretation of the legislation we adopt a **semiotic approach**. A semiotic perspective permits more control through greater awareness of both what is being done during the process of translation and how it is being done. ‘It brings certain matters to the surface by placing a lens to make a picture of what is going on at deeper levels by looking at the signs and asking how meaning is conveyed’ (Robertson 2010:163).

Chromá commented on the need for a semiotic perspective because ‘the gradual integration of text linguistics with discourse analysis, has shifted the focus of the theory of translation from text to discourse, that is, to getting a semiotic perspective of the process of translation’ (2012: 116). ‘The result of the interaction between language and law may be modelled in the form of signs’ (Engberg 2012:176). ‘A language may be seen as a system of signs underlying communicative activity’ (Engberg 2012:177).

Peirce and Saussure proposed two models of the sign. But the Peircean model of the sign turns out to be particularly significant for the study of multilingual EU legislation (Engberg 2012; Loehr 1997; ¹³⁰ Robertson 2010, 2012). Before moving on to the Peircean model, let us make a brief introduction to semiotics.

¹³⁰ Die Interpretanten-gesteuerte *Peirce* Theorie erscheint daher für die geplante Untersuchung der Mehrsprachigkeitsproblematik besonders aussagekräftig (Loehr 1997:18).

3.4.1. Semiotics

Beyond the most basic definition as ‘the study of signs’, there is considerable variation among leading semioticians as to what semiotics involves. Contemporary semioticians study signs not in isolation but as part of semiotic ‘sign-systems’. They study how meanings are made and how reality is represented (Chandler 2007:2). ‘Semiology investigates the nature of signs and the laws governing them’ (Chandler 2007:3, citing Saussure 1983:15). Signs take the form of words, images, sounds, odours, flavours, acts or objects, but such things have no intrinsic meaning and become signs only when we invest them with meaning (Chandler 2007:13).

3.4.2. The Peircean model

In contrast to Saussure’s model of the sign in the form of a ‘self-contained dyad’,¹³¹ Peirce offered a triadic (three-part) model consisting of:

- 1) The **representamen**: the form which the sign takes (sign vehicle).
- 2) An **interpretant**: not an interpreter but rather the sense made of the sign. **Interpretant (it is a sign in the mind of the interpreter).**
- 3) An **object**: something beyond the sign to which it refers (a referent).

The sign is a unity of what is represented (the object), how it is represented (the representamen) and how it is interpreted (the interpretant) (Chandler 2007:29).

Robertson offers a very clear example. For instance, with language we can think of the word ‘cheese’ (**representamen**). There is an **object** that is represented, but if cheese is not in front of us it is in our minds as an idea (**semiotic object**). What are we imagining? Is it cheese from the milk of the cow, goat or sheep? One word may represent different objects. This leads to the third element of the sign: the **interpretant**. The interpretant is the link between the two (Robertson 2012:16).

If we use the interpretant to reflect on all the associations in the mind relating to representamen and object, we can use it as **a tool to enquire not only about words and**

¹³¹ The model Saussure proposed was based on a dyadic model. Focusing on linguistic signs, such as words Saussure defined a sign as being composed of a ‘signifier’ (*signifiant*) and a signified (*signifié*). The signifier can be described as the form that the sign takes and the signified as the concept to which it refers. A linguistic sign is not a link between a thing and a name, but between a concept [signified] and a sound pattern [signifier]. A sound pattern is the hearer’s psychological impression of a sound. The sound pattern may be called a ‘material’ element only in that it is the representation of our sensory impressions. The sound pattern is distinguished from the concept, which is generally of a more abstract kind. (Saussure 1983:66, cited in Chandler 2007:14).

terms and what they refer to as object, but also about cultural associations attached to both of them (*Ibid.*).¹³² This is useful in the cross-language translation context where the translator compares terms to elucidate their meaning and implications in order to select the optimal (least bad) solution from a range of words to insert in a text (*Ibid.*). When translating EU legislation the main concern is the practical implications and legal effects of selecting word A as opposed to word B and how the choice fits into the whole conceptual structure of the text, related texts and EU law as a whole (*Ibid.*).

3.4.3. Interplay between EU law and national laws

As has been mentioned before, the problem translators of EU legislation face is that EU concepts and those of national laws are interwoven. For example, the word ‘consumer’ is used in the EU context but also in national law. We can use the analysis of the sign to identify not only the object and the person/consumer, but also the cultural context and associations attached to it (Robertson 2012:17).

In addition, in this intimate relationship between EU law and national laws, concepts ‘move’ between the national context and the EU context in both directions (Robertson 2010:153). On the one hand, there are EU concepts coming to the national legal systems. Member States have a significant part of their legal systems diffused with EU law through, for example, implementation of EU directives into their national legal systems (Chromá 2012:117). On the other hand, it is the EU legal order that has influence from the national legal systems. Berteloot underlines that the CJEU is like a vector, through which certain notions move or ‘migrate’ from the law of the national legal systems to the EU legal order:

La Cour est enfin un vecteur de terminologie juridique dans la mesure où elle fait passer certaines notions de droit national, notamment des principes et des notions floues, d’un système national au système communautaire, d’où elles sont même susceptibles de migrer vers d’autres systèmes nationaux. C’est le cas du principe de proportionnalité en droit administratif ou du devoir de sollicitude à l’égard du fonctionnaire introduits en droit communautaire sous l’influence du droit allemand (Berteloot 2000: 7–8).

But the number of terms coming from the legal systems of the Member States is not that big:

¹³² Wagner et al. also remarked that from a semiotic point of view, the interpretation process means decoding language and the context at the same time, as well as cultural constraints. The matrix of interpretation can vary from one culture to another; for, the meaning of a word, of a rule of law in an act reflects cultural norms, sociological systems and the legal culture of a state (Wagner 2007:246).

Le droit communautaire est un droit essentiellement technique. Il comprend certes un certain nombre de termes juridiques assez généraux ou adaptés à partir des droits nationaux qui ont exercé une grande influence sur le droit communautaire à ses débuts, surtout du droit français. Mais ces termes juridiques sont peu nombreux par rapport au vocabulaire des différents domaines techniques que la Communauté du charbon et de l'acier et la Communauté économique se sont appliquées à régler en vue de mettre en place le marché unique. Il suffit de penser aux pièces mentionnées dans la législation sur la sécurité automobile ou aux espèces horticoles visées par l'organisation commune des marchés (Berteloot 2008:14).

In this constant interaction, terms acquire their meaning by reference to the system where they are used. For this reason, pragmatics turns out to be fundamental to understand how multilingual EU legislation has been possible.

3.4.4. Meaning created in context

The mere fact of taking words from a national context and converting them into the EU context, converts the words from national to EU. We know that the national context and the EU context are not the same. **That means linguistically that the words change their value as a sign and their full meaning when they are 'moved' in this way** (Robertson 2010:154). No sign makes sense on its own but only in relation to other signs. Saussure explains this as the value of a sign. The value of a sign depends on its relations with other signs within the system. A sign has no absolute value independent of this context (Chandler 2007:19). The value of a sign is determined by the relationship between the sign and other signs within the system as a whole. (Chandler 2007:20). 'Signs are dynamic, changing and dependent upon context' (A. Wagner 2005:176). Legal concepts are not forever fixed entities. They can and do change (Kjær 2004:388). Legal rules are never absolute (A. Wagner 2005:174).

For this reason, the value of each word as a sign is dependent on the total context, and when a lexical unit or word is moved from a national law context to an EU context the sign becomes different. The sense of the word changes, and **the hidden implications and references change**. In effect, 'the word crosses a legal and linguistic frontier to become something different' (Robertson 2010:154).

Legal interpretation requires that we give up the fiction that meaning is actually something objective and objectifiable that exists outside of communication; meaning is only present in communication (Engberg 2002:381; Christensen & Sokolowski 2002). Meanings in

communication are dependent on the discourses in which they occur (Engberg 2012:180; Kjær 2004).

We need to move away from a positivistic perspective, from the default assumption being that meanings are rule-governed, stable and thus at least to a large extent independent of contexts and use, to the default assumption that meanings only exist through use and that they are constantly subject to potential change through the impact of context and communication. The most important consequence of this necessary change of basic assumptions is that the CJEU must produce convincing arguments for its interpretation (Engberg 2002:381).

3.5. How to reconcile legal certainty and multilingualism

The concept of legal certainty is applied in a number of ways. It is found in many legal systems, although their content may vary (Craig & de Burca 2011:533). Generally speaking, it expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly. In *Black Clawson Ltd v. Papierwerke AG*, Lord Diplock the Court stated that the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what the legal consequences are that will flow from it. In some ways, legal certainty is even more important than equality (Tridimas 2007:242).

3.5.1. Paradoxes of legal certainty

There are some areas of conflict between legal certainty and multilingualism, which shows that the current language regime is not perfect. Some paradoxes come to light regarding legal certainty. Law must meet two requirements: it must be **accessible** to the citizen and its effects must be **foreseeable** (Schilling 2010:49).

As we have argued before, the fact that EU law produces rights and obligations for individuals justifies the rendering of the texts in all official languages. Multilingualism in the EU is necessary because citizens need to have access to EU legislation in their own language; otherwise, legal certainty could be at risk (Athanassiou 2006:7).

3.5.1.1. Foreseeability of legislation

Firstly, legal certainty requires that legislation must be **clear and precise** and its application **foreseeable** by individuals.¹³³ In addition, the principle of linguistic equality requires texts of

¹³³ European Parliament, the Council and the Commission, Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, 17/03/1999, C 073, p. 0001 – 0004.

general applicability to be **drafted and published** in all official languages and gives all these texts equal status for the purpose of interpretation. **But can rules carry identical legal implication in all the official languages?**

Exact equivalence between twenty-four language versions of a legal text is difficult to attain (Berends 2010:43; Doczekalska 2009a:361; Gémar 2006:77) and some degree of divergence between the language versions seems to be inevitable (Kuner 1991:958) because ‘each language possesses its own genius, which influences the choice of words and the arrangement of the sentence’ (Van-Calster 1997:369). Pescatore also stated that ‘les décalages linguistiques sont inévitables dans un processus législative multipartite’ (1984:1008). In addition, in the case *A Oy*, the CJEU admits that divergences may appear.

It is settled case-law that the interpretation of a provision of European Union law must, as a rule, take account of possible divergence between the different language versions of that provision (see, inter alia, Case C-382/02 *Cimber Air* [2004] ECR I-8379, paragraph 38).¹³⁴

As a result, one can think that multilingualism adds to uncertainty in law. ‘The fact that linguistic versions can differ, sometimes in significant ways, undermines a central aspect of legal certainty, that of predictability, that is, the foreseeability of outcomes in judicial decisions’ (Paunio & Lindroos-Hovinheimo, 2010:410). As Šarčević puts it, ‘whether and to what extent the authentic texts of EU legislation actually have the same meaning is a matter of interpretation’ (Šarčević 2013:7). The Court of Justice of the EU is responsible for interpreting EU legislation (Article 267 TFEU) based on the premise that no language version prevails over the others and it is necessary to interpret them uniformly, i.e., **in the light of the versions existing in the other languages**.¹³⁵ In this way, the Court ensures the uniform interpretation of EU law because **all versions constitute the same legal instrument**.

Moreover, if all versions form part of the same legal instrument it means individuals are also bound by a norm whose content they may not know or understand in other languages (Van-Calster 1997:365). Putting it differently, EU legislation has to be interpreted taking into account all the language versions. What is debatable is whether the language versions have to be compared **only when there is a doubt as to the meaning**.¹³⁶

3.5.1.2. Accessibility of legislation

¹³⁴ Case C-33/11 *A Oy*, EU:C:2012:482, paragraph 24.

¹³⁵ See Case 19/67 *Van der Vecht*, EU:C:1967:49.

¹³⁶ What Derlén calls the ‘criterion of doubt’ (Derlén 2009; Derlén 2011).

Secondly, legal certainty is ensured by the publication of the legislation in the Official Journal of the EU (Milian i Massana 1995:497; Milian i Massana 2010:113).¹³⁷ It is clear that EU law fulfils the requirement of accessibility (Schilling 2010:49). In the *Skoma-Lux* case, which concerned the legal effect of EU legislation in the event that one of the language versions was not published in the Official Journal, the CJEU held:

The principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies.¹³⁸

The Court makes it clear that the principle of legal certainty requires official publication; unofficial forms of publication, for example on websites, are not sufficient. This follows *inter alia* from Regulation No 1. Secondly, only if a legal instrument has been published in the official language of a Member State can it be enforced against individuals in that Member State. Derlén suggests that the *Skoma Lux* case concerns the ‘formal side of legal certainty’ (Derlén 2011:149). Legal certainty requires official publication; however, paradoxically, once that language version is in existence, no reliance can be placed upon it (*Ibid.*).

3.5.1.3. Right to rely on a single language version: VCLT 1969

It is worth remarking on the difference between the criteria of interpretation established in the Vienna Convention on the Law of Treaties of 1969 and the criteria applied in the EU. The principles of treaty interpretation are provided in Articles 31 to 33. Article 31 and 32 are about interpretation in general and Article 33 concerns multilingual interpretation.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

¹³⁷ Lautissier also recognises the importance of publication in all language versions: ‘Selon la Cour, un principe fondamental dans l’ordre juridique communautaire exige qu’un acte émanant des pouvoirs publics ne soit pas opposable aux justiciables avant que n’existe pour ceux-ci la possibilité d’en prendre connaissance (C-98/78). Une réglementation doit permettre aux intéressés de connaître avec exactitude l’étendue des obligations qu’elle leur impose, ce qui ne saurait être garanti que par sa publication dans les langues officielles’ (Lautissier, 2011:91).

¹³⁸ Case 161/06 *Skoma-Lux*, EU:C:2007:773, paragraph 21.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts having regard to the object and purpose of the treaty shall be adopted.

Article 33(1) and 33(2) define the cases in which the different language versions of a treaty have the status of authentic texts. The original texts are referred to as ‘texts’, and the later translations of the Treaty are referred to as ‘versions’. However, in the EU we refer to ‘language version’ or ‘version’ instead of ‘text’ (Derlén 2009:19).

Article 33(3) of the Vienna Convention on the Law of Treaties of 1969 introduces the presumption of similar meaning instead of a duty to compare the different language versions. This provision safeguards ‘the unity of the treaty’ by the presumption that the terms of the treaty are intended to have the same meaning in each text, which means that every effort should be made to find a common meaning for the texts before preferring one to another (Germer 1970:402; Tabory 1980:195).

Although Article 33(3) introduces the presumption of similar meaning, the question remains whether it creates a right to rely on a single language version. Article 33(3) can be read as either that there is a right to read one version in isolation or precisely the opposite; that is, that the different language versions should always be so that the common meaning can be ascertained (Derlén 2009:22, citing Kjær 2003:54).

What seems clear is that the presumption in Article 33(3) ceases to operate in the face of a vague or ambiguous provision (Derlén 2009:24). Once a divergence of meaning has been discovered, Article 33(4) comes into play. If the divergence cannot be removed by using Article 31 and 32, the meaning that best reconciles the different versions with regard to the object and purpose of the treaty shall be adopted (Article 33(4)). Germer explains that Article 33(4) lays down the rule that the first duty of the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties. Broadly, the standard rules require the interpreter to consider first

the terms, context (including related agreements), and purpose of the treaty, and also any subsequent agreement and practice or any relevant rules of international law, when resolving problems of interpretation (Germer 1970:403).

In the EU, the situation is different. With respect to the system of international law, the EU legal order has special features and characteristics of its own. The Court of Justice of the EU does not follow any written rules of interpretation and case law should be analysed in order to elucidate the criteria applied.

The right to rely on a single language version could be claimed as part of the principle of legal certainty. The Court made it clear that it regards the principles of legal certainty and legitimate expectations as important aspects of the Union's legal system (Kjaer 2011:148). It would be reasonable to assume that the principles of legal certainty and legitimate expectations grant a right to rely on the wording of a single language version. The *Skoma-Lux* case supports this interpretation.

As far as national courts are concerned, in the *CILFIT* case the Court made it clear under which circumstances a national court of last instance can refrain from requesting a preliminary ruling (Article 267 TFEU). According to the Court, 'the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved'.¹³⁹ This is known as the *acte clair* principle. Although the national courts have this margin of discretion, they are required to take into account the multilingual character of EU legislation because it 'is drafted in several languages and 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'.¹⁴⁰

Therefore, before reaching the conclusion that there is no reasonable doubt with regard to the correct application of EU legislation, national courts are required to compare the different language versions. In spite of this, in his extensive study, Derlén concludes that national courts play limited attention to the multilingual interpretation of EU law and do not carry out comparison of the different versions on a routine basis (Derlén 2009:350). Then one can question whether there is a real 'multilingual will' in the EU or whether comparison of language versions is only a legal need that is not applied in practice.

¹³⁹ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, EU:C:1982:335, paragraph 16.

¹⁴⁰ *Ibid.*, paragraph 18.

Furthermore, when comparing different language versions, how many versions should be used? Translators may consider two or three versions. Many national courts have limited resources to compare more than two versions and the Court of Justice is the one with the resources to carry out the proper comparison. In case of linguistic divergences difficult to solve we should then rely on the Court as having the competence to decide on interpretation problems.

3.5.1.4. Comparison of the language versions: a requisite?

What we find in the case law is that in certain cases the CJEU uses the expression ‘in cases of doubt’ but in some other cases it takes comparison for granted. For example, in the following two cases the Court stated that the need for a uniform interpretation of EU regulations necessitates that a passage should not be considered in isolation, but that, **in cases of doubt**, it should be interpreted and applied in the light of the versions existing in the other languages.

C- 19/67 *Soziale Verzekeringsbank v Van Der Vecht* ¹⁴¹

In the case *Van der Vecht* a worker was employed to work in Belgium but at that time his company was engaged in some works in the Netherlands. The company was performing some work for a German undertaking. The worker, Mr. Van der Vecht, went by bus everyday from his work in Belgium to the Netherlands. One day the bus had an accident in the territory of the Netherlands. He was seriously injured but the company did not take any action regarding the insurance in Belgium nor in the Netherlands. Mr. Van der Vecht claimed damages but it was not clear which law was applicable.

The Court invoked the principle of uniform interpretation stating that ‘the need for a uniform interpretation of Community regulations necessitates that this passage should not be considered in isolation, but that, **in cases of doubt**, it should be interpreted and applied in the light of the versions existing in the other three languages’.¹⁴²

C- 64/95 *Konservenfabrik Lubella v Hauptzollamt Cottbus*¹⁴³

Similarly, in *Konservenfabrik Lubella*, the Court also stated that ‘the need for a uniform interpretation of Community regulations makes it impossible for a given piece of legislation

¹⁴¹ Case 19/67 *Soziale Verzekeringsbank v Van Der Vecht*, EU:C:1967:49.

¹⁴² *Ibid.*

¹⁴³ Case 64/95 *Konservenfabrik Lubella Friedrich Büber GmbH & Co. KG v Hauptzollamt Cottbus*, EU:C:1996:388.

to be considered in isolation and requires that, **in case of doubt**, it should be interpreted and applied in the light of the versions existing in the other official languages'.¹⁴⁴

C-72/95 Kraaijeveld and others¹⁴⁵

However, in other cases, the Court does not mention the criterion of doubt. In the *Kraaijeveld* case the Court commented on the obligation to compare, stating that 'interpretation of a provision of Community law involves a comparison of the language versions.'

C-219/95 P Ferriere Nord v Commission¹⁴⁶

In *Ferriere* the case concerned what was then Article 85 EC (now 101 TFEU) and the question was whether the relevant agreement should have as its object and effect the restriction of competition within the Community, or if it was sufficient that either that object or effect was at hand. There was a divergence with the Italian version of a provision used the coordinating conjunction 'and' instead of 'or' and it seemed to suggest that both criteria had to be fulfilled if Article 85 was to apply, while the other language versions made it clear that conditions were alternative and not cumulative.

EN

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object **or** effect the prevention, restriction or distortion of competition within the common market

The Court referred to *Van der Vecht* and *CILFIT* and affirmed that 'Community provisions must be interpreted and applied uniformly in the light of the versions existing in the other Community languages.' The appellant complained that the other language versions should be called in aid only where the meaning of one version of a provision is not clear, which is not the case here. The Court answered explicitly that all language versions must be consulted even if the version at hand is clear and unambiguous in isolation.¹⁴⁷

The approach in *Ferriere* is somewhat difficult to interpret (Derlén 2009:34). It would appear that the Court did not seek to change its line of adjudication since it referred to the *Van der*

¹⁴⁴ *Ibid.*, paragraph 17.

¹⁴⁵ Case 72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland*, EU:C:1996:404, paragraph 25.

¹⁴⁶ Case 219/95 P *Ferriere Nord v Commission*, EU:C:1997:375.

¹⁴⁷ *Ibid.*, paragraph 15.

Vecht case. The Court might be trying to say that a provision cannot be regarded as clear and unambiguous unless all language versions have been consulted.

C- 296/95 *The Queen v. Commissioners of Customs and Excise, ex parte EMU Tabac*¹⁴⁸

In the *EMU Tabac* case, the criterion of doubt is even more confusing. In the English language version of the judgment, paragraph 36 states (italics added) as follows:¹⁴⁹

Furthermore, to discount two language versions, as the applicants in the main proceedings suggest, would run counter to the Court's settled case-law to the effect that the need for a uniform interpretation of Community regulations makes it impossible for the text of a provision to be considered in isolation *but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages* (see, in particular, Case 9/79 *Koschniske* [1979] ECR 2717, paragraph 6). Lastly, all the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question.

However, the German version states (italics added) as follows:

Ferner würde die Nichtbeachtung zweier Sprachfassungen, wie dies die Kläger des Ausgangsverfahrens vorschlagen, im Widerspruch zur ständigen Rechtsprechung des Gerichtshofes stehen, wonach es die Notwendigkeit einer einheitlichen Auslegung der Gemeinschaftsverordnungen verbietet, *im Fall von Zweifeln eine Bestimmung für sich allein zu betrachten, sondern vielmehr dazu zwingt, sie unter Berücksichtigung ihrer Fassungen in den anderen Amtssprachen auszulegen* (vgl. insbesondere Urteil vom 12. Juli 1979 in der Rechtssache 9/79, *Koschniske*, Slg. 1979, 2717, Randnr. 6). Schließlich ist grundsätzlich allen Sprachfassungen der gleiche Wert beizumessen, der nicht je nach Umfang der Bevölkerung der Mitgliedstaaten, die die betreffende Sprache gebraucht, schwanken kann.

The German version states *im Fall von Zweifeln* (in case of doubt), instead of interpreting a provision in isolation, it should be interpreted in the light of the versions in the other official languages while the English version does not.

¹⁴⁸ Case 296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham*, EU:C:1998:152.

¹⁴⁹ Example taken from Derlén (2009:35).

How should the judgment be interpreted? The language of the case was English but if we check the French version it also used the criterion of doubt:

[...] la nécessité d'une interprétation uniforme des règlements communautaires exclut que, *en cas de doute*, le texte d'une disposition soit considéré isolément, et exige au contraire qu'il soit interprété et appliqué à la lumière des versions établies dans les autres langues officielles [...]

The working language of the CJEU is French, which means that all the judgments are drafted in French and then translated into the language of the case (Derlén 2009:5). The problem is that from a *de jure* perspective the language of the case is the only authentic version, and the French version carries no weight unless it is the language of the case. However, from a *de facto* perspective, it is reasonable to assume that the French version best express the intention of the CJEU (*ibid.*).

In *EMU Tabac* the language of the case was English and it was the only authentic version. However, the Court resorted as well to the criterion of uniform interpretation and the need to interpret the provision in the light of the other versions.

The Court has dealt with similar cases in later judgments. In *Kingdom of Spain v. Council of the European Union*,¹⁵⁰ when dealing with the concept of 'management of water resources' the Court referred to the *Kraaijeveld* case and reminded the public that 'it follows from the consistent case-law of the Court that an interpretation of a provision of community law involves a comparison of the language versions'.¹⁵¹

On the basis of the above examples, the general use of the criterion of doubt is unclear (Berends 2010:27; Paunio 2011:148). The *Ferriere* case makes it clear that no reliance can be placed on a single language version if a divergence of meaning is detected. As a working method, clear and unambiguous wording can be presumed to express the correct meaning of the provision, but if a divergence of meaning is detected, the clear meaning cannot be allowed to take precedence over the other versions (Paunio 2011:147).

Concluding remarks

Despite these concerns about the possibility of reconciling multilingualism and legal certainty, we agree with Paunio in that the two concepts can be reconciled. The above cases simply demonstrate that 'legal certainty cannot be transposed as such into the multilingual EU

¹⁵⁰ Case 36/98 *Kingdom of Spain v Council of the European Union*, EU:C:2001:64.

¹⁵¹ *Ibid.*, paragraph 47.

legal system' (2011:5). Multilingualism forces us to look at legal certainty in new terms and move away from a more positivistic view on legal certainty which relies on language as a static basis from which to interpret. In this respect, Paunio's idea of 'communicative legal certainty' can be very useful.

3.5.2. Communicative legal certainty

We consider it necessary to analyse legal certainty from the perspective of the EU as a multilingual legal system. Similarly, Paunio envisions legal certainty as a two-dimensional concept consisting of both formal and substantive elements (predictability and acceptability, respectively) (2011:1). She explains that formal legal certainty implies that laws and adjudication in particular must be predictable: laws must satisfy requirements of clarity, stability and intelligibility so that those concerned can with relative accuracy calculate the legal consequences of their actions as well as the outcome of legal proceedings (Paunio 2009:1469). Substantive legal certainty implies that laws be accepted by the legal community in question.

Next we should explore whether this twofold conception of legal certainty is applied in the context of the EU. The focus of this study is legal certainty as an underlying principle expressing the fundamental rationality of the EU legal order (*idem*: 1470). An emphasis on the communicative relationship between the Court and the EU legal community may enhance substantive legal certainty. Transparent argumentation is key for more open dialogue. In the EU context, one cannot reduce legal certainty to predictability. 'The focus should shift to the Court's reasoning: this is essential for the acceptance of judgments through which interpretative choices are communicated to the legal community' (Paunio 2009:1490). Paunio proposes the conception of **communicative legal certainty** placing emphasis on the acceptability of judicial decision-making within a particular legal community (Paunio 2011:5). The argumentation of the Court must include a certain reflexivity that takes into account the differing legal cultures and traditions that underlie the pluralistic EU legal community. In this sense, the dialectical relationship between the Court and its audience constitutes a forum where different normative views meet (Paunio 2009:1492).

Moreover, we agree with Paunio in that there is a need for a new conception of legal certainty in which purpose, *telos*, and other dynamic methods of interpretation are of particular significance for the **construction of meaning in multilingual EU law** (Paunio 2011:3). In this respect, teleological interpretation is highly important for the Court of Justice and one can conceptualise legal certainty within the context of EU law from the point of view of the

CJEU's legal reasoning, which we explore in the second part of this study. The study of the interpretation criteria applied by the CJEU will help elucidate the Court's legal reasoning.

**PART II: MULTILINGUAL
INTERPRETATION AND LINGUISTIC
DIVERGENCES**

PART II: MULTILINGUAL INTERPRETATION AND LINGUISTIC DIVERGENCES

CHAPTER 4: CORPUS ANALYSIS: METHODS AND PROCEDURES

The general main objective for the second part of this dissertation is the examination of divergences as they arise in the case law. More precisely, the applied study addresses the following specific objectives:

- To examine the use of comparison of different language versions: whether the CJEU resorts to comparison to reconcile diverging language versions or to have a tool to support an interpretation when no divergences are present. For this purpose, we provide a classification of three groups of cases.
- To study the methods of interpretation that the CJEU applies and their link to each of the groups.
- To systematise the types of divergences between different language versions and analyse if they can be attributed to a problem of translation and whether they could have been avoided.

To these purposes, our applied study is based on the corpus analysis of judgements. We first make some preliminary remarks on corpora. Then we provide some methodological features and the stages of analysis.

4.1. Corpus analysis

A corpus typically implies a finite body of text, sampled to be maximally representative and able to be stored electronically (McEnery & Wilson 2007:29). The most commonly used types of corpora in translation studies are comparable and parallel corpora. Monolingual comparable corpora consist of two sets of texts in the same language, one containing original text and the other translations. With this type of corpora one can find patterns that are distinctive of translated texts as opposed to texts produced in a non-translational environment (Saldanha & O'Brien 2013:67). On the contrary, parallel corpora are typically made up of source texts in a certain language and their translations (Saldanha & O'Brien 2013:68). It

should be noted that the terminology used in the literature is not consistent; ‘translation corpora’ is another term used for ‘parallel corpora’ (Saldanha & O’Brien 2013:67).¹⁵²

For our applied study we have two kinds of texts. We select the judgments that deal with divergences. In order to select the judgments the search is done in English; therefore, our first body of texts is a compilation of judgments in English. It must be noted that the original language of judgments is the language of the case (see section 1.6.4.2.). While the judgments selected are in English, this does not mean that they are in the original language version; many of them are, of course, translations. Still, the selection of judgments is crucial in order to identify in which cases the CJEU has resorted to comparison and whether it was to reconcile diverging language versions.

Once the judgments are selected and classified, we delve into the types of divergences. At this stage, we identify the problematic legal instruments, i.e. whether the problem appears in a directive, a regulation, etc. We compile the conflicting texts in English, French, German and Spanish, which are the languages used for the comparative analysis. This corpus could be considered to be composed of multilingual parallel texts, and our research could, therefore, be regarded as product-orientated (see Saldanha & O’Brien 2013:50). However, we must bear in mind that although in practice we deal with translated texts, from a legal point of view, all language versions are equally authentic and there is no single original text (see discussion in section 2.1.2.).

4.1.1. Selection of judgments

For the selection of judgments we use the CVRIA database, from the CJEU, searching by keywords and phrases such as ‘language version’, ‘in the light of the versions existing’, ‘various languages’ etc. These keywords and phrases allow us to retrieve all instances in which the CJEU has resorted to comparison of different language versions, since the Court always refers to ‘language versions’, not ‘translations’. In this respect, it should be noted that the terminology used in the EU differs from that used in the Vienna Convention on the Laws of Treaties of 1969, where the term ‘texts’ is used to refer to the language versions of a treaty

¹⁵² McEnery and Wilson argue that corpora can be monolingual or multilingual. In multilingual corpora two concepts are distinguished: parallel and translation corpora. A parallel corpus represents the same text in its original language and in translation. A translation corpus does not represent text in translation; rather, it allows one to compare texts in the same genre (McEnery & Wilson 2007:38), for example, legal contracts in English and German.

that are authenticated. The concept ‘version’ refers to any other language version, not originally authenticated (Derlén 2009:19).

The time period selected goes from 01/01/2007, when Romania and Bulgaria joined the Union, until 30/06/2013, the day before Croatia joined. We have selected these years because this was the period with the largest number of languages (twenty-three) before the accession of Croatia. In CVRIA one may order the documents according to different dates (date of delivery, date of opinion, date of hearing or date of the lodging of the application). We have chosen the ‘date of delivery’ (*Verkündungsdatum, fecha de pronunciamiento, date du prononcé*), that is to say, when the judgment is delivered in open court (Art. 88 Rules of Procedure), after the deliberations have been completed in private (Art. 32 Rules of Procedure). As far as the type of document is concerned, the search is focused on ‘judgments’, although we also take into account Opinions and Views for the qualitative study of the selected cases.

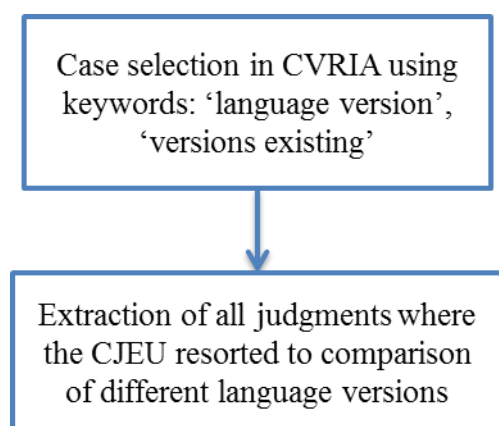


Figure 2: Selection of judgments

4.1.2. Classification of cases according to the type of proceedings

We classify the cases in a spreadsheet. As explained in section 2.5.1., there are five main types of proceedings:

- Request for a preliminary ruling;
- Action for failure to fulfil an obligation;
- Action for annulment;
- Action for failure to act;
- Damage action (also called direct action); and

- Appeal.

Indirect actions are the ones originating and terminating before national courts, which is the case of **requests for a preliminary ruling** (Art. 267 TFEU). Direct actions are the ones originating and terminating before the Court: action for failure to fulfil an obligation, action for annulment, action for failure to act and damage action.

As far as the appeals are concerned, the Court of Justice of the European Union decides on appeals against decisions taken by the General Court. The General Court also decides on appeals against decisions taken by the Boards of Appeal of the OHIM or the Board of Appeal of the Community Plant Variety Office (CPVO).

In references for a preliminary ruling, i.e. indirect actions, we observe **when the divergence appears**. Sometimes the referring court poses the question for a preliminary ruling because it notes some divergence. But other times, the referring court poses a question and the divergence appears later, after comparison. We also analyse **who notes the divergence**.

In the rest of the proceedings, i.e. all other direct actions, we study the **purpose of comparison** as described in section 4.1.3.

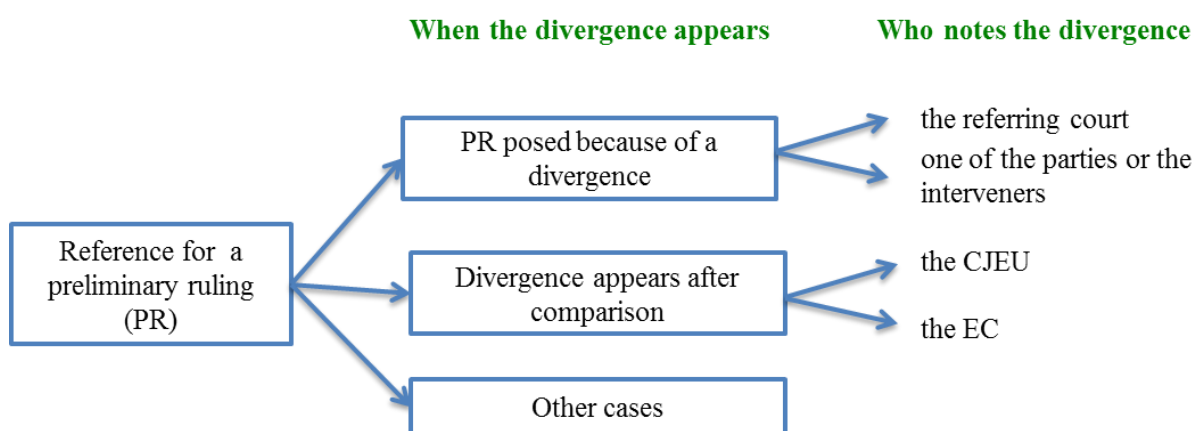


Figure 3: Parameters for preliminary rulings

4.1.3. Classification of cases according to the purpose of comparison

The CJEU uses comparison to reconcile diverging texts as well as for confirming an interpretation when there are no divergences. Both indirect and direct actions are divided into three groups:

Group 1: Hard cases: divergences treated as a problem of interpretation

Group 2: Soft cases: divergences not treated as a problem of interpretation

Group 3: No divergence but comparison is used as a tool

Baaij (2012:219) mentions a similar classification: ‘discrepancies posing interpretation problems’, ‘unproblematic discrepancies’ and ‘no discrepancies’. However, he does not provide details on these three categories and moves on to analyse the interpretive strategies, that is to say, the method of interpretation that the CJEU applies.

Bengoetxea (1993) draws a difference between hard cases and clear cases. The term ‘case’ refers to a situation or a state of affairs, i.e., to the applicability of the sources to a certain situation in a given context (Bengoetxea 1993:183). He explains that hard cases call for interpretation because of semantic or pragmatic features of the case at hand, for example, because the meaning of the applicable norm may not be clear owing to polysemy, vagueness, generality and ambiguity of the terms used in the norm, or due to the open texture of legal language (Bengoetxea 1993:168). In contrast, the justification of a decision in a clear case tends to be straightforward (Bengoetxea 1993:173). ‘Clear cases’ refers to a situation in which ‘the applicability of a legal rule or a set of legal rules to certain facts is clear and unproblematic’ (Bengoetxea 1993:184).

We call Group 1 ‘hard cases’ because the CJEU deals with problematic divergences that require metalinguistic interpretation. However, for Group 2 we use the term ‘soft cases’ and not ‘clear cases’ because the judgments present some divergences that are solved relatively easily. From the evidence found in the applied study, we cannot conclude that all requests for a preliminary ruling are hard cases (see Sankari 2013:80, citing Bengoetxea 1993).

It is essential to start our analysis by distinguishing between the three groups for the following reasons:

- The fact that comparison between different language versions is used does not necessarily entail divergence. In Group 3 comparison is used as a tool to support an interpretation or to confirm that all language versions converge in meaning.
- For the purpose of this study, it is difficult to commence the analysis of the case law according to type of method of interpretation because the CJEU often combines different methods. Resorting to linguistic comparison does not mean that the method of interpretation is simply ‘literal’. The CJEU rarely relies solely on linguistic arguments (Paunio 2013; Pommer 2012); it often compares and then moves on to teleological or systematic interpretation.
- Starting the analysis according to the type of divergence (structural-grammatical,

lexical-conceptual, lack of consistency) is also difficult because in Group 2 the CJEU sometimes admits a divergence but does not treat that as a problem; the problem is solved by looking at other language versions or by examining the context and objectives. Needless to say, in Group 3 there are no divergences; thus, the classification per type of problem does not apply.

For all of this, our applied study has a mixed methods sequential explanatory design, which consists of two phases: quantitative followed by qualitative (Creswell et al. 2003:178; Creswell 2009:211). We first analyse all instances of divergences quantitatively, without limiting the investigation to any languages in particular. This offers a global picture of how cases are distributed into the three groups and the methods of interpretation that the CJEU applies. The qualitative analyses focuses on an examination of the types of divergences, refining and exploring the linguistic and translation issues in greater detail. The focus is on Group 1 and Group 2. For this part, comparison will be limited to English, French, German and Spanish. In addition, because of length limitations, only the most representative examples of different types of problems will be described in detail. The rationale for this approach is that the combination of quantitative and qualitative approaches provides a better understanding of the research problems than either approach alone (Creswell & Plano Clark 2011:282).

4.2. Analysis of types of divergences

In Group 1 and Group 2, we examine the types of linguistic divergences that appear between different language versions of a piece of legislation. Classifying the types of divergences is not easy and some authors acknowledge the difficulty of classification in linguistics:

A language is vastly more complex than an automobile engine, and linguistic items, being multi-functional, can be looked at from more than one point of view, and hence given more than one label on different occasions even within the same analytical framework (O'Brien 2003:106, citing Bloor & Bloor 1995:15).

Therefore, it is not possible to establish a rigid categorisation:

La langue est une entité formée de composantes indissociables aux rapports complexes qui résistent bien souvent aux essais de catégorisation rigide (Germain & LeBlanc 1982:17).

However, there are some studies that provide a classification of divergences or of types of translation problems. Among the main works that have dealt with this issue, Loehr (1997)

provides a classification between two main groups: *Divergenzen im Text* and *Divergenzen im Denken* (Loehr 1997:57). *Divergenzen im Text* are textual divergences, which are possible to avoid, and *Divergenzen im Denken* are conceptual divergences, which are more difficult to avoid.

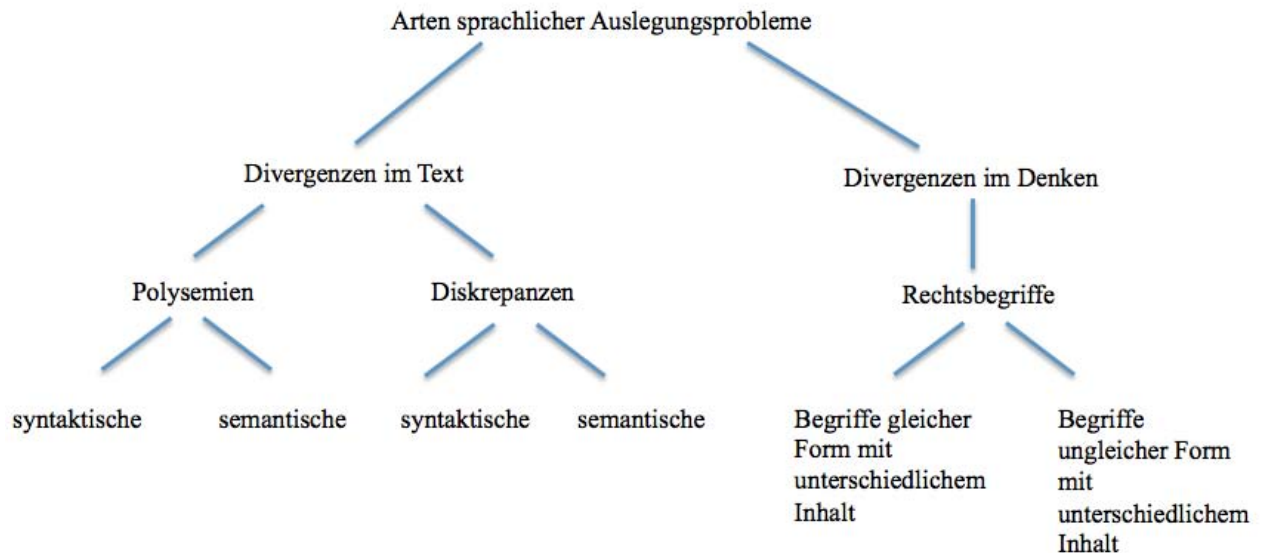


Figure 4: Loehr's classification (1997:58)

Loehr subdivides *Divergenzen im Text* into *Polysemien* and *Diskrepanzen*. *Polysemien* refer to any type of ambiguity, either because a term is ambiguous (*semantische*) or because the syntactical structure leads to ambiguity (*syntaktische*). This author claims that when there is a problem of polysemy, divergence can be solved by looking at the other language versions (Loehr 1997:59). *Diskrepanzen* are described as *Übersetzungsfehler* (translation errors) (Loehr 1997:57).

Divergenzen im Denken refer to *Rechtsbegriffen* (legal terms) and they are also divided into two categories: *Begriffe gleicher Form mit unterschiedlichem Inhalt* (same form but different meaning) (Loehr 1997:82) and *Begriffe ungleicher Form mit unterschiedlichem* (different form and different meaning) (Loehr 1997:87). The first group is purely conceptual. For example, a certain term can be interpreted in one way in the context of national law but in another way in the EU context; it is not a question of the term itself but of the meaning it acquires contextually. The second group would be the case of different terms being used in the language versions and having different connotations because their scope is different.

The model proposed by Loehr (1997) is very valuable and we agree that there are ‘textual divergences’ and ‘conceptual divergences’. Nevertheless, the subcategory *Diskrepanzen* considered *Übersetzungsfehler* (translation errors) is confusing. She states that in the case of *Diskrepanzen*, language versions seem clear in isolation and the divergence can only be discovered by comparing the different language versions;¹⁵³ however, this does not imply that they are always translation errors. In addition, divergences might appear later on, after comparison. This is not a type of problem, but rather an indication of when the divergence appears. Moreover, what she calls *semantische Polysemien* within the group *Divergenzen im Text* can also be confusing because the semantic scope of terms might be included under the other group, i.e. *Divergenzen im Denken* (conceptual divergences).

Both Šarčević (2006) and Schübel-Pfister (2004) mention the classification proposed by Loehr (1997). Šarčević remarks that divergences can be studied within the **lexical field**, but they can also appear in the **syntactical and pragmatic fields** (2006:125). Schübel-Pfister explains that Loehr’s linguistic perspective coincides partially with a legal perspective (2004:106). She also distinguishes between *Divergenzen im Text* and *Divergenzen im Sinn* but calls them *Begriffsdivergenzen* and *Bedeutungsdivergenzen* respectively. She explains that *Begriffsdivergenze* can also be referred to as *Textdivergenzen* (textual divergence) and *Bedeutungsdivergenzen* (conceptual divergence), as *Sinndivergenzen* (Schübel-Pfister 2004:106).

Val Calster (1997:374) refers to ‘obscurities’ in the texts. He proposes the following categories:

- one version says something different than the other(s); there is a clear conflict between different versions;
- one text uses a word without any meaning, or with an uncertain sense, the corresponding word in the other(s) is clear;
- in one text, a word is used with two or more meanings; the other version’s term contains only one of those meanings;
- the word used in one text has a wider meaning than the corresponding word in the other(s); and

¹⁵³ Loehr explains it in the following terms: Denn dort ist jede einzelne Fassung für sich allein eindeutig, die Fehlerhaftigkeit offenbart sich erst im Sprachvergleich (Loehr 1997:75).

- a text uses a category which does not figure in the other(s).

Yankova (2007) analyses the translation problems that appeared in the translated EU directives and she details some of the terminological problematic areas as:

- conceptual non-equivalence;
- specificity/generality of terms;
- *faux amis* or false cognates;
- collocational semantic variation; and
- positive or negative latent value attribution to words or phrases in particular contexts (Yankova 2007:101).

Dengler (2010) provides a similar classification to that of Van Calster (1997). He looks at the degree of divergence. If the language versions differ completely, he calls it *divergencia abierta* (open divergence). He cites *Ferriere*¹⁵⁴ and *Commission v United Kingdom*¹⁵⁵ as examples. If the language versions do not differ completely but their scope is somewhat different, he calls it *divergencia parcial* (partial divergence). Partial divergences can arise because:

- one language version uses a term that is more ambiguous or more generic than the terms used in the other language versions;
- one of the language versions uses a term that is more restrictive than the terms used in the other language versions;
- there is an element that is omitted in the other language versions; and
- there is terminological asymmetry.

Dengler (2010) includes conceptual divergences and divergences because of terminological asymmetry in the same group (partial divergences). However, if there is terminological asymmetry or if a certain element is omitted in a language version, the result can be that the language versions have completely opposite meanings, and would therefore be considered 'open divergence'. For this reason, Dengler's classification according to the degree of disparity may be difficult to apply systematically.

¹⁵⁴ Case 219/95 P *Ferriere Nord v Commission*, EU:C:1997:375.

¹⁵⁵ Case 100/84 *Commission v United Kingdom* EU:C:1985:155.

Solan (2009) mentions that there can be problems of ‘word choice’ or ‘grammatical nuances’. An example of a ‘word choice’ problem would be the *Lumbella*¹⁵⁶ case. He explains:

A regulation adopted protective measures with respect to the import of certain cherries into the EU. Just about all of the versions of the regulation used the word for sour cherries. But the German version, for some reason, had used the word for sweet cherries (*Süßkirschen*). This fact made the scope of the challenged regulation entirely beyond controversy (Solan 2009:49).

Regarding ‘grammatical nuances’, Solan (2009:49) gives the example of *Paterson*.¹⁵⁷ The regulation at hand established special rules for vehicles for the transportation of passengers or goods. If vehicles exceeded certain dimensions and were not assigned to a regular service, they had to be fitted with a mechanical monitoring device or crews had to carry an individual control book. However, the regulation provided certain exceptions to the general rules. Member States could grant exemptions for the following national transport operations and uses:

c) transport of live animals from farms to local markets and vice versa, and *transport of animal carcasses or waste not intended for human consumption*” (emphasis added).¹⁵⁸

Three lorries were inspected and charges were brought against them for not complying with the required monitoring device or control book. The three undertakings had used their vehicles for the carriage of certain animal products, which they regarded as carcasses, intended principally for human consumption. They claimed that the exemption applied to them. They argued that the phrase ‘not intended for human consumption’ referred only to waste, not to carcasses, and that the carcasses in this provision applied to all carcasses, irrespective of whether intended for human consumption or not.

The CJEU recognised that the wording was ambiguous in most language versions but found some language versions, in particular the Dutch version, very clear:

[...] other versions, in particular the Dutch language version, are worded in such a way as to exclude uncertainty. In fact, in that version, the qualifying words ‘not intended for human consumption’ precede the term ‘carcasses’ and consequently can apply only

¹⁵⁶ Case 64/95 *Konservenfabrik Lubella v Hauptzollamt Cottbus*, EU:C:1996:388.

¹⁵⁷ Case C-90/83 *Paterson v Weddel*, EU:C:1984:123.

¹⁵⁸ *Ibid.*, paragraph 5.

to both waste and carcasses.¹⁵⁹

The divergence was due to the position of the postmodifier, whether it was modifying only ‘waste’ or ‘waste and carcasses’. This is a clear example of a divergence that Solan includes in the category of ‘grammatical nuances’.

Baaij (2012) divides the types of discrepancies into ‘translation errors’ and ‘semantic scope’. In the case of ‘translation errors’, discrepancies entail the use of distinctly different terms in the various language versions. Baaij claims that ‘even when the CJEU does not explicitly believe that a translation error is to blame, it seems that the CJEU is generally more likely to treat these types of discrepancies as “textual flaws”’ (2012:229). However, in our opinion, translation is not always to blame when there are textual flaws. This category of ‘translation errors’ does not seem to represent a type of linguistic divergence. Whether the problem was caused by an inaccurate translation is another question that should be resolved afterwards. Regarding the ‘semantic scope’, Baaij points out that ‘differences in the scope of terminology in the various language versions may not be an error, but merely a natural and unavoidable trait of translation’ (*Ibid.*).

What we see in common in most authors is that there is a general tendency to distinguish divergences that appear at a grammatical-syntactical level and those that appear at a lexical-semantic level. Both Loehr (1997:17) and Šarčević (2006:125) suggest considering the three areas within the field of semiotics: **syntax (or syntactics), semantics and pragmatics**. This threefold classification ‘goes back to Peirce, but was first drawn and made familiar by Morris’ (Lyons 1977:114). Let us briefly examine the relationship between syntax, semantics and pragmatics.

4.2.1. Syntax-semantics-pragmatics interface

The term ‘**syntax**’ is from ancient Greek *syntaxis*, which literally means ‘arrangement’ or ‘setting out together’. It refers to the branch of grammar dealing with the ways in which words, with or without inflections, are arranged to show connections of meaning within the sentence (Matthews 1981:1). According to Morris, syntax ‘is the consideration of signs and sign combinations in so far as they are subject to syntactical rules’ (Morris 1971:29). Syntax is not interested in the individual properties of the sign vehicles. It is the ‘study of the syntactical relations of signs to another in abstraction from the relations of signs to objects or to interpreters’ (Morris 1971:28).

¹⁵⁹ *Ibid.*, paragraph 11.

Words are combined with each other in syntactic units to form larger segments of communication, namely phrases, clauses and sentences. Sentences, on the other hand, are the building units of texts (Huber & Mukherjee 2010:1). Germain and LeBlanc also highlight that syntax concerns the study of combination of words into larger units: ‘L’objet de la syntaxe est l’étude des combinaison appropriées de mots en unités plus vastes, la phrase demeurant cependant l’unité maximale d’analyse (Germain & LeBlanc 1982:23). This grants syntax a significant position among the other disciplines of linguistics and it is ‘the best developed of all the branches of semiotic’ (Morris 1971:28):

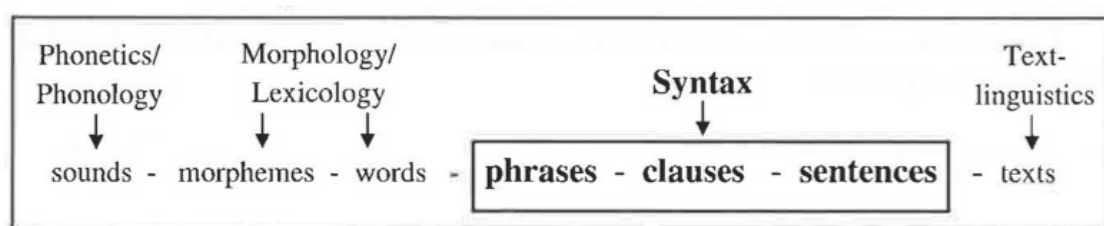


Figure 5: The central position of syntax and syntactic units (Huber & Mukherjee 2010:1)

As far as **semantics** is concerned, it comes from ancient Greek *sēmantikós* (‘significant’) and it is the study of meaning: ‘La sémantique est la partie de la linguistique qui prend la signification des mots et expressions comme objet d’étude (Corblin 2013:22). It ‘deals with the relation of signs to their designata and so to the objects which they may or do denote’ (Morris 1971:35). Linguistic semantics is the study of meaning that is used by humans to express themselves through language. Other forms of semantics include the semantics of programming languages, formal logics, and semiotics (Varalakshmi 2012:168).

Moreover, by **pragmatics** Morris refers to ‘the science of the relation of signs to their interpreters’ (Morris 1971:43). ‘Pragmatics itself would attempt to develop terms appropriate to the study of the relation of signs to their users’ (Morris 1971:46). The context of communication plays a fundamental role: ‘La pragmatique est la partie de la linguistique qui prend pour objet d’étude le calcul des valeurs d’une énonciation en contexte’ (Corblin 2013:22).

Morris (1971) summarises the relation between the three areas of study in the followings terms:

Syntactical rules determine the sign relations between sign vehicles; **semantical** rules correlate sign vehicles with other objects; and **pragmatical** rules state the conditions in the interpreters under which the sign vehicle is a sign (Morris 1971:48).

Carnap's (1942) distinction of the three areas of semiotics is close to Morris' formulation:

If in an investigation explicit reference is made to the speaker, or to the user of the language, then we assign it to the field of **pragmatics**. If we abstract from the user of the language and analyse only the expressions and their designate, we are in the field of **semantics**. And if, finally, we abstract from the designata also and analyse only the relations between the expressions, we are in (logical) **syntax** (Lyons, 1977:115, citing Carnap, 1942:9).

Syntax, semantics and pragmatics intersect with each other. Classification of divergences according to the three fields (syntax, semantics and pragmatics) is not always easy to establish due to the interconnection of the different dimensions. Meaning is constructed in context and depends on the structural relations between the different textual components. Structural differences between languages can also lead to semantic divergences:

Les arguments de cette fonction sont d'une part la signification des mots composants, et d'autre part la structure syntaxique selon laquelle ils sont groupés : il suffit en effet, par exemple, de changer la place des mots dans la structure syntaxique, de les permuter, pour obtenir une autre interprétation. Par conséquent, la signification des phrases n'est pas une simple conjonction de la signification des mots, mais une construction plus complexe qui combine la signification des mots en tenant compte de la structure dans laquelle ils se trouvent (Corblin 2013:13).

In addition, the distinction of **semantics and pragmatics** in relation to the analysis of meaning in natural languages is generally recognised as controversial (Lyons 1977:117). In fact, they are two complementary subdisciplines: 'Loin de former des compartiments étanches, **sémantique** et **pragmatique** sont deux sous-disciplines articulées et complémentaires' (Corblin 2013:22).

Lyons explains very clearly that whatever distinction may be drawn between pure semantics and pure pragmatics, the analysis of meaning in natural languages will necessarily involve pragmatic considerations' (Lyons 1977:117). This takes us to Frege's postulate that 'only in the context of a sentence do words have meaning' (Chierchia & McConnell-Ginet, 2000:431, citing Frege, 1892:25). Word meaning cannot be studied in isolation. The test of any proposed word meaning must be its contribution to the meaning of the sentences that contain it and the meaning relations among such sentences (Chierchia & McConnell-Ginet 2000:431).

4.2.2. Proposed classification of divergences

The classification we propose is, therefore, not guided strictly according to the three fields (syntax, semantics and pragmatics) but they are all interrelated. The most structural-systemic aspects of language are grouped under ‘structural-grammatical divergences’, while the lexical level of discourse is described under ‘lexical-conceptual divergences’, and the intertextual issue of consistency deserves a separate category. They all have a semantic dimension of relevance to the study of meaning and interpretation in this study. We therefore classify divergences according to:

- 1) Structural-grammatical divergences
- 2) Lexical-conceptual divergences
- 3) Lack of consistency

Each category requires a more fine-grained classification, which is why we provide sub-categories to the three main groups.

4.2.2.1. Structural-grammatical divergences

This category corresponds to that of *Textdivergenzen* (textual divergence) (Schübel-Pfister 2004:106) or ‘grammatical nuances’ (Solan 2009:49). Choosing the name ‘grammatical divergences’, it is pertinent to make a brief overview of what grammar is. As suggested by Quirk et al, the word ‘grammar’ has various meanings (1985:12). For these authors, grammar includes both syntax and that aspect of morphology (the internal structure of words) that deals with inflections (or accidents) (Quirk et al. 1985:12). Radford (2004) also acknowledges that grammar is traditionally subdivided into two different but inter-related areas of study: **morphology** (the study of how words are formed out of smaller units) and **syntax** (the study of the way in which phrases and sentences are structured out of words) (Radford 2004:1). Sometimes grammar is identified with inflections, so that non-specialists may still speak of ‘grammar and syntax’, tacitly excluding the latter from the former (Quirk et al. 1985:12).

For contemporary linguists, a grammar is, at the very least, a systematic description of the structure of a language. Their goal is to explain the relationships among parts of a sentence, to understand how form and meaning are related, and in some cases to describe how sentences flow into larger pieces of discourse (Berk 1999:4).

Jacobs (1995) mentions three types of grammars. Firstly, grammar is used to refer to the rules and principles that native speakers use in producing and understanding their language. These

rules are almost always acquired in childhood and are ‘in the heads’ of native speakers. Such grammar might be called a ‘mental grammar’ (Jacobs 1995:4). Secondly, grammar can be ‘descriptive’. Grammarians examine grammatical utterances, compare them with other logically possible strings of words, and then try to determine the properties that differentiate the well-formed sentences from those that speakers reject as ill formed (Jacobs 1995:5). An example of descriptive grammar is *The Student Grammar of Spoken and Written English* (Biber et al. 2003), whose focus is to describe the actual patterns of use and the possible reasons for those patterns. Thirdly, there is ‘prescriptive grammar’, which can be regarded as a set of regulations that are based on what is evaluated as correct or incorrect in the standard varieties (Quirk et al. 1985:14). Prescriptive grammars dictate how people ‘should’ use the language (Biber et al. 2003:7).

Germain and LeBlanc refer to the evolution of the notion of grammar. Traditionally, the focus was on prescriptive grammar but now descriptive grammar has gained prominence:

Alors que, dans l'acception traditionnelle, la grammaire était définie comme l'étude des combinaisons de radicaux et de désinences en mots (morphologie) et des combinaisons de mots en groupes et en phrases (syntaxe), la grammaire entendue dans son sens plus récent est essentiellement descriptive et tente de rendre compte, pour toutes les phrases de la langue, de l'ensemble des relations qui existent entre le son et le sens. Ainsi, non seulement la dimension normative est-elle abandonnée au profit d'une dimension descriptive objective mais le domaine même de la grammaire est élargi considérablement afin de mieux rendre compte du fonctionnement de la langue (Germain & LeBlanc 1982:20).

As it was mentioned before, words can be organised in higher units known as phrases. A phrase can consist of a word or group of words. There are four main types of phrases: noun phrase, verb phrase, adjective phrase and adverb phrase. Each phrase has the head, which will be respectively a noun, a verb, an adjective or an adverb. When we study the structural-grammatical divergences, we analyse in which grammatical unit the problem is found. Our category of ‘structural-grammatical divergences’ includes the following sub-categories:

Structural-grammatical divergences

1.1. Punctuation

Although the importance of punctuation is sometimes overlooked, serious problems of interpretation arise because of faulty punctuation. For example, in *Able UK*,¹⁶⁰ the Spanish version used a comma but the other versions did not. It was not clear to which part of the sentence the adverbial clause of condition was affecting.

A note on punctuation

We include punctuation within structural-grammatical divergences as it can be argued that punctuation is a syntactical element. In the field of controlled language, some authors have included punctuation within syntax (O'Brien 2003). In linguistics and computation linguistics punctuation has gained interest: 'punctuation marks are evidently among the most important structural elements in written language' (White 1994:107). 'Punctuation and graphical markers do play an important role in indicating structural relations in written discourse' (Dale 1991:2). In fact, many colons, semi-colons, parentheses, dashes and commas function as signals of discourse structure; they can act as syntactic separators or textual delimiters. In his work *The Linguistics of Punctuation*, Nunberg claims that punctuation is in fact a linguistic subsystem, and hence to be considered as part of the wider system of written language (Nunberg 1990:6). He presents a detailed analysis of the syntactic constraints on the use of punctuation.

The use of punctuation in different languages

Even though most Western languages use the same punctuation vocabulary, it is also well-known that there are significant differences between them, i.e., each language has its own conventions and preferences (Santos 1998:6). German, for instance, has strict rules, English less so (Triebel 2009:159). The lack of adequate punctuation poses a major obstacle to precision in legal writing (Mellinkoff 1976:366).

In the EU, article 10 of the Interinstitutional Style Guide, which is available in all official languages, contains the general rules for punctuation.¹⁶¹ In addition to this guide, there are

¹⁶⁰ Case C-225/11 *Able UK*, EU:C:2012:252.

¹⁶¹ Interinstitutional style guide 2011. Available at: <http://goo.gl/ZSg4Sq> [last consulted on 16/05/2015].

some style guides for each language. For instance, in Spanish there is the *Guía del Departamento de Lengua Española*,¹⁶² which explicitly states that it only complements the interinstitutional style guide:

En el Libro de estilo interinstitucional (LEI) (10.1) aparecen enunciadas las convenciones básicas relativas a la puntuación. Por consiguiente, en este capítulo de la Guía del Departamento únicamente se recogen aspectos no tratados en el LEI o los casos en que la convención establecida en el Departamento resulte divergente, o bien se recuerdan y ejemplifican algunos casos en que se observan errores frecuentemente.

English also has a guide: English Style Guide of the European Commission Directorate-General for Translation. It acknowledges that punctuation rules and conventions often differ between different languages:

3.1 The punctuation in an English text must follow the rules and conventions for English, which often differ from those applying to other languages.¹⁶³

Despite possible variations in punctuation between different language versions, what prevails is clarity and transparency. Punctuation should not give rise to ambiguity in the interpretation of legal provisions.

1.2. Conjunctions

Conjunctions can be coordinating or subordinating. They indicate a relationship between two units such as phrases or clauses. In *Ferriere*,¹⁶⁴ for instance, the Italian version of the provision used the coordinating conjunction ‘and’ instead of ‘or’ and it seemed to suggest that both criteria had to be fulfilled if Article 85 was to apply. The other language versions made it clear that conditions were alternative and not cumulative.

IT

Sono incompatibili con il mercato comune e vietati tutti gli accordi tra imprese, tutte le decisioni di associazioni di imprese e tutte le pratiche concordate che possano pregiudicare il

¹⁶² Guía del Departamento de Lengua Española I Redacción y presentación. Bruselas y Luxemburgo, agosto de 2010. Available at: <http://goo.gl/QbXaYf> [last consulted on 16/05/2015].

¹⁶³ European Commission Directorate-General for Translation. English Style Guide. A handbook for authors and translators in the European Commission. Seventh edition: August 2011. Last updated: September 2014. Available at: <http://goo.gl/FZCqX9> [last consulted on 16/05/2015].

¹⁶⁴ Case 219/95 P *Ferriere Nord v Commission*, EU:C:1997:375.

	<p>commercio tra Stati membri e che abbiano per oggetto e per effetto di impedire, restringere o falsare il gioco della concorrenza all'interno del mercato comune ed in particolare quelli consistenti nel:</p> <p>EN</p> <p>The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:</p> <p>Despite the crucial role of conjunctions in steering the interpretation of a text, such expressions have received little attention in drafting manuals and guides (European Commission 2013:138).</p>
<p>1.3. Omissions or additions of syntactic units in one language version</p>	<p>The omission of a certain element in the sentence can cause problems of interpretation. For example, in CEPSA,¹⁶⁵ the Spanish version of article 10 of Regulation No 1984/83 did not specify the nature of those commercial or financial advantages, unlike all the other language versions, which used the term ‘specific’ or ‘special’ to describe those advantages.</p>
<p>1.4. Other aspects of syntax</p>	<p>This category includes other problems caused by the lack of correspondence between syntagms in different language versions. Divergences have been found, for instance, in complex noun phrases. Such an example was found in Bark,¹⁶⁶ where there was a problem with a participial clause functioning as postmodifier of the head noun <i>contrato, Anstellungsvertrag</i>, ‘contract’, <i>contrat</i>.</p> <p>The nature of the contract was not clear. Some versions used the expression ‘based on’ but other versions used different expressions like</p>

¹⁶⁵ Case C-279/06 *CEPSA*, EU:C:2008:485.

¹⁶⁶ Case C-89/12 *Bark*, EU:C:2013:276.

	<p>‘according to’ (in German) or ‘inspired on’ (in French).</p> <p>Other divergences have appeared in verb phrases. For example, in Zurita Garcia and Choque Cabrera the problem was that some versions used a modal verb (may be expelled), which expresses possibility, but the Spanish version used the future tense (será expulsado), which expresses obligation.</p>
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4.2.2.2. Lexical-conceptual divergences

This category corresponds to *Bedeutungsdivergenzen* or *Sinndivergenzen* (conceptual divergences) (Schübel-Pfister 2004:106). It focuses on the lexical level. We analyse whether terms and phrases used in some language versions are more ambiguous or more restrictive, and whether all versions used different terms and phrases which have different connotations, etc.

Lexical-conceptual divergences	
2.1. Some version(s) use a term or phrase with a more restrictive meaning	This happens when a certain term has a narrower scope than the terms used in the other languages. For example, in Astrid Preissl , ¹⁶⁷ the term used in German (<i>Handwaschbecken</i>) was more restrictive because it referred expressly to washing of the hands.
2.2. Some version(s) use a term or phrase with a more general meaning	In these cases, one version uses a term that is more generic or ambiguous (more than one meaning) than the terms used in the other versions. For example, in <i>SGS Belgium and Others</i> , ¹⁶⁸ the Dutch version use the generic term <i>verloren</i> (lost) while the other versions referred to ‘perished’ (EN) or <i>péri</i> (FR).
2.3. The language versions use terms or phrases with different connotations	There is plurality in the scope of the terms used in different language versions. For example, in <i>Codirex expeditie</i> , ¹⁶⁹ some language versions used the general term ‘forequarter’ but

¹⁶⁷ Case C-381/10 *Astrid Preissl*, EU:C: 2011:638.

¹⁶⁸ Case C-218/09 *SGS Belgium and Others*, EU:C:2010:152.

¹⁶⁹ Case C-400/06 *Codirex expeditie*, EU:C:2007:519.

	other language versions referred to parts of it such as ‘crop[s]’ and ‘chuck[s]’ and ‘blade[s]’ (such as the Dutch, English and German versions of the CN).
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4.2.2.3. Lack of consistency

Inconsistencies or asymmetries can happen within the same legal instrument or between different instruments. It can happen when some language versions use one and the same term in different provisions, whereas in other language versions two different terms are used to refer to the same concept.

Lack of consistency	
3.1. Some language versions use one and the same term in different provisions, whereas in other language versions two different terms are used.	This is the most frequent problem of consistency within a single instrument. For example, in Tele2 Telecommunication , ¹⁷⁰ it was the French version that used two different terms in different provisions, while the other languages used the same term for both provisions.
3.2. One language versions present an inconsistent use of a term between headline and content of the provision.	We have found only one example of this type of inconsistency: Homawoo . ¹⁷¹ In this case it was the Spanish version that referred to the ‘entry into force’ in the title of the article but to the date of application in the content of the article.

4.3. Analysis of methods of interpretation

As explained in the introduction, we do not aim at proposing a new category of the methods of interpretation since it can be argued that the methods applied by the CJEU are, in principle, the same as those a national judge may apply (Bredimas 1978:xv; Kutscher 1976:I–6):

There is not doubt, and for this no proof is required, that the said methods of interpretation are also applied by the Court of Justice of the Communities. Its methods of interpretation are thus basically the same as those of the national courts of the

¹⁷⁰ Case C-426/05 *Tele2 Telecommunication*, EU:C:2008:103.

¹⁷¹ Case C-412/10 *Homawoo*, EU:C:2011:747.

Member States (Kutscher 1976:I–6).

We seek to understand how the CJEU applies the different methods in order to reconcile diverging language versions.

4.3.1. Methods of interpretation applied by national courts

For the purposes of this study, it is not necessary to carry out a detailed analysis of the methods applied by national courts. We may simply mention some of the works in comparative law that include an examination of the methods applied by different national courts. For example, MacCormick and Summers (1991) analyse and compare the practice of interpretation in nine countries representing Europe (North, South, East and West) and America (USA and Argentina), in both common law and civil law. They provide four main methods of interpretation but some of them are further divided into additional categories. In total they analyse eleven argument types:

- **Linguistic arguments**
 - The argument from ordinary meaning
 - The argument from technical meaning
- **Systemic arguments**
 - The argument from contextual-harmonisation
 - The argument from precedent
 - The argument from analogy
 - Logical-conceptual argument
 - The argument from general principles of law
 - The argument from history
- **Teleological/Evaluative arguments**
 - The argument from purpose
 - The argument from substantive reasons
- **‘Transcategorical’ – argument from intention**
 - The argument from intention

Kadner Graziano (2010:29), for instance, explains that the principles of interpretation that a national judge can normally apply are ‘grammatical interpretation (or literal)’, ‘teleological interpretation’, ‘historical interpretation’ and ‘systematic interpretation’. To these he adds a fifth method that he explains in detail: the ‘comparative method’.¹⁷²

4.3.2. Methods of interpretation applied by the CJEU

As for the methods of interpretation that the CJEU applies, most EU law scholars list three methods (literal, systematic and teleological), and some of them add two more methods: historical and comparative law interpretation (Sankari 2013:64). The terminology used sometimes varies from author to author but the methods are essentially the same. The following table shows different classifications of methods of interpretation in EU law:

Kutscher (1976)				
Literal interpretation	Schematic interpretation	Teleological interpretation	Historical interpretation	Comparative law interpretation
Bredimas (1978)				
Textual Method		Functional Method (or teleological)	Subjective Method	
Brown & Jacobs (1989)				
Albors-Llorens (1999)				
Literal interpretation	Contextual interpretation	Teleological interpretation	Historical interpretation	Comparative law as aid to interpretation
Bengoetxea (1993)				
Bengoetxea, MacCormick & Moral Soriano (2001)				
Itzcovich (2009)				
Paunio (2013)				

¹⁷² Also see Henninger (2009) and Carsten (1997).

Sankari (2013)				
Semiotic or linguistic arguments (semiotic criteria of interpretation)	Systemic and context-establishing arguments (systemic and contextual criteria)	Teleological, functional, or consequentialist arguments (dynamic criteria)		
Buck (1997)				
Grammatikalische Auslegung	Systematische Auslegung	Teleologische Auslegung	Historische Auslegung	
Schübel-Pfister (2004)				
Wortlautauslegung (also called grammatische, exegetische, semantische, grammatikalische Auslegungsmethode)	Systematische Auslegung	Teleologische Auslegung	Historische Auslegung	Rechtsvergleichende Auslegung

Hierarchy in the methods?

In the previous table we ordered the methods in such a way as to show parallelism between different category names. The order in which authors present the methods varies and there is no established hierarchy between the methods. Kutscher (1976) argues that ‘an order of priority or succession of methods of interpretation cannot be established’ and some methods are rarely used. For example, ‘the literal and historical methods of interpretation recede in the background’, while ‘schematic and teleological interpretation including the application of the principle of *effet utile* is of primary importance’ (Kutscher 1976:I–16).

Brown and Jacobs also highlight that the order in which they describe the methods (literal, historical, contextual, comparative law and teleological) does not imply they have a

decreasing importance:

Although this order has a certain logic and accords broadly with the way in which the approaches to interpretation by national courts are traditionally presented, it would be quite wrong to assume that the methods are placed in descending order of importance (Brown & Jacobs 1989:271).

In fact, Brown and Jacobs agree with Kutscher in that the dominant approaches of the CJEU are the contextual and teleological (Brown & Jacobs 1989:271).

4.6.2.1. Literal interpretation

Literal interpretation is also called ‘textual, semiotic, linguistic or grammatical interpretation’. The textual method described by Bredimas includes the ‘strict literal, the grammatical, the logical and the systematic techniques according to whether the European Court resorts to the language, vocabulary, grammar, logical inferences or the context’ (Bredimas 1978:34). Regarding what she calls the ‘systematic technique’, she explains that ‘this technique may be classified under the textual method, whenever the Court resorts to the context in order to reason by analogy; on the contrary, it is classified under the functional method, whenever the Court resorts to the context in order to interpret the provisions by reference to the objectives. The rest of the authors use the term ‘systematic’ to refer to the functional, systemic or contextual interpretation (see next section).

Literal interpretation is generally conceived as a starting point in the interpretative process: ‘Every court must begin from the words of the text before it’ (Brown & Jacobs 1989:271). Kutscher also remarks that ‘every interpretation of a rule has to start with its wording and the “ordinary meaning” of a word, phrase or sentence, with its meaning determined by “common usage”’ (Kutscher 1976:I–17). However, Bredimas notes that the natural or ordinary meaning often clashes with the special meaning of EU notions. In fact, she confirms that ‘in the practice of the European Court the ordinary meaning is of no importance’ because words can acquire a special EU meaning that is different from that in the national legal systems (Bredimas 1978:37).

Bengoetxea claims that literal interpretation draws arguments from semantic and syntactical features of legal language and from a comparison of different language versions in which Community law is authentic’ (Bengoetxea 1993:234). He introduces a key element in literal interpretation: the comparison of the different language versions. When analysing literal interpretation, Schübel-Pfister also acknowledges the fact that all language versions are

equally authentic and this implies the comparison of different language versions (Schübel-Pfister 2004:128).¹⁷³ Bredimas argues that the existence of EU legislation in all official languages has two aspects. The first one is negative; literal construction is sometimes difficult as the various versions are not always concordant. The second aspect is positive, as the ambiguous provisions in one text and one language can often be clarified by using the official text in the other languages. In this respect, Kutscher warns of the risk of relying on a single language version and of comparing only if the wording in the various languages appears to differ (Kutscher 1976:I–18).¹⁷⁴

Albors Llorens (1999) underlines two problems that national courts and the CJEU encounters when trying to construe the law literally:

- i) A literal interpretation may in some cases lead to an absurd result, that is, to an interpretation clearly contrary to the objective of the legislation in question.
- ii) No words are so plain and unambiguous that they do not need interpretation in relation to a context of language and circumstances (Albors Llorens 1999:376).

Bredimas (1978) also mentions that the objections against the rule of clarity rely on the fact that ‘words are never clear by themselves and that the apparent clarity of one text may coincide with the obscurity of another’ (1978:35). For this reason, the literal and contextual methods of interpretation are closely intertwined. The Court often undertakes an exhaustive analysis of both the immediate and the wider context where the provision that necessitates interpretation is found (Albors Llorens 1999:376).

4.6.2.2. Systematic interpretation

Systematic interpretation is also called ‘schematic, contextual or systemic interpretation’. Bengoetxea (1993) writes that this entails both ‘systemic and context-establishing arguments’ and ‘systemic and contextual criteria’. He explains that the main idea of **context-establishing arguments** is that a legal provision is properly understood only when it is placed in a wider context (1993:240). One looks at the context of a provision in order to find clues as to the construction of that provision. Brown and Jacobs also state that this method involves placing the provision at issue within its context and interpreting it in relation to other provisions of

¹⁷³ See Schübel-Pfister: An dieser Stelle wird in der Literatur meist relativ knapp auf die beiden Problemkreise eingegangen, die den Schwerpunkt der vorliegenden Arbeit bilden: Zum einen findet sich gewöhnlich die Feststellung, dass die wörtliche Auslegung des Gemeinschaftsrechts dadurch erschwert werde, dass die Rechtsakte in allen Amtssprachen gleichermaßen verbindlich sind und daher in den verschiedenen Sprachfassungen voneinander abweichen können.

¹⁷⁴ See discussion on the right to rely on a single language version: section 3.5.1.3.

EU law (Brown & Jacobs 1989:280). **Systemic criteria** provide guidance for the process of reasoning from legal norms, i.e. for drawing inferences from legal norms (*per analogiam, a fortiori, lex specialis lex superior, a contrario*, etc.). These arguments have also been called ‘quasi-logical criteria’ (Bengoetxea 1993:243).

4.6.2.3. Teleological interpretation

Teleological interpretation has also been studied as the ‘functional method’ by Bredimas (1978:70). According to her, it consists in ‘taking into consideration the various political, economic and social facts that surround the functioning of the Treaties and which determine its general scope and thereupon try to reconstitute their spirit’ (Bredimas 1978:70). In the teleological or functional method ‘the emphasis lies on the function, utility, aim and purpose which the treaty has to fulfil, the circumstances in which it was made and its place in international life’ (Bredimas 1978:20). It is based upon the purpose or object of the text facing the judge (Brown & Jacobs 1989:286).

Bengoetxea (1993) includes three types of arguments, namely teleological, functional and consequentialist, under the term ‘dynamic criteria’. These three arguments relate to the dynamic context in which norms operate:

[...] norms are to be interpreted in such a way that they function effectively (**functional arguments**), or from the objectives which some norms of the legal order either formulate explicitly or are seen as pursuing (**teleological arguments**), and finally from the consequences to which the proposed interpretation for those norms leads (**consequentialist arguments**) (Bengoetxea 1993:252).

Teleological criteria refers to the objectives of a legal provision, act, or Treaty and assess the adequacy of further acts of implementation or related acts as means to the realization of those objectives (Bengoetxea 1993:255). *Consequentialist criteria* look at the possible consequences of a given interpretation (Bengoetxea 1993:256). *Effet utile* is the functional criterion to which the Court most commonly resorts in its interpretations (Bengoetxea 1993:254).

Kutscher also studies the rule of **effectiveness** (*règle de l’effet utile*) within the teleological method. It states that when interpreting provisions of the Treaty, their purpose should be achieved, so that they have a ‘practical value’ and that their ‘effectiveness’ can be developed: ‘It can therefore be understood as meaning that preference should be given to the construction which gives the rule its fullest effect and maximum practical value’ (Kutscher 1976:I–41). For

Bredimas, effectiveness or *effet utile* is a principle that ‘presupposes that the authors of the Treaty had the intention of adopting a text not stripped of all significance, i.e., that words should be interpreted at least to give a minimum efficacy to the Treaty’ (Bredimas 1978:77).

4.6.2.3.1. Teleological-systematic interpretation

Many authors have noted that the teleological and the systematic interpretation are closely interlocked and ‘they can only be separated with difficulty’ (Kutscher, 1976:I-40). Bengoetxea calls it ‘teleo-systemic criteria’ (1993:250). It is a mix of both systemic and dynamic arguments (functional, teleological or consequentialist) where the aims and objectives of a norm are inferred from its context or interrelationships with other norms (Sankari 2013:72).

Both systematic and teleological methods have special importance in the interpretation of EU law. Kutscher highlights that the **systematic interpretation** has special importance in the EU, since ‘its application corresponds to the special features which characterize the legal system of the Community’ (Kutscher, 1976:I-36). Brown and Jacobs claim that the **teleological approach** is peculiarly appropriate in EU law where ‘the Treaties provide mainly a broad programme or design rather than a detailed blue-print’ (Brown & Jacobs 1989:286). The same point is made by Albors Llorens: ‘there is the general and open-ended nature of many provisions of EC law, and especially of the EC Treaty’ (1999:377).

4.6.2.4. Historical interpretation

Kutscher distinguishes between ‘subjective historical method’ (which refers back to the actual intention of the legislature) and ‘objective historical method’ (which refers back to the objective intention of the legislature and, in particular, to the function of a rule at the time it was adopted) (Brown & Jacobs 1989:276; Albors Llorens 1999:379; Kutscher 1976:I–21).

Bredimas calls this ‘the subjective method’ and states that the subjective or historical interpretation consists in searching for ‘the original common legislative intention as conceived at the time the Treaties were concluded’ (Bredimas 1978:54). The **subjective method** ‘considers as the starting point as well as the only legitimate object of all treaty interpretation to ascertain the real intention or the presumed intention of the original drafters of the treaty’ (Bredimas 1978:17). It allows recourse to preparatory work (*travaux préparatoires*) in order to throw light on the intention of the historical legislator (Bredimas 1978:7).

It is generally agreed that historical interpretation in either sense is little used by the Court of Justice (Brown & Jacobs 1989:276; Kutscher 1976:I–21; Itzcovich 2009:553). The author’s

intention is a vague principle, difficult to trace. This principle is a general idea and not a practical guideline to solve problems of divergences. The parties' intention can only be revealed by subsidiary means, such as the use of preparatory acts or the context of the provision (Van-Calster 1997:386). In addition, the difficulty in tracking the authors' intention stems from the fact that there are no published *travaux préparatoires* of the Treaties and, although transparency is increasing, 'there is still a degree of secrecy in the institutions' negotiations during the legislative process' (Albors Llorens 1999:379).

Itzcovich also discusses the '**genetic argument**' (2009:553). He explains that it is also called '**historical argument**' or '**psychological argument**'. It is typical of the French Exegetic School and of the tradition of the so-called 'legislative legal positivism'. It prescribes to interpret the legal provisions in a way corresponding to the will of the legislator. The genetic argument may pertain to the linguistic criteria as well as systemic criteria:

[...] it is a (sic) linguistic criteria if we maintain that the meaning of a (normative) statement is influenced by the intentions of the speaker (the legislator); it is a systemic criteria if we hold, as it seems preferable to do, that the relevance of the speaker's (the legislator's) intentions depends upon a choice of the addressee (the interpreter), or that it depends upon a context which is external to the communication (such as a certain legal culture), which may be more or less favourable to this kind of considerations (Itzcovich 2009:553).

Precisely because this method of interpretation can be included in different categories, it seems logical to call it 'transcategorical argument from intention', as MacCormick and Summers do (1991:515).

4.6.2.5. Comparative law interpretation

Whether comparative law is a method of interpretation per se remains controversial (Schübel-Pfister 2004:132), or at least it does in the case of the EU, which has a legal order of its own. However, as was argued in the first part of this study, there is constant interplay between EU law and the laws from the national Member States. Comparative law comes into play when a certain concept is used both in national law and in EU law. By **comparative law interpretation** Kutscher refers to the fact that, when EU law uses concepts that have clearly been borrowed from the legal systems of individual Member States, it is necessary to examine whether the concepts acquire a special meaning under EU law – which is normally the case:

In general the concepts taken from the laws of individual Member States have within

the framework of Community law specific meanings different from their meaning under the national legal systems, which spring from the system of Community law and the objectives of the Treaty (Kutscher 1976:I-25).

Interpretation or supplementation on a comparative law basis is also necessary if EU law is silent on particular questions, with which the legal systems of individual Member States have for a long time been familiar and which they have answered (Kutscher 1976:I-26). It is generally agreed that when the Court interprets or supplements EU law on a comparative law basis it is not obliged to take the minimum commonality which the national solutions have in common, or their arithmetic mean or the solution produced by a majority of the legal systems as the basis of its decision (Kutscher 1976:I-29; Schübel-Pfister 2004:133).

Kutscher admits that an interpretation based on the comparison of the relevant legal systems, with the intention of defining a certain concept is rarely found in the judgments of the Court. However, it is more frequently found in the opinions of the Advocates-General (Kutscher 1976:I-26). Although comparative law is not specifically reflected in the judgments, the Court devotes a considerable amount of time and energy to comparative law (Kutscher 1976:I-28).

4.3.3. Methods applied by the CJEU to reconcile diverging language versions

In this section, we delve into the methods of interpretation that the CJEU applies when it deals with diverging language versions. When it comes to linguistic divergences, most authors have divided the methods into two groups: interpretation that uses linguistic arguments and interpretation that uses arguments that go beyond the linguistic level. The terminology used in the literature also varies. Some authors have described the methods of interpretation applied to the problem of divergences as follows:

Pescatore (1984)		
<i>solution réductrice</i>	<i>solution métalinguistique</i>	
Berteloot (2004)		
<i>'reduzierende' Methode</i>	<i>meta-linguistische Methode</i>	
Derlén (2009)		
Berends (2010)		

Classical reconciliation	Reconciliation and examination of the purpose	Radical teleological method
Baaij (2012)		
Literal approach	Teleological approach	

Pescatore (1984) divides the methods into two groups: *solution réductrice* (the reductive solution) and *solution métalinguistique* (metalinguistic solution). Similarly, Berteloot refers to ‘*reduzierende*’ *Methode* and *meta-linguistische Methode* (Berteloot 2004:184). The ‘**reductive**’ **solution** is applied at a linguistic level; it consists in giving preference to certain language versions. Pescatore calls it *solution réductrice* because it rules out one or more language versions and focusing on one or the rest of the languages (Pescatore 1984:996). Within this category, Pescatore studies the *élimination d’une version atypique*, which would be like ruling out the language version that is not clear. This happens when one language version is ambiguous and the rest of the language versions are clear. Some of the examples he provides of the reductive solution are *Van der Vecht* and *Paterson*.¹⁷⁵

The **metalinguistic solution** attempts to reconcile diverging texts by referring to the system and the purpose of the texts, that is to say, applying criteria that go beyond the linguistic level and make it possible to solve the problem without having to choose among the language versions (Pescatore 1984:996). This method is equivalent to the **teleological-systematic interpretation**, also called ‘**teleo-systemic**’ **interpretation** (Bengoetxea 1993:250). As Kutscher affirms, the **teleological interpretation** is closely linked to the schematic interpretation and it is difficult to draw a clear line between them (Kutscher, 1976:I-40). Pescatore starts with the premise that the interpretation of legal texts implies three successive stages, namely, the textual method, the systematic method and the teleological method:

L'interprétation des textes juridiques, selon notre conception, est échelonnée en trois phases successives qui sont : la prise en considération des termes (méthode dite textuelle ou encore sémantique) ; la prise en considération du contexte (méthode systématique) ; enfin, la méthode orientée selon l'objet et le but des dispositions (méthode téléologique) (Pescatore 1984:1000).

¹⁷⁵ Case 19/67 *Soziale Verzekeringsbank v Van der Vecht*, EU:C:1967:49.

Pescatore argues that, in the case of the EU, where all versions are equally authentic, the textual method does not offer any results (Pescatore 1984:1000).¹⁷⁶ The systematic and teleological interpretations are the two methods that the Court normally applies (Pescatore 1984:1001).¹⁷⁷ Some examples of the metalinguistic solution are the famous cases *Stauder*,¹⁷⁸ *North Kerry Milk*,¹⁷⁹ *Bouchereau*,¹⁸⁰ *Koschniske*.¹⁸¹

*Stauder*¹⁸² is a frequently commented case. Kutscher also mentioned it as an example of the ‘real intention of the author’ within the historical method. This case dealt with the decision by the Commission on measures to allow certain categories of consumers to buy butter at a reduced price. This decision authorised Member States to make butter available at a reduced price to certain categories of consumers who were beneficiaries under a social welfare scheme and whose income did not permit them to buy butter at normal prices. The problem at issue was the wording of Article 4 because it presented some divergence between the different language versions. There was a clear discrepancy; the German and Dutch versions required the name of the beneficiary while the French and Italian did not specify that (emphasis added):

DE

'Die Mitgliedstaaten treffen alle erforderlichen Maßnahmen damit ... die Begünstigten der in Artikel 1 vorgesehenen Maßnahmen Butter nur gegen einen **auf ihren Namen** ausgestellten Gutschein erhalten können.'

FR

Les bénéficiaires des mesures prévues à l'article 1er ne puissent obtenir du beurre qu'en échange d'un **bon individualisé**.

¹⁷⁶ Or, il faut bien voir que, lorsqu'un texte juridique est authentique dans deux ou plusieurs langues et que ses expressions linguistiques apparaissent comme étant non concordantes ou même contradictoires, la méthode sémantique ne peut donner aucun résultat. [...] une solution ne peut être trouvée qu'à l'aide des deux autres méthodes restantes, c'est-à-dire par référence à des arguments de système, ou par la prise en considération de l'objet des dispositions et du but qu'elles poursuivent (Pescatore 1984:1000).

¹⁷⁷ En fait, c'est de ces méthodes que la Cour s'est servie dans la plupart des cas, en procédant à *une analyse du contenu* des dispositions dont la signification était linguistiquement contestée, pour ramener ainsi les différentes versions linguistiques à un sens commun.

¹⁷⁸ Case 29/69 *Stauder* EU:C:1969:57.

¹⁷⁹ Case 80/76 *North Kerry Milk Products v Minister for Agriculture*, EU:C:1977:39.

¹⁸⁰ Case 30/77 *Regina v Bouchereau*, EU:C:1977:172.

¹⁸¹ Case 9/79 *Koschniske v Raad van Arbeid*, EU:C:1979:201.

¹⁸² Case 29/69 *Stauder* EU:C:1969:57.

The Federal Republic of Germany made use of this authorisation and issued cards that were detachable coupons with a stub that required the name and address of the beneficiary in order to be valid. When selling butter at a reduced price, the retailer could only accept coupons attached to the stub, on which had to appear, among other things, the name of the beneficiary.

An important point in this judgment is that the Commission argued that the preferred version was the French version if the decision's origin was born in mind. However, the Court did not seem to take this argument as a criterion of interpretation and insisted on the necessity of uniform application and uniform interpretation. It claimed that it was impossible to consider one version of the text in isolation and that the provision had to be interpreted on the basis of both the **real intention of its author** and the **aim he sought to achieve**, in the light of the versions in all four languages.¹⁸³

The Court finally ruled that the second indent of Article 4 of Decision No. 69/71/ (EEC) of 12 February 1969, as rectified by Decision No. 69/244/(EEC), was to be interpreted as only requiring the identification of those benefiting from the measures for which it provides; it did not, however, require or prohibit their identification by name so as to enable checks to be made.¹⁸⁴

In addition, in *North Kerry Milk*,¹⁸⁵ the dispute concerned the interpretation of certain Community rules relating to the payment of aid for the manufacture of casein and caseinates from skimmed milk.¹⁸⁶ The problem revolved around the conversion rate that had to be applied for calculating the aid in national currency.¹⁸⁷ It was of vital importance to decide whether the rate of exchange was applicable on the date of manufacture or on the date of marketing the casein.

According to Article 4(2) of that regulation, sums owed in national currency by a Member States had to be paid on the basis of the relationship between the unit of account and the national currency which obtained at the time when the transaction was carried out.¹⁸⁸ Article 6 of Regulation No 1134/68 provided that the time when a transaction was carried out had to be considered to be the date of the event by which the amount involved in the transaction became

¹⁸³ Case 29/69 *Stauder* EU:C:1969:57, paragraph 3.

¹⁸⁴ *Ibid.*, ruling I.

¹⁸⁵ Case 80/76 *North Kerry Milk Products v Minister for Agriculture*, EU:C:1977:39.

¹⁸⁶ *Ibid.*, paragraph 1.

¹⁸⁷ *Ibid.*, paragraph 3.

¹⁸⁸ *Ibid.*, paragraph 6.

due and payable. Therefore, the crucial issue in the present case was whether that event had to be understood to be the processing or the marketing of the casein.¹⁸⁹

The Court noted an apparent discrepancy between the wordings in the different language versions. The concerned expression in English was ‘the event ... in which the amount ... becomes due and payable’. An examination of all the versions revealed that only the English version spoke of payment. In French it was rendered by the expression *le fait générateur de la créance*; and the other languages used an expression equivalent to the French one.¹⁹⁰

However, the Court focused on the purpose of the rules and stated that ‘any discrepancy between the versions in the different languages of Article 6 of Regulation No 1134/68 is irrelevant in the present context’. Remarkably, the Court pointed out that the elimination of linguistic discrepancies can sometimes jeopardise legal certainty because words would have to be interpreted against their natural meaning:

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.¹⁹¹

As a consequence, the Court ruled that ‘it is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved’.¹⁹² Therefore, it decided the case by examining the context and purpose of the rule in question.

In *Bouchereau*¹⁹³ there was a problem of consistency in the use of the term ‘measures’. In the English version of the concerned Directive the term ‘measures’ had been used in a consistent way in two different provisions, while in other language versions (as in Spanish or German) two different terms had been used. In this case, a worker of French nationality was brought before the Marlborough Street Magistrates’ Court on a charge of unlawful possession of drugs. Bouchereau pleaded guilty and the Court intended to make a recommendation for deportation to the Secretary of State.

The Marlborough Street Court asked the Court of Justice to give a preliminary ruling to answer the following question among others: ‘Whether a recommendation for deportation

¹⁸⁹ *Ibid.*, paragraph 7.

¹⁹⁰ *Ibid.*, paragraph 17.

¹⁹¹ *Ibid.*, paragraph 11.

¹⁹² *Ibid.*

¹⁹³ Case 30/77 *Regina v Bouchereau*, EU:C:1977:172.

made by a national court of a Member State to the executive authority of that State (such recommendation being persuasive but not binding on the executive authority) constitutes a "measure" within the meaning of Article 3 (1) and (2) of Directive No. 64/221/EEC'.¹⁹⁴

The Court ruled that 'a comparison of the different language versions of the provisions in question shows that with the exception of the Italian text all the other versions use different terms in each of the two articles, with the result that no legal consequences can be based on the terminology used'.¹⁹⁵ It invoked the principle of uniform interpretation stating that '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 a part'.¹⁹⁶ As a conclusion, the Court explained that the recommendation constituted a 'measure'.¹⁹⁷

*Koschniske*¹⁹⁸ concerned the interpretation of Article 10(1)(b) of Regulation No 574/72. The regulation was meant to implement Regulation 1408/71 regarding social security for workers and their families. The question was raised in the course of an action brought by a woman of German nationality entitled to a Netherlands invalidity pension.¹⁹⁹ She was benefiting from this allowance but then it was suspended by virtue of Article 10(1)(b) of Regulation No 574/72. There was a divergence between the different language versions of this provision.

This provision relied on withheld payment of a family allowance from anyone entitled to it as a result of an invalidity pension if the 'spouse' exercised a professional or trade activity in the territory of a Member State where entitlement to family benefits was not subject to conditions of insurance or employment.²⁰⁰ However, the Dutch version used the term *diens echtgenote* (wife) instead of 'spouse', term which may refer to either husband or wife. As a result, the wording of the provision in question, considered solely in the Dutch version, could give the impression that the term used referred exclusively to a person of the female sex.²⁰¹

The Court declared the need to consider the provision in the light of the other versions:

However, the need for a uniform interpretation of Community regulations makes it impossible for that passage to be considered in isolation and requires that it should be interpreted and applied in the light of the versions existing in the other official

¹⁹⁴ *Ibid.*, page 2001.

¹⁹⁵ *Ibid.*, paragraph 14.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*, ruling (1) p. 2015.

¹⁹⁸ Case 9/79 *Koschniske v Raad van Arbeid*, EU:C:1979:201.

¹⁹⁹ *Ibid.*, paragraph 2.

²⁰⁰ *Ibid.*, paragraph 3.

²⁰¹ *Ibid.*, paragraph 5.

languages.²⁰²

It considered the purpose of the provision, which was to avoid overlapping multiple family allowances for the same children, and also took into account the principle of equal treatment for male and female workers. Finally, it confirmed that the expression *diens echtgenote* also included a married man.²⁰³

Derlén, an author who carried out a seminal study on the methods of interpretation applied by the CJEU to reconcile diverging language versions (2009), highlights three main approaches:

- Classical reconciliation
- Reconciliation and examination of the purpose
- Radical teleological approach

Firstly, **classical reconciliation** involves a genuine comparison of the language versions, after which are reconciled based on some principle, for example, preference for a clear meaning. There is no separate discussion of the purpose of the rule in question, and it is claimed, implicitly or explicitly, that the purpose is demonstrated by a comparison of all the language versions (Derlén 2009:43). Some of the examples provided for classical reconciliation are *Van der Vecht*,²⁰⁴ and *Road Air*.²⁰⁵ For example, *Road Air* concerned the interpretation of Article 133(1) of the EEC Treaty. The dispute questioned whether this article applied to all goods imported from those countries, or only goods originating in those countries (Derlén 2009:44). There was some divergence between the different language versions. For example, in English and Spanish, the terms used referred to ‘products’ or ‘goods’.²⁰⁶ Other versions like the French one used vaguer terms: *importations originaires de*. The German version referred to ‘goods’ but did not use any terms directly expressing the idea of origin (emphasis added).²⁰⁷

ES

1. Las importaciones de **mercancías originarias** de los países y territorios se beneficiarán, a su entrada en los Estados miembros, de la supresión total de los derechos de aduana llevada a cabo progresivamente entre los Estados miembros de acuerdo con las disposiciones del

²⁰² *Ibid.*, paragraph 6.

²⁰³ *Ibid.*, paragraph 9.

²⁰⁴ Case 19/67 *Soziale Verzekeringsbank v Van der Vecht*, EU:C:1967:49.

²⁰⁵ Case C-310/95 *Road Air BV v Inspecteur der Invoerrechten en Accijnzen*, EU:C:1997:209.

²⁰⁶ *Ibid.*, paragraph 31.

²⁰⁷ *Ibid.*, paragraph 32.

presente Tratado.

DE

(1) Die Zölle bei der Einfuhr von **Waren aus** den Ländern und Hoheitsgebieten in die Mitgliedstaaten werden vollständig abgeschafft; dies geschieht nach Maßgabe der in diesem Vertrag vorgesehenen schrittweisen Abschaffung der Zölle zwischen den Mitgliedstaaten.

EN

1. Customs duties on imports into the Member States of **goods originating** in the countries and territories shall be completely abolished in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of this Treaty.

FR

1. Les **importations originaires** des pays et territoires bénéficient à leur entrée dans les États membres de l'élimination totale des droits de douane qui intervient progressivement entre les États membres conformément aux dispositions du présent traité.

After comparing the different language versions the Court asserted that even if the German version was ambiguous, it had to be interpreted in a manner in agreement with the other language versions. This is what Pescatore (1984) calls the *élimination d'une version atypique* (1984:997), ruling out the language version that is not clear or bringing it in conformity with the rest.

Secondly, the approach via '**reconciliation and examination of the purpose**' implies that the Court starts with classical reconciliation but then examines the result against the purpose and/or context of the rule (Derlén 2009:45). One of the first cases where the Court of Justice employed this method was *Koschniske*,²⁰⁸ which Pescatore studies as an example of metalinguistic solution. Derlén (2009) also provides other examples for this method, such as the famous case *Cricket St Thomas*.²⁰⁹ In this case, it was necessary to define the object of the monopoly of the Milk Marketing Boards in the United Kingdom, i.e., the milk producers' organisations set up in the 1930s to manage the milk and milk products market.

Among the questions considered was whether the concept of 'milk produced and marketed without processing' included the milk that the producers in question pasteurized. There were

²⁰⁸ Case 9/79 *Koschniske v Raad van Arbeid*, EU:C:1979:201.

²⁰⁹ Case C-372/88 *Milk Marketing Board v Cricket St Thomas*, EU:C:1990:140.

conflicting interpretations of Article 25(l)(a) of Council Regulation (EEC) No. 1421/7, particularly on the basis of the different language versions of that subparagraph. Cricket St. Thomas relied on the English version to support the interpretation that the Board's exclusive purchasing right did not cover pasteurised milk, while the Board relied on the other language versions to reach the conclusion that the exclusive right in question extended to milk pasteurized by producers.

The provision in the different languages read as follows (emphasis added):

EN

At its request a Member State may be authorized to grant to an organization representing at least 80 % of the number and at least 50 % of the production of the milk producers established in the area in which the organization is carrying out its activities: (a) the exclusive right, within the limits laid down in paragraph 3, to buy from producers established in the area in question **the milk which they produce and market without processing**, provided it satisfies minimum requirements to be determined.

FR

À sa demande, un État membre peut être autorisé à octroyer à une organisation représentant au moins 80 % du nombre et au moins 50 % de la production des producteurs de lait établis dans la région où l'organisation exerce ses activités: a) le droit exclusif, dans les limites définies conformément au paragraphe 3, d'acheter aux producteurs établis dans la région concernée **le lait produit et mis en vente en l'état** par ces derniers s'il correspond à des exigences minimales à déterminer.

DE

Ein Mitgliedstaat kann auf Antrag ermächtigt werden, einer Organisation, die mindestens 80 % der Zahl und mindestens 50 % der Produktion der Milcherzeuger des Gebietes vertritt, in dem die Organisation ihre Tätigkeit ausübt, folgende Rechte einzuräumen: a) das ausschließliche Recht, nach Maßgabe der gemäß Absatz 3 festgelegten Grenzen von den Erzeugern des betreffenden Gebietes die von ihnen erzeugte und in unverarbeitetem Zustand **auf den Markt gebrachte Milch anzukaufen**, sofern sie bestimmten festzulegenden Mindestanforderungen entspricht.

The English version of Article 25(1)(a) appeared to exclude from the Board's exclusive purchasing right any milk that had been processed, referring to 'the milk that they produce and market *without processing*'.

The main problem was that other provisions in English, which defined the Board's commercial powers according to the state of preparation of the milk or milk products, contained a number of terminological discrepancies in the use of the terms 'processing', 'manufacture' and 'conversion'. However, the other language versions, particularly the French and German versions, were consistent in their use of the terms in question and contained a distinction between milk which was *en l'état* (milk as such) and *produits transformés* (products processed from milk).

In any event, the Court decided in line with the principle of uniform interpretation adjudicating that the English version of Article 25(1)(a) could not serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in this regard. 'Such an approach would be incompatible with the requirement for the uniform application of Community law'.²¹⁰ As the Court affirmed in its judgment of *Van der Vecht*, the need for a uniform interpretation of Community regulations means that a particular provision should not be considered in isolation but in cases of doubt should be interpreted and applied in the light of the other languages.²¹¹ To answer the question the Court then moved on to analysing the purpose of the provisions and finally concluded that the exclusive right was exercisable in respect to pasteurised milk.²¹²

We have seen that by using the teleological method of interpretation the CJEU does not limit itself to analysing the wording but goes beyond that, in order to analyse the purpose of the provision. Going further, the CJEU does not only compare the different versions and analyses the purpose of the provision. It also takes into account the context, the general scheme of the rules of which the provision forms part.

Thirdly, the **radical teleological method** proposed by Derlén (2009) concentrates on the purpose and/or the context of the rule in question, and leaves the level of linguistics as soon as a discrepancy is observed between the language versions. One of the first cases where the Court of Justice resorted to the radical teleological method was *North Kerry Milk*,²¹³ which

²¹⁰ *Ibid.*, paragraph 18.

²¹¹ *Ibid.*, paragraph 19.

²¹² *Ibid.*, paragraph 25.

²¹³ Case 80/76 *North Kerry Milk Products v Minister for Agriculture*, EU:C:1977:39.

we explained as an example of Pescatore's (1984) metalinguistic method. Among the different examples he provides, he mentions the widely commented cases *Bouchereau*²¹⁴ and *Commission v United Kingdom*.²¹⁵ The case *Commission v. United Kingdom* revolved around the definition of the concept of 'origin of goods'. During 1979 and 1980 the fishing industry in the Community was in difficulties owing to declining catches, in particular of cod, and overcapacity in terms of fishing vessels. British trawlers sailed to a fishing zone in the Baltic Sea over which Poland claimed exclusive rights.

In the absence of an agreement between the EEC and Poland permitting Community vessels to fish in those waters, participation in joint fishing operations with Polish vessels seemed to be the means of enabling Community vessels to gain access to them. The Polish vessels were supplied with quantities of fish by way of recompense in kind.

British trawlers cast empty nets into the sea which were taken over by Polish trawlers. The Polish trawlers trawled the nets without at any time taking them on board or entering territorial waters. When the trawl was completed, the British trawlers drew alongside the Polish vessels and lifted the nets, the ends of which were passed to them by the Polish vessels. The contents of the nets were taken on board the British trawlers, which then took the fish to the United Kingdom.²¹⁶

The problem was to define whether the fish was of Polish origin and subject to import duties, since Poland did not belong to the Community at that time. The European Commission brought an action claiming that:

Article 4 of the aforementioned Regulation No. 802/68 of the Council of 27 June 1968 provided as follows:

- (1) Goods wholly obtained or produced in one country shall be considered as originating in that country.
- (2) The expression "goods wholly obtained or produced in one country" means:
 - (e) products of hunting or fishing carried on therein,
 - (f) products of sea-fishing and other products taken from the sea by vessels registered or recorded in that country and flying its flag.

²¹⁴ Case 30/77 *Regina v Bouchereau*, EU:C:1977:172.

²¹⁵ Case 100/84 *Commission v. United Kingdom*, EU:C:1985:155.

²¹⁶ *Ibid.*, paragraphs 2 and 3.

On the basis of a literal interpretation of Article 4(2)(f) of Regulation No. 802/68, the Commission took the view that the phrase at issue, ‘taken from the sea’ (*extraits de la mer*), had to be interpreted as signifying not only the act of taking something out of the sea but also the act of separating a substance from the whole of which it is a part. In the case of fishing, this could not mean anything other than the act of catching fish in a net and so separating them from the sea where they lived before being caught.

The different versions of Article 4(2)(f) of Regulation No. 802/68 read as follows (emphasis added):

EN

Products of sea-fishing and other products **taken from** the sea by vessels registered or recorded in that country and flying its flag.

FR

Les produits de la pêche maritime et autres produits, **extraits** de la mer à partir de bateaux immatriculés ou enregistrés dans ce pays et battant pavillon de ce même pays.

ES

Los productos de la pesca marítima y otros productos **extraídos** del mar por barcos matriculados o registrados en este país y que enarbolan su pabellón.

DE

Erzeugnisse der Seefischerei und andere Meeres Erzeugnisse, die von schiffen aus **gefangen** worden sind, die in diesem Land ins Schiffsregister eingetragen oder angemeldet sind und die die flagge dieses Landes führen.

It should be noted that the phrase *extraits de la mer* or its equivalent employed in the other language versions can mean both ‘taken out of the sea’ and ‘separated from the sea’. The German version of the regulation employed a narrower term, *gefangen* (caught), which, as the United Kingdom acknowledged, seemed to be an inappropriate term to use.²¹⁷ Accordingly, a comparative examination of the various language versions of the regulation did not enable a conclusion to be reached in favour of any of the arguments put forward and so no legal

²¹⁷ *Ibid.*, paragraph 15.

consequences could be based on the terminology used.²¹⁸ As Derlén (2009) argues, in the radical teleological method, the CJEU leaves the level of linguistics as soon as a divergence between the language versions is noted.

Baij (2012) also explores the methods of interpretation that the CJEU applies when dealing with discrepancies. He describes two approaches: teleological and literal. He agrees with other authors in that the **teleological approach** entails that the interpretation should be guided by the function, purpose or objective of the provision or legislative instrument (Baij 2012:220). He refers to teleological interpretation in the broad sense, including the context. Baij carried out a study of the case law between 1960 and 2010, and he concluded that, **when it comes to linguistic discrepancies, the teleological approach is in fact not the prevailing approach to the interpretation of EU law** (Baij 2012:221). Baij argues that there is the erroneous assumption that the teleological method is the dominant approach in taking on linguistic discrepancies (Baij 2012:221, citing Derlén, 2009:37). He explains that the canon of interpretation from *Stauder* and *Bouchereau* is repeated in fifty of the judgments between 1960 and 2010. One example he provides of the teleological approach is *Tele2 Telecommunication*.²¹⁹ In this case, the problem was that several language versions used one and the same term in two different provisions of the directive, whereas in other language versions of the same provisions two different terms were used.

The two provisions concerned were the first sentence of Article 4(1) and the last sentence of Article 16(3) of Directive 2002/21/EC (Framework Directive) (emphasis added):

ES

4(1) Los Estados miembros velarán por que exista a nivel nacional un mecanismo eficaz en virtud del cual cualquier usuario o empresa suministradora de redes o servicios de comunicaciones electrónicas que esté **afectado** por una decisión de una autoridad nacional de reglamentación pueda recurrir ante un organismo independiente de las partes implicadas.

16(3) [...] Esta supresión de obligaciones deberá notificarse a las partes **afectadas** por ella con la antelación adecuada.

DE

²¹⁸ *Ibid.*, paragraph 16.

²¹⁹ Case C-426/05 *Tele2 Telecommunication*, EU:C:2008:103.

4(1) Die Mitgliedstaaten sorgen dafür, dass es auf nationaler Ebene wirksame Verfahren gibt, nach denen jeder Nutzer oder Anbieter elektronischer Kommunikationsnetze und/oder -dienste, der von einer Entscheidung einer nationalen Regulierungsbehörde **betroffen** ist, bei einer von den beteiligten Parteien unabhängigen Beschwerdestelle Rechtsbehelf gegen diese Entscheidung einlegen kann.

16(3) [...] Den **betroffenen** Parteien ist die Aufhebung der Verpflichtungen innerhalb einer angemessenen Frist im Voraus anzukündigen.

EN

4(1) Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is **affected** by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved.

16(3) [...]. An appropriate period of notice shall be given to parties **affected** by such a withdrawal of obligations.

FR

4(1) Les États membres veillent à ce que des mécanismes efficaces permettent, au niveau national, à tout utilisateur ou à toute entreprise qui fournit des réseaux et/ou des services de communications électroniques, et qui est **affecté (e)** par une décision prise par une autorité réglementaire nationale, d'introduire un recours auprès d'un organisme indépendant des parties intéressées.

16(3) [...] Les parties **concernées** par cette suppression d'obligations en sont averties dans un délai approprié.

The Court recognised the divergence and did not favour any language versions. Instead it expressed that in the case of divergence between those versions, the provision in question had to be interpreted by reference to the purpose and general scheme of the rules of which it formed part.²²⁰ After stating the need to consider the purpose and the general scheme, the Court addressed the fact that the Framework Directive did not define the terms ‘user affected’ or ‘undertaking affected’.²²¹ Another important ruling the Court made is that:

²²⁰ *Ibid.*, paragraph 25.

²²¹ *Ibid.*, paragraphs 19 and 20.

[...] terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question.²²²

The Court made clear that the scope that the legislature intended to confer on the terms ‘user affected’ or ‘undertaking affected’ had to be assessed in the light of the purpose of that article within the context of that directive.²²³

The second approach Baaij discusses is the **literal** one. Such an approach generally entails comparing the meaning of the various language versions. Within this approach he includes two categories: the majority argument and the clarity argument (Baaij 2012:221). In his examination of the cases between 1960 and 2010, Baaij remarks that the CJEU’s making a principal literal argument in the event of discrepancies is not an exception to the rule. In fact, the CJEU more often took a literal approach than a teleological approach. Between 1960 and 2010 the CJEU took a teleological approach in dealing with discrepancies in 75 judgments, whereas in the other 95 judgments, the CJEU chose a literal approach (Baaij 2012:221). He mentions two cases as examples of the literal approach: *Codan*²²⁴ and *Nowaco*.²²⁵

*Codan*²²⁶ revolved around the interpretation of Article 12(1)(a) of Directive 69/335/EEC. The Danish and the German versions had the equivalent to the term ‘stock exchange turnover taxes’, while most of the other language versions had the expression ‘taxes on the transfer of securities’.²²⁷

As Baaij pointed out, the Court invoked the need to compare the different language versions:

To begin with, it must be borne in mind that, according to the case-law of the Court, the interpretation of a provision of Community law involves a comparison of the different language versions thereof.²²⁸

However, the Court insisted that **‘in the case of divergence between the different language versions, the provision in question must be interpreted by reference to the purpose and**

²²² *Ibid.*, paragraph 26.

²²³ *Ibid.*, paragraph 26.

²²⁴ Case C-236/97 *Skatteministeriet v Aktieselskabet Forsikringselskabet Codan*, EU:C:1998:617.

²²⁵ Case C-353/04 *Nowaco Germany*, EU:C:2006:522.

²²⁶ Case C-236/97 *Skatteministeriet v Aktieselskabet Forsikringselskabet Codan*, EU:C:1998:617.

²²⁷ *Ibid.*, paragraphs 7 and 23.

²²⁸ *Ibid.*, paragraph 25.

general scheme of the rules of which it forms part’.²²⁹ In the subsequent paragraph the Court examined the purpose of the directive. Although the CJEU contended that it was necessary to compare the different language versions, it then claimed that in the case of divergence a teleological-systematic interpretation was required. For this reason, the classification of this case as an example of a literal approach could be disputed. The fact that the Court compares the different language versions does not mean that the method is simply literal. In fact, the Court moved on to a teleological-systematic interpretation.

In *Nowaco*,²³⁰ there were divergences between the different language versions of Article 7 of Regulation No 1538/91. The German version of that provision used the term *Fertigpackung* (prepackage), which is inconsistent with the other language versions of that provision. For example, *unidad* was used in Spanish, ‘unit’ in English and *unité* in French.

The Court invoked the need for uniform interpretation and affirmed that:

[...] the need for a uniform interpretation of Community law makes it impossible for the text of a provision to be considered in isolation; on the contrary, it requires that it be interpreted in the light of the versions existing in the other official languages.²³¹

As Baaij (2012) observes, the Court drew its interpretation first from the comparison of the language versions. But apart from the comparison, the Court claimed that an analysis of the structure and history of that regulation showed that the term ‘unit’ was preferable.²³²

Baaij does not provide the whole list of cases analysed. An examination of his case sample is necessary to see if he groups other cases like *Codan* in the literal approach. As argued before, we do not consider it convenient to categorise cases like *Codan* simply as literal interpretation since comparison is often only a first step in the interpretative process.

4.3.4. Proposed classification of interpretation methods

The classification we propose stands between Pescatore’s (1984) and Derlén’s (2009) models. Like Pescatore, we separate the methods into two groups: linguistic interpretation and metalinguistic interpretation. In an attempt to systematise the different methods and on the basis of the case law analysed, within each group we detail different arguments applied by the CJEU.

²²⁹ *Ibid.*, paragraph 26.

²³⁰ Case C-353/04 *Nowaco Germany*, EU:C:2006:522.

²³¹ *Ibid.*, paragraph 41.

²³² *Ibid.*, paragraph 42.

4.3.4.1. Linguistic interpretation

Linguistic methods include:

M1.1. The clear version or majority rule	The CJEU solves the divergence by looking at other language versions. The CJEU regards the clear version or states that most language versions are clear. This would equal Pescatore's <i>solution réductrice</i> and Derlén's 'classical reconciliation'.
M1.2. In the light of the other versions	On some occasions, the CJEU simply mentions that a provision cannot be interpreted in isolation but in the light of the other language versions. The CJEU does not mention any clear version(s); it just invokes the need to compare different language versions.
M1.3. By looking at the wording	In some cases the CJEU states the need to look at the wording , the content of the article or the definition provided in the instrument or in a separate provision of EU law. It is linguistic interpretation in the sense that it remains within the confines of textual interpretation.

4.3.4.2. Metalinguistic interpretation

Within the category of metalinguistic methods, the CJEU resorts to teleological or systematic interpretation (or a combination of both) for different purposes. Metalinguistic methods sometimes help confirm a literal interpretation. On other occasions, literal interpretation turns out to be insufficient and the CJEU needs to move forward to teleological-systematic interpretation. In other cases, when faced with a problem of interpretation, the CJEU resorts directly to a teleological-systematic interpretation. We detail the metalinguistic methods as follows:

M2.1. Not only the wording but also the context/scheme and objectives	The CJEU regards the wording but also examines the purpose and the general scheme. This method equals Derlén's ' reconciliation and examination of the purpose '.
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M2.2. Directly teleological-systematic interpretation	When faced with a divergence, the Court affirms that it is settled case-law that the different language versions of a Community text must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part . This method would be included in Derlén’s ‘ radical teleological ’.
M2.3. Directly teleological or systematic interpretation	In these cases the CJEU does not even mention the literal interpretation. It either invokes the purpose/objective or the general scheme/context. The difference with M2.2. is that in M2.3., the Court applies a teleological interpretation but does not use the formulae ‘in the case of divergence [...]’.
M2.4. In the light of the other versions + in case of divergence purpose and scheme	This method would be a combination of M1.2. and M2.2. We treat it as a separate method because the CJEU often applies them together. Derlén (2009) includes three cases that use this argument (or almost the same argument) in three different categories: C-384/98 <i>D v W</i> in ‘classical reconciliation’, C-372/88 <i>Cricket St Thomas</i> in ‘reconciliation and examination of the purpose’, and C-149/97 <i>Institute of the Motor Industry</i> in ‘radical teleological’ method.
M2.5. Wording not enough or not helpful + in case of divergence purpose and scheme	The CJEU often asserts that ‘the wording cannot serve as the sole basis for interpretation or be made to override the other language versions ’ and that in case of divergence it is necessary to look at the purpose and general scheme. In some cases the CJEU claims that the scope of a provision cannot be determined solely ‘on the basis of textual interpretation’. On other occasions, the CJEU resorts to comparison of the different language version but it does not provide an answer to the problem. This method would also be included in Derlén’s ‘ radical teleological ’ interpretation.
M2.6. Independent and uniform interpretation	When the CJEU tries to clarify the scope of a certain term or provision it sometimes repeats that terms can acquire a special

	<p>meaning in the EU context: terms of a provision of EU law which make no express reference to the law of the Member States for the purpose of determining its meaning and scope must be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation.</p>
M2.7. Usual meaning in everyday language	<p>Sometimes the CJEU has to decide on certain terms that are not defined in the legislation. The CJEU has stated that the scope of terms that are not defined must be determined by reference to the general context in which they are used and their usual meaning in everyday language.</p>
M2.8. Real intention of the author	<p>The CJEU has affirmed that it is impossible to consider one version of the text in isolation but it is necessary to consider the real intention of the authors and the aim they seek to achieve, in the light of the versions in all languages.</p>
M2.9. Flexible interpretation	<p>In some cases, the linguistic divergence has been treated in a previous judgment and the CJEU states that it has given the concept or expression a sufficiently flexible interpretation in keeping with the objective of the legal instrument.</p>
M2.10 Literal + historical + contextual + teleological	<p>In a few cases the CJEU has combined all methods to clarify the question at issue.</p>

CHAPTER 5: PURPOSE OF COMPARISON

Chapter 5 delves into the different examples, dividing the cases into three groups according to the purpose of comparison:

Group 1: Hard cases — divergences treated as a problem of interpretation

Group 2: Soft cases — divergences not treated as a problem of interpretation

Group 3: No divergences but comparison is used as a tool

In requests for a preliminary ruling, we note whether divergences appeared at early or late stages. Special attention is paid to the methods of interpretation the CJEU applied in each group.

Hard cases (G1) refer to divergences that the CJEU treats as a problem of interpretation that needs to be solved. Soft cases (G2) include divergences that the CJEU admits but which are not treated as a problem; they are often ambiguities that the CJEU removes quite easily by referring to other language versions or by examining the wording. It must be emphasised that a distinction between hard cases (Group 1) and soft cases (Group 2) is not always clear. As Bengoetxea recognises when distinguishing between ‘hard cases’ and ‘clear cases’, ‘there is an area of penumbra where the distinction loses explanatory force’ (1993:182).

Moreover, some cases deal with hard and soft issues. In spite of these difficulties, we propose a systematisation of the cases, especially analysing the method of interpretation applied and resorting to the Opinion of the Advocate General whenever it is available. In the third group (G3), the cases do not deal with any divergences; comparison is used to support an interpretation or to argue that all language versions converge in a single meaning.

From the selected period (01/01/2007-30/06/2013), and applying the criteria detailed in section 4.1.1., we have analysed a total of 136 judgments: ninety-three requests for a preliminary ruling, ten actions for failure to fulfil an obligation, nineteen actions for annulment, one case of compensation for damage, one case of an action addressed by the Civil Service Tribunal and eleven Appeals.²³³ These 136 judgments are distributed in the three groups as shown in the following chart:

²³³ Appeals include actions brought against decisions of the Board of Appeal of OHIM.

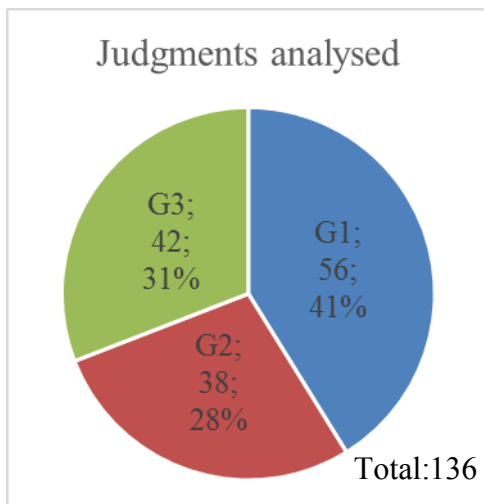


Figure 6: Total judgments analysed distributed among the groups

If we look at the requests for a preliminary ruling, almost half of the cases deal with problematic divergences (fourty-six):

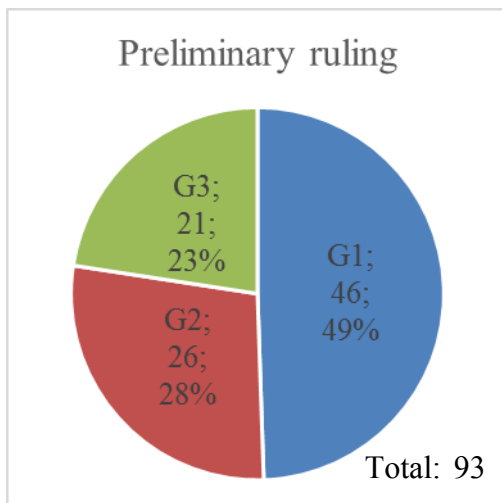


Figure 7: Requests for preliminary rulings distributed among the groups

In actions for failure to fulfil an obligation, most of the cases (seven) do not deal with any divergence (Group 3) and there are three cases in Group 1:

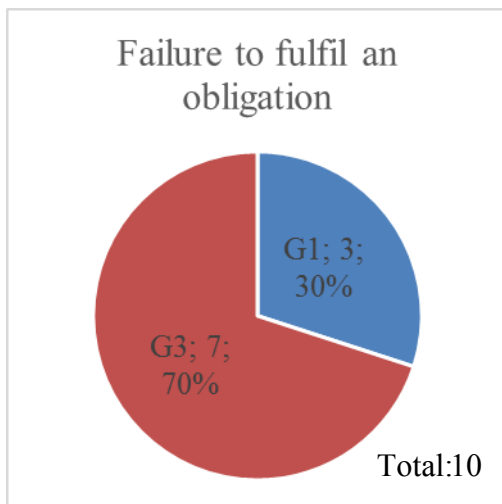


Figure 8: Actions for failure to fulfil an obligation distributed between the groups

Similarly, in actions for annulment, most cases also fall into Group 3 (ten). However, there are some cases of problematic divergences and a few unproblematic divergences:

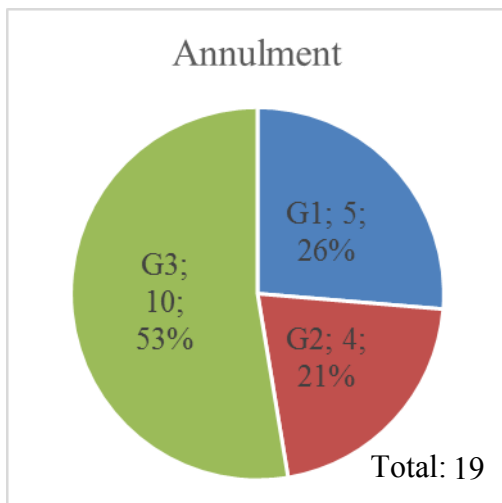


Figure 9: Actions for annulment distributed among the groups

The action for compensation for damage is in Group 2 and the case addressed by the Civil Service Tribunal in Group 1.

Finally, most appeals fall into Group 2 (seven), a few (three) into Group 3 and one into Group 1:

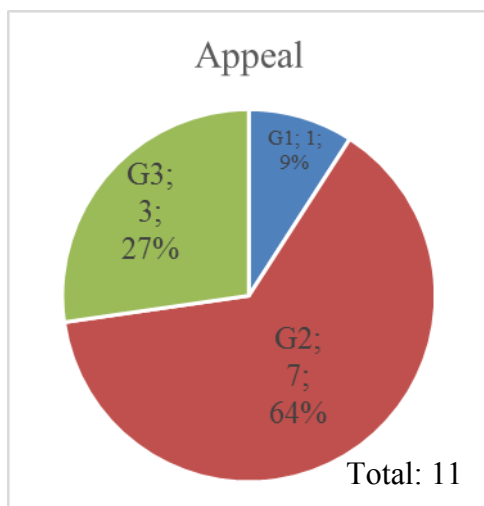


Figure 10: Appeals distributed among the groups

5.1. Group 1: Hard cases — divergences treated as a problem of interpretation

5.1.1. Requests for a preliminary ruling

5.1.1.1. Divergences detected at an early stage

The most representative examples of problematic divergences are the cases where the referring court or one of the parties already note the divergence, which is treated as a problem of interpretation. We found eight cases where the referring court noted some divergence between different language versions. For example, in *Afrasiabi and Others*²³⁴ the referring court mentioned some differences in the use of an adverb of intention, which was key in order to interpret the provision in question. The Court resorted directly to a teleological-systematic interpretation (method M2.2.) (emphasis added):

Thirdly, **in view of the divergences noted by the national court between the language versions** of Article 7(4) of Regulation No 423/2007, some of which, as the Advocate General noted in point 80 of his Opinion, use the term ‘willfully’ or ‘deliberately’ in place of ‘intentionally’, it is appropriate, in order to ensure a uniform interpretation of that provision, to make that interpretation by **reference to the purpose and general scheme of the rules of which it forms a part** (*M and Others*,

²³⁴ Case C-72/11 *Afrasiabi and Others*, EU:C:2011:874.

paragraphs 44 and 49).²³⁵

Similarly, in *IMC Securities*, the national court was not sure about the scope of a verb in Dutch (emphasis added):

The referring court points out that it is unable, by reason of the nuances in the different language versions of Directive 2003/6, to draw any unambiguous conclusions as to the meaning of the verb ‘houden’ in the Dutch-language version of Article 1(2)(a), second indent, of that directive.²³⁶

The CJEU affirmed that the provision could not be examined solely in the Dutch language version and it applied the method ‘M2.8. Real intention of the author’ (emphasis added):

According to settled case-law, the need for uniform application and, accordingly, for uniform interpretation of an EU measure 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 which the latter seeks to achieve, in the light, in particular, of the versions in all languages** [...].²³⁷

The Court compared different language versions and then remarked the purpose of the Directive. It explained that a different interpretation would have jeopardised the objective of the instrument: ‘The objectives thus pursued by Directive 2003/6 would be undermined if [...]’.²³⁸

Another example of divergences being noted by the referring court is *Euro Tex*²³⁹ (emphasis added):

The uncertainty of the Finanzgericht Düsseldorf arises, in particular, from differences between several language versions of Protocol 4. **In the referring court’s view, certain language versions of that protocol suggest that** there is a distinction between simple matching operations and complex matching operations, whereas other versions seem to indicate that all the operations referred to in Article 7(1)(b) of Protocol 4 are, by definition, ‘simple’.²⁴⁰

²³⁵ *Ibid.*, paragraph 65.

²³⁶ Case C-445/09 *IMC Securities*, EU:C:2011:459, paragraph 20.

²³⁷ *Ibid.*, paragraph 25.

²³⁸ *Ibid.*, paragraph 29.

²³⁹ Case C-56/06 *Euro Tex*, EU:C:2007:347.

²⁴⁰ *Ibid.*, paragraph 16.

The slight ambiguity in the wording suggested two different interpretations: the one the applicant relied on (that there is a distinction between simple and complex operations) and the one the Commission suggested (that all operations are ‘simple’). In order to solve the problem the Court resorted to teleological-systematic interpretation (method M2.2.).²⁴¹

The *Laki* case²⁴² is also considered as a divergence that was noted by the referring court, but it is particular. In fact, what the referring court remarked was a change in the wording in the German version of an amended instrument. The Court then revealed that the problem was rooted in an inconsistent change of the wording in the amended instrument. In this case, the national court dealt with the definition of ‘internal traffic’. It cited a previous case, explaining that this judgment concerned the interpretation of an article in an earlier version of the regulation. More precisely, it concerned Article 670 of the Implementing Regulation of the version previously in force to that resulting from Regulation No 993/2001, which defined ‘internal traffic’ as: ‘*Beförderung von ... Waren, die im Zollgebiet der Gemeinschaft verladen und in diesem Gebiet wieder entladen werden*’ (literal translation into English, ‘the carriage of goods loaded in the customs territory of the Community and unloaded at a place within that territory’). However, in a newer version of the Implementing Regulation, Article 555 defined ‘internal traffic’ as ‘*Beförderung von ... Waren, die im Zollgebiet der Gemeinschaft geladen werden, um in diesem Gebiet wieder ...ausgeladen zu werden*’ (literal translation into English, ‘the carriage of ...goods ... loaded in the customs territory of the Community for ... unloading at a place within that territory’).²⁴³

The national court sought to know whether that change could be interpreted as a ‘tightening-up’ or ‘as a relaxation of the conditions laid down in the earlier rules’.²⁴⁴ The point was that the change in the wording of the provision noted by the national court was found only in some language versions of the Implementing Regulation; the vast majority of language versions did not amend this sentence in Article 670 of the Implementing Regulation.²⁴⁵

The CJEU applied method M2.2. and expressed that the change in some language versions of the Implementing Regulation to the wording of the definition of ‘internal traffic’ from that

²⁴¹ *Ibid.*, paragraph 27.

²⁴² Case C-351/10 *Laki*, EU:C:2011:406.

²⁴³ Paragraph 24.

²⁴⁴ Paragraph 25.

²⁴⁵ Paragraph 40.

used in Article 670 did not alter the content of that provision.²⁴⁶ It concluded that the interpretation it arrived at respected the general scheme of the rules.²⁴⁷

Other cases of divergences being noted by the referring court are: *Djurgården-Lilla Värtans Miljöskyddsförening*,²⁴⁸ *Profisa*²⁴⁹ and *Vervet & Steel Immobilien*.²⁵⁰

We also found a few judgments (three) in which one of the parties or the interveners noted the divergence. For example, in *A*, the party that brought the proceedings observed some divergences in its observations:

The referring court's doubts on this point appear to relate to there being **certain divergences between the different language versions** of that provision. **In its observations, A observes that some of the language versions**, such as the English and Swedish versions, **refer to 'international routes' rather than 'international traffic', an expression which may seem more generic** and is used in most of the other language versions of that provision, including the Finnish version.²⁵¹

What is striking in this case is that the Court recognised that divergences can appear at any time: 'the interpretation of a provision of European Union law must, as a rule, take account of possible divergence between the different language versions'.²⁵² The Court first addressed an interpretation of the wording ('Firstly, on a strictly textual reading') but it immediately stated that 'in interpreting a provision of European Union law such as the one at issue here, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part' (method 2.1.).²⁵³

Other cases where one of the parties or the interveners noted some divergences are: *Kurcums Metal*,²⁵⁴ and *Evroetil*.²⁵⁵

5.1.1.2. Divergences detected at a later stage

In most of the cases (thirty-seven), the CJEU discovered the divergence at a second stage, when it examined the question posed by the referring court. For instance, in *Promociones y*

²⁴⁶ Paragraph 39.

²⁴⁷ *Ibid.*.

²⁴⁸ Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*, EU:C:2009:631.

²⁴⁹ Case C-63/06 *Profisa*, EU:C:2007:233.

²⁵⁰ Case C-455/05 *Velvet & Steel Immobilien*, EU:C:2007:232.

²⁵¹ Case C-33/11 *A*, EU:C:2012:482, paragraph 23.

²⁵² *Ibid.*, paragraph 24.

²⁵³ *Ibid.*, paragraph 27.

²⁵⁴ Case C-558/11 *Kurcums Metal*, EU:C:2012:721.

²⁵⁵ Case C-503/10 *Evroetil*, EU:C:2011:872.

*Construcciones BJ 200*²⁵⁶ the issue was to define the concept of ‘compulsory sale procedure’. When the CJEU compared different language versions, it pointed out that the Spanish version used a term that had a narrower scope (emphasis added):

It must first be pointed out that, although the Spanish-language version of Directive 2006/112 uses the term ‘liquidation’ (‘liquidación’), **an examination of different language versions reveals that the most commonly used expression is ‘compulsory sale procedure’** (namely, in the Czech-language version ‘.ízení o nuceném prodeji’, in the German-language version ‘Zwangsversteigerungsverfahren’, in the French-language version ‘procédure de vente forcée’, in the Lithuanian-language version ‘priverstinio pardavimo’, in the Maltese-language version ‘proċedura ta’ bejgħ obligatorju’, in the Portuguese-language version ‘um processo de venda coerciva’, and in the Slovak-language version ‘konanie o nútenom predaji’). **Such a concept encompasses a broader scope than the term ‘liquidation’ by itself.**²⁵⁷

The Court applied the M2.5. method (emphasis added):

It is settled case-law that **the wording** used in one language version of a provision of European Union law **cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions** in that regard. Such an approach would be incompatible with the requirement of the uniform application of European Union law. **Where there is a divergence** between the various language versions, the provision in question must then be interpreted by reference to the **purpose and general scheme of the rules of which it forms part** [...].²⁵⁸

Moreover, in *Omejc*²⁵⁹ the referring court was not sure about the interpretation of the expression ‘prevents an on-the-spot check from being carried out’, which appeared in Article 23(2) of Regulation No 796/2004. It asked whether the expression corresponded to an autonomous concept of European Union law. The CJEU first applied the argument we call ‘M2.6 Independent and uniform interpretation’ (emphasis added):

In such circumstances, according to the Court’s settled case-law, the need for a uniform application of European Union law and the principle of equality require the **terms** of a provision of European Union law **which makes no express reference to**

²⁵⁶ Case C-125/12 *Promociones y Construcciones BJ 200*, EU:C:2013:392.

²⁵⁷ *Ibid.*, paragraph 21.

²⁵⁸ *Ibid.*, paragraph 22.

²⁵⁹ Case C-536/09 *Omejc*, EU:C:2011:398.

the law of the Member States for the purpose of determining its meaning and scope normally to be given an **independent and uniform interpretation** throughout the European Union; that interpretation must take into account the **context of the provision and the objective of the relevant legislation** [...].²⁶⁰

Then it applied method ‘M2.1 Not only the wording but also the context/scheme and objectives’: in interpreting a provision of European Union law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part.²⁶¹ Immediately after that, the CJEU recognised that the wording was not helpful: ‘the actual wording of Article 23(2) of Regulation No 796/2004 does not contain any indication as regards the meaning to give to the expression ‘prevents an on-the-spot check [from being carried out]’.²⁶² As an additional argument, the Court compared different language versions and discovered some linguistic divergences (emphasis added):

Next, **it is clear from a comparative examination of the different language versions** of Article 23(2) of Regulation No 796/2004 **that that provision presents differences as far as concerns the expression** ‘prevents an on-the-spot check from being carried out’. Some language versions, such as the English, French and Slovene versions use the word ‘prevents’, while other versions use a different formula. Thus, the German version uses the expression ‘makes impossible’ and the Italian version makes the rejection of the applications concerned subject to the condition that ‘an on-the-spot check cannot be carried out for reasons which may be ascribed to the farmer or his representative’.²⁶³

The Court affirmed that a textual interpretation was not enough and it was necessary to refer to the context and general scheme (method M2.5) (emphasis added):

In view of the linguistic differences, the purport of the concept of European Union law in question **cannot be determined on the basis of an exclusively textual interpretation**. That expression must therefore be interpreted in the light of the **context** in which it is used and of the **aims and scheme of the regulation of which it is part** [...].²⁶⁴

²⁶⁰ *Ibid.*, paragraph 19.

²⁶¹ *Ibid.*, paragraph 21.

²⁶² *Ibid.*, paragraph 22.

²⁶³ *Ibid.*, paragraph 23.

²⁶⁴ *Ibid.*, paragraph 24.

Omejc is an excellent example of the different methods of interpretation that the CJEU applies when interpreting a provision. The Court departed from its reasoning by metalinguistic interpretation but then resorted to comparison of the different language versions, perhaps in the hope that it would provide an additional argument. However, the comparative linguistic reading revealed a divergence that had to be reconciled by teleological-systematic interpretation.

The other cases that present some divergence that the CJEU discovered at a later stage are:

Case C-488/11 *Asbeek Brusse and de Man Garabito*, EU:C:2013:341.

Case C-604/11 *Genil 48 and Comercial Hostelera de Grandes Vinos*, EU:C:2013:344.

Case C-89/12 *Bark*, EU:C:2013:276.

Case C-395/11 *BLV Wohn- und Gewerbebau*, EU:C:2012:799.

Case C-56/11 *Raiffeisen Waren*, EU:C:2012:713.

Case C-250/11 *Lietuvos geležinkeliai*, EU:C:2012:496.

Case C-509/10 *Geistbeck*, EU:C:2012:416.

Case C-19/11 *Geltl*, EU:C:2012:397.

Case C-510/10 *DR and TV2 Danmark*, EU:C:2012:244.

Case C-225/11 *Able UK*, EU:C:2012:252.

Case C-190/10 *Génesis*, EU:C:2012:157.

Case C-420/10 *Söll*, EU:C:2012:111.

Case C-585/10 *Møller*, EU:C:2011:847.

Case C-381/10 *Astrid Preissl*, EU:C:2011:638.

Case C-215/10 *Pacific World and FDD International*, EU:C:2011:528.

Case C-144/10 *BVG*, EU:C:2011:300.

Joined Cases C-230/09 and C-231/09 *Aissen and Rohaan*, EU:C:2009:490.

Case C-569/08 *Internetportal und Marketing*, EU:C:2010:311.

Case C-63/09 *Walz*, EU:C:2010:251.

Case C-340/08 *M and Others*, EU:C:2010:232.

Case C-511/08 *Heinrich Heine*, EU:C:2010:189.

Case C-451/08 *Helmut Müller*, EU:C:2010:168.

Case C-473/08 *Eulitz*, EU:C:2010:47.

Case C-347/08 *Vorarlberger Gebietskrankenkasse*, EU:C:2009:561.

Case C-482/07 *AHP Manufacturing*, EU:C:2009:501.

Case C-239/07 *Sabatauskas and Others*,
EU:C:2008:551.

Case C-426/05 *Tele2 Telecommunication*,
EU:C:2008:103.

Case C-279/06 *CEPSA*, EU:C:2008:485.

Case C-408/06 *Götz*, EU:C:2007:789.

Case C-66/08 *Kozłowski*, EU:C:2008:437.

Case C-457/05 *Schutzverband der
Spirituosen-Industrie*, EU:C:2007:576.

Case C-187/07 *Endendijk*, EU:C:2008:197.

In *Zurita García and Choque Cabrera*,²⁶⁵ it was the Commission who observed the divergence and the CJEU confirmed it (emphasis added):

The Commission points out, correctly, that there is a discrepancy between the wording of the Spanish-language version of Article 11(3) of Regulation No 562/2006 and that of the other language versions.²⁶⁶

The problem was that the Spanish version used the future tense, which expresses obligation in Spanish. By contrast, the other language version used a different expression that did not imply obligation but rather, gave an option. The Court first employed the ‘real intention of the author’ argument (method M2.8).²⁶⁷ Subsequently, it argued that the wording used in one language version was not enough (method M2.5).²⁶⁸

The Court concluded that the Spanish version was the only one that diverged and it went back to the Opinion of the Advocate General. By regarding the wording of the previous instrument, which was repeated in the contested Regulation, the CJEU confirmed its interpretation:

That interpretation is confirmed, as the Advocate General states in point 43 of her Opinion, by the fact that the Spanish-language version of Article 6b of the CISA, the wording of which was repeated in Article 11 of Regulation No 562/2006, accords with the other language versions as regards the discretionary nature of the power, for the Member States concerned, to expel a third-country national who does not succeed in rebutting the abovementioned presumption.²⁶⁹

5.1.1.3. Concluding remarks

²⁶⁵ Joined Cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera*, EU:C:2009:648.

²⁶⁶ *Ibid.*, paragraph 52.

²⁶⁷ *Ibid.*, paragraph 52.

²⁶⁸ *Ibid.*, paragraph 55.

²⁶⁹ *Ibid.*, paragraph 57.

Requests for a preliminary ruling are the typical proceedings in which issues of linguistic divergences are treated. The referring court has doubts as to the interpretation of a certain provision and the CJEU, in the framework of its competences (Article 267 TFEU), has the final word to decide how it must be interpreted. However, we have also found cases that hinge on some linguistic divergence in other types of proceedings. These contentious cases have a more significant impact on the parties because they touch upon the question of legal certainty more directly. In these cases, the parties often rely on a certain language version, but the versions invoked have different or opposing meanings.

5.1.2. Actions for failure to fulfil an obligation

In these actions, the Commission, or another EU country, can start the proceedings if it believes that a Member State fails to fulfil its obligations under EU law. A good illustration of the problem of diverging language versions in actions for failure to fulfil an obligation is Case C-41/09 *Commission v Netherlands*.²⁷⁰ The parties each referred to certain language versions to support their arguments but the meanings differed (emphasis added):

The parties differ, first, on the interpretation of point 1 of Annex III, **each referring to various language versions of that provision in order to support their arguments.**

In that regard, it must be held that **the meaning of point 1 is not the same in the various official languages** of the European Union.²⁷¹

The Netherlands based its arguments on the German and Dutch versions. The Commission, on the contrary, referred to the English, French and Italian versions. The issue revolved around a grammatical problem in a complex noun phrase. The CJEU resorted to the method of interpretation M2.5.²⁷²

In addition to the analysis of the general scheme, the CJEU looked into the history of the instrument.²⁷³ It revealed that the conflicting provision had been slightly amended when the Sixth Directive was replaced by Directive 2006/112. The grammatical problem concerned a change in the punctuation. In some versions, a comma had been substituted for a semi-colon, which clarified the elements of the provision.²⁷⁴ However, not all language versions had been amended accordingly and this led to ambiguity in the interpretation. In any event, the

²⁷⁰ Case C-41/09 *Commission v Netherlands*, EU:C:2011:108.

²⁷¹ *Ibid.*, paragraphs 40 and 41.

²⁷² *Ibid.*, paragraph 44.

²⁷³ *Ibid.*, paragraph 45.

²⁷⁴ *Ibid.*, paragraph 46.

preamble to Directive 2006/112 made clear that the recasting of the wording of the Sixth Directive did not bring about material changes. The CJEU supported its semantic analysis²⁷⁵ with an examination of the general scheme²⁷⁶ and the purpose of the provision.²⁷⁷

5.1.3. Actions for annulment

Through actions for annulment, the applicant requests the annulment of an act adopted by a European Union institution, body, office or organisation. Actions for annulment may be brought by the European institutions or by individuals under certain conditions.

In Case T-374/04 *Germany v Commission*,²⁷⁸ Germany requested the partial annulment of a Commission Decision. The applicant first compared different language versions to support its argument (emphasis added):

In the applicant's submission, [...] **It cannot be inferred from either the German version or the other language versions** of Directive 2003/87 that the installations referred to in the NAP are entitled to precisely the amount of allowances that has been notified to the Commission.²⁷⁹

In the findings, the Court first addressed a literal interpretation and invoked method of interpretation M1.2. (emphasis added):

For the purposes of a **literal interpretation**, it must be borne in mind that Community legislation is drafted in various 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** (Case 283/81 *Cilfit* [1982] ECR 3415, paragraph 18). [...] ²⁸⁰

When comparing different languages, the Court detected some differences:

In light of the foregoing, **significant nuances exist between the various language versions** of criterion 10 of Annex III to Directive 2003/87, each of which is authentic; depending on the words used, those versions confer upon the individual allocation of emission allowances a character which is, rather, subjective and intentional or, on the

²⁷⁵ *Ibid.*, paragraph 49.

²⁷⁶ *Ibid.*, paragraph 51.

²⁷⁷ *Ibid.*, paragraph 52.

²⁷⁸ Case T-374/04 *Germany v Commission*, EU:T:2007:332.

²⁷⁹ *Ibid.*, paragraph 51.

²⁸⁰ *Ibid.*, paragraph 95.

other hand, a more or less objective and neutral character. [...] ²⁸¹

In order to interpret the contested provision, the Court moved on to historical interpretation:

Accordingly, this literal interpretation and this comparative reading of the various language versions of criterion 10 of Annex III to Directive 2003/87 should be supplemented by a historical interpretation. ²⁸²

The historical interpretation helped clarify the conclusion drawn in paragraph 96 of the judgment but the Court continued with a contextual interpretation: ‘It is accordingly necessary to provide a contextual interpretation of criterion 10 of Annex III to Directive 2003/87’. ²⁸³ Finally, by this teleological-systematic interpretation the Court clarified this question. ²⁸⁴

This case is a good example of the different methods of interpretation that the Court can apply. It seems to be a progressive process starting with the analysis of the wording and concluding with a teleological-systematic interpretation. Historical interpretation was mentioned because the problematic instrument was a directive and the Court could consult the draft directive, the Common Position adopted by the Council and the amendment to the draft directive that the European Parliament Committee on the Environment, Public Health and Consumer Policy proposed. ²⁸⁵ However, as we remarked before, in the case of the treaties as well as regulations (see Case T-324/05 *Estonia v Commission*), there are no preparatory documents so it is not possible to go back to the history of the instrument.

In the Joined Cases T-349/06, T-371/06, T-14/07, T-15/07 and T-332/07 *Germany v Commission*, Germany also sought the annulment of some Decisions. The applicant claimed that the provision in question had to be interpreted in its context and in relation to the ‘spirit and purpose of the provision’. ²⁸⁶ It also stated that the reference to other language versions was not a sufficient statement of reasons since the German version was unequivocal and the English and French versions did not provide convincing support for the Commission’s interpretation. ²⁸⁷

²⁸¹ *Ibid.*, paragraph 96.

²⁸² *Ibid.*, paragraph 97.

²⁸³ *Ibid.*, paragraph 100.

²⁸⁴ *Ibid.*, paragraph 102.

²⁸⁵ *Ibid.*, paragraph 98.

²⁸⁶ Joined Cases T-349/06, T-371/06, T-14/07, T-15/07 and T-332/07 *Germany v Commission*, EU:T:2008:318, paragraph 48

²⁸⁷ *Ibid.*, paragraph 53.

Very interestingly, in order to interpret the contested provision, the Court also went through all methods of interpretation:

[...] Under those circumstances, when considering whether the arguments put forward are well founded, the case-law requires that point 6.2 of the Guidelines **must be interpreted literally, historically, contextually and teleologically**.²⁸⁸

When invoking the need to interpret the provision in the light of the other language versions, the Court mentioned the delicate issue of legal certainty (emphasis added):

[...] The need for a uniform interpretation of Community regulations necessitates that one language version should not be considered in isolation, but that it should be interpreted and applied in the light of the versions existing in the other official languages (Case 19/67 *van der Vecht* [1967] ECR 345 at 353), **even if that means that the provision at issue has to be interpreted and applied in a manner at variance with the natural and usual meaning of the words used in one or more linguistic versions, contrary to the requirements of legal certainty** (see, to that effect, Case 80/76 *North Kerry Milk Products* [1977] ECR 425, paragraph 11).

The Court then recognised there was **‘indeed a difference between the German version and the other language versions** of point 6.2 of the Guidelines’.²⁸⁹ As stated at the beginning of the judgment, in order to answer the question the Court also examined the contextual,²⁹⁰ historical and teleological interpretations.²⁹¹

In Case C-370/07 *Commission v Council*,²⁹² the Commission sought the annulment of a Council decision. The Commission sent to the Council a proposal for the adoption of the contested decision, which included as its legal basis Articles 175(1) EC and 133 EC and the second subparagraph of Article 300(2) EC. The Council adopted the contested decision but did not indicate the legal basis underlying it.²⁹³

The Commission put forward a single plea in support of its action, alleging breach of duty for failure to state reasons referred to in Article 253 EC (now 296 TFEU), on the ground that the contested decision failed to state the legal basis on which it was founded.²⁹⁴ The omission of

²⁸⁸ *Ibid.*, paragraph 66.

²⁸⁹ *Ibid.*, paragraph 68.

²⁹⁰ *Ibid.*, paragraph 70.

²⁹¹ *Ibid.*, paragraph 72.

²⁹² Case C-370/07 *Commission v Council*, EU:C:2009:590.

²⁹³ *Ibid.*, paragraphs 7 and 8.

²⁹⁴ *Ibid.*, paragraph 19.

the legal basis, the Commission contended, caused a great deal of uncertainty as to the procedure actually followed by the Council and affected the prerogatives of the Parliament.²⁹⁵

Article 253 EC provided (emphasis added):

ES	EN	DE	FR
Los reglamentos, las directivas y las decisiones adoptadas conjuntamente por el Parlamento Europeo y el Consejo, así como los reglamentos, las directivas y las decisiones adoptados por el Consejo o la Comisión deberán ser motivados y se referirán a las propuestas o dictámenes preceptivamente recabados en aplicación del presente Tratado.	Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.	Die Verordnungen, Richtlinien und Entscheidungen , die vom Europäischen Parlament und vom Rat gemeinsam oder vom Rat oder von der Kommission angenommen werden, sind mit Gründen zu versehen und nehmen auf die Vorschläge oder Stellungnahmen Bezug, die nach diesem Vertrag eingeholt werden müssen.	Les règlements, les directives et les décisions adoptés conjointement par le Parlement européen et le Conseil ainsi que lesdits actes adoptés par le Conseil ou la Commission sont motivés et visent les propositions ou avis obligatoirement recueillis en exécution du présent traité.

The Council based its argument on a terminological distinction that appeared in the Danish, Dutch, German and Slovene versions of the EC Treaty. It argued that the contested decision

²⁹⁵ *Ibid.*, paragraph 21.

was not a decision within the terms of Article 249 EC (now 288 TFEU), an article that established the types of legal acts.

Article 249 EC:

ES	EN	DE	FR
La decisión será obligatoria en todos sus elementos para todos sus destinatarios.	A decision shall be binding in its entirety upon those to whom it is addressed.	Die Entscheidung ist in allen ihren Teilen für diejenigen verbindlich, die sie bezeichnet.	La décision est obligatoire dans tous ses éléments pour les destinataires qu'elle désigne.

One of the Articles the Commission had included as the legal basis of the contested decision was Article 300(2) EC. The Council contended as its principal argument that in this case it was not required to state the legal basis of the contested decision inasmuch as the latter is a *sui generis* decision, designated in German by the term *Beschluß*, adopted by the Council in the context of the Community's external relations, in accordance with the second subparagraph of Article 300(2) EC. It argued that this decision had to be distinguished from the decision designated by the German word *Entscheidung* contained in Articles 249 EC and 253 EC.

Article 300(2) EC provided:

ES	EN	DE	FR
2. Sin perjuicio de las competencias reconocidas a la Comisión en este ámbito, la firma, que podrá ir acompañada de una decisión sobre la	2. Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on provisional	(2) Vorbehaltlich der Zuständigkeiten, welche die Kommission auf diesem Gebiet besitzt, werden die Unterzeichnung, mit der ein Beschluss	2. Sous réserve des compétences reconnues à la Commission dans ce domaine, la signature, qui peut être accompagnée d'une décision

aplicación provisional antes de la entrada en vigor, y la celebración de los acuerdos serán decididas por el Consejo, por mayoría cualificada, a propuesta de la Comisión. [...]	application before entry into force, and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. [...]	über die vorläufige Anwendung vor dem Inkrafttreten einhergehen kann, sowie der Abschluss der Abkommen vom Rat mit qualifizierter Mehrheit auf Vorschlag der Kommission beschlossen. [...]	d'application provisoire avant l'entrée en vigueur, ainsi que la conclusion des accords sont décidées par le Conseil, statuant à la majorité qualifiée sur proposition de la Commission. [...]
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The Council alleged that the contested decision was a *Beschluß* and, as such, did not appear on the exhaustive list of measures for which reasons had to be given. The Commission stated that the measures referred to in the second subparagraph of Article 300(2) EC were designated by the word ‘decisions’ and that, in particular, the English and French versions of the Treaty, considered in their context, were consistent with that terminology.²⁹⁶

The Court then recognised the parties were relying on different languages:

In support of their respective arguments, the parties primarily adduce terminological arguments, relying on the different linguistic versions of Article 300(2) EC. The Commission submits that the contested decision is a decision within the meaning of Article 249 EC, designated in German by the word ‘Entscheidung’, and must therefore be reasoned. By contrast, the Council, supported by the United Kingdom, takes the view that it is a *sui generis* decision, designated in German by the word ‘Beschluß’, which is not covered by Article 253 EC.²⁹⁷

It then ruled that the classification of the contested decision as a decision within the meaning of Article 249 EC or as a *sui generis* decision was not conclusive for the purpose of deciding whether it had to include the legal basis. It made clear that this obligation applied to all acts which may be the subject of an action for annulment. Acts open to challenge are any measures

²⁹⁶ *Ibid.*, paragraph 23.

²⁹⁷ *Ibid.*, paragraph 41.

adopted by the institutions which are intended to have binding legal effects, regardless of their form. Therefore, any measure producing binding effects is subject to the obligation to state reasons.²⁹⁸

Finally, the Court claimed that the contested decision was a measure which produced binding legal effects; as a consequence, it had to be reasoned indicating the legal basis on which it was founded.²⁹⁹ It supported its argument by explaining that the choice of the appropriate legal basis had ‘constitutional significance’, since the EU only has conferred powers (Article 5 TFEU), hence it was necessary to tie the contested decision to a Treaty provision which empowered it to approve such a measure.³⁰⁰

Although the Court acknowledged that the parties were relying on different language versions and that these versions diverged, it did not address the issue as a problem of translation or of terminological consistency. However, we consider that the case did revolve around a translation problem that could have been avoided with better mechanisms to guarantee terminological consistency.

The Court directly applied a teleological method of interpretation by looking at the purpose of the rules, completely avoiding any attempt to apply a literal method. It is worth examining how the Advocate General (AG) treated the divergence in her Opinion.³⁰¹ First of all, the AG recognised the parties were arguing on a purely terminological plane, invoking different language versions of Article 300(2) EC.³⁰² Then she referred to the literal interpretation addressed by the Commission and the need to apply a teleological-systematic interpretation.³⁰³

That a majority of the language versions use in Article 300(2) EC the term which also occurs in Articles 249 EC and 253 EC is, however, at most some indication that the Commission’s view is correct. (18) But it cannot be decisive: all the language versions must, in principle, be of equal worth. (19) If the different language versions diverge, the need for a uniform interpretation requires their meaning to be ascertained by means of systematic and teleological considerations (20).³⁰⁴

²⁹⁸ *Ibid.*, paragraph 42.

²⁹⁹ *Ibid.*, paragraphs 44 and 45.

³⁰⁰ *Ibid.*, paragraph 47.

³⁰¹ Case C-370/07 *Commission v Council*, Opinion of AG Kokott, EU:C:2009:249.

³⁰² *Ibid.*, paragraph 43.

³⁰³ For more details on this method, see Bengoetxea (1993:250) and Sankari (2013:72).

³⁰⁴ *Ibid.*, paragraph 44.

In footnote 18, the AG explained that the Court makes reference to a majority of uniform language versions only as confirmation of an interpretation. It is clear that such a sensitive divergence present in the Treaty requires in depth examination beyond literal confines.

In Case T-324/05 *Estonia v Commission*, the parties also pointed to opposing interpretations (emphasis added):

The Republic of Estonia argues that the term ‘stocks’, circumscribed in that manner, **must be interpreted narrowly**, as describing only the reserves built up by commercial operators, whereas the Commission advocates a **broad interpretation** that also includes household reserves.³⁰⁵

The Court explained that it was not possible to elucidate the intention of the draftsmen because there were no working documents of the regulation. Therefore, the scope of the wording had to be based on a ‘literal and logical interpretation’.³⁰⁶ The Court first repeated the need to compare different language versions³⁰⁷ and then declared that the term ‘stocks’ did not have an unequivocal meaning in the various language versions of the legal documents in question.³⁰⁸ The Court proceeded with metalinguistic method ‘M2.1. Not only the wording but also the context/scheme and objectives’. Regarding the purpose of the legislation, the Court explained how to face ambiguity:

In particular, it should be noted that even where in the different language versions there are elements which seem to support a given interpretation, if a text when read as a whole remains ambiguous, the function of the words in question must be examined in the light of the intention and purpose of the legislation in question (see, to that effect, Case 803/79 *Roudolff* [1980] ECR 2015, paragraph 7).

As the contested term (‘stocks’) was to some extent ambiguous, the Court interpreted it in the light of the intention and purpose of the Regulation in question.³⁰⁹ The Court mentioned the text had to be read ‘as a whole’, an expression which would imply a comparative reading between different language versions.

In the Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie v Commission*, the parties disputed the concept of ‘continuing or repeated infringement’. The Court first addressed a

³⁰⁵ Case T-324/05 *Estonia v Commission*, paragraph 107.

³⁰⁶ *Ibid.*, paragraph 109.

³⁰⁷ *Ibid.*, paragraph 110.

³⁰⁸ *Ibid.*, paragraph 111.

³⁰⁹ *Ibid.*, paragraph 117.

literal interpretation claiming the equal authenticity of all language versions and the need to compare them. Then, it applied metalinguistic method ‘M2.4. Not in isolation but in the light of the other versions + in case of divergence purpose and scheme’.³¹⁰ The Court even emphasised the importance of a systematic interpretation:

More generally, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (Case 292/82 *Merck* [1983] ECR 3781, paragraph 12), and also the provisions of European Union law as a whole (*CILFIT*, paragraph 73 above, paragraph 20).³¹¹

When the Court examined the provisions as a whole, it pointed out that the contested provisions had been based on the provisions of a previous Regulation. The Court found that the wording in French had been changed from *infractions continue ou continueés* to *infractions continue ou répétée*. However, not all the language versions of that provision had been amended in that way.³¹² The Court explained that the change of wording was meant to add clarity to the concept (emphasis added):

It must therefore be held that it was not the legislature’s intention to amend the meaning of the earlier provision when it recast Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), in spite of the change in terminology which took place in certain language versions, but, on the contrary, **it intended to put an end to the possible confusion to which the use of the concept of ‘infraction continuée’ had given rise.**³¹³

Finally, the Court ruled that the concept of a repeated infringement was different from that of a continuing infringement. The use of the conjunction ‘or’ made this distinction clear.³¹⁴

5.1.4. Actions – Civil Service Tribunal

The ‘EU Civil Service Tribunal’ rules on disputes between the European Union and its staff. Case F-23/10 *Allen v Commission* concerned the interpretation of a decision laying down

³¹⁰ Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie v Commission*, EU:T:2013:259, paragraph 73.

³¹¹ *Ibid.*, paragraph 74.

³¹² *Ibid.*, paragraphs 77-79.

³¹³ *Ibid.*, paragraph 82.

³¹⁴ *Ibid.*, paragraph 83.

general implementing provisions for the reimbursement of medical expenses ('the GIP'). The Commission noted linguistic divergences (emphasis added):

In another connection, the Commission stated in reply to a question raised by the Tribunal, and was not contradicted by the applicant, that in case of disparity between the different language-versions of the GIP, only three versions – French, English and German – are authentic. **Significant differences exist between those three versions as regards the wording of the first criterion in point 1.**³¹⁵

The problem revolved around the expression 'shortened life expectancy'. The German version read *ungünstige Lebenserwartung* (poor life expectancy), the English version read 'shortened life expectancy' and the French one read *pronostic vital défavorable* (life-threatening illness).³¹⁶ The expressions used in the German and English versions referred more to a shortening of lifespan, whereas the French version referred to significant likelihood of dying.³¹⁷ In order to reconcile this divergence the Court applied metalinguistic method 'M2.8. Real intention of the author' emphasising the need to interpret the expression in the light of the other languages.³¹⁸

The fact that the Court resorted to the real intention of the author did not mean that it completely disregarded the objectives of the rules. This is evidenced by the use of some expressions like 'that text seeks' and 'the authors of the text specified'.³¹⁹ The Court finally interpreted the French version in conformity with the other versions.³²⁰

5.1.5. Appeals

In Case C-135/06 P *Weißenfels v Parliament*,³²¹ the applicant sought the annulment of the judgment of the Court of First Instance of 25 January 2006 in Case T-33/04 *Weißenfels v Parliament*. The appellant was an official of the European Parliament in Luxembourg. He had a son that was severely handicapped and was granted an allowance, in accordance with Article 67(1)(b) of the Staff Regulations. In addition, he received an allowance from the Luxembourg *Fonds National de Solidarité*.³²² Article 67(2) of the Staff Regulations stated that: 'Officials in receipt of family allowances ... shall declare allowances of like nature paid from

³¹⁵ Case F-23/10 *Allen v Commission*, EU:F:2011:162, paragraph 53.

³¹⁶ *Ibid.*, paragraph 54.

³¹⁷ *Ibid.*, paragraph 55.

³¹⁸ *Ibid.*, paragraph 57.

³¹⁹ *Ibid.*, paragraph 58.

³²⁰ *Ibid.*, paragraphs 60 and 61.

³²¹ CASE C-135/06 P *Weißenfels v Parliament*, EU:C:2007:812.

³²² *Ibid.*, paragraph 8.

other sources; such latter allowances shall be deducted from those paid under [the Staff Regulations]’. Mr. Weißenfels declared the amount he received from the Luxembourg *Fons National de Solidarité* and this quantity was deducted from the Parliament’s allowance. However, he claimed that the aid from Luxembourg was an independent benefit and not an ‘allowance’; in other words, that the benefit was not ‘of like nature’ within the meaning of Article 67(2) of the Staff Regulations.³²³ The appellant argued that his analysis was confirmed by the German language version of Article 67(2) of the Staff Regulations, which used the term *Zulage* (‘supplement’). The Luxemburg and the French version of the Staff Regulations used the term ‘allocation’.³²⁴ He contended that this difference in the German version was sufficient to demonstrate that the two allowances were not identical in nature.

After analysing the subject-matter and the purpose of the allowances (method 2.3.),³²⁵ the Court concluded that the allowance under the Staff Regulations and the Luxembourg allowance were not of like nature within the meaning of Article 67(2) of the Staff Regulations.³²⁶

5.2. Methods of interpretation in hard cases

In Group 1 we analysed a total of fifty-seven cases, including all kinds of proceedings. Hard cases par excellence are those requests for a preliminary ruling posed because the referring court already notes a divergence between different language versions. However, from a total of forty-five requests for a preliminary ruling in Group 1 only seven contain problematic divergences that the national court detected. In three cases one of the parties or the interveners noted the divergence, and in the rest of the cases (thirty-seven), a comparative reading of the different language versions helped unveil the divergence at a second stage.

The examples analysed above demonstrate that hard cases require metalinguistic interpretation. The following table shows a summary of the metalinguistic arguments used in Group 1:

Method of interpretation	Total
G1	57
Metalinguistic	56

³²³ *Ibid.*, paragraph 13.

³²⁴ *Ibid.*, paragraph 39.

³²⁵ Paragraph 98.

³²⁶ Paragraph 99.

M2.1.	5
M2.2.	10
M2.3.	6
M2.4.	6
M2.4. + M1.1.	1
M2.5.	12
M2.5.+ M1.3	2
M2.6.	1
M2.6. + M2.1. + M2.5.	1
M2.6. + M2.2.	1
M2.6. + M2.7. + M2.2.	1
M2.7. + M2.2.	1
M2.7. + M2.3.	1
M2.8.	6
M2.10.	2
Other	1
Grand Total	57

It must be noted that many times the CJEU applied a method of interpretation and then supported its interpretation with another method. The table above reflects the main methods applied, although the Court supplements the methods with other arguments.

5.2.1. Literal and contextual methods intertwined

The most frequently used argument is ‘2.5. Wording not enough or not helpful + in case of divergence purpose and scheme’ (twelve cases). This shows that the CJEU normally starts with literal interpretation but in case of divergence it moves on to teleological-systematic interpretation. The expressions that the CJEU applied most frequently are: ‘the wording used in one language version of a provision of European Union law cannot serve as the sole basis

for the interpretation of that provision, or be made to override the other language versions’ and ‘in view of the linguistic differences, the purport of the concept of European Union law in question cannot be determined on the basis of an exclusively textual interpretation’.

The cases in which the CJEU applied method M2.5. are: *Promociones y Construcciones BJ 200*,³²⁷ *Bark*,³²⁸ *Geltl*,³²⁹ *DR and TV2 Danmark*,³³⁰ *Able UK*,³³¹ *Aissen and Rohaan*,³³² *Helmut Müller*,³³³ *Sabatauskas and Others*,³³⁴ *Endendijk*,³³⁵ *Götz*,³³⁶ *Velvet & Steel Immobilien*³³⁷ (requests for preliminary ruling) and Case C-41/09 *Commission v Netherlands*³³⁸ (action for failure to fulfil an obligation).

There are two cases (*Kurcums Metal*³³⁹ and *Pacific World and FDD International*)³⁴⁰ that concern the interpretation of the Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87. These cases are significant because the CJEU first applied method M2.5. but eventually solved the problem by looking at the wording of the subheadings or the Explanatory Notes (M1.3.). In *Kurcums Metal*, it took into account the description of the goods³⁴¹ and it then stated that the mere omission in the Latvian language version of that provision of a reference to CN subheading 7312 10 99 in the version of Regulation No 2263/2000 was ‘clearly an editing mistake’.³⁴² In *Pacific World and FDD International*, the CJEU started with method M2.5. but then referred to the specifications established in the HS Explanatory Note.³⁴³ To conclude its ruling, it also mentioned the objective characteristics and properties of the products.³⁴⁴ As these two cases finally resort to method M1.3., they

³²⁷ Case C-125/12 *Promociones y Construcciones BJ 200*, EU:C:2013:392.

³²⁸ Case C-89/12 *Bark*, EU:C:2013:276.

³²⁹ Case C-19/11 *Geltl*, EU:C:2012:397.

³³⁰ Case C-510/10 *DR and TV2 Danmark*, EU:C:2012:244.

³³¹ Case C-225/11 *Able UK*, EU:C:2012:252.

³³² Joined Cases C-230/09 and C-231/09 *Aissen and Rohaan*, EU:C:2009:490.

³³³ Case C-451/08 *Helmut Müller*, EU:C:2010:168.

³³⁴ Case C-239/07 *Sabatauskas and Others*, EU:C:2008:551.

³³⁵ Case C-187/07 *Endendijk*, EU:C:2008:197.

³³⁶ Case C-408/06 *Götz*, EU:C:2007:789.

³³⁷ Case C-455/05 *Velvet & Steel Immobilien*, EU:C:2007:232.

³³⁸ Case C-41/09 *Commission v Netherlands*, EU:C:2011:108

³³⁹ Case C-558/11 *Kurcums Metal*, EU:C:2012:721.

³⁴⁰ Case C-215/10 *Pacific World and FDD International*, EU:C:2011:528.

³⁴¹ Case C-558/11 *Kurcums Metal*, EU:C:2012:721, paragraph 49.

³⁴² *Ibid.*, paragraph 50.

³⁴³ Case C-215/10 *Pacific World and FDD International*, EU:C:2011:528, paragraph 49-50.

³⁴⁴ *Ibid.*, paragraph 51. The Court declared in paragraph 28 of the judgment that ‘in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes’.

could also be included in Group 2. However, since the Court dealt with the divergence as a problem of interpretation, we analyse them in Group 1.

In method M2.4. (six cases), the CJEU mentioned literal interpretation (the need to compare) but prioritised teleological-systematic interpretation in case of divergence. The Court normally expresses a ruling in the following terms:

According to settled case-law, the need for uniform application and accordingly a uniform interpretation of the provisions of EU law makes it impossible for one version of the text of a provision to be considered, in case of doubt, in isolation, but requires, on the contrary, that it be interpreted and applied in the light of the versions existing in the other official languages.

Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.

The cases that utilised method M2.4. are: *Eleftheri tileorasi and Giannikos*,³⁴⁵ *Heinrich Heine*,³⁴⁶ *Vorarlberger Gebietskrankenkasse*,³⁴⁷ *Schutzverband der Spirituosen-Industrie*,³⁴⁸ *Profisa*³⁴⁹ (requests for preliminary ruling) and Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie v Commission*³⁵⁰ (action for annulment).

Finally, in a few cases (five), the Court supplemented the literal interpretation with the purpose and general scheme (method M2.1.). For instance in *A*,³⁵¹ the CJEU stated:

According to the Court's settled case-law, in interpreting a provision of European Union law such as the one at issue here, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part [...].³⁵²

The other cases that include method M2.1. are: *AHP Manufacturing*³⁵³ (request for a preliminary ruling), Case C-85/11 *Commission v Ireland*³⁵⁴ and Case C-86/11 *Commission v*

³⁴⁵ Case C-52/10 *Eleftheri tileorasi and Giannikos*, EU:C:2011:374, paragraphs 23 and 24.

³⁴⁶ Case C-511/08 *Heinrich Heine*, EU:C:2010:189, paragraph 51.

³⁴⁷ Case C-347/08 *Vorarlberger Gebietskrankenkasse*, EU:C:2009:561, paragraph 26.

³⁴⁸ Case C-457/05 *Schutzverband der Spirituosen-Industrie*, EU:C:2007:576, paragraphs 17 and 18.

³⁴⁹ Case C-63/06 *Profisa*, EU:C:2007:233, paragraphs 13 and 14.

³⁵⁰ Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie v Commission*, EU:T:2013:259, paragraph 73.

³⁵¹ Case C-33/11 *A Oy*, EU:C:2012:482.

³⁵² *Ibid.*, paragraph 27.

³⁵³ Case C-482/07 *AHP Manufacturing*, EU:C:2009:501, paragraph 27.

³⁵⁴ Case C-85/11 *Commission v Ireland*, EU:C:2013:217, paragraph 35.

*United Kingdom*³⁵⁵ (actions for failure to fulfil an obligation) and Case T-324/05 *Estonia v Commission*³⁵⁶ (action for annulment).

5.2.2. Directly teleological-systematic interpretation

When the Court applied argument ‘M2.2. Directly teleological-systematic interpretation’ (ten cases), it abandoned the wording as soon as a divergence was confirmed and prioritised a teleological-systematic interpretation. For example, in *Genil*,³⁵⁷ the problem revolved around the expression ‘an investment service is offered as part of a financial product’, which was contained in Article 19(9) of Directive 2004/39. The Court observed that only the French and Portuguese versions used an expression communicating ‘within the framework of’ in that provision, whereas the Spanish, Danish, German, Greek, English, Italian, Dutch, Finnish and Swedish versions employed terms equivalent to ‘as part of’, which suggested a closer, more specific link than that connoted by the expression ‘within the framework of’.³⁵⁸

Immediately after spotting the divergence, the CJEU addressed the teleological-systematic interpretation:

According to settled case-law, the various language versions of a text of EU law must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part [...].³⁵⁹

Similarly, in *Söll*,³⁶⁰ the CJEU first remarked the divergence³⁶¹ and then claimed that ‘in the case of divergence between the different language versions of a European Union text, the provision in question must be interpreted by reference to, inter alia, the purpose and general scheme of the rules of which it forms a part’ (method M2.2.).³⁶²

The other cases that used method M2.2. are: *Lietuvos geležinkeliai*,³⁶³ *Afrasiabi and Others*,³⁶⁴ *Evroetil*,³⁶⁵ *Laki*,³⁶⁶ *BVG*,³⁶⁷ *M and Others*,³⁶⁸ *CEPSA*³⁶⁹ and [Euro Tex](#).³⁷⁰

³⁵⁵ Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267, paragraph 31.

³⁵⁶ Case T-324/05 *Estonia v Commission*, EU:T:2009:381, paragraph 115.

³⁵⁷ Case C-604/11 *Genil*, EU:C:2013:344.

³⁵⁸ *Ibid.*, paragraph 37.

³⁵⁹ *Ibid.*, paragraph 38.

³⁶⁰ Case C-420/10 *Söll*, EU:C:2012:111.

³⁶¹ *Ibid.*, paragraph 25.

³⁶² *Ibid.*, paragraph 26.

³⁶³ Case C-250/11 *Lietuvos geležinkeliai*, EU:C:2012:496, paragraphs 32 and 34.

³⁶⁴ Case C-72/11 *Afrasiabi and Others*, EU:C:2011:874, paragraph 65.

³⁶⁵ Case C-503/10 *Evroetil*, EU:C:2011:872, paragraphs 41 and 42.

³⁶⁶ Case C-351/10 *Laki*, EU:C:2011:406, paragraphs 38 and 39.

5.2.3. Real intention of the authors

Regarding the real intention of the authors (M2.8.), it is worth examining whether the Court supplements this method with other arguments. In *Asbeek Brusse and de Man Garabito*,³⁷¹ the CJEU first applied method M2.8.³⁷² and then it pointed out that the problematic term in Dutch was defined in the same way as in the other language versions. After that, it claimed that ‘beyond the term used to designate the other party to the contract with the consumer, the legislature’s intention was not to restrict the scope of the directive solely to contracts concluded between a seller and a consumer’.³⁷³ In *IMC Securities*,³⁷⁴ the Court addressed the real intention of the author and then added that a different interpretation would have undermined the objective of the instrument.³⁷⁵ It highlighted that the purpose of Directive 2003/6 was to protect the integrity of EU financial markets and to enhance investor confidence in those markets.³⁷⁶ Similarly, in *Internetportal und Marketing*,³⁷⁷ the CJEU asserted that the provision had to be interpreted on the basis of the real intention of the author, in the light of the versions in all languages.³⁷⁸ Immediately after that, it stated that the objective of the regulation ‘would be compromised’ with a different interpretation.³⁷⁹

In addition, in *Eulitz*³⁸⁰ the Court also invoked method M2.8. and it then ruled that the terms used to specify the exemption in the provision at issue had to be interpreted strictly, since they constituted exemptions to the general principle. Nevertheless, the CJEU claimed that the interpretation of those terms had to be consistent with the objectives pursued by the exemptions. Thus, the requirement of strict interpretation did not mean that the terms used to specify the exemptions had to be construed in such a way as to deprive the exemptions of their intended effect.³⁸¹

³⁶⁷ Case C-144/10 *BVG*, EU:C:2011:300, paragraphs 26-28.

³⁶⁸ Case C-340/08 *M and Others*, EU:C:2010:232, paragraphs 38-44.

³⁶⁹ Case C-279/06 *CEPSA*, EU:C:2008:485, paragraph 50.

³⁷⁰ Case C-56/06 *Euro Tex*, EU:C:2007:347, paragraphs 24-27.

³⁷¹ Case C-488/11 *Asbeek Brusse and de Man Garabito*, EU:C:2013:341.

³⁷² *Ibid.*, paragraph 26.

³⁷³ *Ibid.*, paragraph 28.

³⁷⁴ Case C-445/09 *IMC Securities*, EU:C:2011:459.

³⁷⁵ *Ibid.*, paragraph 29.

³⁷⁶ *Ibid.*, paragraph 27.

³⁷⁷ Case C-569/08 *Internetportal und Marketing*, EU:C:2010:311.

³⁷⁸ *Ibid.*, paragraph 35.

³⁷⁹ *Ibid.*, paragraph 37.

³⁸⁰ Case C-473/08 *Eulitz*, EU:C:2010:47.

³⁸¹ *Ibid.*, paragraph 27.

In *Zurita García and Choque Cabrera*,³⁸² the CJEU applied method M2.8 but the real intention of the legislature was elucidated by comparing the different language versions: ‘[...] the Spanish-language version of Article 11(3) of Regulation No 562/2006 is the only one which diverges from the wording of the other language versions, it must be concluded that the real intention of the legislature was not to impose an obligation on the Member States’ [...]. Finally, in F-23/10 *Allen v Commission*,³⁸³ the Court also applied the intention of the author’s argument and then made some reference to what the text pursued.³⁸⁴

These six cases that employed argument ‘M2.8. Real intention of the author’ involved a comparison of the different language versions. In addition, in these cases, the real intention of the legislature may be the same as the purpose of the instrument, since the Court always made some reference to the objectives of the texts.

5.2.4. Usual meaning, independent EU meaning and context

Some cases in Group 1 combine methods ‘M2.6. Independent and uniform interpretation’ and ‘M2.7. Usual meaning in everyday language’ with other arguments. In *Génesis*,³⁸⁵ the CJEU had to decide on the meaning and scope of the expression ‘date of filing’ laid down in Article 27 of Regulation No 40/94. First of all, the Court referred to method M2.6. (emphasis added):

[...] the need for a uniform application of European Union law and the principle of equality require that the **terms of a provision of European Union law which makes no express reference to the law of the Member States** for the purpose of determining its meaning and scope **must normally be given an independent and uniform interpretation** throughout the European Union; that interpretation must take into account the **context** of the provision and the **objective** of the relevant legislation [...].³⁸⁶

In the subsequent paragraph the Court stated that, in the absence of a definition, the meaning and scope of terms had to be ‘determined by considering their **usual meaning in everyday language**, while also taking into account the context in which they occur and the purposes of the rules of which they form part’³⁸⁷ Then it added that in the case of divergence between those language versions, the provision in question had to be interpreted by reference to the

³⁸² Joined Cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera*, EU:C:2009:648.

³⁸³ Case F-23/10 *Allen v Commission*, EU:F:2011:162.

³⁸⁴ *Ibid.*, paragraph 58.

³⁸⁵ Case C-190/10 *Génesis*, EU:C:2012:157.

³⁸⁶ *Ibid.*, paragraph 40.

³⁸⁷ *Ibid.*, paragraph 41.

purpose and general scheme of the rules of which it formed part (method M2.2.).³⁸⁸ It is striking that after these rulings, the CJEU compared the different language versions and confirmed that some versions read ‘day of filing’ while others read ‘date of filing’. Finally, it seems the usual or ordinary meaning helped to clarify the issue (emphasis added):

Nevertheless, the differences between those language versions must be placed in perspective since, **according to its ordinary meaning**, the term ‘date’ generally designates the day of the month, the month and the year when an act has been adopted or an event has taken place. In the same way, stating the day when an act has been adopted or an event has taken place means, **according to its ordinary meaning**, that it is also necessary to state the month and the year.³⁸⁹

This conclusion was supported by the examination of the context: ‘That interpretation also follows from the context of Article 27 of Regulation No 40/94 as amended’.

We may wonder why the Court made use of two arguments (M2.6. and M2.7.). As Bredimas (1978) notes, the natural or ordinary meaning often clashes with the special meaning of EU notions. In fact, she confirms that in practice the ordinary meaning is of no importance because words can acquire a special EU meaning that is different from that in the national legal systems (Bredimas 1978:37). In *Génesis*, the reference to the ‘independent interpretation’ may reinforce the idea that the ‘Community trade mark system is an autonomous system’³⁹⁰ and ‘as an autonomous system which is independent from national systems, the Community trade mark regime has its own rules relating to the procedure for filing an application for a Community trade mark’.³⁹¹ In any event, the CJEU did not lose sight of the context of Article 27, which helped confirm the conclusion.³⁹²

In *Møller*,³⁹³ the national court asked whether the expression ‘places for sows’ included places for gilts. Møller and Ireland took the view that the question had to be answered in the negative, particularly in view of the legislation on animal welfare, which distinguished sows from gilts.³⁹⁴ The Kommune, the Danish and Czech Governments and the European Commission, by contrast, took the view that the expression ‘places for sows’ included places for gilts. Faced with this dilemma, the CJEU first mentioned method M2.7. (emphasis added):

³⁸⁸ *Ibid.*, paragraph 42.

³⁸⁹ *Ibid.*, paragraph 46.

³⁹⁰ *Ibid.*, paragraph 36.

³⁹¹ *Ibid.*, paragraph 37.

³⁹² *Ibid.*, paragraph 48.

³⁹³ Case C-585/10 *Møller*, EU:C:2011:847.

³⁹⁴ *Ibid.*, paragraph 22.

According to settled case-law, **the meaning and scope of terms for which European Union law provides no definition must be determined by considering their usual meaning in everyday language**, while also taking into account the **context** in which they occur and the **purposes** of the rules of which they are part [...].³⁹⁵

In the following paragraph the Court gave equal importance to the purpose and general scheme, applying method M2.2.³⁹⁶ However, when the Court examined the usual meaning it realised that it was of no help: ‘Therefore, contrary to what Ireland maintained at the hearing, the definition of the term “sow” in that article **cannot be regarded as allowing the usual meaning of that term to be determined**’ because the term did not have a univocal meaning in all the official languages.³⁹⁷ Finally, the question was answered by examining the general scheme and purposes of the directive.³⁹⁸

Génesis and *Møller* are two examples of the use of method ‘M2.7. Usual meaning in everyday language’. In the case of *Génesis*, the ordinary meaning helped clarify the question, although the Court confirmed the conclusion by referring to the context. However, in *Møller* the usual meaning was of no guidance and the Court had to examine the purpose and general scheme.

Regarding method ‘M2.6. Independent and uniform interpretation’, the CJEU started by invoking it in *Omejc*³⁹⁹ but it was of no use. Then it applied method M2.1. and recognised that the wording did not contain any indication as regards the meaning to give to the expression at hand.⁴⁰⁰ Once again, the Court answered the question by applying a teleological-systematic interpretation (method M2.5.). Similarly, in *Tele2 Telecommunication*⁴⁰¹ the CJEU applied method M2.6. but in the following paragraph made clear that the scope that the legislature intended to confer on the terms had to be assessed in the light of the purpose of that article within the context of that directive.⁴⁰²

In addition, there are three cases (*BLV Wohn*,⁴⁰³ *Kozłowski*⁴⁰⁴ and *Emirates Airlines*)⁴⁰⁵ included in Group 1 in which the divergences were not the main problem; rather, concepts

³⁹⁵ *Ibid.*, paragraph 25.

³⁹⁶ *Ibid.*, paragraph 26.

³⁹⁷ *Ibid.*, paragraph 27.

³⁹⁸ *Ibid.*, paragraph 28.

³⁹⁹ Case C-536/09 *Omejc*, EU:C:2011:398.

⁴⁰⁰ *Ibid.*, paragraph 22.

⁴⁰¹ Case C-426/05 *Tele2 Telecommunication*, EU:C:2008:103.

⁴⁰² *Ibid.*, paragraph 26.

⁴⁰³ Case C-395/11 *BLV Wohn- und Gewerbebau*, EU:C:2012:799.

⁴⁰⁴ Case C-66/08 *Kozłowski*, EU:C:2008:437.

⁴⁰⁵ Case C-173/07 *Emirates Airlines*, EU:C:2008 :145.

were not defined in the legislation. Therefore, these two cases could be categorised in Group 2. However, since the Court had to resort to metalinguistic methods we study them as hard cases.

In *BLV Wohn*⁴⁰⁶ the national court wanted to know whether the term ‘construction work’ as used in point (1) of Article 2 of Decision 2004/290 encompassed not only services but also supplies of goods.⁴⁰⁷ The CJEU noted at the outset that the Decision contained no definition of ‘construction work’. Moreover, **none of the language versions** of the Sixth VAT Directive, to which Article 1 of Decision 2004/290 referred, **mentioned ‘construction work’, with the exception of the German language version (*Bauleistungen*)**. Article 5(5) of the Sixth VAT Directive mentioned only ‘works of construction’. Although the term used in German could give rise to doubt, the problem was that the Sixth VAT Directive was silent as to the meaning of the term. As a result, the Court held that ‘in the absence of any definition of the term ‘construction work’, the meaning and scope of that term had to be determined **by reference to the general context** in which it was used and its **usual meaning in everyday language**’ (method M2.7.). The Court also recalled that it was necessary to consider the **objectives** pursued by the legislation in question and its **effectiveness** (method M2.3.).⁴⁰⁸

In *Kozłowski*,⁴⁰⁹ the reference was made in proceedings concerning the execution by the Generalstaatsanwaltschaft Stuttgart (‘the German executing judicial authority’) of a European arrest warrant against Mr Kozłowski, a Polish national.⁴¹⁰ By its first question, the national court sought to ascertain the scope of the terms ‘resident’ and ‘staying’ contained in Article 4(6) of the Framework Decision. **The problem was that the meaning and scope of those two terms were not defined** in the Framework Decision.⁴¹¹ The Commission contended that in some linguistic versions the wording of Article 4(6) could suggest a certain interpretation.⁴¹² It followed that it was necessary to take into account the scope of the term ‘resident’ and how the term ‘staying’ complemented its meaning.⁴¹³ The Court then alleged that the definition of those two terms could not be left to the assessment of each Member State

⁴⁰⁶ Case C-395/11 *BLV Wohn- und Gewerbebau*, EU:C:2012:799.

⁴⁰⁷ *Ibid.*, paragraph 18.

⁴⁰⁸ *Ibid.*, paragraph 25.

⁴⁰⁹ Case C-66/08 *Kozłowski*, EU:C:2008:437.

⁴¹⁰ *Ibid.*, paragraph 2.

⁴¹¹ *Ibid.*, paragraph 34.

⁴¹² *Ibid.*, paragraph 35.

⁴¹³ *Ibid.*, paragraph 39.

and it was necessary to give them an autonomous and uniform interpretation throughout the Union (method M2.6).⁴¹⁴

In *Emirates Airlines*,⁴¹⁵ the reference for a preliminary ruling concerned the interpretation of Article 3(1)(a) of Regulation (EC) No 261/2004. The referring court asked whether a ‘flight’ included a journey by air from the point of departure to the destination and back.⁴¹⁶ The CJEU stated that the concept of ‘flight’ was of decisive importance for answering the question put. The term ‘flight’ appeared in the German language version of Article 3(1)(a) of Regulation No 261/2004; however, a clear majority of the other language versions of that provision did not refer to it or use a term derived from the word ‘flight’.⁴¹⁷

The Advocate General explained in his Opinion that most language versions used a construction similar to the phrase ‘passengers departing from an airport’, which appeared in the English version of Article 3(1)(a) and (b). The German version, however, included the word ‘flight’, rendering the phrase as ‘passengers who embark on a flight at airports ...’.⁴¹⁸ The AG explained that the difference in wording between the German and other language versions did not alter the actual sense of the provision. Embarkation on a flight is the normal preliminary to departure. When passengers depart from an airport, it is understood and obvious that they do so by embarking on a flight.⁴¹⁹

The CJEU disregarded this divergence and stated that it had no effect on the actual meaning to be given to the provisions concerned.⁴²⁰ The term ‘flight’ was not among those defined in the regulation. Therefore, it had to be interpreted in the light of the provisions of Regulation No 261/2004 as a whole and the objectives of that regulation.⁴²¹

Finally, there is one case (*Walz*)⁴²² classified under the category of ‘Other’ because it concerned the interpretation of an international treaty: the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999. The European Community signed the Convention on 9 December 1999 and it was approved by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 39; ‘the Montreal Convention’). Since the provisions of that convention have been an integral part of the

⁴¹⁴ *Ibid.*, paragraphs 41 and 42.

⁴¹⁵ Case C-173/07 *Emirates Airlines*, EU:C:2008:400.

⁴¹⁶ *Ibid.*, paragraph 23.

⁴¹⁷ *Ibid.*, paragraph 24.

⁴¹⁸ Case C-173/07 *Emirates Airlines*, Opinion of AG Sharpston, EU:C:2008:145, point 7.

⁴¹⁹ *Ibid.*, point 8.

⁴²⁰ Case C-173/07 *Emirates Airlines*, EU:C:2008:400, paragraph 25.

⁴²¹ *Ibid.*, paragraphs 27 and 28.

⁴²² Case C-63/09 *Walz*, EU:C:2010:251.

European Union legal order from the date on which the convention entered into force, the Court has jurisdiction to give a preliminary ruling concerning its interpretation.⁴²³ The reference was made in proceedings between Mr Walz, an air passenger and the company Clickair, concerning compensation for the damage resulting from the loss of checked baggage in the context of a flight operated by that company. Article 1 of Council Regulation (EC) No 2027/97, as amended by Regulation (EC) No 889/2002 implemented the relevant provisions of the Montreal Convention in respect of the carriage of passengers and their baggage by air and laid down certain supplementary provisions.⁴²⁴

The referring court was not sure as to the scope of the term ‘damage’, which underpinned Article 22(2) of the Montreal Convention. It was not clear whether the term had to be interpreted as including both material and non-material damage. The CJEU first stated that the term had to be given a ‘uniform and autonomous interpretation, notwithstanding the different meanings given to that concept in the domestic laws of the States Parties to that convention’.⁴²⁵ Since the term ‘damage’ was contained in an international agreement, it had to be interpreted ‘**in accordance with the rules of interpretation of general international law, which are binding on the European Union**’.⁴²⁶ These rules are established in the Vienna Convention on the Law of Treaties. Its Article 31 states that a treaty must be interpreted in good faith in accordance with the **ordinary meaning** to be given to its terms in their **context** and in the light of its **object and purpose**.⁴²⁷

The Montreal Convention presented lack of consistency in the use of the term ‘damage’. In fact, the CJEU acknowledged that the French and Russian versions used two different terms in different provisions, while the English and Spanish version used the same term throughout the provisions:⁴²⁸

Heading of Chapter III and Article 17(1)	Heading of article 17 and Article 17(2)
FR	
<i>préjudice</i>	<i>dommage</i>
EN	

⁴²³ *Ibid.*, paragraph 20.

⁴²⁴ *Ibid.*, paragraph 3.

⁴²⁵ *Ibid.*, paragraph 21.

⁴²⁶ *Ibid.*, paragraph 22.

⁴²⁷ *Ibid.*, paragraph 23.

⁴²⁸ *Ibid.*, paragraph 24.

damage	damage
ES	
<i>daño</i>	<i>daño</i>

In the end, the CJEU resorted to teleological-systematic interpretation. After analysing the context⁴²⁹ and the ordinary meaning,⁴³⁰ the CJEU concluded that the term ‘damage’, referred to in Chapter III of the Montreal Convention, had to be construed as including both material and non-material damage.⁴³¹ That conclusion was supported by the objectives which governed the adoption of the Montreal Convention.⁴³²

5.3. Group 2: Soft cases — divergences not treated as a problem of interpretation

5.3.1. Request for a preliminary ruling

5.3.1.1. Divergences solved by looking at other language versions

The cases included in this group present some divergences which the CJEU solved quite easily by referring to the **clear version** or to the **majority** of the language versions (M1.1.). On other occasions it simply invoked the need to compare the provision in the light of the other language versions (M1.2.).

For example, in *RVS Levensverzekeringen*,⁴³³ the parties to the main proceedings disagreed as to the interpretation of Articles 1(1)(g) and 50(3) of Directive 2002/83. It was not sure whether the place of habitual residence of the policyholder had to be determined on the date of entry into the commitment or on the date of payment of the premium.⁴³⁴ It is remarkable that, before starting to analyse the provision, the CJEU claimed that it was necessary to consider not only the wording but also the context and the objectives pursued by the rules.⁴³⁵

On the one hand, RVS and the Estonian Government submitted that the provisions had to be interpreted as meaning that the Member State of the commitment was the Member State where the policyholder had his habitual residence on the date the life assurance contract was concluded, regardless of the fact that the policyholder later moved to another Member State.

⁴²⁹ *Ibid.*, paragraphs 25 and 26.

⁴³⁰ *Ibid.*, paragraphs 27 and 28.

⁴³¹ *Ibid.*, paragraph 29.

⁴³² *Ibid.*, paragraph 30.

⁴³³ Case C-243/11 *RVS Levensverzekeringen*, EU:C:2013:85.

⁴³⁴ *Ibid.*, paragraph 20.

⁴³⁵ *Ibid.*, paragraph 23.

Thus, they defended a ‘static’ interpretation of the term ‘Member State of the commitment’.⁴³⁶ On the other hand, the Belgian and the Austrian Governments and also the European Commission supported a ‘dynamic’ interpretation of that term, alleging that the Member State of the commitment was determined on the date of the payment of the assurance premium on which the tax must be levied.⁴³⁷ In that regard, the Court contended that the ‘the habitual residence of the policyholder was, by its very nature, a criterion that could change’,⁴³⁸ hence ‘dynamic’.

After arriving at this conclusion, the Court compared different language versions of Article 50(3) of Directive 2002/83 and admitted that some, such as the French and Dutch ones, could be subject to different interpretations in so far as their wording ‘assurance undertakings which assume commitments on its territory’ referred to the signature of the assurance contract as well as to the place where the commitments were situated. However, the Court ruled out the ambiguity by referring to other language versions (method M1.1.) (emphasis added):

[...] **other language versions**, such as the version in English, contradict the reading proposed by RVS. Indeed, that version, **in which clear reference is made to** the undertakings which cover commitments situated in a given Member State, does not contain any reference to the conclusion or to the signature of the assurance contract.⁴³⁹

RVS Levensverzekeringen is a perfect example of a divergence being detected but not treated as a problem. The Court clarified the ambiguity by resorting to the clear versions, in particular the English one. However, this does not mean the Court lost sight of the purpose of the provision, since it contended, to conclude its reasoning, that the provision and its meaning had to be ascertained having regard primarily to the objectives pursued by both the provision and the directive as a whole.⁴⁴⁰

Moreover, the joined cases *Gebr. Weber and Putz*,⁴⁴¹ concerned the interpretation of Article 3(2) and the third subparagraph of Article 3(3) of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. As regards Case C-65/09, the reference for a preliminary ruling had been made in proceedings between *Gebr. Weber GmbH* (‘Weber’) and Mr Wittmer concerning the delivery of tiles in conformity with the contract of

⁴³⁶ *Ibid.*, paragraph 28.

⁴³⁷ *Ibid.*, paragraph 29.

⁴³⁸ *Ibid.*, paragraph 33.

⁴³⁹ *Ibid.*, paragraph 37.

⁴⁴⁰ *Ibid.*, paragraph 47.

⁴⁴¹ Joined Cases C-65/09 and C-87/09 *Gebr. Weber and Putz*, EU:C:2011:396.

sale and the payment of financial compensation and, as regards Case C-87/09, between Ms Putz and Medianess Electronics GmbH (‘Medianess Electronics’) concerning the reimbursement of the purchase price of a dishwasher which was not in conformity with the contract of sale, instead of replacing the machine.⁴⁴²

There are two important points discussed in this judgment. The first point is the concept of ‘replacement’. The CJEU recognised the terms used in the different language versions had different scopes (emphasis added):

With regard to the term ‘replacement’, it should be noted that its precise scope varies in the different language versions. **While in some of those language versions**, such as the Spanish (‘sustitución’), English (‘replacement’), French (‘remplacement’), Italian (‘sostituzione’), Dutch (‘vervanging’) and Portuguese (‘substituição’), **that term refers to** the operation as a whole, on completion of which the goods not in conformity must actually be ‘replaced’, thus obliging the seller to undertake all that is necessary to achieve that result, **other language versions**, such as in particular the German language version (‘Ersatzlieferung’), **might suggest a slightly narrower reading.**⁴⁴³

However, the CJEU took the view that even in the German language version, the term was not restricted to the mere delivery of replacement goods and could, on the contrary, indicate that there was an obligation to substitute those goods. This interpretation was in conformity with the purpose of the Directive, which was to ensure a high level of consumer protection.⁴⁴⁴ The Court explained that the seller was obliged to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of the replacement goods.⁴⁴⁵ This point was answered by resorting to a teleological interpretation (method M2.3.).

The second point discussed was whether the seller could refuse to bear the cost of removing defective goods and installing replacement goods where the cost was disproportionate. The problem revolved around the use of a noun in plural in recital 11 of the Directive (emphasis added):

ES

⁴⁴² *Ibid.*, paragraph 2.

⁴⁴³ *Ibid.*, paragraph 54.

⁴⁴⁴ *Ibid.*, paragraph 55.

⁴⁴⁵ *Ibid.*, paragraph 62.

Considerando que el consumidor podrá en primer lugar exigir al vendedor la reparación o la sustitución del bien salvo si ello resulta imposible o desproporcionado; que deberá determinarse de forma objetiva si esta forma de saneamiento es desproporcionada o no; que una forma de saneamiento es desproporcionada cuando impone gastos que no son razonables **en comparación con otras formas de saneamiento**; que para determinar si los gastos no son razonables, los correspondientes a una forma de saneamiento deben ser considerablemente más elevados que los gastos correspondientes a la otra;

EN

Whereas the consumer in the first place may require the seller to repair the goods or to replace them unless those remedies are impossible or disproportionate; whereas whether a remedy is disproportionate should be determined objectively; whereas a remedy would be disproportionate if it imposed, **in comparison with the other remedy**, unreasonable costs; whereas, in order to determine whether the costs are unreasonable, the costs of one remedy should be significantly higher than the costs of the other remedy.

DE

Zunächst kann der Verbraucher vom Verkäufer die Nachbesserung des Gutes oder eine Ersatzlieferung verlangen, es sei denn, daß diese Abhilfen unmöglich oder unverhältnismäßig wären. Ob eine Abhilfe unverhältnismäßig ist, müßte objektiv festgestellt werden. Unverhältnismäßig sind Abhilfen, die **im Vergleich zu anderen** unzumutbare Kosten verursachen; bei der Beantwortung der Frage, ob es sich um unzumutbare Kosten handelt, sollte entscheidend sein, ob die Kosten der Abhilfe deutlich höher sind als die Kosten einer anderen Abhilfe.

FR

considérant que, en premier lieu, le consommateur peut exiger du vendeur qu'il répare le bien ou le remplace, à moins que ces modes de dédommagement soient impossibles ou disproportionnés; que le caractère disproportionné du mode de dédommagement doit être déterminé de manière objective; qu'un mode de dédommagement est disproportionné s'il impose des coûts déraisonnables **par rapport à l'autre mode de dédommagement**; que, pour que des coûts soient jugés déraisonnables, il faut qu'ils soient considérablement plus élevés que ceux de l'autre mode de dédommagement.

Admittedly, some language versions of recital 11 referred to ‘other remedies’, for instance, in Spanish *otras formas de saneamiento*, giving the impression that there were other possibilities besides repair and replacement. The Court looked at other language versions and declared that the majority left no doubt as to the interpretation, alleging the choice was between only two remedies: repair or replacement.⁴⁴⁶

The Court spotted the divergence but it was not treated as a problem. This can be seen by the use of the concessive clause: ‘**While it is true that**’ [...] ‘**the fact remains that a large number of language versions**’ [...]. The Court first resorted to the majority rule (method M1.1.) and then supported its interpretation by looking at the wording of another provision in the same directive: [...] ‘as in Article 3(3) of the Directive, which is worded in all those language versions, including the German, in the singular, only to the other remedy provided for in the first place by that provision, namely the repair of the goods not in conformity’.⁴⁴⁷

The Court concluded that the European Union legislature had intended to give the seller the right to refuse repair or replacement of the defective goods only if this was impossible or relatively disproportionate. If only one of the two remedies was possible, the seller could not refuse the only remedy.⁴⁴⁸

In *Hofmann*,⁴⁴⁹ the problem revolved around the interpretation of Article 11(4), second paragraph of Directive 2006/126. This provision imposed an obligation on Member States to ‘refuse to recognise the validity of any driving license issued by another Member State to a person whose driving license is restricted, suspended or withdrawn in the former State's territory’. There was doubt as to the conditions for refusal because of the verb tense used in the German-language version. It was not clear if the measures covered the possibility of a driving license that had been withdrawn in the past. The Court acknowledged the ambiguity (emphasis added):

Whilst it is true that some language versions of Article 11(4), second subparagraph, of Directive 2006/126, and particularly the German version (‘einer Person ..., deren Führerschein ...eingeschränkt, ausgesetzt oder entzogen *worden ist*’), are formulated in such a way as **not to exclude the possibility that the measures mentioned in that provision might have exhausted their effects, the fact remains that a large**

⁴⁴⁶ *Ibid.*, paragraph 70.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*, paragraph 71.

⁴⁴⁹ Case C-419/10 *Hofmann*, EU:C:2012:240.

number of other language versions of Article 11(4), second subparagraph, of Directive 2006/126, such as the French and the English (‘à une personne dont le permis de conduire *fait* l’objet, sur son territoire, d’une restriction, d’une suspension ou d’un retrait’ and ‘to a person whose driving licence *is* restricted, suspended or withdrawn in the former State’s territory’) express the idea that **the said measures must be current** for a Member State to be obliged to refuse recognition of a driving licence issued to a person whose licence has been subject, in its territory, to one of those measures.⁴⁵⁰

The verb tense used in German (*worden ist*) gave the impression that the measures could cover a withdrawal in the past. However, by referring to the other language versions (method M1.1.), the Court made clear that the said measure had to be current. It must be remarked, that the CJEU supported its interpretation with metalinguistic method M2.5.⁴⁵¹ For this reason, *Hofmann* is a case that could also be included in Group 1. However, we include it in Group 2 because the use of the concessive clause seemed to indicate that doubt could be removed by looking at other language versions: ‘**Whilst it is true that some language versions** [...] are formulated in such a way as [...], **the fact remains that a large number of other language versions** [...] express the idea that [...]’. In addition, the Advocate General⁴⁵² did not address the question of the use of the verb tenses as a problem of interpretation.

In addition, we found two cases that presented terminological inconsistency but the divergence was not significant for the interpretation: *Budějovický Budvar*⁴⁵³ and *Kirin Amgen*.⁴⁵⁴ The first case is *Budějovický Budvar*.⁴⁵⁵ There was terminological inconsistency in the English version but the CJEU considered it as ‘immaterial’ (emphasis added):

First, it is clear that, in the majority of language versions of Directive 89/104, the same word is used both in the eleventh recital and in Article 9(1) of the directive to designate ‘acquiescence’. **The fact that the English language version uses the words** ‘tolerated’ in the eleventh recital and ‘acquiesced in’ in Article 9(1) **is immaterial** since, as pointed out by the United Kingdom Government in its written

⁴⁵⁰ *Ibid.*, paragraph 67.

⁴⁵¹ *Ibid.*, paragraph 68.

⁴⁵² Case C-419/10 *Hofmann*, Opinion of AG Bot, EU:C:2011:723.

⁴⁵³ Case C-482/09 *Budějovický Budvar*, EU:C:2011:605.

⁴⁵⁴ Case C-66/09 *Kirin Amgen*, EU:C:2010:484.

⁴⁵⁵ Case C-482/09 *Budějovický Budvar*, EU:C:2011:605.

observations, the use of the word ‘tolerated’ does not imply that a less restrictive interpretation of Article 9(1) should be adopted.⁴⁵⁶

The Court also observed that the verb ‘acquiesce’ had several usual meanings in everyday language, one of those signifying ‘allow to continue’ or ‘not prevent’.⁴⁵⁷ Then it referred to the Opinion of the Advocate General, who consulted in particular the Danish and Swedish language versions of the contested provision.⁴⁵⁸ It is pertinent to examine the Opinion of the Advocate General⁴⁵⁹ to elucidate what helped her clarify the divergence.

In point 68 of her Opinion, the Advocate General adopted a very interesting approach as to how to ascertain the meaning of the concept, emphasising that the exegesis of a rule of European Union law required a complex approach in cases of doubt, which implied a comparative investigation.⁴⁶⁰ In point 69, she made a thorough comparison and concluded that the English version was the only one that presented terminological inconsistency. As the other language versions were clear, the divergence had ‘no effect on the result of the interpretation’ (method M1.1.).⁴⁶¹ Finally, the Advocate General explained what the ‘expressions used in the various language versions’ described, highlighting the Danish and Swedish language versions as clear examples.⁴⁶²

The second case is *Kirin Amgen*.⁴⁶³ It also presented terminological inconsistency in certain language versions, in particular in the English one (emphasis added):

[...] In the majority of the language versions of that regulation [...] Admittedly, certain language versions of that regulation, in particular the English version, use a different expression in Articles 3(b) and 7 of Regulation No 1768/92, namely ‘granted’. The fact, however, remains that the obtaining of a marketing authorisation occurs at the time when it is granted.⁴⁶⁴

⁴⁵⁶ *Ibid.*, paragraph 41.

⁴⁵⁷ *Ibid.*, paragraph 42.

⁴⁵⁸ *Ibid.*, paragraph 42.

⁴⁵⁹ Case C-482/09 *Budějovický Budvar*, Opinion of AG Trstenjak of 3 February 2011, EU:C:2011:46.

⁴⁶⁰ *Ibid.*, point 68.

⁴⁶¹ *Ibid.*, point 69.

⁴⁶² *Ibid.*, point 70.

⁴⁶³ Case C-66/09 *Kirin Amgen*, EU:C:2010:484.

⁴⁶⁴ *Ibid.*, paragraph 42.

The Court overlooked this terminological inconsistency relying on the majority of the language versions (method M1.1.). It then continued its interpretation with an examination of the purpose of the Regulation.⁴⁶⁵

Similarly, in *SGS Belgium and Others*,⁴⁶⁶ the applicants compared different language versions and used the divergence to support their interpretation (method M1.1.), but the CJEU did not analyse it as a problem. The national court sought to know whether the term *force majeure* in Article 5(3) of Regulation No 3665/87 covered the damage described in the proceedings. More precisely, the case concerned beef that had been damaged while being transported in the correct packaging and in a refrigerated container continuously maintained at the prescribed temperature.⁴⁶⁷ The applicants, SGS Belgium and Firme Derwa, were of the opinion that the question referred had to be answered in the affirmative.

There was some difference in the scope of the terms used. The Dutch version of Article 5(3) used the term *verloren* (in English ‘lost’). The applicants contended that the concept of ‘loss’ in that provision also covered ‘damage’, as was apparent from other language versions of that provision. The English and French versions used ‘perished’ and *péri* respectively, rather than ‘lost’ or *perdue* [...].⁴⁶⁸

The Court did not address these terminological differences. It highlighted that, since the concept of *force majeure* did not have the same scope in the various spheres of application of European Union law, its meaning had to be determined by reference to the legal context in which it was to operate.⁴⁶⁹ Article 5(3) of Regulation No 3665/87 constituted an exception to the normal export refund procedure and, consequently, that provision had to be interpreted strictly.⁴⁷⁰ The CJEU finally answered that Article 5(3) had to be interpreted as meaning that damage to a consignment of beef in the conditions described by the national court did not constitute *force majeure* within the meaning of that provision.⁴⁷¹

SGS Belgium and Others is an excellent example of meaning created in context. The case addressed not only the meaning of terms in each language version but also the meaning the concept of *force majeure* acquired in different ‘spheres of application of European Union law’.

⁴⁶⁵ *Ibid.*, paragraphs 45-48.

⁴⁶⁶ Case C-218/09 *SGS Belgium and Others*, EU:C:2010:152.

⁴⁶⁷ *Ibid.*, paragraph 32.

⁴⁶⁸ *Ibid.*, paragraph 33.

⁴⁶⁹ *Ibid.*, paragraph 45.

⁴⁷⁰ *Ibid.*, paragraph 46.

⁴⁷¹ *Ibid.*, paragraph 52.

Other cases where the Court applied the majority or the clear version: *Latchways*,⁴⁷² *Uzonyi*,⁴⁷³ *S.P.C.M. and Others*,⁴⁷⁴ *Codirex expeditie*,⁴⁷⁵ *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*,⁴⁷⁶ *Länsstyrelsen i Norrbottens län*.⁴⁷⁷

Furthermore, there are three cases (*Consiglio*,⁴⁷⁸ *Horvath*⁴⁷⁹ and *Eschig*)⁴⁸⁰ in which the CJEU compared different languages but did not give preference to any in particular. Although their classification is not very clear, the analysis of the Opinions of the Advocates General drove our decision to include them into this subgroup.

In *Consiglio*, one of the parties based its arguments on the wording of some language versions, which differed from the wording in the other language versions. The CJEU ruled out this literal interpretation (emphasis added):

In that context, **the arguments** relied on by the Consiglio Nazionale degli Ingegneri and by the Italian and Austrian Governments, **based on the wording of certain language versions of Directive 89/48, which differ** in places, as has been noted in paragraphs 7, 9, 11 and 12 of this judgment, **from other language versions** by mentioning the words ‘another Member State’ **whereas the large majority of language versions** simply contain the words ‘Member State’ or ‘host Member State’, cannot be accepted.⁴⁸¹

After this, it added that the requirement of uniform application and interpretation of the provisions of EU law ‘makes it impossible, in cases of doubt, for the text of a provision to be considered in isolation in one of its versions, but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages’ (method M1.2.). Despite comparing different language versions, the CJEU did not ignore the objectives of the directive; on the contrary, it explained what the directive pursued: ‘Directive

⁴⁷² Case C-185/08 *Latchways*, EU:C:2010:619.

⁴⁷³ Case C-133/09 *Uzonyi*, EU:C:2010:563, paragraph 28.

⁴⁷⁴ Case C-558/07 *S.P.C.M. and Others*, EU:C:2009:430.

⁴⁷⁵ Case C-400/06 *Codirex expeditie*, EU:C:2007:519, paragraph 21.

⁴⁷⁶ Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*, EU:C:2007:391, paragraph 33.

⁴⁷⁷ Case C-289/05 *Länsstyrelsen i Norrbottens län*, EU:C:2007:146, paragraph 20.

⁴⁷⁸ Case C-311/06 *Consiglio*, EU:C:2009:37.

⁴⁷⁹ Case C-428/07 *Horvath*, EU:C:2009:458.

⁴⁸⁰ Case C-199/08 *Eschig*, EU:C:2009:538.

⁴⁸¹ Case C-311/06 *Consiglio*, EU:C:2009:37, paragraph 52.

89/48 seeks to remove obstacles to the pursuit of a profession in a Member State other than that which issued the diploma establishing the professional qualifications concerned [...].⁴⁸²

In *Horvath* the CJEU dealt with the concept of ‘landscape features’. It first stated that the concept was not defined in the regulation and it had to be interpreted by taking into account its usual meaning and the context in which it is generally used.⁴⁸³ Then it invoked the need to compare different language versions (method M1.2.).⁴⁸⁴ This time, the Court did not mention any divergence. It just contented that the expression ‘*particularités topographiques*’ in the French version had to be compared, for example, with the expression ‘landscape features’ in the English version of that regulation.⁴⁸⁵ However, the Advocate General did remark some divergence between different language versions (emphasis added):

However, **the expression ‘landscape features’ in Annex IV to Regulation No 1782/2003 has certain semantic differences in the individual language versions.** For example, the French language version refers to ‘*particularités topographiques*’, (25) which alludes to the geographical concept of landscape, especially since topography is a term from geography.⁴⁸⁶

The AG made a very detailed study the geographical concept of landscape, even examining the Greek origin of the word ‘topography’.⁴⁸⁷

In *Eschig*,⁴⁸⁸ the CJEU also contended that the need for a uniform interpretation required that the text of the provision had to be interpreted and applied in the light of the versions existing in the other official languages (method M1.2.)⁴⁸⁹ Then it referred to the analysis that the Advocate General made in her Opinion (emphasis added):

As noted by the Advocate General in point 71 of her Opinion, **it is apparent from the comparison of those different language versions that** the right to freely choose a representative in the context of any inquiry or proceedings is recognised independently of the occurrence of a conflict of interests.⁴⁹⁰

⁴⁸² *Ibid.*, paragraph 55.

⁴⁸³ Case C-428/07 *Horvath*, EU:C:2009:458.

⁴⁸⁴ *Ibid.*, paragraph 35.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ Case C-428/07 *Horvath*, Opinion of AG Trstenjak, EU:C:2009:47.

⁴⁸⁷ *Ibid.*, paragraph 36.

⁴⁸⁸ Case C-199/08 *Eschig*, EU:C:2009:538.

⁴⁸⁹ *Ibid.*, paragraph 54.

⁴⁹⁰ *Ibid.*, paragraph 55.

It supported the comparison of the language versions with the drafting history of the directive in question: [...] the drafting history of that directive supports the conclusion that [...].⁴⁹¹ The CJEU solved the question quite easily by resorting to other languages: ‘it is apparent from the comparison of those different language versions’. However, in her Opinion,⁴⁹² the Advocate General did treat it as a problem of interpretation. In point 71, she explained that it was the German language version that differed from the others and in a footnote she added it was a translation problem (emphasis added):

There is much evidence that **the German language version is founded on an initial mistake and a consequential mistake**. The initial mistake was in not taking the phrase about being represented in any inquiry and proceedings to express a self-standing alternative (as also stated in Article 4(1)(a)) but as an additional element of the qualifications of the ‘other person’. Then, **the words expressing in the other language versions that two possibilities are being enumerated** (for example, ‘*et chaque fois*’ in the French language version and ‘and whenever’ in the English language version) **was mistakenly translated by the words ‘und zwar immer’** (‘that is to say whenever’).⁴⁹³

As expressed by the AG, the equivocal version was the German one and the problem rooted in an inadequate translation.

The comparison of the different language versions was supplemented with other arguments. For example, in *Consiglio* the Court supported method M1.2. by mentioning the objectives of the directive and in *Eschig*, by referring to the drafting history of the instrument. In *Horvath* and *Eschig*, the Court did not deal with the divergence but the analysis of the Opinions shows that the Advocates General did treat the divergences.

5.3.1.2. Divergences solved by looking at the content of the provision or the definition

In some judgments, the CJEU arrived at a conclusion and then spotted some divergence that had no impact on the interpretation, if account was taken to the definition provided or the content of the article.

⁴⁹¹ *Ibid.*, paragraph 58.

⁴⁹² Case C-199/08 *Eschig*, Opinion of AG Trstenjak 14 May 2009, EU:C:2009:310.

⁴⁹³ *Ibid.*, footnote 11 to point 71.

*Elsacom*⁴⁹⁴ is a similar case to [Hofmann](#) in that the CJEU solved the question by applying a linguistic method but then supported its argument with metalinguistic method M2.5. Accordingly, *Elsacom* could also be included in Group 1, but we consider it in Group 2 for the same reasons as *Hofmann* (the Court used a concessive clause and seemed to remove the doubt looking at other language versions). In *Elsacom*, the referring court was not sure about the interpretation of Article 7(1) of the Eighth VAT Directive. It asked whether the six-month time-limit for submitting an application for a VAT refund was a mandatory time-limit.⁴⁹⁵ The CJEU first replied that the answer was to be found in the wording (method M1.3.): ‘[...] it is already clear from the wording of that provision that the period laid down in Article 7(1) is a mandatory time-limit’.⁴⁹⁶ It admitted that the wording in the different languages was slightly different, although this seemed to be irrelevant. The use of the concessive clause confirms that (emphasis added):

While it is true that certain language versions of that provision – such as, inter alia, the Spanish (‘dentro’), Italian (‘entro’) and English (‘within’) versions – might give rise to doubts as to the nature of that period, **it is apparent from Section B of Annex C** of those language versions of the Eighth VAT Directive that the period in question is not simply a non-mandatory time-limit.

The CJEU confirmed that interpretation by comparing the various language versions (method M1.1.): [...] **That interpretation is confirmed by other language versions** [...] Thus, for example, in the French version, [...]. The same applies, inter alia, in the German (‘spätestens’) and Dutch (‘uiterlijk’) versions [...].⁴⁹⁷

It is interesting to note that the CJEU also invoked metalinguistic method M2.5. to support its conclusion⁴⁹⁸ and referred to the purpose of the rules in question.⁴⁹⁹

In *Systeme Helmholtz*⁵⁰⁰ the CJEU concluded its interpretation and then admitted some divergence (emphasis added):

That conclusion cannot be affected by the fact that there is a certain divergence between the various language versions of [...] Whereas a number of language

⁴⁹⁴ Case C-294/11 *Elsacom*, EU:C:2012:382.

⁴⁹⁵ *Ibid.*, paragraph 23.

⁴⁹⁶ *Ibid.*, paragraph 24.

⁴⁹⁷ *Ibid.*, paragraph 26.

⁴⁹⁸ *Ibid.*, paragraph 27.

⁴⁹⁹ *Ibid.*, paragraph 28.

⁵⁰⁰ Case C-79/10 *Systeme Helmholtz*, EU:C:2011:797.

versions of that provision use terms which appear to refer only to [...], **the German version** of that directive refers [...] to the concept of [...].⁵⁰¹

The divergence was insignificant because the concepts were clearly defined and the scope of the provision had to be interpreted in the light of that definition (method M1.3.) (emphasis added):

However, **those diverging concepts are expressly defined** in the second subparagraph of Article 14(1)(b) of Directive 2003/96 as [...]. **It is in the light of that definition that the scope** of the tax exemption provided for under Article 14(1)(b) of Directive 2003/96 **must be interpreted.**⁵⁰²

In *Homawoo*,⁵⁰³ the reference for a preliminary ruling was made in proceedings between Mr. Homawoo, who was domiciled in the United Kingdom, the victim of a road traffic accident during a stay in France, and GMF Assurances SA ('GMF'), an insurance company incorporated and established in France.

On 29 August 2007, during a stay in France, Mr. Homawoo sustained a road traffic accident caused by a vehicle being driven by a person insured by GMF.⁵⁰⁴ On 8 January 2009, Mr. Homawoo brought proceedings for personal injury and indirect damages against GMF before the High Court of Justice.⁵⁰⁵

The applicant in the main proceedings claimed that English law governed the assessment of damages as the *lex fori*, according to the conflict-of-law rules applicable to the dispute in the main proceedings. However, GMF, whilst not disputing that the applicant's claim for compensation was well founded, claimed, however, that French law should govern the assessment of those damages, in accordance with the conflict-of-law rules laid down in the Regulation.⁵⁰⁶

The dispute was whether Regulation No 864/2007 could be applied or not. Article 32 of that Regulation entitled "Date of application" provided that the Regulation was applicable from 11 January 2009. However, the date of entry into force was another one. The Regulation had been published in the Official Journal on 31 July 2007 and, as no date of entry into force had been established, it entered into force on 20 August 2007, on the twentieth day after its

⁵⁰¹ *Ibid.*, paragraph 28.

⁵⁰² *Ibid.*, paragraph 29.

⁵⁰³ Case C-412/10 *Homawoo*, EU:C:2011:747.

⁵⁰⁴ *Ibid.*, paragraph 14.

⁵⁰⁵ *Ibid.*, paragraph 15.

⁵⁰⁶ *Ibid.*, paragraph 17.

publication, as per Article 267 TFEU. In other words, the Regulation had one date for entry into force (20 August 2007) and another date of application (11 January 2009).

There was a divergence in some of the language versions of Article 32:

ES	DE	EN	FR
<p>Entrada en vigor</p> <p>El presente Reglamento se aplicará a partir del 11 de enero de 2009, excepto por lo que respecta al artículo 29, que se aplicará a partir del 11 de julio de 2008.</p>	<p>Zeitpunkt des Beginns der Anwendung</p> <p>Diese Verordnung gilt ab dem 11. Januar 2009, mit Ausnahme des Artikels 29, der ab dem 11. Juli 2008 gilt.</p>	<p>Date of application</p> <p>This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008.</p>	<p>Date d'application</p> <p>Le présent règlement est applicable à partir du 11 janvier 2009, à l'exception de l'article 29, lequel est applicable à partir du 11 juillet 2008.</p>

At the outset, the CJEU acknowledged that three language versions referred to the 'entry into force' instead of the 'date of application'. Immediately after that, it clarified the divergence by looking at the content of the article:

Admittedly, three language versions of the title of Article 32 of the Regulation ('Inwerkingtreding', 'Data intrării în vigoare' and 'Entrada en vigor') refer to the term 'Entry into force'. **However, even in those three versions, the content of the article** refers to 11 January 2009 as being the date set of application of the Regulation.⁵⁰⁷

It is clear that the Spanish version, for instance, states *entrada en vigor* when it should have indicated *fecha de aplicación*. The Court explained that the distinction between *date of entry into force* and *date of application* had been made on purpose:

It is open to the legislature to separate the date for the entry into force from that of the application of the act that it adopts, by delaying the second in relation to the first. Such a procedure may in particular, once the act has entered into force and is therefore part of the legal order of the European Union, enable the Member States or European

⁵⁰⁷ *Ibid.*, paragraph 27.

Union institutions to perform, on the basis of that act, the prior obligations which are necessary for its subsequent full application to all persons concerned.⁵⁰⁸

Therefore, from the date of entry into force, the Regulation imposed certain obligations on Member States and on the Commission, but this did not mean that judges had to apply it to the cases that took place immediately after the Regulation entered into force because the actual date of application was later.

Apart from clarifying the difference in the wording by looking at the content of the article (method M1.3.), the Court supported its argument by referring to the objectives of the Regulation and the protection of legal certainty as well as of uniform interpretation.⁵⁰⁹

The CJEU finally ruled that the Regulation applied only to events giving rise to damage occurring after 11 January 2009. Neither date, the date on which proceedings were brought nor on which the national court determined applicable law, had a bearing on determining the scope *ratione temporis* of the Regulation.⁵¹⁰

In addition, in *Stoppelkamp*,⁵¹¹ the CJEU also noted a divergence but resorted to the definition provided in a separate provision of EU law. The problem concerned the interpretation of the concept of ‘taxable person established abroad’. The Court first compared different language versions (emphasis added):

First, it must be noted that **it is apparent from a combined reading of**, in particular, the French- and German-language versions of Article 21(1)(b) of the Sixth Directive that the German-language version does not, in this instance, employ the terms ‘taxable person who is not established within the territory of the country’. That version uses the terms ‘im Ausland ansässigen Steuerpflichtigen’, the literal translation of which is to be understood as ‘taxable person established abroad’.⁵¹²

The national court sought to know whether Article 21(1)(b) of the Sixth Directive had to be interpreted as meaning that in order to be considered ‘a taxable person established abroad’, within the meaning of the German-language version of that provision, it was sufficient for the

⁵⁰⁸ *Ibid.*, paragraph 24.

⁵⁰⁹ *Ibid.*, paragraph 34.

⁵¹⁰ *Ibid.*, paragraph 37.

⁵¹¹ Case C-421/10 *Stoppelkamp*, EU:C:2011:640.

⁵¹² *Ibid.*, paragraph 19.

taxable person to have established the seat of his economic activity outside the country or whether, in addition, his personal residence had to be outside the territory of the country.⁵¹³

The CJEU explained that, although the Sixth Directive provided no definition in the German-language version of the concept of ‘taxable person established abroad’, Article 1 of the Eighth Directive defined the concept of ‘taxable person not established within the territory’.⁵¹⁴ After analysing the implications of this definition (method M1.3.),⁵¹⁵ the Court ruled that this provision had to be interpreted as meaning that, in order for the person to be considered a ‘taxable person who is not established within the territory of the country’, it was sufficient that the taxable person had established the seat of the economic activity outside that country.⁵¹⁶

Other cases are included in Group 2 because the referring court or the Commission noted some divergence but the CJEU did not treat such a divergence as a problem. For example, *Delphi Deutschland*⁵¹⁷ concerned the interpretation of subheading 8536 69 of the Combined Nomenclature (‘the CN’) in Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. It was not clear under which subheading certain goods had to be classified. The referring court compared the German, English and French language versions and noted some differences in the wording⁵¹⁸ but the CJEU did not address them as such.

As a preliminary point, the CJEU remarked that when the question posed concerns a matter of classification for customs purposes, the Court’s task is limited to providing the national court with guidance on the criteria which will enable the latter to classify the products. The Court does not effect the classification itself since the national court is a better place to do so.⁵¹⁹

The Court contended that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes was to be sought in their **objective characteristics and properties as defined in the wording** of the relevant heading of the CN and in the section or chapter notes (method M1.3.).⁵²⁰ Then it supported

⁵¹³ *Ibid.*, paragraph 20.

⁵¹⁴ *Ibid.*, paragraph 24.

⁵¹⁵ *Ibid.*, paragraph 33.

⁵¹⁶ *Ibid.*, paragraph 36.

⁵¹⁷ Case C-423/10 *Delphi Deutschland*, EU:C:2011:315.

⁵¹⁸ *Ibid.*, paragraphs 17 and 18.

⁵¹⁹ *Ibid.*, paragraph 21.

⁵²⁰ *Ibid.*, paragraph 23.

the objective characteristics and properties of the goods with the explanatory notes,⁵²¹ though recognising that the notes did not have legally binding force.⁵²²

In addition, the case *Sunshine Deutschland Handelsgesellschaft*⁵²³ also dealt with the classification of certain foodstuffs under subheadings of the Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87. The Commission, like Sunshine and the Netherlands Government, considered that the goods at issue had to be classified under subheading 1212 99 80 of the CN.⁵²⁴ The Commission pointed out a divergence between different language versions of the explanatory notes to the CN. In the light of these ‘significant linguistic differences’, it proposed that account not be taken of the explanatory notes. Indeed, the Court did not analyse the divergence and ruled that, in effect, there was no need to take account of those explanatory notes.⁵²⁵ The decisive criterion for the classification of goods for customs purposes had to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and the section and chapter notes (method M1.3.).⁵²⁶

5.3.1.3. Divergences treated in previous cases

Some judgments refer to a divergence already discussed. They all relate to the concept of ‘legal transfer’ that appeared in Article 1(1) of Directive 77/187 and Article 1 of Council Directive 2001/23/EC.

In these cases, the CJEU mentioned ‘on account of the differences between the language versions [...] and the divergences between the laws of the Member States [...] the Court has given that concept a **sufficiently flexible interpretation in keeping with the objective** of the directive [...]’. But the Court did not enter into detail as far as the divergence is concerned.

These cases include: *Scattolon*,⁵²⁷ *CLECE*,⁵²⁸ and *Jouini and Others*.⁵²⁹

Similarly, in *Athinaiki Chartopoiia*,⁵³⁰ the Court also referred to a divergence already discussed in another judgment. The reference for a preliminary ruling concerned the

⁵²¹ *Ibid.*, paragraph 28.

⁵²² *Ibid.*, paragraph 24.

⁵²³ Case C-229/06 *Sunshine Deutschland Handelsgesellschaft*, EU:C:2007:239.

⁵²⁴ *Ibid.*, paragraph 23.

⁵²⁵ *Ibid.*, paragraph 31.

⁵²⁶ *Ibid.*, paragraph 26.

⁵²⁷ Case C-108/10 *Scattolon*, EU:C:2011:542, paragraph 63.

⁵²⁸ Case C-463/09 *CLECE*, EU:C:2011:24, paragraph 29.

⁵²⁹ Case C-458/05 *Jouini and Others*, EU:C:2007:512.

⁵³⁰ Case C-270/05 *Athinaiki Chartopoiia*, EU:C:2007:101.

interpretation of the concept of ‘establishment’ found in, inter alia, Article 1(1)(a) of Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies. The reference was made in the context of proceedings between employees who had been dismissed and their former employer Athinaiki Chartopoiia AE (‘the company’) concerning the lawfulness of their collective redundancy which followed the termination of the activities of one of that company’s production units because of a decision made by the company.⁵³¹ The national court sought to know whether such a production unit came within the concept of ‘establishment’ for the purposes of the application of Directive 98/59.

The Court held in a previous judgment, namely *Rockfon*,⁵³² that the concept of ‘establishment’, which was not defined in that directive, had to be interpreted by reference to the purpose and general scheme (method M2.2.).⁵³³ The Court also held that the terms used in the various language versions were somewhat different and had different connotations, signifying, according to the version in question, establishment, undertaking, work centre, local unit or place of work (see *Rockfon*, paragraphs 26 and 27).⁵³⁴ The Court maintained the same interpretation as that given in *Rockfon*, bearing in mind the purpose of the directive (method M2.3.).

5.3.2. Action for annulment

In Joined Cases T-204/08 and T-212/08 *Team Relocations and Others v Commission*,⁵³⁵ the Court admitted some divergence but did not treat it as a problem of interpretation. It clarified it by looking at other language versions (method M1.1.). It concerned the interpretation of Article 23(3) of Regulation No 1/2003, which stated how to fix the amount of fines.

ES	DE	EN	FR
A fin de determinar el importe de la multa, procederá tener en cuenta,	Bei der Festsetzung der Höhe der Geldbuße ist sowohl die Schwere der	In fixing the amount of the fine, regard shall be had both to the gravity and to the	Pour déterminer le montant de l'amende, il y a lieu de prendre en considération, outre

⁵³¹ *Ibid.*, paragraph 2.

⁵³² Case C-449/93 *Rockfon*, EU:C:1995:420.

⁵³³ Case C-270/05 *Athinaiki Chartopoiia*, EU:C:2007:101, paragraph 23 and Case C-449/93 *Rockfon*, EU:C:1995:420, paragraph 28.

⁵³⁴ *Ibid.*, paragraph 24.

⁵³⁵ Joined Cases T-204/08 and T-212/08 *Team Relocations and Others v Commission*, EU:T:2011:286.

además de la gravedad de la infracción, duración.	de la	Zuwiderhandlung als auch deren Dauer zu berücksichtigen.	duration of the infringement.	la gravité de l'infraction, la durée de celle-ci.
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The French and Spanish versions seemed to attach less importance to duration than to gravity for the purposes of fixing the amount of fines. By contrast, the English and German versions indicated that that provision attached equal weight to the gravity and the duration of the infringement.⁵³⁶ The Court simply compared the different versions and continued its analysis, without entering into details regarding the divergence.

In Case T-576/08 *Germany v Commission*,⁵³⁷ it was one of the interveners that raised the possibility of a certain difference in wording between the different language versions of the regulation.⁵³⁸ However, the Commission disputed the intervener's interpretation and claimed that 'the great majority of language versions of Article [...] are rather compatible with the interpretation given by the Commission (method M1.1.). The CJEU did not address the divergence as a problem of interpretation as such.

In Case T-161/05 *Hoechst v Commission*,⁵³⁹ there was an error in the hearing officer's report, which referred to a 'Zusammenschluss' (concentration). There were other language versions, namely a French and an English version, which were also communicated to the College of Members of the Commission and did not contain an error. Once again, the Court did not analyse it as a problem and ruled out the equivocal version, which was the German one,⁵⁴⁰ by referring to the other language versions (method M1.1.).

Finally, Case T-339/06 *Greece v Commission*⁵⁴¹ concerned an application for annulment of a Commission Decision. As this judgment was further appealed, we discuss it in section 5.3.4., under Case C-54/09 P [Greece v Commission](#).

⁵³⁶ *Ibid.*, paragraph 109.

⁵³⁷ Case T-576/08 *Germany v Commission*, EU:T-2011:166.

⁵³⁸ *Ibid.*, paragraph 56.

⁵³⁹ Case T-161/05 *Hoechst v Commission*, EU:T:2009:366.

⁵⁴⁰ *Ibid.*, paragraph 183.

⁵⁴¹ Case T-339/06 *Greece v Commission*, EU:T:2008:568, paragraph 28.

5.3.3. Damage action

Case T-341/07 *Sison v Council*⁵⁴² concerned an application for compensation for damage allegedly sustained by the applicant as a result of the restrictive measures taken against him with a view to combating terrorism. In the judgment, the Court explained that ‘whereas actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action for damages seeks compensation for damage resulting from a measure or from unlawful conduct, attributable to an institution’.⁵⁴³

The applicant pleaded infringement of Article 2(3) of Regulation No 2580/2001, read in conjunction with Article 1(4) of Common Position 2001/931.⁵⁴⁴ The Court responded that although the infringement of these provisions was clearly clarified in a previous judgment, it was important ‘to take into consideration the particular difficulties attaching to the interpretation and application, in this case, of those provisions’.⁵⁴⁵ The Court considered that the difficulties attaching to the literal, systematic interpretation could reasonably explain the error of law made by the Council in applying those provisions.⁵⁴⁶

Although the Court did not analyse the question as a problem of divergence, it did remark that the ‘actual wording of those provisions is particularly confused’. According to Article 1(4) of Common Position 2001/931, ‘competent authority’ means a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area’. However, the problem was that there was no definition of a ‘competent authority’ might be and it was not clear whether those provisions were to be interpreted by reference and *renvoi* to national law or whether they possessed an autonomous meaning in European Union law.⁵⁴⁷ The Court then pointed out that the concept had different scopes in the national legal systems (emphasis added):

[...] In either case, it is not apparent that **the differing language versions of these provisions cover the same national factual situations**. Thus, in certain language

⁵⁴² Case T-341/07 *Sison v Council*, EU:T:2011:687.

⁵⁴³ *Ibid.*, paragraph 32.

⁵⁴⁴ *Ibid.*, paragraph 41.

⁵⁴⁵ *Ibid.*, paragraph 62.

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*, paragraph 63.

versions, the terms used may be those of criminal law *sensu stricto*, whereas in other language versions their interpretation may fall outside the strictly criminal context.⁵⁴⁸

This kind of linguistic problem would be an example of inevitable divergences between the language versions. The Court recognised that there was copious case-law that showed the difficulties in interpreting the provisions in question⁵⁴⁹ and it compared different language versions. But it was not really a question of linguistic divergences. The question revolved around the scope the concept acquired in the national legislations. It finally concluded that, in the circumstances of the case, the infringement of Article 2(3) of Regulation No 2580/2001 and Article 1(4) of Common Position 2001/931 could not be regarded as a sufficiently serious breach of Community law.⁵⁵⁰

5.3.4. Appeal

Moreover, Case C-54/09 P *Greece v Commission*⁵⁵¹ was an appeal where some divergence was discussed. By its appeal, the Hellenic Republic sought to have set aside the judgment of the Court of First Instance of the European Communities of 11 December 2008 in Case T-339/06 *Greece v Commission*. In a nutshell, there was doubt as to the interpretation of Article 16(1) of Regulation No 1227/2000. This provision provided that, in most of the language versions, the Member States were to forward to the Commission, ‘not later than’ 10 July each year, the information referred to in that provision.⁵⁵² However, three language versions, including the Greek, used the expression ‘by’. As a consequence, Greece submitted that the time-limit was indicative, not mandatory. The Court compared the different versions (method M1.1.) and concluded that there was no doubt that ‘such wording makes that time-limit binding’. **The fact that three language versions** provided that Member States were to forward that information to the Commission ‘by’ 10 July each year **did not confer on that article a different meaning as against the other language versions.**⁵⁵³ That interpretation was confirmed both by the **general scheme** of Regulation No 1227/2000 and by the **purpose** of Article 16(1) of that regulation.⁵⁵⁴

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*, paragraph 65.

⁵⁵⁰ *Ibid.*, paragraph 74.

⁵⁵¹ Case C-54/09 P *Greece v Commission*, EU:C:2010/451.

⁵⁵² *Ibid.*, paragraph 45.

⁵⁵³ *Ibid.*, paragraph 46.

⁵⁵⁴ *Ibid.*, paragraph 47.

Case C-38/07 P *Heuschen & Schrouff Oriëntal Foods Trading v Commission*⁵⁵⁵ is a very good example of the problem of legal certainty discussed in section 3.5.1. By its appeal, Heuschen & Schrouff Oriëntal Foods Trading BV ('H & S') sought to have set aside the judgment of the Court of First Instance of the European Communities of 30 November 2006 in Case T-382/04 *Heuschen & Schrouff Oriëntal Foods v Commission*.⁵⁵⁶ - **Procedure before the Court of First Instance and the judgment under appeal**

By application lodged at the Registry of the Court of First Instance, H & S brought an action against the contested decision. In support of its action, H & S relied on three pleas.⁵⁵⁷ By its first plea, H & S maintained, inter alia, that the legislation was complex on account of the fact that, **unlike other language versions, the Dutch version of the CN did not contain an express reference** to 'dried sheets of flour paste'. Furthermore, H & S submitted that the Classification Regulation was contrary to the Dutch version of the CN and could not therefore be relied on against H & S.⁵⁵⁸

The Court of First Instance found that the publication of the Classification Regulation had put an end to any possible legislative complexity created by the absence of certain words in the Dutch version of the wording of subheading 1905 90 20 of the CN. The Court of First Instance rejected the first plea.

- The appeal

H & S divided the ground of appeal into three parts.⁵⁵⁹ The first part again concerned the complexity of the legislation. The appellant's view was that the legislation was complex, in particular on account of the drafting inadequacies of the Dutch version of the CN and the customs authorities' persistence in accepting an allegedly incorrect classification.⁵⁶⁰ The Court recognised the divergence but looked at the content of the classification regulation, which clarified the question (method M1.3.):

[...] **Although it is true that**, as regards the classification of the goods in question, **the wording of the Dutch version** of subheading 1905 90 20 of the CN **may have appeared less precise than that of other language versions, the fact remains that** that classification regulation, which is directly applicable and binding in its entirety,

⁵⁵⁵ Case C-38/07 P *Heuschen & Schrouff Oriëntal Foods Trading v Commission*, EU:C:2008:641.

⁵⁵⁶ *Ibid.*, paragraph 1.

⁵⁵⁷ *Ibid.*, paragraphs 17 and 18.

⁵⁵⁸ *Ibid.*, paragraph 20.

⁵⁵⁹ *Ibid.*, paragraph 31.

⁵⁶⁰ *Ibid.*, paragraph 38.

explicitly and unequivocally describes the goods that have to be classified under that subheading and the goods imported by the appellant correspond thereto (see, to that effect, Case C-375/07 *Heuschen & Schrouff Oriëntal Foods Trading* [2008] ECR I-0000, paragraph 52).⁵⁶¹

It followed that the Court of First Instance did not err in law when it found that the publication of the Classification Regulation had put an end to any possible legislative complexity created by the absence of certain words in the wording of the Dutch version of heading 1905 of the CN and, more specifically, of subheading 1905 90 20.⁵⁶² Once again, the divergence in the wording was irrelevant if the content of the Classification Regulation was taken into account. The concessive clause also implies that the divergence was not relevant: [...] **Although it is true that, [...]the fact remains that [...]**’.

In addition, the last part of the ground of appeal was the care taken by the importer. The appellant took the view that operators could not be required to acquaint themselves with the applicable provisions in the different language versions published in the *Official Journal of the European Communities*. [...] ⁵⁶³ This relates directly to the question of legal certainty and the right to rely on a single language version. The appellant claimed precisely that the operators could not be obliged to consult the different language versions. To tackle this point, the Court repeated what it had stated in paragraph 42 of this judgment: ‘the Classification Regulation, including the Dutch version thereof, described explicitly and unequivocally the goods that had to be classified under subheading 1905 90 20 and the goods imported by H & S correspond thereto’.⁵⁶⁴ The Court concluded that all three parts of the single ground of appeal relied on by H & S had to be rejected and the appeal had to be dismissed.⁵⁶⁵

Finally, there are four cases that concern actions against decisions of the Board of Appeal of OHIM: *Present-Service Ullrich v OHMI - Punt Nou (babilu)*,⁵⁶⁶ *Bongrain v OHMI - apetito (APETITO)*,⁵⁶⁷ *Grupo Promer Mon Graphic v OHMI – PepsiCo*,⁵⁶⁸ *Powerserv Personalservice v OHMI - Manpower (MANPOWER)*.⁵⁶⁹ In addition, there is one action

⁵⁶¹ *Ibid.*, paragraph 42.

⁵⁶² *Ibid.*, paragraph 43.

⁵⁶³ *Ibid.*, paragraph 58.

⁵⁶⁴ *Ibid.*, paragraph 58.

⁵⁶⁵ *Ibid.*, paragraph 69.

⁵⁶⁶ Case T-66/11 *Present-Service Ullrich v OHMI - Punt Nou (babilu)*, EU:T:2013:48.

⁵⁶⁷ Case T-129/09 *Bongrain v OHMI - apetito (APETITO)*, EU:T:2011 :193.

⁵⁶⁸ Case T-9/07 *Grupo Promer Mon Graphic v OHMI – PepsiCo*, EU:T:2010:96.

⁵⁶⁹ Case T-405/05 *Powerserv Personalservice v OHMI – Manpower*, EU:T:2008:442.

against a decision of the Board of Appeal of the Community Plant Variety Office: T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana v CPVO*.⁵⁷⁰

First, in Case T-66/11 *Present-Service Ullrich v OHMI - Punt Nou (babilu)*,⁵⁷¹ the applicant, Present-Service Ullrich GmbH & Co. KG, filed an application for registration of a Community trade mark (the word sign *babilu*).⁵⁷² The goods and services in respect of which registration was sought were in, inter alia, Class 35 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (emphasis added): ‘Advertising; advertising mail; dissemination of advertising; on line advertising on a computer network; advertising mail; advertising on the Internet, for others; presentation of companies on the Internet and other media; provision of auctioneering services on the Internet’.

The intervener, Punt-Nou, SL, filed a notice of opposition to the registration of the mark applied for.⁵⁷³ The opposition was based on the earlier Community word mark BABIDU, which covered, inter alia, services in Class 35 corresponding to the following description (emphasis added): ‘Commercial retailing, import and export; commercial management assistance in relation to franchises; franchise-issuing services in relation to commercial management assistance; publicity; business management; business administration; office functions’.

In the English version of the list of the goods and services covered by the earlier trade mark, the term *publicidad* in Spanish had been translated as ‘publicity’. However, the official English version of the Nice Classification and the list of the services in Class 35 used the term ‘advertising’, not ‘publicity’.

The application for the Community trade mark had been filed in Spanish. Article 120(3) of Regulation No 207/2009 stipulates inter alia that, ‘[i]n cases of doubt, the text in the language of the Office in which the application for the Community trade mark was filed shall be authentic’.⁵⁷⁴ Thus, Spanish was the authentic language version in the present case.⁵⁷⁵ The wording in Spanish (*Publicidad; gestión de negocios comerciales; administración comercial; trabajos de oficina*) corresponded with that used in the official Spanish version of the class

⁵⁷⁰ Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana v CPVO*, EU:T:2008:25.

⁵⁷¹ Case T-66/11 *Present-Service Ullrich v OHMI - Punt Nou (babilu)*, EU:T:2013:48.

⁵⁷² *Ibid.*, paragraphs 1 and 2.

⁵⁷³ *Ibid.*, paragraph 5.

⁵⁷⁴ *Ibid.*, paragraph 28.

⁵⁷⁵ *Ibid.*, paragraph 38.

heading for Class 35. It followed that *publicidad* should have been translated as ‘advertising’ and not ‘publicity’.⁵⁷⁶ Finally, the Court considered the services were identical and dismissed the applicant’s claim that the English words ‘advertising’ and ‘publicity’ were not the same.⁵⁷⁷ *Present-Service Ullrich v OHMI - Punt Nou* is one of the few cases where the Court explicitly recognised there was a translation problem. It is clear that the problem would have been avoided if translators had referred to the wording used in the official version of Class 35. The method of interpretation is classified as ‘Other’ because it entailed referring to the official version of the Nice Classification.

Second, in Case T-129/09 *Bongrain v OHMI - apetito (APETITO)*,⁵⁷⁸ the applicant submitted that the Board of Appeal had based its analysis of the likelihood of confusion on a misinterpretation of the list of goods in Class 29 covered by the earlier mark. The Board of Appeal had not taken into account the conjunction ‘and’, which appeared twice in the list of goods in Class 29 covered by the earlier mark.⁵⁷⁹ According to the applicant, that interpretation implied that the goods covered by its application for registration were not identical to those covered by the earlier mark. The applicant claimed the provision separated the goods into three parts, marked as follows:

EN

‘Prepared meals, mainly of meat, sausage, fish, game, poultry, prepared fruit and vegetables, potatoes, mashed potatoes, potato dumplings, prepared pulses, mushrooms, meat salads, fish salads, fruit salads, vegetable salads, soups, meat jellies, fish jellies, fruit jellies, vegetable jellies, eggs, cheese, quark, milk, butter, cream, yoghurt and ingredients for the aforesaid meals in prepared form’.

The Court dismissed the argument of the applicant and compared different language versions. It first claimed that it was ‘evident from the combined reading of the different language versions’ that the first ‘and’ attributed the adjective ‘prepared’ to both fruit and vegetables. Its purpose is not to divide the list of goods designated into the foodstuffs mentioned before and those mentioned after the coordinating conjunction.⁵⁸⁰ The Court explained that the versions in Latin languages identified the ‘prepared fruit and vegetables’ by placing the adjective

⁵⁷⁶ *Ibid.*, paragraphs 38-46.

⁵⁷⁷ *Ibid.*, paragraphs 47-52.

⁵⁷⁸ Case T-129/09 *Bongrain v OHMI - apetito (APETITO)*, EU:T:2011 :193.

⁵⁷⁹ *Ibid.*, paragraph 16.

⁵⁸⁰ *Ibid.*, paragraph 25.

‘prepared’ after the word ‘vegetables’, whereas the versions in Germanic languages placed that adjective before the word ‘fruit’.⁵⁸¹

It followed that the interpretation proposed by the applicant resulted in a contradiction between the different language versions. In the Germanic language versions, the first group included prepared fruit and the second group included unprepared vegetables, whereas in the Romance language versions, the first group included fruit and the second group included prepared vegetables.⁵⁸² The interpretation proposed by the applicant lacked coherence.⁵⁸³ By contrast, the interpretation put forward by OHIM, according to which the prepared meals covered by the earlier mark may consist of one or several foodstuffs from the list, was coherent and did not pose any linguistic problems.⁵⁸⁴ *Bongrain v OHMI - appetito (APETITO)* is an excellent example of how punctuation and the coordinating conjunctions can affect the interpretation of the provisions. In this case, the Court also solved the ambiguity by comparing different language versions (method M1.1.).

Third, in Case T-9/07 *Grupo Promer Mon Graphic v OHMI – PepsiCo*,⁵⁸⁵ there was a slight difference in the wording of two provisions relating to the scope of the protection conferred by a design. The Court compared different language versions and then dispelled the doubt (method M1.1.). The vast majority of the language versions communicated an expression meaning ‘different overall impression’. Three language versions, however, used the expression a ‘different overall visual impression’. However, since, under the two provisions in question a design was only the appearance of the whole or a part of a product, the Court found that the overall impression to which the provisions referred had to be a visual one. Thus, the difference in wording between the language versions was insignificant and did not confer a different meaning on that provision.⁵⁸⁶

Fourth, Case T-405/05 *Powerserv Personalservice v OHMI - Manpower (MANPOWER)*⁵⁸⁷ related to an application for a declaration that Community trade mark No 76059, MANPOWER, was invalid. What must be highlighted from this case is that the applicant relied on the German language version but the Court dismissed that argument, invoking the need to consider all language versions (emphasis added):

⁵⁸¹ *Ibid.*, paragraph 25.

⁵⁸² *Ibid.*

⁵⁸³ *Ibid.*, paragraph 26.

⁵⁸⁴ *Ibid.*, paragraph 27.

⁵⁸⁵ T-9/07 *Grupo Promer Mon Graphic v OHMI – PepsiCo*, EU:T:2010:96.

⁵⁸⁶ *Ibid.*, paragraph 50.

⁵⁸⁷ T-405/05 *Powerserv Personalservice v OHMI – Manpower*, EU:T:2008:442.

[...] First, **the applicant cannot usefully rely solely on the German version** of Article 51(2) of Regulation No 40/94 in support of its line of reasoning. It is settled case law that the need for a uniform interpretation of Community law means that, in cases of doubt, a particular provision must not be considered in isolation but must be interpreted and applied in the light of the other official languages [...].⁵⁸⁸

In the same paragraph, the Court seemed to clarify the question by looking at the rest of the language versions which were clear (method M1.1.): ‘Most of the language versions of Article 51(2) of Regulation No 40/94, **other than the German version, refer expressly to the use ‘after registration’** of the trade mark in respect of which a declaration of invalidity is sought’.⁵⁸⁹

5.4. Methods of interpretation in soft cases

In Group 2 we analysed a total of thirty-eight cases, including all kinds of proceedings. The examples analysed above demonstrate that soft cases are normally solved by linguistic methods. The following table shows a summary of the arguments used in Group 2:

Method of interpretation	Total
G2	37
Linguistic	32
M1.1.	18
M1.1. + M2.3.	1
M1.1. + M2.5.	1
M1.2.	5
M1.3.	6
M1.3. + M1.1. + M2.5.	1
Metalinguistic	4
M2.3.	1
M2.9.	3

⁵⁸⁸ *Ibid.*, paragraph 126.

⁵⁸⁹ *Ibid.*

Other	1
Other	1
Grand Total	37

In most cases (nineteen), the Court solved the problem by looking at other language versions (method M1.1.). Typically, the CJEU would use a concessive clause admitting the divergence but then stating that the other language versions are clear. For example: ‘**While it is true that**’ [...] ‘**the fact remains that a large number of language versions**’.⁵⁹⁰ In *Weber*,⁵⁹¹ the Court tackled two different problems, one was solved with method M1.1. and the other one with a teleological interpretation (M2.3.). In addition, *Hofmann*⁵⁹² combines M1.1. and M2.5. but, as we have already argued, we include it in Group 2 because the CJEU removed the divergence by looking at other language versions. The concessive clause confirmed that: ‘**Whilst it is true that some language versions** [...] are formulated in such a way as [...], **the fact remains that a large number of other language versions** [...] express the idea that’ [...].

In actions for annulment and appeals we have seen that there was often the question of legal certainty. One of the parties relied on a certain language version but the Court solved the question by resorting to other language versions.

In a few cases (five), the Court did not give preference to any language version. It simply invoked the need to compare the different language versions (method M1.2.). In spite of that, in all cases the CJEU reinforced its interpretation, for example, with the objectives (such as in *Consiglio*)⁵⁹³ or with the drafting history of the instrument (such as in *Eschig*).⁵⁹⁴

In other cases (six), the Court admitted some divergence but solved it quite easily by looking at the definition or the wording of the provision (method M1.3.). A clear example of this situation is *Homawoo*. In the case of *Delphi Deutschland* and *Sunshine Deutschland*, the Court followed the ruling it normally gives to interpret provisions of the CN: regard must be taken to the ‘objective characteristics and properties as defined in the wording of the relevant heading’.

⁵⁹⁰ See, for instance, Joined Cases C-65/09 and C-87/09 *Gebr. Weber*, EU:C:2011:396, paragraph 70.

⁵⁹¹ *Ibid.*

⁵⁹² Case C-419/10 *Hofmann*, EU:C:2012:240.

⁵⁹³ Case C-311/06 *Consiglio*, EU:C:2009:37.

⁵⁹⁴ Case C-199/08 *Eschig*, EU:C:2009:538.

The four cases that include a metalinguistic method are those in the last subgroup 5.3.1.3. Divergences treated in previous cases. In these judgments the Court recognised some divergence but it had been treated in a previous case, as in *Scattolon*, *CLECE* and *Jouini and Others*, where the Court claimed it has given the concept ‘a sufficiently flexible interpretation in keeping with the objective’ (M2.9.). *Athinaiki Chartopoiia* was also a case that dealt with a divergence that had been discussed in a previous judgment.

5.5. Group 3: No divergences but comparison is used as a tool

As noted at the beginning of this chapter, comparison is widely used as a method to support an interpretation when no divergences are present. From a total of 136 judgments analysed, the Court used comparison as a tool in forty-one.

5.5.1. Request for a preliminary ruling

In requests for preliminary rulings, the CJEU often arrives at a conclusion and confirms its interpretation by comparing different language versions. By way of example, in *Volvo Car Germany*⁵⁹⁵ the CJEU provided details on the wording in the different language versions:

The interpretation outlined above is supported by the fact that the same part of speech is used in the various language versions of Article 18(a) of the Directive, including Spanish (‘por un incumplimiento imputable al agente comercial’), German (‘wegen eines schuldhaften Verhaltens des Handelsvertreters’), English (‘because of default attributable to the commercial agent’), French (‘pour un manquement imputable à l’agent commercial’), Italian (‘per un’inadempienza imputabile all’agente commerciale’), and Polish (‘z powodu uchybienia przypisywanego przedstawicielowi handlowemu’).⁵⁹⁶

Other examples where the Court expressed that all language versions converge in meaning are:

Sousa Rodríguez and Others: ‘[...] it must be noted that both Article [...] and [...], **in the various language versions of Regulation [...]** refer to [...]’.⁵⁹⁷

⁵⁹⁵ Case C-203/09 *Volvo Car Germany*, EU:C:2010:647.

⁵⁹⁶ *Ibid.*, paragraph 41.

⁵⁹⁷ Case C-83/10 *Sousa Rodríguez and Others*, EU:C:2011:652, paragraph 32.

Akavan Erityisalojen Keskusliitto AEK and Others: ‘[...] As stated by the Advocate General [...], **it is clear from comparison of various language versions of that provision** that the Community legislature envisaged that [...]’.⁵⁹⁸

Ruben Andersen: ‘[...] As the Commission of the European Communities rightly pointed out, **that conclusion is borne out by comparison of the various language versions** of Directive [...]’.⁵⁹⁹

01051 Telecom: ‘**That interpretation is confirmed by the various language versions** of Directive [...] which refer, unequivocally, to [...]’.⁶⁰⁰

In addition, *K*.⁶⁰¹ is a particular case. In this judgment the Court did not analyse the divergence as a problem of interpretation; on the contrary, it used the divergence as a positive tool. The concept of ‘family members’ was defined in Article 2 of the Regulation in question and it did not cover the daughter-in-law or grandchildren of an asylum seeker. However, the Court decided that such persons were covered by the words ‘another relative’ included in Article 15(2) of this Regulation. The Court gave a broad interpretation to the concept of ‘family member’ and supported its interpretation by comparing different language versions (method M1.1.) (emphasis added):

In that regard, it must first be observed that **the various language versions** of the abovementioned wording of Article 15(2) of Regulation No 343/2003 **diverge** and that **some of them, for example the English version, use different and broader wording** than that used in Article 2(i) of that regulation.⁶⁰²

The fact that the language versions diverged, with some broadening the scope of the term, was used as a justification to include daughter-in-law or grandchildren into the concept of ‘another relative’. This case could also be studied in Group 2 because the CJEU mentioned that the language versions diverged. However, as the divergence is used as a tool to support an interpretation, we include it in Group 3.

⁵⁹⁸ Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK and Others*, EU:C:2009:533, paragraph 39.

⁵⁹⁹ Case C-306/07 *Ruben Andersen*, EU:C:2008:229, paragraph 33.

⁶⁰⁰ Case C-306/06 *01051 Telecom*, EU:C:2008:187, paragraph 24.

⁶⁰¹ Case C-245/11 *K*, EU:C:2012:685.

⁶⁰² *Ibid.*, paragraph 39.

Moreover, in *Singh*⁶⁰³ there was no divergence but the Court used comparison to argue that the wording was ambiguous in general. Literal interpretation was not enough and it was necessary to engage in a teleological-systematic interpretation:

In this respect, it must be stated that, in a large number of language versions, the literal wording of Article 3(2)(e) of Directive 2003/109 is not unambiguous in meaning and it is not therefore possible to determine clearly and at first sight its exact scope.⁶⁰⁴

Similarly, in *Teleos and Others*,⁶⁰⁵ the applicants compared different language versions and they relied on a literal interpretation of the term ‘dispatched’.⁶⁰⁶ Nevertheless, the Court argued that there were several possible literal interpretations and, in order to determine the scope of the expression, it was necessary to have recourse to the context in which it was used, taking account of the aims and scheme of the directive.⁶⁰⁷ The Advocate General also remarked that the concept of ‘dispatch’ was not entirely clear in any of the language versions of the directive.⁶⁰⁸ As happened in *Singh*, in *Teleos and Others* the Court also claimed literal interpretation was not enough.

The other cases in Group 3 are: *Health Service Executive*,⁶⁰⁹ *Painer*,⁶¹⁰ *DHL Express France*,⁶¹¹ *Jakubowska*,⁶¹² *Parviainen*,⁶¹³ *Gassmayr*,⁶¹⁴ *E and F*,⁶¹⁵ *FEIA*,⁶¹⁶ *Tyson Parketthandel*,⁶¹⁷ *Afton Chemical*,⁶¹⁸ *Lahti Energia*,⁶¹⁹ *Metherma*,⁶²⁰ *Trespa International*⁶²¹ and *ZF Zefeser*.⁶²²

⁶⁰³ Case C-502/10 *Singh*, EU:C:2012:636.

⁶⁰⁴ *Ibid.*, paragraph 33.

⁶⁰⁵ Case C-409/04 *Teleos and Others*, EU:C:2007:548.

⁶⁰⁶ *Ibid.*, paragraph 30.

⁶⁰⁷ *Ibid.*, paragraph 35.

⁶⁰⁸ Case C-409/04 *Teleos and Others*, Opinion of AG Kokott, EU:C:2007:7.

⁶⁰⁹ Case C-92/12 PPU *Health Service Executive*, EU:C:2012:255.

⁶¹⁰ Case C-145/10 *Painer*, EU:C:2011:798.

⁶¹¹ Case C-235/09 *DHL Express France*, EU:C:2011:238, paragraph 30.

⁶¹² Case C-225/09 *Jakubowska*, EU:C:2010:729, paragraph 5.

⁶¹³ Case C-471/08 *Parviainen*, EU:C:2010:391, paragraph 50.

⁶¹⁴ Case C-194/08 *Gassmayr*, EU:C:2010:386, paragraph 61.

⁶¹⁵ Case C-550/09 *E and F*, EU:C:2010:382, paragraph 68.

⁶¹⁶ Case C-32/08 *FEIA*, EU:C:2009:418, paragraph 70.

⁶¹⁷ Case C-134/08 *Tyson Parketthandel*, EU:C:2009:229, paragraph 13.

⁶¹⁸ Case C-517/07 *Afton Chemical*, EU:C:2008:751, paragraph 35.

⁶¹⁹ Case C-317/07 *Lahti Energia*, EU:C:2008:684, paragraph 20.

⁶²⁰ Case C-403/07 *Metherma*, EU:C:2008:657, paragraph 50.

⁶²¹ Case C-248/07 *Trespa International*, EU:C:2008:607, paragraph 64.

⁶²² Case C-62/06 *ZF Zefeser*, EU:C:2007:811, paragraph 24.

5.5.2. Failure to fulfil an obligation

In actions for failure to fulfil an obligation, the CJEU also resorted to comparison as a tool to confirm an interpretation. For example, in Case C-34/04 *Commission v Netherlands*⁶²³ and Case C-64/04 *Commission v United Kingdom*,⁶²⁴ the Court dealt with the meaning of the expression ‘measures to stop vessels’. It took into account different language versions, highlighting those that were the clearest (emphasis added):

Regulation No 3699/93, which defines the measures to stop vessels’ fishing activities permanently, was, moreover, adopted after Regulation No 3690/93. **As is clear from most language versions of Regulation No 3699/93, particularly from the German, Spanish, French and Italian versions**, the Community legislature knowingly intended to choose the same expression as that already used in Regulation No 3690/93.⁶²⁵

We include Case C-507/03 *Commission v Ireland*⁶²⁶ in this group but it could also be considered in Group 2 because divergence was mentioned but not analysed. In this case, the interveners claimed there was ‘a linguistic difference between the language versions of the judgments referred to by the Commission’ which allowed their scope to be modified. However, neither the Court nor the Advocate General in her Opinion⁶²⁷ mentioned anything related to this issue.

In Case C-132/05 *Commission v Germany*,⁶²⁸ there was no divergence between different language versions; the Court compared different languages to determine whether the name ‘Parmesan’ violated the protected designation of origin (PDO) ‘Parmigiano Reggiano’. In addition, in Case C-360/11 *Commission v Spain*,⁶²⁹ the Court used comparison to confirm an interpretation. The Commission had argued that two terms were comparable; more precisely, that the concept of ‘pharmaceutical products’ within the meaning of Annex III had to be regarded as being comparable to that of ‘medicinal product’ in Article 1 of Directive

⁶²³ Case C-34/04 *Commission v Netherlands*, EU:C:2007:95.

⁶²⁴ Case C-64/04 *Commission v United Kingdom*, EU:C:2007:192.

⁶²⁵ Case C-34/04 *Commission v Netherlands*, EU:C:2007:95., paragraph 37 and C-64/04 *Commission v United Kingdom*, EU:C:2007:192, paragraph 32.

⁶²⁶ Case C-507/03 *Commission v Ireland*, EU:C:2007:676.

⁶²⁷ Case C-507/03 *Commission v Ireland*, Opinion of AG Stix-Hackl, EU:C:2007:676.

⁶²⁸ Case C-132/05 *Commission v Germany*, EU:C:2008:117.

⁶²⁹ Case C-360/11 *Commission v Spain*, EU:C:2013:17.

2001/83.⁶³⁰ In order to support the interpretation that the two concepts were different, the CJEU resorted to comparison:

First of all, the majority of the language versions of Directive 2001/83 and Annex III to Directive 2006/112 use different terms in relation to the two concepts. Thus, in the French language version, the concepts of ‘medicinal product’ and ‘pharmaceutical product’ are referred to respectively as ‘médicament’ and ‘produit pharmaceutique’. The same is true, inter alia, of the Spanish (‘medicamento’ and ‘producto farmacéutico’), Lithuanian (‘vaistai’ and ‘farmacijos gaminiai’), Polish (‘produkt leczniczy’ and ‘produkty farmaceutyczne’), Romanian (‘medicament’ and ‘produsele farmaceutice’), Slovenian (‘zdravilo’ and ‘farmaceutski izdelki’) and Swedish (‘läkemedel’ and ‘farmaceutiska produkter’) language versions [...].⁶³¹

In other cases, it was the defendant that resorted to comparison to support its interpretation. Such was the case of *C-270/07 Commission v Germany*.⁶³² Here, Germany supported its interpretation by comparing different language versions: ‘[...] First, it follows from a combined reading of several language versions of that provision that it does not preclude [...].’⁶³³ Similarly, in *Commission v Spain*⁶³⁴ it was also the defendant that made the comparison: ‘[...] The formulation used in other language versions of the directive confirms that interpretation.’

5.5.3. Annulment

First, in Joined Cases T-427/04 and T-17/05 *France v Commission*,⁶³⁵ there was no divergence between the different language versions. The problem was that the version of a decision notified to France and the version approved by the College of Commissioners presented some differences in French. The Court also clarified a point at the end of the judgment by comparing different languages: ‘Fifth, Article 15 of Regulation No 659/1999 fixes the point from which time for the purposes of the limitation period starts to run as the date on which the aid was ‘awarded’, not the date on which it was ‘paid’, whichever the

⁶³⁰ *Ibid.*, paragraph 40.

⁶³¹ Case C-360/11 *Commission v Spain*, EU:C:2013:17, paragraphs 41 and 42.

⁶³² Case C-270/07 *Commission v Germany*, EU:C:2009:168.

⁶³³ *Ibid.*, paragraph 22.

⁶³⁴ Case C-404/09 *Commission v Spain*, EU:C:2011:768.

⁶³⁵ Joined Cases T-427/04 and T-17/05 *France v Commission*, EU:T:2009:474.

language version (for example, *concedido* in Spanish, *accordée* in French, *gewährt* in German, *vienne concesso* in Italian) [...].⁶³⁶

In Case T-442/03 *SIC v Commission*,⁶³⁷ there was no divergence between different language versions. The text in Portuguese presented terminological inaccuracies and comparison was used to say the problem was also in other language versions:

It should be noted at this stage that that independent external verification by the auditors in respect of the public service reports, mentioned in the last sentence of recital 180 of the contested decision, is referred to, in other places in the contested decision – both in its authentic Portuguese version and in other language versions [...].⁶³⁸

In Case T-256/07 *People's Mojahedin Organization of Iran v Council*,⁶³⁹ the applicant notes that the provisions in question are expressed in the present tense,⁶⁴⁰ suggesting a possible interpretation. The CJEU, however, disregards the applicant's arguments by comparing different language versions:

First, contrary to the applicant's arguments, that point of view is not undermined by the wording of the provisions in question. Although Article 1(2) of Common Position 2001/931 uses the present indicative [...] to define what is meant by [...], that is in the sense of a general truth particular to the legal definition of offences, and not by reference to a given period of time. **The same is true of the present participle used in the French [...] and English [...], which is confirmed by the use of the present indicative for the equivalent form used in other language versions [...].**⁶⁴¹

Other annulment actions in which comparison was used as a tool include: *NLG v Commission*,⁶⁴² *Putters International v Commission*,⁶⁴³ *Ziegler v Commission*,⁶⁴⁴ *Gosselin*

⁶³⁶ *Ibid.*, paragraph 313.

⁶³⁷ Case T-442/03 *SIC v Commission*, EU:T:2008:228.

⁶³⁸ *Ibid.*, paragraph 235.

⁶³⁹ Case T-256/07 *People's Mojahedin Organization of Iran v Council*, EU:T:2008:461.

⁶⁴⁰ *Ibid.*, paragraph 105.

⁶⁴¹ *Ibid.*, paragraph 108.

⁶⁴² Joined Cases T-109/05 and T-444/05 *NLG v Commission*, EU:T:2011:235, paragraph 174.

⁶⁴³ Case T-211/08 *Putters International v Commission*, EU:T:2011:289, paragraph 59.

⁶⁴⁴ Case T-199/08 *Ziegler v Commission*, EU:T:2011:285, paragraph 66.

Group v Commission,⁶⁴⁵ *Germany v Commission*,⁶⁴⁶ *Du Pont de Nemours (France) e.a. v Commission*⁶⁴⁷ and *Italy v Commission*.⁶⁴⁸

5.5.4. Appeal

In C-542/07 P *Imagination Technologies v OHIM*,⁶⁴⁹ the Court arrived at a conclusion and then compared different language versions:

It must be pointed out that **that finding**, which relates to the French version of Regulation No 40/94, **is borne out by examination of the various other language versions** such as, inter alia, the English, German, Italian and Dutch versions.⁶⁵⁰

In C-402/11 P *Jager & Polacek v OHIM*,⁶⁵¹ the Court discussed the expression ‘when the opposition is found admissible’ and also resorted to comparison as a supplementary method. It first examined the French version: ‘The use of the words *jugée recevable* (found admissible) in the French version of the Implementing Regulation indicates that the European Union legislature intended that OHIM should examine [...]. It then proceeded with the examination of the Spanish, German, English and Italian versions. Most versions seemed to confirm the Court’s interpretation, despite the fact that the term used in German did not have the same ‘force’:

[...] The examination of those different versions – with the exception of the German version, in which the word ‘gilt’ does not have the same force as the words used in the other language versions – shows that the opposition must be found admissible before the *inter partes* proceedings can commence.⁶⁵²

Finally, T-41/09 *Hipp v OHMI - Nestlé (Bebio)*⁶⁵³ concerned an action against a decision of the Second Board of Appeal of OHIM. In this case, there was no divergence but the Court used different languages to make a comparison of the sign and to determine the likelihood of confusion.

⁶⁴⁵ Case T-208/08 *Gosselin Group v Commission*, EU:T:2011:287, paragraph 108.

⁶⁴⁶ Case T-265/08 *Germany v Commission*, EU:T:2012:434, paragraph 26.

⁶⁴⁷ Case T-31/07 *Du Pont de Nemours (France) e.a. v Commission*, EU:T:2013:167, paragraph 227.

⁶⁴⁸ Case T-99/09 *Italy v Commission*, EU:T:2013:200, paragraph 46.

⁶⁴⁹ Case C-542/07 P *Imagination Technologies v OHIM*, EU:C:2009:362.

⁶⁵⁰ *Ibid.*, paragraph 43.

⁶⁵¹ Case C-402/11 P *Jager & Polacek v OHIM*, EU:C:2012:649.

⁶⁵² *Ibid.*, paragraph 51.

⁶⁵³ Case T-41/09 *Hipp v OHMI - Nestlé (Bebio)*, EU:T:2012:163.

As all the examples in Group 3 show, the use of comparison as a tool to support an interpretation is not an exception. From the total number of judgments analysed (136), this method was applied in forty-two cases (31%).

CHAPTER 6: TYPES AND CAUSES OF DIVERGENCES

Chapter 6 explores the different types of divergences detected in the judgments of our corpus: structural-grammatical, lexical-conceptual and lack of consistency. A fine-grained classification is also provided within each group. We triangulate quantitative and qualitative data in order to study the following questions: which methods of interpretation are used for which problems, the types of instruments where divergences appear, and the causes for divergences.

Most of the divergences analysed (fifty-five cases) deal with a structural-grammatical divergences. The second most recurrent divergence is lexical-conceptual (twenty-seven cases):

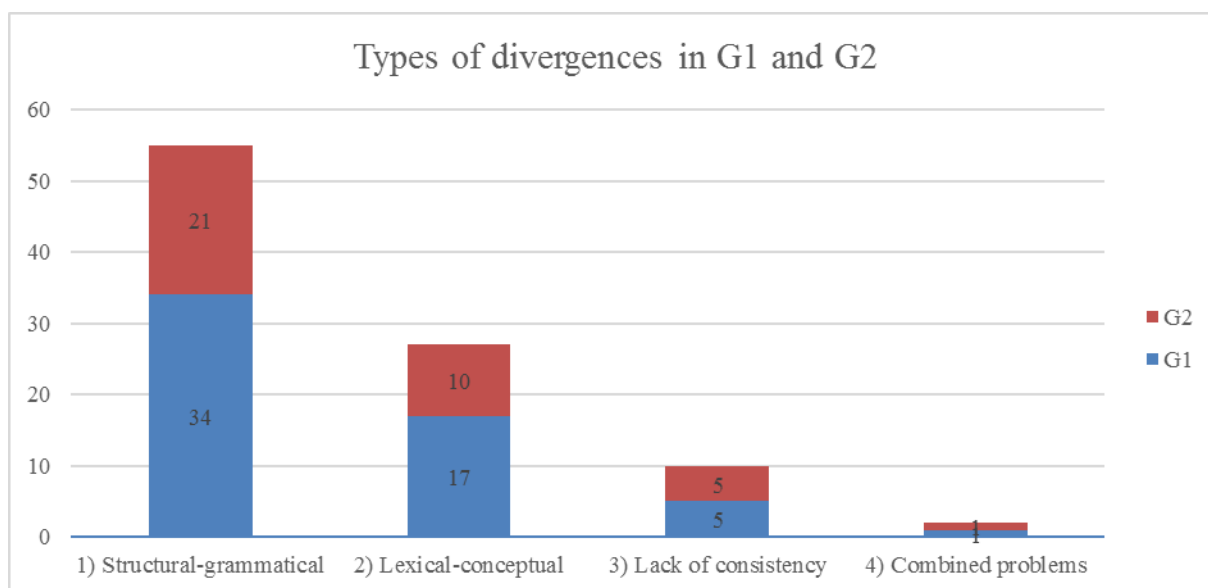


Figure 11: Types of divergences in G1 and G2

6.1. Structural-grammatical

Taking into account both Group 1 and Group 2, there are fifty-six cases that deal with structural-grammatical divergences. The distribution of the cases into the subcategories is as follows:

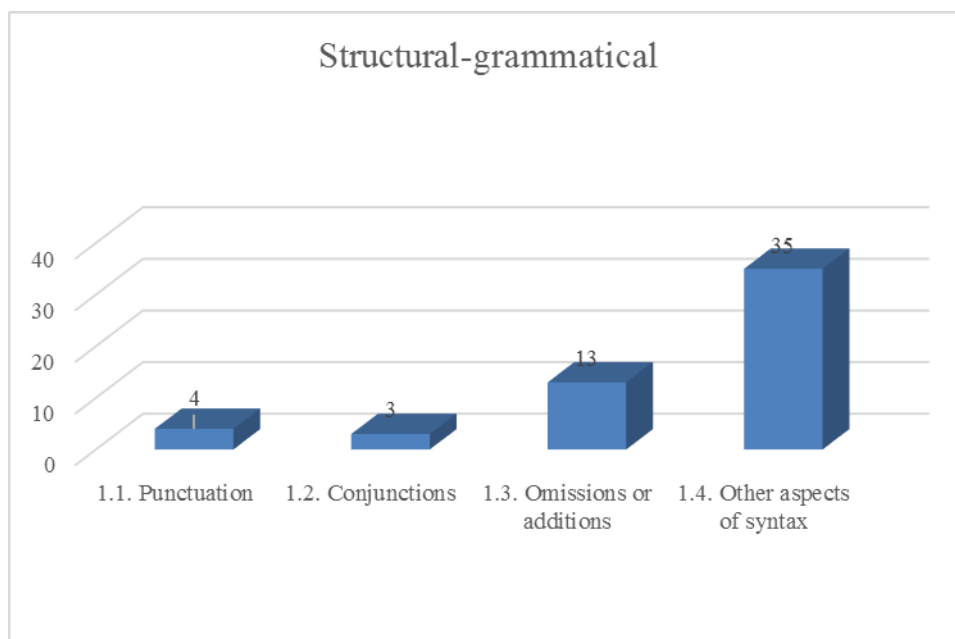


Figure 12: Types of structural-grammatical divergences

Punctuation was the source of interpretative problems in four cases. Three cases correspond to Group 1 (*Able UK*,⁶⁵⁴ *Evroetil*⁶⁵⁵ and C-41/09 *Commission v Netherlands*)⁶⁵⁶ and one to Group 2 (*Uzonyi*).⁶⁵⁷ We have found problems with conjunctions in three cases. One in Group 1 (*DR and TV2 Danmark*)⁶⁵⁸ and two in Group 2 (T-129/09 *Bongrain v OHMI - apetito*⁶⁵⁹ and Joined Cases T-204/08 and T-212/08 *Team Relocations v Commission*).⁶⁶⁰

In addition, the category of ‘Other aspects of syntax’ includes other problems caused by the lack of correspondence between syntagms in different language versions (see section 4.2.2.). We have thirty-five cases that concerned other aspects of syntax: twenty-one in Group 1 and fourteen in Group 2. Finally, we have found thirteen cases that concerned an omission in one of the language versions: nine cases are in Group 1 and four are in Group 2.

6.1.1. Punctuation: Group 1

The cases in Group 1 are *Able UK*,⁶⁶¹ *Evroetil*⁶⁶² and C-41/09 *Commission v Netherlands*.⁶⁶³

⁶⁵⁴ Case C-225/11 *Able UK*, EU:C:2012:252.

⁶⁵⁵ Case C-503/10 *Evroetil*, EU:C:2011:872.

⁶⁵⁶ Case C-41/09 *Commission v Netherlands*, EU:C:2011:108.

⁶⁵⁷ Case C-133/09 *Uzonyi*, EU:C:2010:563.

⁶⁵⁸ Case C-510/10 *DR and TV2 Danmark*, EU:C:2012:244.

⁶⁵⁹ Case T-129/09 *Bongrain v OHMI - apetito (APETITO)*, EU:T:2011:193.

⁶⁶⁰ Joined Cases T-204/08 and T-212/08 *Team Relocations and Others v Commission*, EU:T:2011:286.

⁶⁶¹ Case C-225/11 *Able UK*, EU:C:2012:252.

⁶⁶² Case C-503/10 *Evroetil*, EU:C:2011:872.

⁶⁶³ Case C-41/09 *Commission v Netherlands*, EU:C:2011:108.

In *Able UK*,⁶⁶⁴ the reference for a preliminary ruling related to the interpretation of Article 151(1)(c) of Council Directive 2006/112/EC on the common system of value added tax. According to the order for reference, Able had secured a contract with the United States Department of Transportation Maritime Administration to dismantle thirteen vessels which were in the service of the US Navy. Able had doubts as to the VAT liability of the dismantling service which it provided and argued that the supply was exempt pursuant to Article 151(1)(c) of the VAT Directive. The wording of this provision differed in various language versions (emphasis added):

ES

Los Estados miembros eximirán las operaciones siguientes:

c) las entregas de bienes y las prestaciones de servicios que se realicen en los Estados miembros que formen parte del Tratado del Atlántico Norte **y** se destinen a las **fuerzas armadas** de los otros Estados que formen parte de dicho Tratado, para uso de dichas fuerzas o del elemento civil que las acompaña, o para el aprovisionamiento de sus comedores o cantinas, **siempre que dichas fuerzas estén afectadas al esfuerzo común de defensa;**

DE

Die Mitgliedstaaten befreien folgende Umsätze von der Steuer:

c) Lieferungen von Gegenständen und Dienstleistungen, die in den Mitgliedstaaten, die Vertragsparteien des Nordatlantikvertrags sind, an die Streitkräfte anderer Vertragsparteien bewirkt werden, **wenn diese Umsätze für den Gebrauch oder Verbrauch durch diese Streitkräfte oder ihr ziviles Begleitpersonal oder für die Versorgung ihrer Kasinos oder Kantinen bestimmt sind und wenn diese Streitkräfte der gemeinsamen Verteidigungsanstrengung dienen;**

EN

Member States shall exempt the following transactions:

(c) the supply of goods or services within a Member State which is a party to the North Atlantic Treaty, **intended either for** the armed forces of other States party to that Treaty for the use of those forces, or of the civilian staff accompanying them, **or for** supplying their messes or canteens **when such forces take part in the common defence effort;**

FR

⁶⁶⁴ Case C-225/11 *Able UK*, EU:C:2012:252.

Les États membres exonèrent les opérations suivantes:

c) les livraisons de biens et les prestations de services effectuées dans les États membres parties au traité de l'Atlantique Nord et destinées aux forces armées des autres États parties à ce traité pour l'usage de ces forces ou de l'élément civil qui les accompagne, ou pour l'approvisionnement de leurs mess ou cantines **lorsque ces forces sont affectées à l'effort commun de défense** ;

The wording allowed the last clause of that provision, that is, the phrase ‘when such forces take part in the common defence effort’, to be taken to qualify only the part of the sentence immediately preceding it, namely ‘for supplying their messes or canteens’ and not as qualifying that provision as a whole. The absence of a comma before this last clause bore out such a reading in certain language versions, such as the English and French versions.⁶⁶⁵ The Court acknowledged that there was a comma in that place in certain language versions of the provision, such as in the Spanish, Danish and Dutch versions. However, the Court contended that the presence or absence of a comma could not be taken as decisive in the interpretation of Article 151(1)(c) of the VAT Directive. Then it applied metalinguistic method M2.5.⁶⁶⁶

We agree with the CJEU that an interpretation according to which the last phrase of Article 151(1)(c) of the VAT Directive qualifies only the part of the sentence which immediately precedes it (‘for supplying their messes or canteens’) would result in giving the exemption a scope which would be illogical.⁶⁶⁷ The Court made clear that the provision had to be understood in the light of the objective of the exemption it established.⁶⁶⁸

Analysing the wording in the different languages in more detail, we note other differences apart from the use of the comma. First, in Spanish and French the supply of goods or services must meet two requirements: 1) they must be carried out within a Member State which is a party to the North Atlantic Treaty and 2) they must be intended for the armed forces:

[...] las entregas de bienes y las prestaciones de servicios que se realicen en los Estados miembros [...] **y** se destinan a las fuerzas armadas [...]

[...] les livraisons de biens et les prestations de services effectuées dans les États membres [...] **et** destinées aux forces armées [...]

The German and English versions use a comma instead of the coordinating conjunction ‘and’.

⁶⁶⁵ *Ibid.*, paragraph 11.

⁶⁶⁶ *Ibid.*, paragraph 13.

⁶⁶⁷ *Ibid.*, paragraph 15.

⁶⁶⁸ *Ibid.*, paragraph 17.

In addition, what is even more confusing, and in our opinion erroneous, is the use of the correlative conjunction ‘either...or’ in English:

[...] intended **either for** the armed forces of other States party to that Treaty for the use of those forces, or of the civilian staff accompanying them, **or for** supplying their messes or canteens [...]

The conjunction separates the clause into two parts: 1) either for the armed forces [...] 2) or for supplying [...]. We believe that this is the reason why it was not clear whether the last phrase (‘when such forces take part in the common defence effort’) qualified only one part of the sentence (‘for supplying their messes or canteens’) or the whole provision.

In *Evroetil*,⁶⁶⁹ the referring court asked whether the definition of bioethanol in Article 2(2)(a) of Directive 2003/30 had to be interpreted as meaning that it encompassed a product such as that at issue in the main proceedings. Under Article 2(2)(a) of Directive 2003/30, bioethanol is an ethanol or, in other words, an ethyl alcohol, produced inter alia from biomass and used as biofuel.⁶⁷⁰ But the requirement that it had to be used as biofuel was not clear in the different language versions. Article 2(2)(a) read as follows (emphasis added):

ES

«bioetanol»: etanol producido **para uso como biocarburante**, a partir de la biomasa o de la fracción biodegradable de los residuos;

DE

„Bioethanol“: Ethanol, das aus Biomasse und/oder dem biologisch abbaubaren Teil von Abfällen hergestellt wird **und für die Verwendung als Biokraftstoff bestimmt ist**;

EN

‘bioethanol’: ethanol produced from biomass and/or the biodegradable fraction of waste, **to be used as biofuel**;

FR

a) «bioéthanol»: éthanol produit à partir de la biomasse et/ou de la fraction biodégradable des déchets **et utilisé comme biocarburant**;

⁶⁶⁹ Case C-503/10 *Evroetil*, EU:C:2011:872.

⁶⁷⁰ *Ibid.*, paragraph 40.

The CJEU recognised that a comparative examination of the different language versions of that provision shows that certain versions, such as the Czech and French versions, give the impression that actual use as a biofuel is required, whilst other versions, such as the Italian and Lithuanian versions, seem to indicate that the mere fact that the product is intended to be used as biofuel is sufficient, and yet other language versions, such as the Spanish and Polish versions, may be construed either way.⁶⁷¹

An examination of the languages we have compared shows that the English and Spanish version use a comma to introduce the condition, while the French and German versions use the coordinating conjunction ‘and’, which makes the requirement more explicit. The CJEU applied metalinguistic method M2.5. to clarify the question.⁶⁷²

In Case C-41/09 [*Commission v Netherlands*](#),⁶⁷³ as we explained in section 5.1.2., the grammatical problem concerned a change in the punctuation in point 1 of Annex III to Directive 2006/112. In some versions, a comma had been substituted for a semi-colon.⁶⁷⁴ However, not all language versions had been amended accordingly and this led to ambiguity in the interpretation. Annex III stated in point 1 as follows (emphasis added):

ES

«Los productos alimenticios (incluidas las bebidas, pero con exclusión de las bebidas alcohólicas) para consumo humano o animal, los animales vivos, las semillas, las plantas y los ingredientes utilizados normalmente en la preparación de productos alimenticios; los productos utilizados normalmente como complemento o sucedáneo de productos alimenticios».

DE

„Nahrungs- und Futtermittel (einschließlich Getränke, alkoholische Getränke jedoch ausgenommen), lebende Tiere, Saatgut, Pflanzen und üblicherweise für die Zubereitung von Nahrungs- und Futtermitteln verwendete Zutaten, üblicherweise als Zusatz oder als Ersatz für Nahrungs- und Futtermittel verwendete Erzeugnisse.“

EN

⁶⁷¹ *Ibid.*, paragraph 41.

⁶⁷² *Ibid.*, paragraph 42.

⁶⁷³ Case C-41/09 *Commission v Netherlands*, EU:C:2011:108.

⁶⁷⁴ *Ibid.*, paragraph 46.

‘Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs; products normally used to supplement foodstuffs or as a substitute for foodstuffs’.

FR

Les denrées alimentaires (y compris les boissons, à l'exclusion, toutefois, des boissons alcooliques) destinées à la consommation humaine et animale; les animaux vivants, les graines, les plantes et les ingrédients normalement destinés à être utilisés dans la préparation des denrées alimentaires; les produits normalement utilisés pour compléter ou remplacer des denrées alimentaires.’

According to the German and the Dutch language versions, on which the Kingdom of the Netherlands based its arguments, the phrase ‘normally intended for use in the preparation of foodstuffs’ applied only to ingredients, which means that all supplies of live animals, whatever their use, could be subject to a reduced rate of VAT.⁶⁷⁵ On the other hand, the English, French and Italian versions to which the Commission referred could be interpreted, to different degrees, as meaning that the expression ‘normally intended for use in the preparation of foodstuffs’ applied not only to ingredients but also to live animals, seeds and plants.

The CJEU explained that, as the Advocate General pointed out in point 54 of his Opinion,⁶⁷⁶ from a semantic point of view, the use of a semi-colon after the phrase ‘[f]oodstuffs... for human and animal consumption’ clearly indicated that the phrase was made up of three quite distinct parts, and each of the three parts of the phrase concerned foodstuffs for human and animal consumption.⁶⁷⁷ The CJEU supported its semantic analysis teleologically with an examination of the general scheme⁶⁷⁸ and the purpose of the provision.⁶⁷⁹

6.1.2. Punctuation: Group 2

Regarding the case in Group 2, i.e., *Uzonyi*,⁶⁸⁰ the reference for a preliminary ruling related to the interpretation of Article 143ba(1) of Council Regulation (EC) No 1782/2003, concerning

⁶⁷⁵ *Ibid.*, paragraph 42.

⁶⁷⁶ Case C-41/09 *Commission v Netherlands*, Opinion of AG Bot, EU:C:2010:580.

⁶⁷⁷ *Ibid.*, paragraphs 49 and 50.

⁶⁷⁸ *Ibid.*, paragraph 51.

⁶⁷⁹ *Ibid.*, paragraph 52.

⁶⁸⁰ Case C-133/09 *Uzonyi*, EU:C:2010:563.

an application for a separate sugar payment. The criteria to accede to this payment were not clear because of the provision's wording. The first subparagraph of Article 143ba(1) of Regulation No 1782/2003, headed 'Separate sugar payment' provided (emphasis added):

ES

No obstante lo dispuesto en el artículo 143 *ter* los nuevos Estados miembros que aplican el sistema de pago único por superficie podrán decidir antes del 30 de abril de 2006, la concesión, por lo que se refiere a los años 2006, 2007 y 2008, [de] un pago aparte por azúcar a los agricultores con derecho al mismo bajo el sistema de pago único por superficie. Se concederá sobre la base de criterios objetivos y no discriminatorios, como:

DE

Abweichend von Artikel 143b können die neuen Mitgliedstaaten, die die Regelung für die einheitliche Flächenzahlung anwenden, spätestens bis zum 30. April 2006 beschließen, Betriebsinhabern, die Anspruch auf die einheitliche Flächenzahlung haben, für die Jahre 2006, 2007 und 2008 eine spezielle Zahlung für Zucker zu gewähren. Diese Zahlung wird anhand objektiver und nichtdiskriminierender Kriterien, wie beispielsweise:

EN

By way of derogation from Article 143b the new Member States applying the single area payment scheme may decide by 30 April 2006, to grant in respect of the years 2006, 2007 and 2008, a separate sugar payment to farmers eligible under the single area payment scheme. It shall be granted on the basis of objective and non-discriminatory criteria such as:

FR

«Par dérogation à l'article 143 *ter*, les nouveaux États membres appliquant le régime de paiement unique à la surface peuvent décider, pour le 30 avril 2006 au plus tard, d'accorder pour les années 2006, 2007 et 2008 un paiement séparé pour le sucre aux agriculteurs éligibles dans le cadre du régime de paiement unique à la surface. Ce paiement est accordé sur la base de critères objectifs et non discriminatoires tels que:

The defendant in the main proceedings submitted, before the referring court, that the objective and non-discriminatory criteria were to be applied only in relation to the representative

period, not in relation to the persons eligible for payment who are covered by Article 143ba of Regulation No 1782/2003.⁶⁸¹

It must be noted that Article 1(2) of Council Regulation (EC) No 2011/2006 replaced the second sentence of the first subparagraph of Article 143ba(1) with the following (emphasis added):

ES

Se concederá en relación con un período representativo, que podrá ser diferente para cada producto, de una o más de las campañas de comercialización 2004/05, 2005/06 y 2006/07 que deberán determinar los Estados miembros antes del 30 de abril de 2006, y sobre la base de criterios objetivos y no discriminatorios, como:

DE

Diese Zahlung wird unter Bezug auf einen von den Mitgliedstaaten vor dem 30. April 2006 zu bestimmenden repräsentativen Zeitraum, der aus einem oder mehreren der Wirtschaftsjahre 2004/05, 2005/06 und 2006/07 besteht und für jedes Erzeugnis unterschiedlich sein kann, und anhand objektiver und nicht diskriminierender Kriterien gewährt, wie beispielsweise

EN

It shall be granted in respect of a representative period which could be different for each product of one or more of the marketing years 2004/2005, 2005/2006 and 2006/2007 to be determined by Member States before 30 April 2006, and on the basis of objective and non-discriminatory criteria such as:

FR

«Ce paiement est accordé pour une période représentative — qui pourrait être différente pour chaque produit — d'une ou de plusieurs des campagnes de commercialisation 2004/2005, 2005/2006 et 2006/2007, à déterminer par les États membres avant le 30 avril 2006 sur la base de critères objectifs et non discriminatoires, tels que:

The defendant found confirmation of its submission in the amendment made to Article 143ba of Regulation No 1782/2003 by Article 1(2) of Regulation No 2011/2006. It contended that the amendment simply clarified the wording of the provision without altering the meaning.

⁶⁸¹ *Ibid.*, paragraph 16.

Both before and after the amendment, objective and non-discriminatory criteria were to be applied only in relation to the representative period.⁶⁸²

The referring court considered that the wording of the provision of EU law to be interpreted was unclear and, furthermore, that the provision had been subsequently amended.⁶⁸³ The CJEU acknowledged that the amending provision that had been relied on was not clear in all its available nineteen versions of it. In six of those versions, namely the Danish, Estonian, French, Hungarian, Polish and Portuguese versions, it contained differences in wording which gave rise to uncertainty as to whether objective and non-discriminatory criteria had to be applied when granting the payment or when determining the representative period.⁶⁸⁴

If we take the French language version, it could be interpreted as meaning that Member States should apply the objective criteria when determining the representative period. The absence of the comma before the expression *sur la base de critères objectifs et non discriminatoires* bore out that reading:

Ce paiement est accordé pour une période représentative [...] à déterminer par les États membres [...] **sur** la base de critères objectifs et non discriminatoires [...]

The Spanish, German and English version can be understood as meaning that Member States should apply the objective criteria when granting a payment:

[El pago] Se concederá en relación con un período representativo [...], **y** sobre la base de criterios objetivos y no discriminatorios [...]

Diese Zahlung wird [...] zu bestimmenden repräsentativen Zeitraum, [...], **und** anhand objektiver und nicht diskriminierender Kriterien gewährt,

It [the payment] shall be granted in respect of a representative period [...], **and** on the basis of objective and non-discriminatory criteria [...]

In order to answer the question the CJEU resorted to method M1.1., claiming that the other language versions were clear:

⁶⁸² *Ibid.*, paragraph 16.

⁶⁸³ *Ibid.*, paragraph 20.

⁶⁸⁴ Paragraph 27.

Furthermore, the thirteen other language versions, namely the versions in Spanish, Czech, German, Greek, English, Italian, Latvian, Lithuanian, Dutch, Slovene, Slovak, Finnish and Swedish are worded as clearly as the provision to be interpreted.⁶⁸⁵

Immediately after that, the Court held that Article 143ba of Regulation No 1782/2003 required the new Member States to apply objective and non-discriminatory criteria when granting a separate sugar payment.⁶⁸⁶

6.1.3. Conjunctions: Group 1

Regarding the case in Group 1, in *DR and TV2 Danmark*,⁶⁸⁷ there was uncertainty in the interpretation of a provision because the German version (as well as the Czech and Maltese versions) used the disjunctive coordinating conjunction ‘or’ instead of the copulative coordinating conjunction ‘and’, which the other language versions used.⁶⁸⁸ The referring court wished to ascertain whether recital 41 of the InfoSoc Directive was to be read as ‘on behalf of *and* under the responsibility of the broadcasting organisation’ or as ‘on behalf of *or* under the responsibility of the broadcasting organisation’ (see point 38 of the Opinion of the AG).⁶⁸⁹

Recital 41 read as follows (emphasis added):

ES

Al aplicar la excepción o limitación por lo que respecta a las grabaciones efímeras realizadas por organismos de radiodifusión, debe entenderse que los medios propios de dichos organismos incluyen los de las personas que actúen en nombre **v** bajo la responsabilidad de dichos organismos.

DE

Bei Anwendung der Ausnahme oder Beschränkung für ephemere Aufzeichnungen, die von Sendeunternehmen vorgenommen werden, wird davon ausgegangen, dass zu den eigenen Mitteln des Sendeunternehmens auch die Mittel einer Person zählen, die im Namen **oder** unter der Verantwortung des Sendeunternehmens handelt.

EN

⁶⁸⁵ Paragraph 28.

⁶⁸⁶ Paragraph 29.

⁶⁸⁷ Case C-510/10 *DR and TV2 Danmark*, EU:C:2012:244.

⁶⁸⁸ *Ibid.*, paragraph 41. The CJEU mentioned many languages: ‘By contrast, in other language versions, significantly more numerous (the Bulgarian, Spanish, Danish, Estonian, Greek, English, French, Latvian, Lithuanian, Hungarian, Dutch, Polish, Rumanian, Slovak, Slovenian, Finnish and Swedish language versions) [...]’.

⁶⁸⁹ Case C-510/10 *DR and TV2 Danmark*, Opinion of AG Trstenjak, EU:C:2012:244.

When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations it is understood that a broadcaster's own facilities include those of a person acting on behalf of **and** under the responsibility of the broadcasting organisation.

FR

Lors de l'application de l'exception ou de la limitation pour les enregistrements éphémères effectués par des organismes de radiodiffusion, il est entendu que les propres moyens d'un organisme de radiodiffusion comprennent les moyens d'une personne qui agit au nom **et** sous la responsabilité de celui-ci.

The referring court was not sure whether the two conditions set out in recital 41 in the preamble to Directive 2001/29 had to be understood as being alternative or cumulative in nature. To answer the question, the CJEU first expressed that a purely literal interpretation of the recital at issue did not, in itself, provide an answer to the question referred since it inevitably resulted in 'an outcome which proves to be *contra legem* on the basis of the wording of one or the other of the abovementioned linguistic variants'.⁶⁹⁰ As a consequence, the CJEU resorted to metalinguistic method M2.5.⁶⁹¹

In addition, the Advocate General also provided very interesting reasoning. He first contented that the numerical ratio of the language versions containing the conjunctions in question ('and' or 'or') was immaterial 'as differences of linguistic detail, the determining factor being the purpose and general scheme of the rules of which they form a part'. The main principle is that 'no particular language version has primacy for the purposes of interpretation'.⁶⁹² He also claimed the need to interpret the provision in the light of the versions existing in other languages and explained the implication that multilingualism has on interpretation: '[...] the imprecision attendant upon multi-lingualism means that an individual word will have less force in the provisions of European Union law than it would in a monolingual environment'.⁶⁹³

6.1.4. Conjunctions: Group 2

The two cases in Group 2 are T-129/09 *Bongrain v OHMI - apetito*⁶⁹⁴ and Joined Cases T-204/08 and T-212/08 *Team Relocations v Commission*.⁶⁹⁵

⁶⁹⁰ Case C-510/10 *DR and TV2 Danmark*, EU:C:2012:244, paragraph 43.

⁶⁹¹ *Ibid.*, paragraph 44-45.

⁶⁹² Case C-510/10 *DR and TV2 Danmark*, Opinion of AG Trstenjak, EU:C:2012:244, point 40.

⁶⁹³ *Ibid.*, point 41.

⁶⁹⁴ Case T-129/09 *Bongrain v OHMI - apetito (APETITO)*, EU:T:2011 :193.

As we explained in section 5.3.4., in Case T-129/09 *Bongrain v OHMI - apetito (APETITO)*,⁶⁹⁶ the applicant claimed that the provision separated the goods into three parts, as marked by the coordinating conjunction ‘and’. However, the Court dismissed this argument, claiming that it was ‘evident from the combined reading of the different language versions’ (method M1.1.) that the first ‘and’ attributed the adjective ‘prepared’ to both fruit and vegetables. Its purpose is not to divide the list of goods designated into the foodstuffs mentioned before and those mentioned after the coordinating conjunction’.⁶⁹⁷ The interpretation proposed by the applicant lacked coherence.⁶⁹⁸ In contrast, the interpretation put forward by OHIM was coherent and did not pose any linguistic problems.⁶⁹⁹

Similarly, in the Joined Cases T-204/08 and T-212/08 *Team Relocations v Commission*, the CJEU admitted some divergence in the use of the correlative conjunction ‘both...and’, but did not treat it as a problem of interpretation. The Court clarified it by looking at other language versions (method M1.1.).

6.1.5. Omissions or additions: Group 1

The cases in Group 1 are: *Raiffeisen-Waren-Zentrale Rhein-Main*,⁷⁰⁰ *Kurcums Metal*,⁷⁰¹ *Lietuvos geležinkeliai*,⁷⁰² *Eleftheri tileorasi and Giannikos*,⁷⁰³ *AHP Manufacturing*,⁷⁰⁴ *CEPSA*⁷⁰⁵ (requests for preliminary rulings), C-85/11 *Commission v Ireland*⁷⁰⁶ and C-86/11 *Commission v United Kingdom*⁷⁰⁷ (actions for failure to fulfil an obligation) and Joined Cases T-349/06, T-371/06, T-14/07, T-15/07 and T-332/07 *Germany v Commission*⁷⁰⁸ (actions for annulment).

In *Raiffeisen Waren*,⁷⁰⁹ there was an omission in the French version of Article 9(3) of Regulation No 1768/95. As the Advocate General explained in his Opinion, whereas the majority of the language versions, such as the versions in Spanish, Danish, German, English,

⁶⁹⁵ Joined Cases T-204/08 and T-212/08 *Team Relocations and Others v Commission*, EU:T:2011:286.

⁶⁹⁶ Case T-129/09 *Bongrain v OHMI - apetito (APETITO)*, EU:T:2011:193.

⁶⁹⁷ *Ibid.*, paragraph 25.

⁶⁹⁸ *Ibid.*, paragraph 26.

⁶⁹⁹ *Ibid.*, paragraph 27.

⁷⁰⁰ Case C-56/11 *Raiffeisen Waren*, EU:C:2012:713.

⁷⁰¹ Case C-558/11 *Kurcums Metal*, EU:C:2012:721.

⁷⁰² Case C-250/11 *Lietuvos geležinkeliai*, EU:C:2012:496.

⁷⁰³ Case C-52/10 *Eleftheri tileorasi and Giannikos*, EU:C:2011:374.

⁷⁰⁴ Case C-482/07 *AHP Manufacturing*, EU:C:2009:501.

⁷⁰⁵ Case C-279/06 *CEPSA*, EU:C:2008:485.

⁷⁰⁶ Case C-85/11 *Commission v Ireland*, EU:C:2013:217.

⁷⁰⁷ Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267.

⁷⁰⁸ Joined Cases T-349/06, T-371/06, T-14/07, T-15/07 and T-332/07 *Germany v Commission*, EU:T:2008:318.

⁷⁰⁹ Case C-56/11 *Raiffeisen Waren*, EU:C:2012:713.

Italian, Hungarian, Finnish and Swedish referred to one or more of the three preceding marketing years, the French version omitted the numeral adjective ‘three’.⁷¹⁰ He contended that since it was impossible to draw definite conclusions solely from that divergence, it was necessary to examine the provision at issue in its context taking into account, in particular, its objective.⁷¹¹ The CJEU also applied method M2.3, taking into account the objective of the Regulation.⁷¹²

In *Kurcums Metal*,⁷¹³ there was an omission in the Latvian version of Article 1 of Regulation No 1601/2001. The CJEU attributed the divergence to an ‘editing mistake’ (emphasis added):

In those circumstances, in the light of the general scheme of Article 1 of Regulation No 1601/2001, **the mere omission in the Latvian language version of that provision** of a reference to CN subheading 7312 10 99 in the version of Regulation No 2263/2000, **an omission which is clearly an editing mistake**, does not allow that provision to be interpreted as excluding from its scope the importation from Russia into Latvia of cables such as those at issue in the main proceedings, on the assumption that those cables are covered by CN subheading 7312 10 98.⁷¹⁴

The CJEU first applied metalinguistic method M2.5. and it then considered the description of the goods (method M1.3.).

In *Lietuvos Geležinkeliai*,⁷¹⁵ there was an omission in the Danish, Dutch and Romanian versions of Article 82(2)(a) of Directive 83/181. The CJEU recognised the divergence (emphasis added):

In that regard, as observed in paragraphs 6, 8, 12 and 14 of this judgment, there are divergences between the different language versions of the provisions at issue here. In the Bulgarian, Spanish, Czech, German, Estonian, Greek, English, French, Italian, Latvian, Lithuanian, Hungarian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene and Finnish versions, the vehicle in question is expressly described as being a ‘road’ vehicle, **whilst the Danish and Dutch versions contain no such specification; they refer simply to the notion of ‘motorised vehicle’**.⁷¹⁶

⁷¹⁰ Case C-56/11 *Raiffeisen Waren*, Opinion of AG Jääskinen, EU:C:2012:350, point 26.

⁷¹¹ *Ibid.*, point 27.

⁷¹² Case C-56/11 *Raiffeisen Waren*, EU:C:2012:713, paragraph 28.

⁷¹³ Case C-558/11 *Kurcums Metal*, EU:C:2012:721.

⁷¹⁴ *Ibid.*, paragraph 50.

⁷¹⁵ Case C-250/11 *Lietuvos geležinkeliai*, EU:C:2012:496.

⁷¹⁶ *Ibid.*, paragraph 32.

The CJEU applied method ‘M2.2 Directly teleological-systematic interpretation’,⁷¹⁷ examining the purpose of the provisions in question.⁷¹⁸ It then claimed that ‘where it is necessary to interpret a provision of secondary European Union law, preference should be given, as far as possible, to the interpretation which renders the provision consistent with the treaties and the general principles of European Union law’.⁷¹⁹

In *Eleftheri*,⁷²⁰ the problem was the omission of the adverbial construction meaning ‘in particular’ in the Greek version of the second sentence of Article 1(d) of Directive 89/552. It was used in the Spanish, German, English and French versions but did not appear in the Greek one.⁷²¹ The CJEU applied metalinguistic method M2.4.⁷²²

In *AHP Manufacturing*,⁷²³ there was an omission in the Italian language version: ‘Moreover, the word “pending” does not feature in the Italian language version of Regulation No 1610/96, according to which those applications must merely have been submitted (*[t]uttavia, se sono state introdotte due o più domande*)’.⁷²⁴ The CJEU applied method ‘M2.1. Not only the wording but also the context/scheme and objectives’.⁷²⁵

In *CEPSA*,⁷²⁶ there was an omission in the Spanish version of Article 10 of Regulation No 1984/83: ‘It should be noted that the Spanish version of that article 10 did not specify the nature of those commercial or financial advantages, unlike all the other language versions, which used the term “specific” or “special” to describe those advantages’.⁷²⁷ Faced with this omission, the CJEU applied method M2.2.⁷²⁸ It must be noted that the Advocate General also observed some differences in the French version of this provision. It used the adjective *particuliers* instead of ‘special’, as the other language versions had. This rendered the French version ‘imprecise on this point’.⁷²⁹ However, as seen in the judgment, the CJEU did not tackle this point and focused on the omission in the Spanish version.

⁷¹⁷ *Ibid.*, paragraph 34.

⁷¹⁸ *Ibid.*, paragraph 36.

⁷¹⁹ *Ibid.*, paragraph 40.

⁷²⁰ Case C-52/10 *Eleftheri tileorasi and Giannikos*, EU:C:2011:374.

⁷²¹ *Ibid.*, paragraph 21.

⁷²² *Ibid.*, paragraphs 23 and 24.

⁷²³ Case C-482/07 *AHP Manufacturing*, EU :C:2009 :501.

⁷²⁴ *Ibid.*, paragraph 25.

⁷²⁵ *Ibid.*, paragraph 27.

⁷²⁶ Case C-279/06 *CEPSA*, EU:C:2008:485.

⁷²⁷ *Ibid.*, paragraph 50.

⁷²⁸ *Ibid.*

⁷²⁹ Case C-279/06 *CEPSA*, Opinion of AG Mengozzi, EU:C:2008:163, point 65-66.

Regarding the two cases of actions for failure to fulfil an obligation, in Case C-85/11 *Commission v Ireland*⁷³⁰ and Case C-86/11 *Commission v United Kingdom*,⁷³¹ the European Commission requested the Court to declare that the Member States concerned had failed to fulfil their obligations by permitting non-taxable persons to be members of a group of persons regarded as a single taxable person for the purposes of value added tax.⁷³²

There was uncertainty as to the interpretation of Article 11 of Council Directive 2006/112/EC (emphasis added):

ES

Previa consulta al Comité consultivo del Impuesto sobre el Valor Añadido (denominado en lo sucesivo «Comité del IVA»), cada Estado miembro podrá considerar como un solo sujeto pasivo a **las personas** establecidas en el territorio de ese mismo Estado miembro que gocen de independencia jurídica, pero que se hallen firmemente vinculadas entre sí en los órdenes financiero, económico y de organización.

DE

Nach Konsultation des Beratenden Ausschusses für die Mehrwertsteuer (nachstehend „Mehrwertsteuerausschuss“ genannt) kann jeder Mitgliedstaat in seinem Gebiet **ansässige Personen**, die zwar rechtlich unabhängig, aber durch gegenseitige finanzielle, wirtschaftliche und organisatorische Beziehungen eng miteinander verbunden sind, zusammen als einen Steuerpflichtigen behandeln.

EN

After consulting the advisory committee on value added tax (hereafter, the ‘VAT Committee’), each Member State may regard as a single taxable person **any persons** established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

FR

Après consultation du comité consultatif de la taxe sur la valeur ajoutée (ci-après dénommé «comité de la TVA»), chaque État membre peut considérer comme un seul assujetti **les personnes** établies sur le territoire de ce même État membre qui sont indépendantes du point

⁷³⁰ Case C-85/11 *Commission v Ireland*, EU:C:2013:217.

⁷³¹ Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267.

⁷³² *Ibid.*, paragraph 1.

de vue juridique mais qui sont étroitement liées entre elles sur les plans financier, économique et de l'organisation.

In support of its action, the Commission submitted that Article 11 of the VAT Directive had to be interpreted as meaning that non-taxable persons could not be included in a VAT group for VAT purposes.⁷³³ Disputing the Commission's arguments, the Member States maintained that the Commission's interpretation of Article 11 of the VAT Directive was not consistent with its literal sense. The use of the word 'persons' in the English-language version, and not 'taxable persons', was a deliberate choice on the part of the European Union legislature. The argument set out in the reasoned opinion (i.e., that the word 'taxable' was omitted to eschew repetition) was implausible in view of the fact that, when that directive was adopted, the word 'any' was added in the English-language version thereof between the term 'single taxable person' and the word 'persons'.⁷³⁴

In order to answer the question, the CJEU stated that in determining the scope of a provision of European Union law, its wording, context and objectives had to be taken into account.⁷³⁵ Regarding the wording, the CJEU explained that as Article 11 used the word 'persons' and not the words 'taxable persons', it did not make a distinction between taxable persons and non-taxable persons.⁷³⁶ The Court concluded that it was not apparent from the wording of Article 11 of the VAT Directive that non-taxable persons could not be included in a VAT group. Then, the CJEU proceeded with the analysis of the context⁷³⁷ and the objectives of Article 11 of the VAT Directive.⁷³⁸ It followed that the CJEU dismissed the Commission's action.⁷³⁹

In Joined Cases T-349/06, T-371/06, T-14/07, T-15/07 and T-332/07 [*Germany v Commission*](#),⁷⁴⁰ there was an omission in the German language version of point 6.2 of the

⁷³³ Case C-85/11 *Commission v Ireland*, EU:C:2013:217, paragraphs 27 and 38. Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267, paragraph 20.

⁷³⁴ Case C-85/11 *Commission v Ireland*, EU:C:2013:217, paragraphs 27 and 38. Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267, paragraph 27.

⁷³⁵ Case C-85/11 *Commission v Ireland*, EU:C:2013:217, paragraphs 27 and 38. Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267, paragraph 35.

⁷³⁶ Case C-85/11 *Commission v Ireland*, EU:C:2013:217, paragraphs 27 and 38. Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267, paragraph 36.

⁷³⁷ Case C-85/11 *Commission v Ireland*, EU:C:2013:217, paragraphs 27 and 38. Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267, paragraph 44.

⁷³⁸ Case C-85/11 *Commission v Ireland*, EU:C:2013:217, paragraphs 27 and 38. Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267, paragraph 47.

⁷³⁹ Case C-85/11 *Commission v Ireland*, EU:C:2013:217, paragraphs 27 and 38. Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267, paragraph 51.

⁷⁴⁰ Joined Cases T-349/06, T-371/06, T-14/07, T-15/07 and T-332/07 *Germany v Commission*, EU:T:2008:318.

Guidelines:

[...] for the intermediate level, the German version indicates only ‘sub-programme’ (Unterprogramm) whereas the other versions indicate ‘sub-programme/priority axis’ (‘delprogram/prioriteret’ in Danish, ‘programme/priority axis’ in English, ‘subprograma/eje prioritario’ in Spanish, ‘alaohjelma/toimintalinja’ in Finnish, ‘sous-programme/axe prioritaire’ in French, ‘subprogramma/prioritaire doelstelling’ in Dutch, ‘subprograma/eixo prioritário’ in Portuguese, and ‘underprogram/prioriterat område’ in Swedish).⁷⁴¹

In order to answer the question, the CJEU stated that it was necessary to proceed with contextual, historical and teleological interpretations.⁷⁴²

6.1.6. Omissions or additions: Group 2

The cases in Group 2 are: *Länsstyrelsen i Norrbottens län*⁷⁴³ (request for a preliminary ruling), T-9/07 *Grupo Promer Mon Graphic v OHMI – PepsiCo*, C-38/07 P *Heuschen & Schrouff Oriëntal Foods Trading v Commission*⁷⁴⁴ and Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana v CPVO*⁷⁴⁵ (appeals).

In *Länsstyrelsen i Norrbottens län*,⁷⁴⁶ the Finnish version presented an omission (emphasis added):

Although the Finnish version of that provision contains no reference to the requirement that overheads be allocated ‘pro rata’ to the operation in question, **that fact is of no consequence**, since it follows from settled case-law that Community provisions must be interpreted and applied uniformly in the light of the versions existing in all the Community languages and **since, in this case, the language versions other than the Finnish expressly refer to** the requirement that overheads be allocated pro rata or proportionally to the operation in question [...]⁷⁴⁷

As seen in this ruling, this divergence had no consequences on the interpretation and the CJEU solved it by looking at the other language versions (M1.1.).

⁷⁴¹ *Ibid.*, paragraph 68.

⁷⁴² *Ibid.*, paragraph 69.

⁷⁴³ Case C-289/05 *Länsstyrelsen i Norrbottens län*, EU:C:2007:146.

⁷⁴⁴ Case C-38/07 P *Heuschen & Schrouff Oriëntal Foods Trading v Commission*, EU:C:2008:641.

⁷⁴⁵ Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana v CPVO*, EU:T:2008:25

⁷⁴⁶ Case C-289/05 *Länsstyrelsen i Norrbottens län*, EU:C:2007:146.

⁷⁴⁷ *Ibid.*, paragraph 20.

Moreover, in Case T-9/07 [Grupo Promer Mon Graphic v OHMI – PepsiCo](#),⁷⁴⁸ there was a slight difference in the wording of two provisions relating to the scope of the protection conferred by a design. The vast majority of the language versions indicated the expression a ‘different overall impression’. Three language versions, however, used the expression a ‘different overall visual impression’. The Court compared different language versions and then dispelled the doubt (method M1.1.). The difference in wording between the language versions was insignificant and did not confer a different meaning to the provision.⁷⁴⁹

As we explained in section 5.3.4., in Case C-38/07 P [Heuschen & Schrouff Oriental Foods Trading v Commission](#),⁷⁵⁰ the problem was that unlike other language versions, the Dutch version of the CN did not contain an express reference to ‘dried sheets of flour paste’.⁷⁵¹ The CJEU solved the problem by referring to the description of the goods (method M1.3.).⁷⁵²

Finally, in Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana v CPVO*,⁷⁵³ the French and Greek versions presented some differences in the wording. Article 49(1) of Commission Regulation (EC) No 1239/95 establishing implementing rules for the application of the basic regulation read as follows (emphasis added):

ES

«si el recurso **no cumpliera lo dispuesto en el Reglamento de base** (en particular los artículos 67, 68 y 69) o en el presente Reglamento, en particular el artículo 45, la sala de recurso se encargará de comunicarlo al recurrente y le instará a subsanar las deficiencias observadas, si ello fuera posible, en el plazo que fije la sala» y que, «si el recurso no se corrigiera en dicho plazo, la sala de recurso podrá rechazarlo por improcedente».

DE

„**Stimmt** die Beschwerde **nicht mit den Bestimmungen der Grundverordnung**, insbesondere den Artikeln 67, 68 und 69, oder den Bestimmungen der vorliegenden Verordnung, insbesondere Artikel 45, überein, so teilt die Beschwerdekammer dies dem Beschwerdeführer mit und fordert ihn auf, die festgestellten Mängel, sofern dies möglich ist, innerhalb einer

⁷⁴⁸ Case T-9/07 *Grupo Promer Mon Graphic v OHMI – PepsiCo*, EU:T:2010:96.

⁷⁴⁹ *Ibid.*, paragraph 50.

⁷⁵⁰ Case C-38/07 P *Heuschen & Schrouff Oriental Foods Trading v Commission*, EU:C:2008:641.

⁷⁵¹ *Ibid.*, paragraph 20.

⁷⁵² *Ibid.*, paragraph 42.

⁷⁵³ Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana v CPVO*, EU:T:2008:25.

bestimmten Frist abzustellen. Wird die Beschwerde nicht rechtzeitig berichtigt, so wird sie von der Beschwerdekammer als unzulässig zurückgewiesen.“

EN

‘[i]f the appeal **does not comply with the provisions of the Basic Regulation** and in particular Articles 67, 68 and 69 thereof or those of this Regulation and in particular Article 45 thereof, the Board of Appeal shall so inform the appellant and shall require him to remedy the deficiencies found, if possible, within such period as it may specify’ and that ‘[i]f the appeal is not rectified in good time, the Board of Appeal shall reject it as inadmissible’.

FR

« [s]i le recours **n’est pas conforme aux dispositions** des articles 67, 68 et 69 du règlement de base ou à l’article 45 du présent règlement, la chambre de recours notifie ce fait au requérant et l’invite à remédier aux irrégularités constatées, et ce, si possible, dans les délais qu’elle fixe » et que, « [s]i le recours n’est pas rectifié en temps voulu, la chambre de recours le déclare irrecevable ».

In the French version there was a clear omission of part of the sentence (‘provisions of the Basic Regulation and in particular’). The French version did not mention compliance of the appeal with all the provisions; it directly stated compliance with articles 67, 68 and 69. The Court invoked the need to interpret the provision in the light of the other language versions (method M1.2.) and then concluded that the French and Greek versions did not give that passage ‘a different meaning from that of the other language versions’.⁷⁵⁴

6.1.7. Other aspects of syntax: Group 1

The cases in Group 1 are: *Genil 48 and Comercial Hostelera de Grandes Vinos*,⁷⁵⁵ *Bark*,⁷⁵⁶ *Geltl*,⁷⁵⁷ *Söll*,⁷⁵⁸ *Pacific World and FDD International*,⁷⁵⁹ *Omejc*,⁷⁶⁰ *Laki*,⁷⁶¹ *BVG*,⁷⁶² *Aissen and Rohaan*,⁷⁶³ *Internetportal und Marketing*,⁷⁶⁴ *M and Others*,⁷⁶⁵ *Heinrich Heine*,⁷⁶⁶ *Choque*

⁷⁵⁴ *Ibid.*, paragraph 33.

⁷⁵⁵ Case C-604/11 *Genil 48 and Comercial Hostelera de Grandes Vinos*, EU:C:2013:344.

⁷⁵⁶ Case C-89/12 *Bark*, EU:C:2013:276.

⁷⁵⁷ Case C-19/11 *Geltl*, EU:C:2012:397.

⁷⁵⁸ Case C-420/10 *Söll*, EU:C:2012:111.

⁷⁵⁹ Case C-215/10 *Pacific World and FDD International*, EU:C:2011:528.

⁷⁶⁰ Case C-536/09 *Omejc*, EU:C:2011:398.

⁷⁶¹ Case C-351/10 *Laki*, EU:C:2011:406.

⁷⁶² Case C-144/10 *BVG*, EU:C:2011:300.

⁷⁶³ Joined Cases C-230/09 and C-231/09 *Aissen and Rohaan*, EU:C:2009:490.

⁷⁶⁴ Case C-569/08 *Internetportal und Marketing*, EU:C:2010:311.

Cabrera & Zurita García,⁷⁶⁷ *Djurgården-Lilla Värtans Miljöskyddsförening*,⁷⁶⁸ *Schutzverband der Spirituosen-Industrie*,⁷⁶⁹ *Euro Tex*,⁷⁷⁰ *Profisa*,⁷⁷¹ and *Velvet & Steel Immobilien*⁷⁷² (requests for preliminary rulings), T-374/04 *Germany v Commission* and T-147/09 and T-148/09 *Trelleborg Industrie v Commission* and F-23/10 *Allen v Commission*⁷⁷³ (action before the Civil Service Tribunal).

In *Genil*,⁷⁷⁴ the divergence concerned a prepositional phrase functioning as a circumstance adverbial. There was uncertainty as to the interpretation of Article 19(9) of Directive 2004/39. The referring court asked whether this provision had to be interpreted as meaning that an investment service was offered as part of a financial product where it was linked to that product.⁷⁷⁵ Article 19(9) read as follows (emphasis added):

ES

En caso de que se ofrezca un servicio de inversión **como parte de un producto financiero** que ya esté sujeto a otras disposiciones de la legislación comunitaria o a normas europeas comunes para entidades de crédito y créditos al consume relativas a la valoración de riesgos de los clientes o a los requisitos de información, dicho servicio no estará sujeto además a las obligaciones establecidas en el presente artículo.

DE

Wird eine Wertpapierdienstleistung **als Teil eines Finanzprodukts** angeboten, das in Bezug auf die Bewertung des Risikos für den Kunden und/oder die Informationspflichten bereits anderen Bestimmungen des Gemeinschaftsrechts oder gemeinsamen europäischen Normen für Kreditinstitute und Verbraucherkredite unterliegt, so unterliegt diese Dienstleistung nicht zusätzlich den Anforderungen dieses Artikels.

EN

In cases where an investment service is offered **as part of a financial product** which is already

⁷⁶⁵ Case C-340/08 *M and Others*, EU:C:2010:232.

⁷⁶⁶ Case C-511/08 *Heinrich Heine*, EU:C:2010:189.

⁷⁶⁷ Joined cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera*, EU:C:2009:648.

⁷⁶⁸ Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*, EU:C:2009:631.

⁷⁶⁹ Case C-457/05 *Schutzverband der Spirituosen-Industrie*, EU:C:2007:576.

⁷⁷⁰ Case C-56/06 *Euro Tex*, EU:C:2007:347.

⁷⁷¹ Case C-63/06 *Profisa*, EU:C:2007:233.

⁷⁷² Case C-455/05 *Velvet & Steel Immobilien*, EU:C:2007:232.

⁷⁷³ Case F-23/10 *Allen v Commission*, EU:F:2011:162.

⁷⁷⁴ Case C-604/11 *Genil 48 and Comercial Hosteleria de Grandes Vinos*, EU:C:2013:344.

⁷⁷⁵ *Ibid.*, paragraph 36.

subject to other provisions of Community legislation or common European standards related to credit institutions and consumer credits with respect to risk assessment of clients and/or information requirements, this service shall not be additionally subject to the obligations set out in this Article.

FR

Dans les cas où un service d'investissement est proposé **dans le cadre d'un produit financier** qui est déjà soumis à d'autres dispositions de la législation communautaire ou à des normes communes européennes relatives aux établissements de crédit et aux crédits à la consommation concernant l'évaluation des risques des clients et/ou les exigences en matière d'information, ce service n'est pas en plus soumis aux obligations énoncées dans le présent article.

The CJEU observed that only the French and Portuguese versions used an expression equating to 'within the framework of' in that provision, whereas the Spanish, Danish, German, Greek, English, Italian, Dutch, Finnish and Swedish versions employed terms equivalent to 'as part of', which suggested a closer, more specific link than that connoted by the expression 'within the framework of'. When faced with the divergence, the CJEU resorted directly to metalinguistic method M2.2.⁷⁷⁶

In *Bark*,⁷⁷⁷ the referring court asked whether Article 11(2) of the Statutes of the Galileo Joint Undertaking had to be interpreted as meaning that the conditions of employment of other servants of the European Communities, and more specifically the pay conditions of employment, were applicable to Galileo staff members who were employed on fixed-term contracts.⁷⁷⁸ Article 11(2) read as follows (emphasis added):

ES

Los miembros del personal de la Empresa Común tendrán un contrato de duración limitada **basado en** el régimen aplicable a otros agentes de las Comunidades Europeas.

DE

Die Beschäftigten des gemeinsamen Unternehmens erhalten einen befristeten Anstellungsvertrag **gemäß den** Beschäftigungsbedingungen für die sonstigen Bediensteten der

⁷⁷⁶ *Ibid.*, paragraph 38.

⁷⁷⁷ Case C-89/12 *Bark*, EU:C:2013:276.

⁷⁷⁸ *Ibid.*, paragraph 32.

Europäischen Gemeinschaften.

EN

The members of its staff of the Joint Undertaking shall have a fixed-term contract **based on** the “conditions of employment of other servants of the European Communities”.

FR

Les membres du personnel de l'entreprise commune bénéficient d'un contrat à durée déterminée **s'inspirant** du «régime applicable aux autres agents des Communautés européennes».

The CJEU pointed out that the various language versions diverged: the French or Italian language versions employed an expression equating to ‘guided by’; the Spanish, Czech, Polish, English or Dutch language versions, used, by contrast, the expression ‘based on’. The German language version referred to the term ‘according to’.⁷⁷⁹ In order to answer the question the CJEU employed method M2.5.⁷⁸⁰

In *Geltl*,⁷⁸¹ the referring court had doubts regarding the wording of Article 1(1) of Directive 2003/124. There was a certain divergence between the various language versions of this provision. As the Advocate General explained in his Opinion,⁷⁸² the uncertainty could be attributable to the wording of the German version which, with regard to the materialisation of future sets of circumstances or events, referred to the yardstick of ‘sufficient probability’ (*man mit hinreichender Wahrscheinlichkeit Davon ausgehen kann*), as opposed to the majority of the other language versions of that provision which essentially referred to the yardstick of reasonable expectation.⁷⁸³ Article 1(1) of Directive 2003/124 read as follows (emphasis added):

ES

A efectos de la aplicación del punto 1 del artículo 1 de la Directiva 2003/6/CE, se entenderá que la información es de carácter preciso si indica una serie de circunstancias que se dan o **pueden darse razonablemente** o un hecho que se ha producido o que puede esperarse razonablemente que se produzca, cuando esa información sea suficientemente específica para

⁷⁷⁹ *Ibid.*, paragraph 34.

⁷⁸⁰ *Ibid.*, paragraph 36.

⁷⁸¹ Case C-19/11 *Geltl*, EU:C:2012:397.

⁷⁸² Case C-19/11 *Geltl*, Opinion of AG Mengozzi, EU:C:2012:153.

⁷⁸³ *Ibid.*, paragraph 63.

permitir que se pueda llegar a concluir que el posible efecto de esa serie de circunstancias o hecho sobre los precios de los instrumentos financieros o de los instrumentos financieros derivados correspondientes.

DE

Für die Anwendung von Artikel 1 Absatz 1 der Richtlinie 2003/6/EG ist eine Information dann als präzise anzusehen, wenn damit eine Reihe von Umständen gemeint ist, die bereits existieren oder **bei denen man mit hinreichender Wahrscheinlichkeit davon ausgehen kann**, dass sie in Zukunft existieren werden, oder ein Ereignis, das bereits eingetreten ist oder mit hinreichender Wahrscheinlichkeit in Zukunft eintreten wird, und diese Information darüber hinaus spezifisch genug ist, dass sie einen Schluss auf die mögliche Auswirkung dieser Reihe von Umständen oder dieses Ereignisses auf die Kurse von Finanzinstrumenten oder damit verbundenen derivativen Finanzinstrumenten zulässt.

EN

For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or **may reasonably be expected** to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.

FR

Aux fins de l'application de l'article 1er, point 1, de la directive 2003/6/CE, une information est réputée «à caractère précis» si elle fait mention d'un ensemble de circonstances qui existe ou dont **on peut raisonnablement penser** qu'il existera ou d'un événement qui s'est produit ou dont on peut raisonnablement penser qu'il se produira, et si elle est suffisamment précise pour que l'on puisse en tirer une conclusion quant à l'effet possible de cet ensemble de circonstances ou de cet événement sur les cours des instruments financiers concernés ou d'instruments financiers dérivés qui leur sont liés.

The CJEU recognised that the wording in the various language versions diverged⁷⁸⁴ and

⁷⁸⁴ *Ibid.*, paragraph 42.

resorted to method M2.5. to resolve the question.⁷⁸⁵

In *Söll*,⁷⁸⁶ there were some discrepancies between the different language versions of Article 2(1)(a) of Directive 98/8 (the Biocidal Products Directive). The referring court asked whether the concept of ‘biocidal products’ set out in Article 2(1)(a) of Directive 98/8 had to be interpreted as including products containing active substances which, by reason of their specific mode of action, were intended to act, chemically or biologically, on the target harmful organisms only by indirect means and, where relevant, what was required of such an action.⁷⁸⁷

The provision in question read as follows (emphasis added):

ES

Sustancias activas y preparados que contienen una o más sustancias activas, presentados en la forma en que son suministrados al usuario, destinados a destruir, contrarrestar, neutralizar, impedir la acción o **ejercer un control de otro tipo** sobre cualquier organismo nocivo por medios químicos o biológicos.

DE

Wirkstoffe und Zubereitungen, die einen oder mehrere Wirkstoffe enthalten, in der Form, in welcher sie zum Verwender gelangen, und die dazu bestimmt sind, auf chemischem oder biologischem Wege Schadorganismen zu zerstören, abzuschrecken, unschädlich zu machen, Schädigungen durch sie zu verhindern oder sie **in anderer Weise zu bekämpfen**.

EN

Active substances and preparations containing one or more active substances, put up in the form in which they are supplied to the user, intended to destroy, deter, render harmless, prevent the action of, or otherwise **exert a controlling effect** on any harmful organism by chemical or biological means.

FR

Les substances actives et les préparations contenant une ou plusieurs substances actives qui sont présentées sous la forme dans laquelle elles sont livrées à l'utilisateur, qui sont destinées à détruire, repousser ou rendre inoffensifs les organismes nuisibles, à en prévenir l'action ou à

⁷⁸⁵ *Ibid.*, paragraph 43.

⁷⁸⁶ Case C-420/10 *Söll*, EU:C:2012:111.

⁷⁸⁷ *Ibid.*, paragraph 23.

les **combattre de toute autre manière**, par une action chimique ou biologique.

As the Advocate General explained in his Opinion,⁷⁸⁸ it was necessary to focus on the final part of the second element of the definition, concerning the purpose of that substance.⁷⁸⁹ Some versions used more restrictive terms, in particular the German-language version (*in anderer Weise zu bekämpfen*) and the French-language version (*combattre de toute autre manière*). By contrast, a number of other language versions referred, in broader terms, to a ‘controlling’ effect, as in the English-language version (‘exert a controlling effect’) and also the Italian-language version (*esercitare altro effetto di controllo*).⁷⁹⁰ Thus, the German and French versions suggested that the biocidal products had to be intended to have a direct effect on the target harmful organisms. In contrast, the English and Spanish versions referred in more general terms to a controlling effect on those organisms by the biocidal products. Faced with the divergence, the CJEU applied metalinguistic method M2.2. directly.⁷⁹¹

The case *Pacific World and FDD International*⁷⁹² concerned the interpretation of subheading 8214 20 00 of the Combined Nomenclature. The appellants in the main proceedings argued that it followed from the English version of the subheading that it did not refer expressly to sets of manicure or pedicure ‘instruments’. The CJEU, however, dismissed this argument.⁷⁹³ The subheading read as follows (emphasis added):

ES

Herramientas y surtidos de herramientas de manicura o de pedicura (incluidas las limas para uñas).

DE

Instrumente und Zusammenstellungen, für die Hand- oder Fußpflege (einschließlich Nagelfeilen).

EN

Manicure or pedicure sets and instruments (including nail files).

FR

⁷⁸⁸ Case C-420/10 *Söll*, Opinion of AG Jääskinen, EU:C:2011:705.

⁷⁸⁹ *Ibid.*, point 30.

⁷⁹⁰ *Ibid.*, point 31.

⁷⁹¹ Case C-420/10 *Söll*, EU:C:2012:111, paragraph 26.

⁷⁹² Case C-215/10 *Pacific World and FDD International*, EU:C:2011:528.

⁷⁹³ *Ibid.*, paragraph 47.

Outils et assortiments d'outils de manucures ou de pédicures (y compris les limes à ongles).

The ambiguity in English was in the premodifiers ‘manicure or pedicure’. It was not clear whether they were modifying only ‘sets’ or ‘sets and instruments’. To deal with this question, the CJEU invoked metalinguistic method M2.5.⁷⁹⁴ After that, it referred to the specifications established in the HS Explanatory Note⁷⁹⁵ and, to conclude its ruling, it also mentioned the objective characteristics and properties of the products.⁷⁹⁶

In *Omejc*,⁷⁹⁷ the referring court was not sure about the interpretation of the expression ‘prevents an on-the-spot check from being carried out’, which appeared in Article 23(2) of Regulation No 796/2004. In this case, Ms Omejc was not on the premises the day when an inspector went to carry out a check.⁷⁹⁸ As a consequence, the application Ms Omejc had made was rejected taking the view that the on-the-spot check had been prevented or made impossible for reasons attributable solely to the applicant in the main proceedings.⁷⁹⁹ The referring court sought to know whether the contested provision could be understood as meaning that it included, in addition to deliberate conduct, any act or omission that could be ascribed to the negligence of the farmer or of his representative that had the consequence of preventing an on-the-spot check from being carried out. Article 23(2) read as follows (emphasis added):

ES

Se rechazarán las solicitudes de ayuda correspondientes si el productor o su representante **impide** la ejecución de un control sobre el terreno.

DE

Die betreffenden Beihilfeanträge werden abgelehnt, falls der Betriebsinhaber oder sein Vertreter die Durchführung einer Vor-OrtKontrolle **unmöglich macht**.

EN

The applications for aid concerned shall be rejected if the farmer or his representative

⁷⁹⁴ *Ibid.*, paragraph 48.

⁷⁹⁵ Case C-215/10 *Pacific World and FDD International*, EU:C:2011:528, paragraphs 49 and 50.

⁷⁹⁶ *Ibid.*, paragraph 51. The Court declared in paragraph 28 of the judgment that ‘in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes’.

⁷⁹⁷ Case C-536/09 *Omejc*, EU:C:2011:398.

⁷⁹⁸ *Ibid.*, paragraph 12.

⁷⁹⁹ *Ibid.*, paragraphs 13 and 14.

prevents an on-the-spot check from being carried out.

FR

Les demandes concernées sont rejetées si l'agriculteur ou son représentant empêche la réalisation du contrôle sur place.

The CJEU admitted that the provision presented differences in wording. Some language versions, such as the English, French and Slovene versions used the word ‘prevents’, while other versions used a different formula. Thus, the German version used the expression ‘makes impossible’ and the Italian version makes the rejection of the applications concerned subject to the condition that ‘an on-the-spot check cannot be carried out for reasons which may be ascribed to the farmer or his representative’.⁸⁰⁰

As expounded in section 5.1.1.2., the CJEU applied different methods of interpretation in this case. When it concluded its reasoning it contended that in view of the linguistic differences, the purport of the provision could not be determined on the basis of an exclusively textual interpretation. It was necessary to apply metalinguistic method M2.5.⁸⁰¹

The *Laki* case⁸⁰² revolved around the definition of ‘internal traffic’. The wording of the definition had changed in a new version of the Regulation. The national court sought to know whether that change could be interpreted as a ‘tightening-up’ or ‘as a relaxation of the conditions laid down in the earlier rules’.⁸⁰³ The point was that the change in the wording of the provision noted by the national court was to be found in only some language versions of the Implementing Regulation; the vast majority of language versions did not amend this sentence in Article 670 of the Implementing Regulation.⁸⁰⁴ The CJEU applied method M2.2,⁸⁰⁵ expressing that it did so because it was apparent that a different interpretation of Article 555 would be inconsistent with the scheme of the rules of which that provision forms part.⁸⁰⁶

In *BVG*,⁸⁰⁷ the reference for a preliminary ruling dealt with the interpretation of Article 22(2) of Regulation No 44/2001 (Brussels I Regulation). The case revolved around a contract that

⁸⁰⁰ *Ibid.*, paragraph 23.

⁸⁰¹ *Ibid.*, paragraph 24.

⁸⁰² Case C-351/10 *Laki*, EU:C:2011:406.

⁸⁰³ Paragraph 25.

⁸⁰⁴ Paragraph 40.

⁸⁰⁵ Paragraph 39.

⁸⁰⁶ *Ibid.*

⁸⁰⁷ Case C-144/10 *BVG*, EU:C:2011:300.

had been signed between JPM, an American investment bank, and BVG, a legal person governed by public law whose seat was in Berlin (Germany). This contract contained a clause conferring jurisdiction on the English courts.⁸⁰⁸

BVG had not complied with certain agreed payments and JPM brought proceeding against BVG before the High Court of Justice of England and Wales, the court having jurisdiction under the terms of the contract. BVG submitted that the contract was not valid because it had acted *ultra vires* when the contract was concluded and that the decisions of its organs which had led to the conclusion of that contract were therefore null and void.⁸⁰⁹ Subsequently, BVG also requested the High Court to decline jurisdiction in favour of the German courts, which, in its submission, had exclusive jurisdiction to adjudicate upon the case, under Article 22(2) of Regulation No 44/2001.⁸¹⁰

By its first question, the national court essentially asked whether Article 22(2) had to be interpreted as applying to proceedings in which a company pleaded that a contract could not be relied upon against it because a decision of its organs which led to the conclusion of the contract was supposedly invalid on account of infringement of its statutes.⁸¹¹ Article 22(2) read as follows (emphasis added):

ES

Son exclusivamente competentes, sin consideración del domicilio:

[...]

en materia de validez, nulidad o disolución de sociedades y personas jurídicas, así como en materia de validez de las decisiones de sus órganos, los tribunales del Estado miembro en que la sociedad o persona jurídica estuviere domiciliada; para determinar dicho domicilio, el tribunal aplicará sus reglas de Derecho internacional privado,

DE

Ohne Rücksicht auf den Wohnsitz sind ausschließlich zuständig:

[...]

⁸⁰⁸ *Ibid.*, paragraph 14.

⁸⁰⁹ *Ibid.*, paragraph 17.

⁸¹⁰ *Ibid.*, paragraph 18.

⁸¹¹ *Ibid.*, paragraph 23.

für Klagen, **welche** die Gültigkeit, die Nichtigkeit oder die Auflösung einer Gesellschaft oder juristischen Person **oder die Gültigkeit der Beschlüsse ihrer Organe** zum Gegenstand haben, die Gerichte des Mitgliedstaats, in dessen Hoheitsgebiet die Gesellschaft oder juristische Person ihren Sitz hat. Bei der Entscheidung darüber, wo der Sitz sich befindet, wendet das Gericht die Vorschriften seines Internationalen Privatrechts an;

EN

The following courts shall have exclusive jurisdiction, regardless of domicile:

[...]

in proceedings which have as their **object** the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, **or of the validity of the decisions of their organs**, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

FR

Sont seuls compétents, sans considération de domicile:

[...]

en matière de validité, de nullité ou de dissolution des sociétés ou personnes morales ayant leur siège sur le territoire d'un État membre, **ou de validité des décisions de leurs organes**, les tribunaux de cet État membre. Pour déterminer le siège, le juge applique les règles de son droit international privé;

The CJEU recognised that in the wording of Article 22(2) there was a certain divergence among the various language versions of that provision. According to some of the language versions, the courts where a company or other legal person or an association of natural or legal persons had its seat had exclusive jurisdiction ‘in the matter of’ the validity of its constitution, its nullity or its dissolution or of the validity of the decisions of its organs. By contrast, other language versions provided for such jurisdiction where proceedings had such a question as their ‘object’ or ‘subject-matter’.⁸¹² This second form of wording suggested that only proceedings in which the validity of a company’s constitution or of a decision of a company’s organs was raised as the primary issue were covered by this provision of

⁸¹² *Ibid.*, paragraph 26.

Regulation No 44/2001.⁸¹³

The Court resolved the divergence by applying method M2.5.⁸¹⁴ It adopted a strict interpretation regarding of Article 22 of Regulation No 44/2001 and stated that the divergence was to be resolved by interpreting the provision as covering only proceedings whose principal subject-matter comprised the validity of the constitution, the nullity or the dissolution of the company, legal person or association or the validity of the decisions of its organs.

Moreover, examining the divergence in more detail, we should add that the English version presented a grammatical mistake. Proceedings could have as their object two things: 1) the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, and 2) the validity of the decisions of their organs. In English there was an extra preposition ‘of’ before the second element:

[...] in proceedings which have **as their object** [the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons], or **of** [the validity of the decisions of their organs] [...]

Delving into the possible cause for this textual flaw, we note that the problem with the wording of this article may come from the adaptation of Article 16 of Brussels Convention 1968. The provision in the Brussels Convention 1968 read as follows (emphasis added):

ES

en materia de validez , de nulidad o de disolución que afecte a sociedades o personas morales que tengan su domicilio social en el territorio de un Estado contratante , **o de las decisiones de sus órganos** , los tribunales de ese Estado;

DE

für Klagen, **welche** die Gültigkeit, Nichtigkeit oder die Auflösung einer Gesellschaft oder juristischen Person **oder der Beschlüsse ihrer Organe** zum Gegenstand haben, die Gerichte des Vertragsstaats, in dessen Hoheitsgebiet die Gesellschaft oder juristische Person ihren Sitz hat;

EN

in proceedings which have as their **object** the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, **or**

⁸¹³ *Ibid.*, paragraph 27.

⁸¹⁴ *Ibid.*, paragraph 28.

the decisions of their organs, the courts of the Contracting State in which the company, legal person or association has its seat;

FR

en matière de validité, de nullité ou de dissolution des sociétés ou personnes morales ayant leur siège sur le territoire d'un État contractant, ou des décisions de leurs organes, les tribunaux de cet État;

The CJEU affirmed that the provisions of Article 16 of the Brussels Convention were essentially identical to those of Article 22 of Regulation No 444/2001.⁸¹⁵ However, looking at the provision carefully, it can be seen that the wording is not identical because it was changed after the coordinating conjunction, *or*. This may indicate that the legislator noticed the need to clarify the scope of the provision. However, in spite of the change, it caused indeterminacy.

In *Aissen and Rohaan*,⁸¹⁶ the references for preliminary ruling concerned the interpretation of Article 10(3) of Council Regulation (EC) No 1788/2003. The provision related to the reallocation of the unused part of the national reference quantity allocated to deliveries:

ES

La contribución de cada productor al pago de la tasa que corresponda se determinará mediante decisión del Estado miembro, tanto si se han reasignado como si no, proporcionalmente a las cantidades de referencia individuales de cada productor o según los criterios objetivos que fije cada Estado miembro, de la parte no utilizada de la cantidad nacional de referencia asignada a las entregas:

DE

Je nach Entscheidung des Mitgliedstaats wird der Beitrag der Erzeuger zur Zahlung der fälligen Abgabe, gegebenenfalls nach Neuzuweisung des ungenutzten Anteils der für Lieferungen zugewiesenen einzelstaatlichen Referenzmenge, die proportional zu den Referenzmengen der einzelnen Erzeuger oder nach objektiven, von den Mitgliedstaaten festzulegenden Kriterien erfolgt, wie folgt festgelegt:

EN

Each producer's contribution to payment of the levy shall be established by decision of the

⁸¹⁵ *Ibid.*, paragraph 30.

⁸¹⁶ Joined Cases C-230/09 and C-231/09 *Aissen and Rohaan*, EU:C:2009:490.

Member State, after any unused part of the national reference quantity allocated to deliveries has or has not been re-allocated, **in proportion to the individual reference quantities of each producer or according to objective criteria to be set by the Member States:**

FR

Selon la décision de l'État membre, la contribution des producteurs au paiement du prélèvement dû **est établie**, après réallocation ou non, **proportionnellement aux quantités de référence individuelles de chaque producteur** ou selon des critères objectifs à fixer par les États membres, de la partie inutilisée de la quantité de référence nationale affectée aux livraisons:

It was necessary to ascertain which part of the sentence the adverbial phrase ‘in proportion to the individual reference quantities of each producer or according to objective criteria to be set by the Member States’ qualified. It was not clear whether it was modifying the main verb, i.e., how the contribution to payment shall be established, or whether it was modifying the reallocation of the unused part.

The CJEU first examined the wording in the German, French, Portuguese and Slovene versions of the provision.⁸¹⁷ These versions suggested that the clause referred to the reallocation of the unused part. Then it contended that it appeared from other language versions, such as the Bulgarian, English and Dutch versions, that the clause referred not to the possible reallocation of the unused part of the national reference quantity allocated to deliveries, but to the establishment of the contribution of producers to payment of the levy due.⁸¹⁸

Apart from the uncertainty noted by the referring court, one must remark that the Spanish version presented a wording that, in our opinion, was incorrect. The problem was in the expression ‘reallocation of the unused part’. In French the provision read: ‘[...] après réallocation ou non [...] de la partie inutilisée [...]’. The Spanish version read: ‘[...] tanto si se han reasignado como si no [...], de la parte no utilizada [...]’. As is, the phrase is grammatically incorrect; one solution would be to delete the preposition ‘de’ and to conjugate the verb accordingly: tanto si se **ha reasignado han reasignado** como si no [...], **de** la parte no utilizada [...].

⁸¹⁷ *Ibid.*, paragraph 58.

⁸¹⁸ *Ibid.*, paragraph 59.

To answer the question posed, the CJEU applied method M2.5.⁸¹⁹ After examining the purpose of the Regulation, the CJEU expressed that it was clear from all the language versions of that latter provision that it was indeed the allocation of unused reference quantities which was to be carried out ‘in proportion to the reference quantities of each producer’ and that the contribution of producers to the payment of the levy due was, for its part, established by reference to the overrun of the reference quantity of each individual producer.⁸²⁰

In *Internetportal und Marketing*,⁸²¹ the national court asked whether the circumstances capable of establishing bad faith were listed exhaustively in Article 21(3)(a) to (e) of Regulation No 874/2004. The CJEU observed that there was a degree of disparity between the various language versions.⁸²² Article 21(3) read as follows (emphasis added):

ES

Podrá quedar demostrada la mala fe a efectos de la letra b) del apartado 1 en los casos en que:

DE

Bösgläubigkeit im Sinne von Absatz 1 Buchstabe b) liegt vor, wenn

EN

Bad faith, within the meaning of point (b) of paragraph 1 may be demonstrated, where:

FR

La mauvaise foi au sens du paragraphe 1, point b), peut être démontrée quand:

The CJEU expressed that the expression used in German (*Bösgläubigkeit im Sinne von Absatz 1 Buchstabe b) liegt vor, wenn*) could suggest that the instances of bad faith referred to in Article 21(1)(b) of Regulation No 874/2004 were limited to the cases expressly set out in Article 21(3).⁸²³ In German the present tense was used: *liegt vor*. However, it followed from the language versions other than the German version that the list of the circumstances constituting bad faith which was set out in that provision was merely intended to offer an example. This idea was confirmed by the use of the modal verbs *podrá quedar demostrada*,

⁸¹⁹ *Ibid.*, paragraph 60.

⁸²⁰ *Ibid.*, paragraph 64.

⁸²¹ Case C-569/08 *Internetportal und Marketing*, EU:C:2010:311.

⁸²² *Ibid.*, paragraph 32.

⁸²³ *Ibid.*

‘may be demonstrated’ and *peut être démontrée*.⁸²⁴

The Advocate General contended that a comparison of the various language versions of these provisions revealed an error in the German version. The use of the present tense introduced ‘a categorical tone which could lead it to be inferred that a legitimate interest exists only in the cases expressly referred to’.⁸²⁵

A similar problem with the use of modal verbs was found in *Zurita García and Choque Cabrera*.⁸²⁶ The references for preliminary ruling were made in the course of two actions brought by Bolivian nationals relating to orders for expulsion from Spanish territory. More precisely, the competent authorities ordered their expulsion, either on the ground that they had not obtained an extension of their permission to stay or residence permit, or on the ground that the validity of those documents had expired more than three months previously and they had not sought to have them renewed. That penalty was accompanied with a prohibition on entry to the Schengen area for a period of five years.⁸²⁷

Ms García and Mr Cabrera challenged this decision, arguing that the administration had not applied the principle of proportionality when assessing the circumstances of the case, and did not give reasons for replacing a fine (a sanction that was also possible under EU law) with expulsion.⁸²⁸

The referring court had doubts as to the interpretation of Article 11 of Regulation No 562/2006. It was not clear whether Member States were obliged to adopt a decision to expel a person who no longer fulfils the conditions to reside in a country. The Commission noted a discrepancy between the wording of the Spanish language version of Article 11(3) of Regulation No 562/2006 and that of the other language versions.⁸²⁹ The CJEU then affirmed that there was a divergence and treated it as a problem of interpretation. Article 11(3) read as follows (emphasis added):

ES

De no refutarse la presunción a que se refiere el apartado 1, el nacional del tercer país **será**

⁸²⁴ *Ibid.*, paragraph 34. The CJEU compared different languages: The idea expressed by the verb ‘pouvoir’ is also to be found in other language versions, including the English (‘may’), Italian (‘può’), Spanish (‘podrá’), Polish (‘można’), Portuguese (‘pode’), Dutch (‘kan’) and Bulgarian (‘може’) versions.

⁸²⁵ Case C-569/08 *Internetportal und Marketing*, Opinion of AG Trstenjak, EU:C:2010:65, point 84.

⁸²⁶ Joined cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera*, EU:C:2009:648.

⁸²⁷ *Ibid.*, paragraphs 24-25.

⁸²⁸ *Ibid.*, paragraph 26.

⁸²⁹ *Ibid.*, paragraph 52.

expulsado por las autoridades competentes del territorio del Estado miembro de que se trate.

DE

Wird die Annahme nach Absatz 1 nicht widerlegt, so **können** die zuständigen Behörden den Drittstaatsangehörigen aus dem Hoheitsgebiet der betreffenden Mitgliedstaaten **ausweisen**.

EN

Should the presumption referred to in paragraph 1 not be rebutted, the third-country national **may be expelled** by the competent authorities from the territory of the Member States concerned.

FR

Dans le cas où la présomption visée au paragraphe 1 ne serait pas renversée, les autorités compétentes **peuvent expulser** le ressortissant du pays tiers du territoire de l'État membre concerné.

In the Spanish language version, the future verb tense had been used and it imposed an obligation, inasmuch as it provided that the competent authorities of the Member State had to expel a third-country national from the territory of that Member State if the presumption was not rebutted. By contrast, in all the other language versions, expulsion appeared as an option for those authorities. The use of modal verbs confirmed that: *können*, *may*, *peuvent*.

The CJEU referred to settled case law and highlighted the need for uniform application and interpretation of EU law. As a first argument, the CJEU applied method ‘M2.8. Real intention of the author’. Subsequently, it argued that the wording used in one language version was not enough (method M2.5.).⁸³⁰

The Court concluded that the Spanish version was the only one that diverged and it went back to the Opinion of the Advocate General.⁸³¹ In her Opinion, the AG recalled that in the case of divergence between language versions, the provision concerned had to be interpreted, in principle, consulting the purpose and general scheme of the rules of which it formed a part. However, she added that it was not necessary to examine this in detail: ‘A provision which diverges in the language versions must also be interpreted on the basis of the real intention of

⁸³⁰ *Ibid.*, paragraph 55.

⁸³¹ Joined cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera*, Opinion of AG Kokott, EU:C:2009:322.

its author'.⁸³² In order to elucidate the intention of the authors, she resorted to the history of the provision:

It is apparent from the legislative history of Article 11(3) of the Borders Code that the Spanish version does not correspond to the real intention of the legislature, but arises from an error in translation.⁸³³

Thus the AG made clear that the problem rooted in 'an error in translation'. It was a problem that could have been avoided.

In *M and Others*,⁸³⁴ the national court and the parties advanced contradictory interpretations regarding Article 2(2) of Regulation No 881/2002. The provision read as follows (emphasis added):

ES

Se prohíbe poner a disposición de las personas físicas y jurídicas, grupos o entidades señalados por el Comité de Sanciones y enumerados en el anexo I, o **utilizar en beneficio suyo, directa o indirectamente**, cualquier tipo de fondos.

DE

Den vom Sanktionsausschuss benannten und in Anhang I aufgeführten natürlichen oder juristischen Personen, Gruppen oder Organisationen dürfen Gelder **weder direkt noch indirekt** zur Verfügung gestellt werden oder **zugute kommen**.

EN

No funds **shall be made available, directly or indirectly**, to, or **for the benefit of**, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.

FR

Aucun fonds ne doit pas être **mis, directement ou indirectement**, **à la disposition ni utilisé au bénéfice** des personnes physiques ou morales, des groupes ou des entités désignés par le comité des sanctions et énumérés à l'annexe I.

The CJEU claimed that since the Treasury relied on the English language version of that provision, it was to be considered whether the question referred could be answered by giving

⁸³² *Ibid.*, point 42.

⁸³³ *Ibid.*

⁸³⁴ Case C-340/08 *M and Others*, EU:C:2010:232.

a literal interpretation, which called for a comparison of the various language versions of that provision.⁸³⁵ However, as the Advocate General put it in his Opinion, ‘the literal interpretation of the wording of Article 2(2) is uncertain, because the various language versions are not identical in their formulation’.⁸³⁶ It was not clear whether the expression ‘directly or indirectly’ meant the prohibition of making funds available or the prohibition of using funds for the benefit of such persons.

The Treasury inferred that the prohibition included making funds available indirectly for the benefit of a designated person.⁸³⁷ In its view, ‘that provision applies also when funds are made available to someone other than the designated person but when the latter indirectly derives benefit therefrom’.⁸³⁸ The Court mentioned other language versions that were worded like the English version: ‘the Treasury’s definition of the ambit of Article 2(2) of Regulation No 881/2002 could also be founded on certain other language versions, such as the versions in Hungarian, Dutch, Finnish and Swedish.’⁸³⁹

However, the Court recognised that the wording of the provision in other language versions, in particular the versions in Spanish, French, Portuguese and Romanian, was different’.⁸⁴⁰ It was clear from those latter language versions that, in addition to making funds directly or indirectly available, it also prohibited that funds be ‘used for the benefit of’ a designated person.⁸⁴¹ In those language versions, the benefit supposedly derived by a designated person was linked, not to the making available of funds, but to their use. Furthermore, in those language versions, the words ‘directly or indirectly’ related to the making available of funds and not to their use.⁸⁴²

Moreover, other language versions, such as those in German and Italian, did not fall within either of the two groups of language versions described above, but used their own terminology.⁸⁴³ Thus, those versions, in addition to laying down the prohibition of making funds directly or indirectly available to a designated person, also prohibited that funds ‘benefit’ (*zugute kommen*) such a person, or that they be ‘allocated for the benefit of’

⁸³⁵ *Ibid.*, paragraph 33-34.

⁸³⁶ Case C-340/08 *M and Others*, Opinion of AG Mengozzi, EU:C:2010:13, point 77.

⁸³⁷ Case C-340/08 *M and Others*, EU:C:2010:232, paragraph 36.

⁸³⁸ *Ibid.*, paragraph 37.

⁸³⁹ *Ibid.*, paragraph 38.

⁸⁴⁰ *Ibid.*

⁸⁴¹ *Ibid.*, paragraph 39.

⁸⁴² *Ibid.*, paragraph 40.

⁸⁴³ *Ibid.*, paragraph 43.

(*stanziar[e] a ... vantaggio*) such a person.⁸⁴⁴

In order to answer the question, the CJEU invoked method ‘M2.2 Directly teleological-systematic interpretation’.⁸⁴⁵ The contested provision had to be construed in terms of the purpose and general scheme of the legislation of which it formed a part.⁸⁴⁶ The CJEU explained that the funds in question were in fact used by the spouses concerned to meet the essential needs of the households to which the designated persons belonged.⁸⁴⁷ In consequence, considering the variations found to exist in the language versions of Article 2(2) of Regulation No 881/2002, the provision had to be construed as meaning that it did not apply to the payment of social security or social assistance benefits in circumstances such as those under issue in the main proceedings.⁸⁴⁸

In *Heinrich Heine*,⁸⁴⁹ the problem revolved around the interpretation of Article 6(1), first subparagraph, second sentence, and Article 6(2), second sentence, of Directive 97/7. The provisions read as follows (emphasis added):

ES

6(1) Respecto a todo contrato negociado a distancia, el consumidor dispondrá de un plazo mínimo de siete días laborables para rescindir el contrato sin penalización alguna y sin indicación de los motivos. **El único gasto que podría imputarse al consumidor es el coste directo de la devolución de las mercancías al proveedor.**

6(2) 2. Cuando el consumidor haya ejercido el derecho de rescisión con arreglo a lo dispuesto en el presente artículo, el proveedor estará obligado a devolver las sumas abonadas por el consumidor sin retención de gastos. **Únicamente podrá imputarse al consumidor que ejerza el derecho de rescisión el coste directo de la devolución de las mercancías.** La devolución de las sumas abonadas deberá efectuarse lo antes posible y, en cualquier caso, en un plazo de treinta días.

DE

6(1) Der Verbraucher kann jeden Vertragsabschluß im Fernabsatz innerhalb einer Frist von mindestens sieben Werktagen ohne Angabe von Gründen und ohne Strafzahlung widerrufen.

⁸⁴⁴ *Ibid.*, paragraph 43.

⁸⁴⁵ *Ibid.*, paragraph 44.

⁸⁴⁶ *Ibid.*, paragraph 49.

⁸⁴⁷ *Ibid.*, paragraph 60.

⁸⁴⁸ *Ibid.*, paragraph 63.

⁸⁴⁹ Case C-511/08 *Heinrich Heine*, EU:C:2010:189.

Die einzigen Kosten, die dem Verbraucher infolge der Ausübung seines Widerrufsrechts auferlegt werden können, sind die unmittelbaren Kosten der Rücksendung der Waren.

6(2)(2) Übt der Verbraucher das Recht auf Widerruf gemäß diesem Artikel aus, so hat der Lieferer die vom Verbraucher geleisteten Zahlungen kostenlos zu erstatten. **Die einzigen Kosten, die dem Verbraucher infolge der Ausübung seines Widerrufsrechts auferlegt werden können, sind die unmittelbaren Kosten der Rücksendung der Waren.** Die Erstattung hat so bald wie möglich in jedem Fall jedoch binnen 30 Tagen zu erfolgen.

EN

6(1) For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. **The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.**

6(2) 2. Where the right of withdrawal has been exercised by the consumer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. **The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.** Such reimbursement must be carried out as soon as possible and in any case within 30 days.

FR

6(1) Pour tout contrat à distance, le consommateur dispose d'un délai d'au moins sept jours ouvrables pour se rétracter sans pénalités et sans indication du motif. **Les seuls frais qui peuvent être imputés au consommateur en raison de l'exercice de son droit de rétractation sont les frais directs de renvoi des marchandises.**

6(2) Lorsque le droit de rétractation est exercé par le consommateur conformément au présent article, le fournisseur est tenu au remboursement des sommes versées par le consommateur, sans frais. **Les seuls frais qui peuvent être imputés au consommateur en raison de l'exercice de son droit de rétractation sont les frais directs de renvoi des marchandises.** Ce remboursement doit être effectué dans les meilleurs délais et, en tout cas, dans les trente jours.

The national court observed that the words *infolge der Ausübung seines Widerrufsrechts* ('because of the exercise of his right of withdrawal') in the German version of Article 6(1), first subparagraph, second sentence, and Article 6(2), second sentence, of Directive 97/7

could suggest that those provisions related only to the costs incurred as a result of exercising the right of withdrawal, excluding costs of delivering the goods which have already been incurred at the date of withdrawal. Other language versions of the directive, in particular the French and English versions, supported this interpretation.⁸⁵⁰

The CJEU admitted that in certain language versions, the wording of Article 6(1), first subparagraph, second sentence, and Article 6(2), second sentence, of the directive could be interpreted either as relating only to costs incurred following the exercise of the right of withdrawal and caused by it, or as relating to all of the costs incurred by the conclusion, performance or termination of the contract which could be charged to the consumer if he exercised his right of withdrawal. As the Advocate General noted in point 41 of his Opinion,⁸⁵¹ even if the German, English and French versions of Directive 97/7 used respectively the terms *infolge*, ‘because of’ and *en raison de*, other language versions of that directive, in particular the Spanish and Italian, did not use such terms, but merely referred to consumers who exercised their right of withdrawal.⁸⁵²

Faced with this divergence, the CJEU resorted to metalinguistic method ‘M2.4. In the light of the other versions + in case of divergence purpose and scheme’.⁸⁵³ It then concluded that Article 6(1), first subparagraph, second sentence, and Article 6(2), second sentence, of the directive related to all of the costs incurred under the contract and not only costs incurred following the exercise of the right of withdrawal and caused by it.⁸⁵⁴

In *Djurgården-Lilla Värtans Miljöskyddsförening*,⁸⁵⁵ the referring court asked whether a project of the type at issue in the main proceedings had to be regarded as being covered by ‘groundwater abstraction and artificial groundwater recharge schemes not included in Annex I to Directive 85/337 mentioned in point 10(1) of Annex II to that directive’.⁸⁵⁶ According to the referring court, the Swedish version of point 10(1) of Annex II could only cover projects for abstracting groundwater with a view to the subsequent use of that water.⁸⁵⁷

As the Advocate General explained in his Opinion, both Sweden and the Commission took

⁸⁵⁰ *Ibid.*, paragraph 24.

⁸⁵¹ Case C-511/08 *Heinrich Heine*, Opinion of AG Mengozzi, EU:C:2010:48.

⁸⁵² Case C-511/08 *Heinrich Heine*, EU:C:2010:189, paragraph 50.

⁸⁵³ *Ibid.*, paragraph 51.

⁸⁵⁴ *Ibid.*, paragraph 53.

⁸⁵⁵ Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*, EU:C:2009:631.

⁸⁵⁶ *Ibid.*, paragraph 23.

⁸⁵⁷ *Ibid.*, paragraph 24.

the view that the project in question fell within Annex II.⁸⁵⁸ More specifically, the Commission argued that if doubt should arise from any of the translations such a discrepancy could not give rise to a narrow interpretation of the scope of the directive.⁸⁵⁹ The AG agreed with the Commission in that the doubts raised by the referring court could not stem from the other translations.⁸⁶⁰

The CJEU first applied method M2.4.,⁸⁶¹ but then clarified the question by referring to other language versions (method M1.1.):

As far as concerns point 10(1) of Annex II to Directive 85/337, it is clear from an examination of the various language versions and, in particular, the Dutch, English, Finnish, French, German, Italian, Polish, Portuguese and Spanish versions, that that provision covers groundwater abstraction and artificial groundwater recharge schemes not included in Annex I to that directive, irrespective of the purpose for which those works must be carried out and, in particular, of the subsequent use of the water thereby abstracted or recharged into the ground.

Finally, the CJEU concluded that the scope of Directive 85/337 was wide and its purpose very broad.⁸⁶²

In *Schutzverband*,⁸⁶³ there was doubt as to the interpretation of Article 5(3)d) of Directive 75/106. The national court asked whether prepackages with a nominal volume of 0.071 litre which contained one of the products listed in section 4 and which were lawfully manufactured and marketed in Ireland or the United Kingdom could also be marketed in the other EC Member States. Article 5(3)d) read as follows (emphasis added):

ES

Sin perjuicio de la letra b), podrán comercializarse los productos enumerados en el punto 4 del Anexo III que se presenten en el volumen de 0,071 litros en Irlanda y en el Reino Unido.

DE

Unbeschadet des Buchstabens b) dürfen die in Anhang III Nr. 4 genannten Erzeugnisse in

⁸⁵⁸ Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*, Opinion of AG Sharpston, EU:C:2009:421, point 23.

⁸⁵⁹ *Ibid.*, point 24.

⁸⁶⁰ *Ibid.*, point 27.

⁸⁶¹ Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*, EU:C:2009:631. paragraphs 25 and 26.

⁸⁶² *Ibid.*, paragraph 29.

⁸⁶³ Case C-457/05 *Schutzverband der Spirituosen-Industrie*, EU:C:2007:576.

Irland und im Vereinigten Königreich in 0,071 l-Volumen in den Verkehr gebracht werden.

EN

Without prejudice to subparagraph (b), products listed in Annex III, section 4, and having the volume of 0.071 litre may be marketed in Ireland and the United Kingdom.

FR

Sans préjudice du point b), peuvent être commercialisés les produits énumérés à l'annexe III point 4 qui se présentent dans le volume de 0,071 litre en Irlande et au Royaume-Uni.

This provision provided an exception to the prohibition of marketing.⁸⁶⁴ However, the Court admitted that a comparative examination of the different language versions of that provision offered no clear indication of the precise scope of the exception which that provision provided.⁸⁶⁵ It was not clear to which part of the sentence the adverbial phrase ‘in Ireland and the United Kingdom’ modified:

It is clear from an examination of certain language versions of Article 5(3)(d) of Directive 75/106 that the products set out in section 4 of Annex III to that directive, having the volume of 0.071 litre in Ireland and the United Kingdom, may be marketed, whilst, according to other language versions of the same provision, products having the volume of 0.071 litre may be marketed in Ireland and the United Kingdom.⁸⁶⁶

The CJEU resorted to metalinguistic method M2.4.⁸⁶⁷ Then it pointed out that ‘where it is necessary to interpret a provision of secondary Community law, preference should be given to the interpretation which renders the provision consistent with the EC Treaty and the general principles of Community law.’⁸⁶⁸ The Court concluded that Article 5(3)(d) of the Directive had to be interpreted as meaning that prepackages with a nominal volume of 0.071 litre, which contained one of the products listed in section 4 of the same directive, and which were lawfully manufactured and marketed in Ireland or the United Kingdom, could also be marketed in all the other EC Member States.⁸⁶⁹

[*Euro Tex*](#)⁸⁷⁰ concerned the interpretation of the Europe Agreement establishing an association

⁸⁶⁴ *Ibid.*, paragraph 14.

⁸⁶⁵ *Ibid.*, paragraph 15.

⁸⁶⁶ *Ibid.*, paragraph 16.

⁸⁶⁷ *Ibid.*, paragraphs 17 and 18.

⁸⁶⁸ *Ibid.*, paragraph 22.

⁸⁶⁹ *Ibid.*, paragraph 31.

⁸⁷⁰ Case C-56/06 *Euro Tex*, EU:C:2007:347.

between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, approved by Decision 93/743/Euratom, ECSC, EC of the Council, and more specifically of Article 7(1)(b) of Protocol 4 to that agreement. The provision read as follows (emphasis added):

ES

las **operaciones simples** de desempolvado, cribado, selección, clasificación, preparación de surtidos (incluso la formación de juegos de artículos), lavado, pintura y troceado;

DE

einfaches Entstauben, Sieben, Aussondern, Einordnen, Sortieren (einschließlich des Zusammenstellens von Sortimenten), Waschen, Anstreichen, Zerschneiden;

EN

simple operations **consisting of** removal of dust, sifting or screening, sorting, classifying, matching (including the making-up of sets of articles), washing, painting, cutting up;

FR

les **opérations simples** de dépoussiérage, de criblage, de triage, de classement, d'assortiment (y compris la composition de jeux de marchandises), de lavage, de peinture, de découpage ;

In the referring court's view, certain language versions of that protocol suggested that there was a distinction between simple matching operations and complex matching operations, whereas other versions seemed to indicate that all the operations referred to in Article 7(1)(b) of Protocol 4 were, by definition, 'simple'.⁸⁷¹

The slight ambiguity in the wording suggested two different interpretations: the one that the applicant relied on (that there was a distinction between simple and complex operations) and the one that the Commission suggested (that all operations were 'simple').

In order to solve the problem the Court resorted to teleological-systematic interpretation (method M2.2.).⁸⁷² It concluded that no distinction between simple and complex matching operations could be drawn either from the wording of Article 7(1)(b) of Protocol 4 or from the purposes of that protocol.

⁸⁷¹ *Ibid.*, paragraph 16.

⁸⁷² *Ibid.*, paragraph 27.

In *Profisa*,⁸⁷³ it was the referring court that noted some divergence in the wording of Article 27(1)(f). As the problem was to be found in the Lithuanian language version, we do not enter into detail about the divergence. The CJEU applied metalinguistic method ‘M2.4. In the light of the other versions + in case of divergence purpose and scheme’.⁸⁷⁴

In *Velvet & Steel Immobilien*,⁸⁷⁵ the preliminary ruling concerned the interpretation of Article 13B(d)(2) of Sixth Council Directive 77/388/EEC. The national court asked whether the assumption of the obligation to renovate property constituted a transaction which was exempt from turnover tax pursuant to Paragraph 4(8)(g) of the UStG (the transposition into national law of Article 13B (d)(2) of the Sixth Directive). It considered that the wording of this provision excluded any limitation of the exemption to pecuniary obligations. Nevertheless, the court was uncertain whether that interpretation was in conformity with Article 13B(d)(2) of the Sixth Directive because there were some differences in the wording in the various language versions. Article 13B(d)(2) read as follows (emphasis added):

ES

la negociación y la **prestación de fianzas**, cauciones y otras modalidades de garantía, así como la gestión de garantías de créditos efectuada por quienes los concedieron.

DE

die Vermittlung und **die Übernahme von Verbindlichkeiten**, Bürgschaften und anderen Sicherheiten und Garantien sowie die Verwaltung von Kreditsicherheiten durch die Kreditgeber.

EN

the negotiation of or **any dealings in credit guarantees** or any other security for money and the management of credit guarantees by the person who is granting the credit.

FR

la négociation et la **prise en charge d’engagements**, de cautionnements et d’autres sûretés et garanties ainsi que la gestion de garanties de crédits effectuée par celui qui a octroyé les crédits.

Unlike the German and French language versions, the English language version of that

⁸⁷³ Case C-63/06 *Profisa*, EU:C:2007:233.

⁸⁷⁴ *Ibid.*, paragraphs 13 and 14.

⁸⁷⁵ Case C-455/05 *Velvet & Steel Immobilien*, EU:C:2007:232.

provision referred not to the assumption of obligations generally (*prise en charge d'engagements, Übernahme von Verbindlichkeiten*) but solely to special forms of guarantees or securities.⁸⁷⁶ The CJEU added that a comparative analysis of the different language versions of the provision revealed terminological differences regarding the concept of assumption of obligations. In certain language versions, such as the German, French and Italian, the above mentioned expression has a general meaning, whereas in others, such as English and Spanish, it clearly refers to pecuniary obligations.⁸⁷⁷

The CJEU applied method M2.5.⁸⁷⁸ It contended that in view of the linguistic differences, the scope of the phrase in question had to be interpreted in the light of the context in which it was used and of the aims and scheme of the Sixth Directive.⁸⁷⁹ Finally, the CJEU explained that the conclusion that it was the intention of the legislature to exempt the assumption of non-pecuniary obligations from VAT was not supported by the wording, context or purpose of Article 13B(d)(2) of the Sixth Directive. It followed that the assumption of such obligations was subject to VAT.⁸⁸⁰

As we pointed out in section 5.1.3., Case T-374/04 [Germany v Commission](#)⁸⁸¹ concerned the interpretation of Criterion 10 of Annex III to Directive 2003/87. The provision read as follows (emphasis added):

ES

el [PNA] contendrá una lista de las instalaciones cubiertas por la presente Directiva con mención de las cifras de derechos de emisión **que se prevé asignar** a cada una.

DE

Der [NZP] muss eine Liste der unter diese Richtlinie fallenden Anlagen unter Angabe der Anzahl Zertifikate enthalten, die den einzelnen Anlagen **zuguteilt werden sollen**.

EN

the [NAP] shall contain a list of the installations covered by this Directive with the quantities of allowances **intended to be allocated** to each.

⁸⁷⁶ *Ibid.*, paragraph 12.

⁸⁷⁷ *Ibid.*, paragraph 18.

⁸⁷⁸ *Ibid.*, paragraph 19.

⁸⁷⁹ *Ibid.*, paragraph 20.

⁸⁸⁰ *Ibid.*, paragraph 25.

⁸⁸¹ Case T-374/04 *Germany v Commission*, EU:T:2007:332.

FR

[l]e [PNA] contient la liste des installations couvertes par la présente directive avec pour chacune d'elles les quotas **que l'on souhaite** lui allouer.

The CJEU recognised that the expression *que l'on souhaite lui allouer* in the French version was reproduced in the Spanish and Portuguese versions. All these versions expressed the same subjective character — involving a certain degree of independent will — of the individual allocation of emission allowances to the various installations.

However, this character was toned down and became a simple intention in the versions drafted in English, Danish, Finnish and Swedish, where the phrase was reproduced with a slightly different sense, namely as meaning 'which the Member State would intend to allocate'. Moreover, in the German version (*zugeteilt werden sollen*) and the Dutch version the individual allocation of emission allowances to the various installations had an increasingly neutral and objective character. This neutral and objective character was accentuated slightly further in the Greek version and the Italian version, which presented the individual allocation of emission allowances simply as a future act ('will be allocated').⁸⁸²

The CJEU supplemented the literal interpretation and the comparative reading of the various language versions by a historical interpretation.⁸⁸³ However, the historical interpretation did not provide additional information⁸⁸⁴ and it was necessary to provide a contextual interpretation.⁸⁸⁵

As we have already explained, in the Joined Cases T-147/09 and T-148/09 [Trelleborg Industrie v Commission](#),⁸⁸⁶ it was necessary to ascertain whether the infringement had to be categorised as repeated, which the applicants disputed. Article 25(2) of Regulation No 1/2003 presented some differences in the wording (emphasis added):

ES

El plazo de prescripción comenzará a contar a partir del día en que se haya cometido la infracción. No obstante, respecto de las **infracciones continuas o continuadas**, la prescripción sólo empezará a contar a partir del día en que haya finalizado la infracción.

⁸⁸² *Ibid.*, paragraph 95.

⁸⁸³ *Ibid.*, paragraph 97.

⁸⁸⁴ *Ibid.*, paragraph 99.

⁸⁸⁵ *Ibid.*, paragraph 100.

⁸⁸⁶ Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie v Commission*, EU:T:2013:259.

DE

Die Verjährungsfrist beginnt mit dem Tag, an dem die Zuwiderhandlung begangen worden ist. Bei **dauernden oder fortgesetzten Zuwiderhandlungen** beginnt die Verjährung jedoch erst mit dem Tag, an dem die Zuwiderhandlung beendet ist.

EN

Time shall begin to run on the day on which the infringement is committed. However, in the case of **continuing or repeated infringements**, time shall begin to run on the day on which the infringement ceases.

FR

La prescription court à compter du jour où l'infraction a été commise. Toutefois, pour les **infractions continues ou répétées**, la prescription ne court qu'à compter du jour où l'infraction a pris fin.

The Spanish version, for instance, referred to *infracciones continuas o continuadas* (continuing or continued infringements), while the other versions referred explicitly to 'repeated infringement'. When the Court examined the provisions as a whole, it pointed out that the contested provisions had been based on the provisions of a previous regulation. The Court found that the wording in French had been changed from *infractions continue ou continueés* to *infractions continue ou répétée*. However, not all the language versions of that provision had been amended in that way.⁸⁸⁷ The CJEU remarked that some language versions remained unchanged:

[...] when adopting Regulation No 1/2003, the legislature retained, in most of the language versions, the terminology which previously appeared in Regulation No 2988/74 (they were, in this instance, the Spanish, Danish, German, Greek, Dutch, Finnish and Swedish language versions), whereas the other language versions were also amended in order to include the concept of a repeated infringement instead of an 'infraction continuée' (this concerned the Italian and Portuguese language versions).⁸⁸⁸

The CJEU expressed that it was not the legislature's intention to amend the meaning of the earlier provision; on the contrary, it intended to put an end to the possible confusion to which

⁸⁸⁷ *Ibid.*, paragraphs 77-79.

⁸⁸⁸ *Ibid.*, paragraph 80.

the use of the concept of *infracion continuée* had given rise.⁸⁸⁹ However, we consider that this divergence would have been avoided if all language versions had been amended in a consistent way.

Finally, as described in section 5.1.4., Case F-23/10 *Allen v Commission*⁸⁹⁰ concerned the interpretation of a decision laying down general implementing provisions for the reimbursement of medical expenses ('the GIP'). The Commission noted linguistic divergences.⁸⁹¹ The problem revolved around the expression 'shortened life expectancy'. The German version read *ungünstige Lebenserwartung* (poor life expectancy), the English version read 'shortened life expectancy' and the French one read *pronostic vital défavorable* (life-threatening illness).⁸⁹² The expressions used in the German and English versions referred more to a shortening of lifespan, whereas the French version referred to significant likelihood of dying.⁸⁹³

In order to reconcile this divergence the Court applied the method 'M2.8. Real intention of the author' emphasising the need to interpret the expression in the light of the other languages.⁸⁹⁴ The fact that the Court resorted to the real intention of the author did not mean that it completely disregarded the objectives of the rules. This is evidenced by the use of some expressions like 'that text seeks' and 'the authors of the text specified'.⁸⁹⁵ The Court finally interpreted the French version in conformity with the other versions.⁸⁹⁶

6.1.8. Other aspects of syntax: Group 2

The cases in Group 2 are: *RVS Levensverzekeringen*,⁸⁹⁷ *Elsacom*,⁸⁹⁸ *Hofmann*,⁸⁹⁹ *Stoppelkamp*,⁹⁰⁰ *Latchways and Eurosafe Solutions*,⁹⁰¹ *Eschig*,⁹⁰² *Consiglio Nazionale degli Ingegneri*,⁹⁰³ *Codirex expeditie*,⁹⁰⁴ *Sunshine Deutschland Handelsgesellschaft*⁹⁰⁵ (requests for

⁸⁸⁹ *Ibid.*, paragraph 82.

⁸⁹⁰ Case F-23/10 *Allen v Commission*, EU:F:2011:162.

⁸⁹¹ *Ibid.*, paragraph 53.

⁸⁹² *Ibid.*, paragraph 54.

⁸⁹³ *Ibid.*, paragraph 55.

⁸⁹⁴ *Ibid.*, paragraph 57.

⁸⁹⁵ *Ibid.*, paragraph 58.

⁸⁹⁶ *Ibid.*, paragraphs 60 and 61.

⁸⁹⁷ Case C-243/11 *RVS Levensverzekeringen*, EU:C:2013:85.

⁸⁹⁸ Case C-294/11 *Elsacom*, EU:C:2012:382.

⁸⁹⁹ Case C-419/10 *Hofmann*, EU:C:2012:240.

⁹⁰⁰ Case C-421/10 *Stoppelkamp*, EU:C:2011:640.

⁹⁰¹ Case C-185/08 *Latchways*, EU:C:2010:619.

⁹⁰² Case C-199/08 *Eschig*, EU:C:2009:538.

⁹⁰³ Case C-311/06 *Consiglio*, EU:C:2009:37.

⁹⁰⁴ Case C-400/06 *Codirex expeditie*, EU:C:2007:519.

⁹⁰⁵ Case C-229/06 *Sunshine Deutschland Handelsgesellschaft*, EU:C:2007:239.

preliminary rulings), T-576/08 *Germany v Commission*⁹⁰⁶ and T-161/05 *Hoechst v Commission*⁹⁰⁷ (actions for annulment), C-54/09 P *Greece v Commission*⁹⁰⁸ and T-405/05 *Powerserv Personalservice v OHMI - Manpower (MANPOWER)*.⁹⁰⁹ (appeal).

In [RVS Levensverzekeringen](#),⁹¹⁰ the CJEU dealt with the interpretation of Article 50(3) of Directive 2002/83. The provision read as follows (emphasis added):

ES

Sin perjuicio de una armonización posterior, los Estados miembros aplicarán a las **empresas de seguros que adquieran compromisos en su territorio** sus disposiciones nacionales relativas a las medidas destinadas a garantizar la percepción de los impuestos indirectos y las exacciones parafiscales debidas en virtud del apartado 1.

DE

Jeder Mitgliedstaat wendet vorbehaltlich einer späteren Harmonisierung auf die **Versicherungsunternehmen, die Verpflichtungen in seinem Hoheitsgebiet eingehen**, seine einzelstaatlichen Bestimmungen an, mit denen die Erhebung der indirekten Steuern und steuerähnlichen Abgaben, die nach Absatz 1 fällig sind, sichergestellt werden soll.

EN

Pending future harmonisation, each Member State shall apply to those **assurance undertakings which cover commitments situated within its territory** its own national provisions for measures to ensure the collection of indirect taxes and parafiscal charges due under paragraph 1.

FR

Sous réserve d'une harmonisation ultérieure, chaque État membre applique aux **entreprises d'assurance qui prennent des engagements sur son territoire** ses dispositions nationales concernant les mesures destinées à assurer la perception des impôts indirects et taxes parafiscales dus en vertu du paragraphe 1.

RVS relied on a literal interpretation but the CJEU ruled it out:

⁹⁰⁶ Case T-576/08 *Germany v Commission*, EU:T-2011:166.

⁹⁰⁷ Case T-161/05 *Hoechst v Commission*, EU:T:2009:366.

⁹⁰⁸ Case C-54/09 P *Greece v Commission*, EU:C:2010/451.

⁹⁰⁹ Case T-405/05 *Powerserv Personalservice v OHMI – Manpower*, EU:T:2008:442.

⁹¹⁰ Case C-243/11 *RVS Levensverzekeringen*, EU:C:2013:85.

Indeed, contrary to what RVS claims, the use, in some of the language versions of that provision, such as the versions in French and Dutch, of the wording ‘assurance undertakings which assume commitments on its territory’ in referring to the undertakings to which the competent Member State is to apply those measures, does not lead to the conclusion that competence over taxation is determined on the date of signature of the assurance contract.

From the languages we compare, we see that the Spanish and French versions referred to ‘assuming commitments’, while the English version referred to ‘covering commitments’. The CJEU explained that the wording in the French and Dutch versions could be subject to different interpretations in so far as it referred to the signature of the assurance contract as well as to the place where the commitments were situated.⁹¹¹ However, the English language version made clear reference to the undertakings which covered commitments in a given Member State and did not contain any reference to the conclusion or the signature of the assurance contract.⁹¹²

In addition, the Advocate General argued that the interpretation of Article 50(3) depended on what the phrase ‘situated within its territory’ meant.⁹¹³ She explained that it could refer to ‘cover’ and so emphasise the place where the contract was concluded. On the other hand, it was also possible for the phrase to be related to ‘the commitments’. The decisive factor in each case, then, would be where the commitments covered were. That possible interpretation was reflected even more clearly in the English language version. In any event, she took the view that the place where a commitment was situated could not be the place where the contract was concluded.⁹¹⁴

In [Elsacom](#),⁹¹⁵ the problem concerned the interpretation of the last phrase in Article 7(1) of the Eighth VAT Directive:

ES

[...] La solicitud del artículo 9, dentro de los seis meses siguientes a la expiración del año natural durante el que se hubiera devengado el impuesto.

DE

⁹¹¹ *Ibid.*, paragraph 37.

⁹¹² *Ibid.*

⁹¹³ Case C-243/11 *RVS Levensverzekeringen*, Opinion of AG Kokott, EU:C:2013:85, point 39.

⁹¹⁴ *Ibid.*, point 40.

⁹¹⁵ Case C-294/11 *Elsacom*, EU:C:2012:382.

[...] Der Antrag ist **spätestens sechs Monate** nach Ende des Kalenderjahres, in dem die Steuer fällig geworden ist, an die in Artikel 9 Absatz 1 bezeichnete zuständige Behörde zu stellen.

EN

[...] Applications shall be submitted to the competent authority referred to in the first paragraph of Article 9 **within six months** of the end of the calendar year in which the tax became chargeable.

FR

[...] La demande doit être présentée au service compétent visé à l'article 9 premier alinéa **au plus tard dans les six mois** qui suivent l'expiration de l'année civile au cours de laquelle la taxe est devenue exigible.

The referring court asked whether the six-month time-limit for submitting an application for a VAT refund was a mandatory time-limit.⁹¹⁶ The CJEU first answered the question with linguistic methods M1.3. and M1.1. Then it supported its interpretation by invoking metalinguistic method M2.5.,⁹¹⁷ making reference to the purpose of the rules in question.⁹¹⁸

Moreover, as we highlighted in section 5.3.1.1., in [Hofmann](#),⁹¹⁹ the problem concerned the use of the verb tense in the German-language version. It was not clear if the measures covered the possibility of a driving license that had been withdrawn in the past. The verb tense used in German (*worden ist*) gave the impression that the measures could cover a withdrawal in the past. However, by referring to the other language versions (method M1.1.), the Court made clear that the said measure had to be current. We should remark that the CJEU supported its interpretation with metalinguistic method 'M2.5. Wording not enough or not helpful + in case of divergence purpose and scheme'.⁹²⁰

[Stoppelkamp](#)⁹²¹ concerned the interpretation of Article 21(1)(b) of Sixth Council Directive 77/388/EEC as amended by Directive 2000/65. The provision read as follows (emphasis added):

ES

⁹¹⁶ *Ibid.*, paragraph 23.

⁹¹⁷ *Ibid.*, paragraph 27.

⁹¹⁸ *Ibid.*, paragraph 28.

⁹¹⁹ Case C-419/10 *Hofmann*, EU:C:2012:240.

⁹²⁰ *Ibid.*, paragraph 68.

⁹²¹ Case C-421/10 *Stoppelkamp*, EU:C:2011:640.

los sujetos pasivos destinatarios de servicios a que se refiere la letra e) del apartado 2 del artículo 9 o, cuando estén identificados a efectos del impuesto sobre el valor añadido en el interior del país, los destinatarios de los servicios a que se refieren las partes C, D, E y F del artículo 28 ter, siempre que el servicio sea prestado por un **sujeto pasivo no establecido en el interior del país**;

DE

der steuerpflichtige Empfänger einer in Artikel 9 Absatz 2 Buchstabe e) genannten Dienstleistung oder der Empfänger einer in Artikel 28b Teile C, D, E und F genannten Dienstleistung, der im Inland für Zwecke der Mehrwertsteuer erfasst ist, wenn die Dienstleistung von einem **im Ausland ansässigen Steuerpflichtigen** erbracht wird;

EN

taxable persons to whom services covered by Article 9(2)(e) are supplied or persons who are identified for value added tax purposes within the territory of the country to whom services covered by Article 28b(C), (D), (E) and (F) are supplied, if the services are carried out by a **taxable person not established within the territory of the country**;

FR

par le preneur assujetti de services visés à l'article 9, paragraphe 2, point e), ou par le preneur, qui est identifié à la taxe sur la valeur ajoutée à l'intérieur du pays, de services couverts par l'article 28 ter, titres C, D, E et F, si les services sont effectués par un **assujetti non établi à l'intérieur du pays**;

The CJEU acknowledged that ‘from a combined reading of, in particular, the French and German-language versions of Article 21(1)(b) of the Sixth Directive’, the German language version did not employ the terms ‘taxable person who is not established within the territory of the country’. The latter version used the expression *im Ausland ansässigen Steuerpflichtigen* (‘taxable person established abroad’). The question was to determine whether the status of *im Ausland ansässigen Steuerpflichtigen* required that the taxable person have established the seat of his economic activity outside the country or whether, in addition, his personal residence had to be outside the territory of the country.⁹²²

⁹²² *Ibid.*, paragraph 20.

The CJEU revealed that the problem rooted in an inconsistent amendment to the wording. Prior to the amendments introduced by Directive 2000/65, the expression used was ‘taxable person established abroad’, not only in the German, but also, in particular, in the Spanish, Danish, English, French, Italian, Dutch, Portuguese and Swedish language versions. Following the entry into force of that amending directive, all of these language versions employed, in contrast to the German language version, the concept corresponding to that of ‘taxable person who is not established within the territory of the country’.⁹²³

The Court clarified the question by referring to the definition of ‘taxable person not established within the territory of the country’ found in Article 1 of the Eighth Directive (method M1.3).⁹²⁴ Then it concluded that to be considered a ‘taxable person who is not established within the territory of the country’, it was sufficient that the taxable person had established the seat of his economic activity outside that country.⁹²⁵

In *Latchways and Eurosafe Solutions*⁹²⁶ the problem with the wording appeared in the Dutch version, because of which we do not enter into details about the divergence. The CJEU applied method M1.1.⁹²⁷

In *Eschig*,⁹²⁸ there was some divergence in the eleventh recital of the preamble to Directive 87/344 (emphasis added):

ES

«Considerando que el interés del asegurado en defensa jurídica implica que este último pueda elegir por sí mismo su abogado o cualquier otra persona que tenga las cualificaciones admitidas por la legislación nacional en el marco de cualquier procedimiento judicial o administrativo y **cada vez** que surja un conflicto de intereses.[...]

DE

„Das Interesse des Rechtsschutzversicherten setzt voraus, dass Letzterer selbst seinen Rechtsanwalt oder eine andere Person wählen kann, die die nach den einzelstaatlichen Rechtsvorschriften im Rahmen von Gerichts- und Verwaltungsverfahren anerkannten Qualifikationen besitzt, **und zwar immer**, wenn es zu einer Interessenkollision kommt. [...]

⁹²³ *Ibid.*, paragraph 21.

⁹²⁴ *Ibid.*, paragraph 24.

⁹²⁵ *Ibid.*, paragraph 36.

⁹²⁶ Case C-185/08 *Latchways*, EU:C:2010:619.

⁹²⁷ *Ibid.*, paragraph 57.

⁹²⁸ Case C-199/08 *Eschig*, EU:C:2009:538.

EN

‘Whereas the interest of persons having legal expenses cover means that the insured person must be able to choose a lawyer or other person appropriately qualified according to national law in any inquiry or proceedings and **whenever** a conflict of interests arises; [...]

FR

«considérant que l’intérêt de l’assuré en protection juridique implique que ce dernier puisse choisir lui-même son avocat ou toute autre personne ayant les qualifications admises par la loi nationale dans le cadre de toute procédure judiciaire ou administrative et **chaque fois** que surgit un conflit d’intérêt; [...]

As we explained in section 5.3.1.1., the CJEU recognised that the words *und zwar immer* in the German language version of that recital could be interpreted as tying the right to freely choose a representative to the occurrence of a conflict of interests. The Court invoked method ‘M1.2. In the light of the other versions’ and then added that ‘it is apparent from the comparison of those different language versions that the right to freely choose a representative in the context of any inquiry or proceedings is recognised independently of the occurrence of a conflict of interests’.⁹²⁹

In *Consiglio*,⁹³⁰ the Consiglio Nazionale degli Ingegneri and the Italian and Austrian Governments based their arguments on the wording of certain language versions, which presented some divergences. First, in only the Italian and Hungarian versions, Article 1(b) of Directive 89/48 referred to a national ‘of another Member State’ (*di un altro Stato membro/egy másik tagállam*), instead of a national ‘of a Member State’.⁹³¹ In addition, in only the German and Hungarian versions, the first paragraph of Article 2 of the directive referred to the pursuit of a regulated profession ‘in another Member State’ (*in einem anderen Mitgliedstaat/egy másik tagállamban*), instead of the pursuit of a regulated profession ‘in a host Member State’.⁹³² Regarding the first paragraph of Article 3 of this directive, the Italian, Spanish and Slovene versions only referred to a refusal directed against a national of ‘another Member State’ (*di un altro Stato membro/de otro Estado miembro/druge države članice*), rather than a refusal directed against a national of ‘a Member State’.⁹³³ Finally, in only the

⁹²⁹ *Ibid.*, paragraph 55.

⁹³⁰ Case C-311/06 *Consiglio*, EU:C:2009:37.

⁹³¹ *Ibid.*, paragraph 7.

⁹³² *Ibid.*, paragraph 9.

⁹³³ *Ibid.*, paragraph 11.

Italian and Slovene versions, point (a) of the first paragraph of Article 3 of the directive referred to a diploma which was awarded ‘in another Member State’ (*in un altro Stato membro/drugi državi članici*), instead of a diploma which was awarded ‘in a Member State’.⁹³⁴

Despite these differences in wording, the CJEU ruled out the arguments relied on by the Consiglio Nazionale degli Ingegneri and the Italian and Austrian Governments.⁹³⁵ The CJEU insisted on the need to take into account the different language versions (method M1.2.) and then supported its interpretation with the objective of Directive 89/48.⁹³⁶

In *Codirex expeditie*,⁹³⁷ the reference for a preliminary ruling concerned the interpretation of subheading 0202 30 50 of the Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87. The referring court asked if a consignment of frozen boned meat from the forequarter of the bovine animal, consisting of several pieces, could be classified under subheading 0202 30 50.⁹³⁸ This subheading read as follows:

ES

-- cortes de cuartos delanteros y cortes de pecho, llamados “australianos”

DE

-- als „crops“, „chucks and blades“ und „briskets“ bezeichnete Teile

EN

— Crop, chuck and blade and brisket cuts

FR

— découpes de quartiers avant et de poitrines dites 'australiennes' [...]

Some language versions of subheading 0202 30 50 made no reference to the ‘forequarter’, as a whole, but to the parts of it indicated, according to the English terminology, by the words ‘crop[s]’ and chuck[s] and blade [s]’, appearing, inter alia, in the English and Dutch versions of the CN.⁹³⁹ The Court admitted that the different language versions diverged:

⁹³⁴ *Ibid.*, paragraph 12.

⁹³⁵ *Ibid.*, paragraph 52.

⁹³⁶ *Ibid.*, paragraph 55.

⁹³⁷ Case C-400/06 *Codirex expeditie*, EU:C:2007:519.

⁹³⁸ *Ibid.*, paragraph 15.

⁹³⁹ *Ibid.*, paragraph 19.

[...] the different language versions of the wording of subheading 0202 30 50 are not altogether coterminous, in so far as some of them refer expressly to the forequarter of the bovine animal (such as the French and Spanish versions of the CN) while others refer expressly to different parts of the forequarter such as crops and chucks and blades (such as the Dutch, English and German versions of the CN).⁹⁴⁰

The Court replied directly that in the absence of coterminous texts, the CN did not expressly require the frozen boned forequarter of the bovine animal to be presented at customs in a single piece. It seemed to clarify the question by referring to other language versions (method M1.1.): [...] ‘since some language versions of subheading 0202 30 50 do not even refer to the whole of the forequarter of the bovine animal’.⁹⁴¹

Furthermore, as it was explained in section 5.3.1.2., in the [Sunshine Deutschland Handelsgesellschaft](#) case⁹⁴² the Commission pointed out a divergence between different language versions of the explanatory notes to the CN even though the Court did not analyse the divergence. It contended that there was no need to take account of the explanatory notes.⁹⁴³ The decisive criterion for the classification of goods for customs purposes had to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the the section and chapter notes (method M1.3.).⁹⁴⁴

The actions for annulment, [T-576/08 Germany v Commission](#)⁹⁴⁵ and [T-161/05 Hoechst v Commission](#),⁹⁴⁶ have already been commented in section 5.3.2. Similarly, the appeals [C-54/09 P Greece v Commission](#)⁹⁴⁷ and [T-405/05 Powerserv Personalservice v OHMI - Manpower \(MANPOWER\)](#)⁹⁴⁸ have been commented in section 5.3.4.

6.2. Lexical-conceptual

Taking into account both Groups 1 and 2, there are twenty-seven cases that deal with Lexical-conceptual problems. The distribution of cases into subcategories is as follows:

⁹⁴⁰ *Ibid.*, paragraph 20.

⁹⁴¹ *Ibid.*, paragraph 21.

⁹⁴² Case C-229/06 *Sunshine Deutschland Handelsgesellschaft*, EU:C:2007:239.

⁹⁴³ *Ibid.*, paragraph 31.

⁹⁴⁴ *Ibid.*, paragraph 26.

⁹⁴⁵ Case T-576/08 *Germany v Commission*, EU:T-2011:166.

⁹⁴⁶ Case T-161/05 *Hoechst v Commission*, EU:T:2009:366.

⁹⁴⁷ Case C-54/09 P *Greece v Commission*, EU:C:2010/451.

⁹⁴⁸ Case T-405/05 *Powerserv Personalservice v OHMI – Manpower*, EU:T:2008:442.

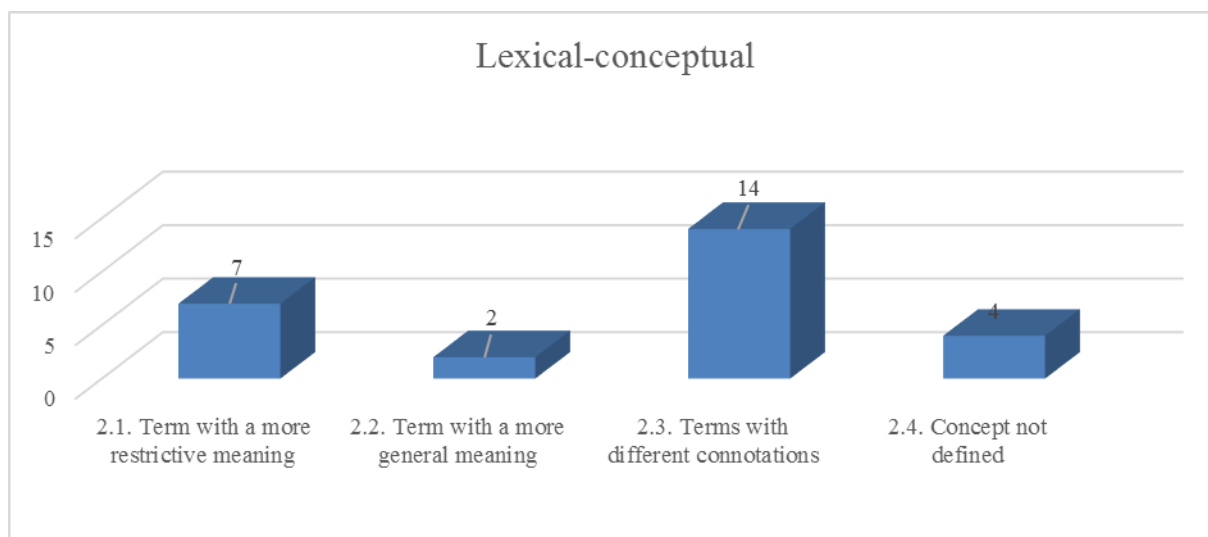


Figure 13: Types of lexical-conceptual divergences

We have found problems of terms with a more restrictive meaning in seven cases (all in Group 1). There are only two cases of terms with a more general meaning: one in Group 1 and one in Group 2. In addition, we have found problems of language versions using terms with different connotations in fourteen cases: five in Group 1 and nine in Group 2. Finally, there are four cases that we include in Group 1, although the main problem is not the divergence; rather, the difficulty is that the concepts are not defined in the legislation.

6.2.1. Term with a more restrictive meaning: Group 1

The cases are as follows: *Promociones y Construcciones BJ 200*,⁹⁴⁹ *Asbeek Brusse and de Man Garabito*,⁹⁵⁰ *A*,⁹⁵¹ *Astrid Preissl*,⁹⁵² *IMC Securities*,⁹⁵³ *Vorarlberger Gebietskrankenkasse*⁹⁵⁴ and *Endendijk*,⁹⁵⁵ (requests for preliminary rulings).

As we analysed in section 5.1.1.2., in *Promociones y Construcciones BJ 200*,⁹⁵⁶ the Spanish version used a term (*liquidación*) whose scope was narrower than the scope of the terms used in the other language versions ('compulsory sale procedure'). The CJEU applied method M2.5.⁹⁵⁷

⁹⁴⁹ Case C-125/12 *Promociones y Construcciones BJ 200*, EU:C:2013:392.

⁹⁵⁰ Case C-488/11 *Asbeek Brusse and de Man Garabito*, EU:C:2013:341.

⁹⁵¹ Case C-33/11 *A*, EU:C:2012:482.

⁹⁵² Case C-381/10 *Astrid Preissl*, EU:C: 2011:638.

⁹⁵³ Case C-445/09 *IMC Securities*, EU:C:2011:459.

⁹⁵⁴ Case C-347/08 *Vorarlberger Gebietskrankenkasse*, EU:C:2009:561.

⁹⁵⁵ Case C-187/07 *Endendijk*, EU:C:2008:197.

⁹⁵⁶ Case C-125/12 *Promociones y Construcciones BJ 200*, EU:C:2013:392.

⁹⁵⁷ *Ibid.*, paragraph 22.

In *Asbeek Brusse and de Man Garabito*,⁹⁵⁸ the preliminary ruling concerned the interpretation of Council Directive 93/13/EEC on unfair terms in consumer contracts. The Dutch version used a term with a narrower scope than the terms used in the other language versions. The referring court asked whether a tenancy agreement relating to premises to be used as a residence, signed onto between a landlord acting for purposes relating to his trade, business or profession and a tenant acting on a non-commercial basis, came within the scope of the directive.⁹⁵⁹

The CJEU discovered a degree of discrepancy between the various language versions of Article 1(1) of the directive. The Dutch version of Article 1(1) of the directive stated that the purpose of the latter was to approximate the national provisions relating to unfair terms in contracts concluded between a ‘seller’ (*verkoper*) and a consumer. However, the other language versions of that provision used an expression which was wider in scope to designate the other party to the contract with the consumer.⁹⁶⁰ The CJEU compared different languages:

The French version of Article 1(1) of the directive refers to contracts concluded between a ‘professionnel’ and a consumer. That wider approach is found in the Spanish version (‘profesional’), the Danish version (‘erhvervsdrivende’), the German version (‘Gewerbetreibender’), the Greek version (‘επαγγελματίας’), the Italian version (‘professionista’) and the Portuguese version (‘profissional’). The English version uses the terms ‘seller or supplier’.⁹⁶¹

The Court applied method M2.8.⁹⁶² It confirmed the legislature’s intention by referring to the definition the term *verkoper* in Article 2(c) of the directive: ‘It thus appears that [...] the legislature’s intention was not to restrict the scope of the directive solely to contracts concluded between a seller and a consumer’.⁹⁶³

In *A*,⁹⁶⁴ the referring court asked whether the wording ‘operating for reward on international routes’ within the meaning of Article 15(6) of the Sixth Directive had to be interpreted as encompassing also international charter flights in order to meet the requirements of companies and private persons.⁹⁶⁵ The referring court’s doubts on this point stemmed from

⁹⁵⁸ Case C-488/11 *Asbeek Brusse and de Man Garabito*, EU:C:2013:341.

⁹⁵⁹ *Ibid.*, paragraph 23.

⁹⁶⁰ *Ibid.*, paragraph 25.

⁹⁶¹ *Ibid.*

⁹⁶² *Ibid.*, paragraph 26.

⁹⁶³ *Ibid.*, paragraph 28.

⁹⁶⁴ Case C-33/11 *A*, EU:C:2012:482.

⁹⁶⁵ *Ibid.*, paragraph 22.

there being certain divergences between the different language versions of the provision. The English and Swedish versions used terms with a narrower meaning. Article 15(6) read as follows (emphasis added):

ES

Las entregas, transformaciones, reparaciones, mantenimiento, fletamentos y arrendamientos de aeronaves utilizadas por las compañías de navegación aérea que se dediquen esencialmente al tráfico internacional remunerado, así como las entregas, arrendamientos, reparaciones y mantenimiento de los objetos incorporados a estas aeronaves o que se utilicen para su explotación.

EN

the supply, modification, repair, maintenance, chartering and hiring of aircraft used by airlines operating for reward chiefly on international routes, and the supply, hiring, repair and maintenance of equipment incorporated or used therein;

DE

Lieferungen, Umbauten, Instandsetzungen, Wartungen, Vercharterungen und Vermietungen von Luftfahrzeugen, die von Luftfahrtgesellschaften verwendet werden, die hauptsächlich im entgeltlichen internationalen Verkehr tätig sind, sowie Lieferungen, Vermietungen, Instandsetzungen und Wartungen der in diese Luftfahrzeuge eingebauten Gegenstände oder der Gegenstände für ihren Betrieb;

FR

les livraisons, transformations, réparations, entretien, affrètements et locations d'aéronefs, utilisés par des compagnies de navigation aérienne pratiquant essentiellement un trafic international rémunéré, ainsi que les livraisons, locations, réparations et entretien des objets incorporés à ces aéronefs ou servant à leur exploitation;

In its observations, A noted that some of the language versions, such as the English and Swedish versions, referred to ‘international routes’ rather than ‘international traffic’, which seemed more generic and was used in most of the other language versions of that provision, including the Finnish version.⁹⁶⁶ As the Advocate General explained in his Opinion, the English version could suggest that the airlines concerned had to be scheduled airlines since

⁹⁶⁶ *Ibid.*, paragraph 23.

the expression ‘international routes’ could indicate the existence of scheduled routes and flights.⁹⁶⁷ The CJEU claimed that ‘the interpretation of a provision of European Union law must, as a rule, take account of possible divergence between the different language versions of that provision’.⁹⁶⁸ It then applied method ‘M2.1. Not only the wording but also the context/scheme and objectives’.⁹⁶⁹

*Astrid Preissl*⁹⁷⁰ concerned the interpretation of Chapter 1 of Annex II to Regulation (EC) No 852/2004. The referring court was uncertain whether the term ‘washbasin’ within the meaning of paragraph 4 referred to every installation, equipped with a hot water connection, where hands can be washed or whether that provision required that the washbasin be used exclusively for washing hands. The doubt arose because the German language version of paragraph 4 contained the term *Handwaschbecken*, a term which, in contrast to the terminology used in the other language versions of that provision, was narrower and referred to an object expressly for washing hands. However, the Court concluded that the term *Handwaschbecken* used in the German language version could not in its overall context, be interpreted as designating a facility which must be used exclusively for washing hands.⁹⁷¹ For the purposes of interpretation, consideration had to be taken of the general context (method M2.3.).⁹⁷²

In *IMC Securities*,⁹⁷³ the referring court had doubts as to the meaning of the verb *houden* (‘maintain’) in the Dutch language version of Article 1(2)(a), second indent, of Directive 2003/6. The wording in Dutch suggested a narrower interpretation.⁹⁷⁴ However, the CJEU contended that for the purpose of its interpretation the provision could not be examined solely in the Dutch language version.⁹⁷⁵ The CJEU applied method ‘M2.8. Real intention of the author’.⁹⁷⁶

Language versions other than Dutch used verbs with a different connotation, as in Spanish, *aseguren ... el precio*, in Danish, *sikrer at kursen*, in German *den Kurs ... in der Weise beeinflussen, dass ein ... Kursniveau erzielt wird*, in English, ‘secure ... the price’, in French,

⁹⁶⁷ Case C-33/11 *A*, Opinion of AG Cruz Villalón, EU:C:2012:249, point 55.

⁹⁶⁸ *Ibid.*, paragraph 24.

⁹⁶⁹ *Ibid.*, paragraph 27.

⁹⁷⁰ Case C-381/10 *Astrid Preissl*, EU:C: 2011:638.

⁹⁷¹ *Ibid.*, paragraph 24.

⁹⁷² *Ibid.*, paragraph 26.

⁹⁷³ Case C-445/09 *IMC Securities*, EU:C:2011:459.

⁹⁷⁴ *Ibid.*, paragraph 23.

⁹⁷⁵ *Ibid.*, paragraph 24.

⁹⁷⁶ *Ibid.*, paragraph 25.

fixent ... le cours, in Italian, *fissare ... il prezzo*, in Portuguese, *assegurem ... o preço*, in Finnish, *varmistaa ... hinnat* and in Swedish, *låser fast priset*.⁹⁷⁷ After comparing the different language version, the Court highlighted the purpose of the Directive. It explained that a different interpretation would have undermined the objective of the instrument.⁹⁷⁸

In *Vorarlberger*,⁹⁷⁹ the CJEU noted some differences between the various language versions of Article 11(2) of Regulation No 44/2001 (emphasis added):

ES

Las disposiciones de los artículos 8, 9 y 10 serán aplicables en los casos de acción directa entablada por la **persona perjudicada** contra el asegurador cuando la acción directa fuere posible.

DE

Auf eine Klage, die der **Geschädigte** unmittelbar gegen den Versicherer erhebt, sind die Artikel 8, 9 und 10 anzuwenden, sofern eine solche unmittelbare Klage zulässig ist.

EN

Articles 8, 9 and 10 shall apply to actions brought by the **injured party** directly against the insurer, where such direct actions are permitted.

FR

Les dispositions des articles 8, 9 et 10 sont applicables en cas d'action directe intentée par la **victime** contre l'assureur, lorsque l'action directe est possible.

The French version used the term *victime*, which, in a semantic interpretation, referred to the person who directly suffered the damage. The French term was narrower than the terms used in the other language versions. For instance, the version in German used the term *der Geschädigte* (meaning the ‘injured party’), which may refer not only to persons who directly suffered damage, but also to persons who suffered indirectly.⁹⁸⁰

The CJEU admitted that other language versions, like the German one, used a term equivalent to ‘the injured party’ (in French, *la personne lésée*). This is true of the following language versions: Spanish (*persona perjudicada*), Czech (*poškozený*), Danish (*skadelidte*), Estonian

⁹⁷⁷ *Ibid.*, paragraph 26.

⁹⁷⁸ *Ibid.*, paragraph 29.

⁹⁷⁹ Case C-347/08 *Vorarlberger Gebietskrankenkasse*, EU:C:2009:561.

⁹⁸⁰ *Ibid.*, paragraph 25.

(*kahju kannatanud pool*), Italian (*persona lesa*), Polish (*poszkodowany*), Slovak (*poškodený*) and Swedish (*skadelidande*).⁹⁸¹ The CJEU applied method M2.4.⁹⁸² and concluded that Article 11(2) of Regulation No 44/2001 had be interpreted as referring to the injured party.⁹⁸³

Finally, *Endendijk*⁹⁸⁴ concerned the interpretation of the word ‘tether’ (*aanbinden*) within the meaning of Council Directive 91/629/EEC. The reference was made in the course of criminal proceedings brought against Dirk Endendijk for having kept calves tethered in conditions not in compliance with the first sentence of point 8 of the Annex to Amended Directive 91/629.⁹⁸⁵ Mr Endendijk contended that the calves were tied by a rope around the neck and therefore could not be considered to be tethered with the meaning of the contested provision.⁹⁸⁶

The CJEU stated that in order to determine the meaning of the word ‘tether’, in the absence of a definition of that word, it was necessary to refer to the usual and everyday accepted meaning of that word (method M2.7.).⁹⁸⁷ The Court examined the wording of the provision⁹⁸⁸ and admitted that the Dutch version referred to a tether which was metallic in nature, using the word ‘chains’ (*kettingen*),⁹⁸⁹ a term that had a narrower scope than the terms used in the other language versions. However, the Court then applied method M2.5.⁹⁹⁰ It explained that the other language versions referred to a general term. For example, the German language version used the word *Anbindevorrichtung* (tethering device), the English language version used the word ‘tether’, and the French language version the word *attache* (‘tether’), while the Italian language version used the word *attacco*. The use of a general term was logical and respected the objective pursued by the legislature.⁹⁹¹ The reply of the CJEU was that a calf was tethered within the meaning of Amended Directive 91/629 when it was tied by a rope, irrespective of the material, length and purpose of that rope.⁹⁹²

⁹⁸¹ *Ibid.*, paragraph 27.

⁹⁸² *Ibid.*, paragraph 26.

⁹⁸³ *Ibid.*, paragraph 28.

⁹⁸⁴ Case C-187/07 *Endendijk*, EU:C:2008:197.

⁹⁸⁵ *Ibid.*, paragraphs 1 and 2.

⁹⁸⁶ *Ibid.*, paragraph 12.

⁹⁸⁷ *Ibid.*, paragraph 15.

⁹⁸⁸ *Ibid.*, paragraph 19.

⁹⁸⁹ *Ibid.*, paragraph 20.

⁹⁹⁰ *Ibid.*, paragraphs 22-25.

⁹⁹¹ *Ibid.*, paragraph 25.

⁹⁹² *Ibid.*, paragraph 26.

6.2.2. Term with a more general meaning: Group 1

In *Götz*,⁹⁹³ the referring court asked whether a sales point was a staff shop (*Verkaufsstelle*) within the meaning of point 12 of Annex D to the Sixth Directive. The question arose by reason of the fact that the term *Verkaufsstelle* featured in the title of the sales point at issue in the main proceedings. The CJEU invoked the need to interpret the provision in the light of the other language versions and applied method M2.5.⁹⁹⁴ The CJEU admitted that the German term *Verkaufsstelle* had a broad meaning, contrary to the French language version that used the word *économat*, the English-language that used the term ‘staff shops’, the Spanish language that used the term *economatos* or even Italian-language that used the term *spacci*.⁹⁹⁵ The Court concluded that it was apparent from the context, the purpose and the general scheme of the Sixth Directive that the milk-quota sales point operated by the Landesanstalt could not be equated with a staff shop within the meaning of point 12 of Annex D to the Sixth Directive.⁹⁹⁶

6.2.3. Term with a more general meaning: Group 2

In *SGS Belgium and Others*,⁹⁹⁷ the Dutch version of Article 5(3) used the term *verloren* (in English ‘lost’), a term that was more generic than the terms used in other language versions. For instance, the English and French versions used ‘perished’ and *péri* respectively, rather than ‘lost’ or *perdue*. The applicants contended that the concept of ‘loss’ in that provision also covered ‘damage’, as was apparent from other language versions of that provision (method M1.1.).⁹⁹⁸

6.2.4. Terms with different connotations: Group 1

The cases in Group 1 are: *Génesis*,⁹⁹⁹ *Afrasiabi and Others*¹⁰⁰⁰ and *Eulitz*¹⁰⁰¹ (requests for preliminary ruling) and T-324/05 *Estonia v Commission*¹⁰⁰² (action for annulment).

In *Génesis*,¹⁰⁰³ there was a variety of terms used. The CJEU compared the different language versions and admitted divergences. The Czech, German, Hungarian, Slovak, Finnish and

⁹⁹³ Case C-408/06 *Götz*, EU:C:2007:789.

⁹⁹⁴ *Ibid.*, paragraphs 29-31.

⁹⁹⁵ *Ibid.*, paragraph 31.

⁹⁹⁶ *Ibid.*, paragraph 33.

⁹⁹⁷ Case C-218/09 *SGS Belgium and Others*, EU:C:2010:152.

⁹⁹⁸ *Ibid.*, paragraph 33.

⁹⁹⁹ Case C-190/10 *Génesis*, EU:C:2012:157.

¹⁰⁰⁰ Case C-72/11 *Afrasiabi and Others*, EU:C:2011:874.

¹⁰⁰¹ Case C-473/08 *Eulitz*, EU:C:2010:47.

¹⁰⁰² Case T-324/05 *Estonia v Commission*, EU:T:2009:381.

¹⁰⁰³ Case C-190/10 *Génesis*, EU:C:2012:157.

Swedish versions of that article referred – in both the heading and the main text thereof – to the day of filing (*Den podáni, Anmeldetag, A bejelentés napja, Deň podania, Hakemispäivä, Ansökningsdag*), while the Lithuanian and Polish versions of that article stated that the date of filing (*Padavimo data, Data zgłoszenia*) corresponded to the day (*diena, dzień*) when the application was filed.¹⁰⁰⁴ By contrast, the other language versions simply used the expression ‘date of filing’ of the Community trade mark application. As we explained in section 5.2.4., the CJEU combined different methods of interpretation (method M2.6., method M2.7. and method M2.2.). The ordinary meaning helped clarify the question, but the Court confirmed the conclusion by referring to the context.

In *Afrasiabi and Others*,¹⁰⁰⁵ the national court had doubts as to the mental element of the terms ‘knowingly’ and ‘intentionally’, used in Article 7(4) of Regulation No 423/2007.¹⁰⁰⁶ It also asked whether the German term *vorsätzlich* meant *absichtlich*, so that the prohibition on circumvention referred only to conduct adopted by someone knowing for certain that its object or effect is to circumvent the prohibitions set out in Article 7(3) of Regulation No 423/2007, or whether that term covered, more widely, any act in respect of which its author realises and accepts the possibility that it is aimed at or will result in a circumvention of the prohibition on ‘making available’.¹⁰⁰⁷ Article 7(4) of Regulation No 961/2010 read as follows (emphasis added):

ES

Queda prohibida la participación **consciente y deliberada** en actividades cuyo objeto o efecto directo o indirecto sea la elusión de las medidas mencionadas en los apartados 1, 2 y 3.

DE

Es ist verboten, **wissentlich und vorsätzlich** an Aktivitäten teilzunehmen, mit denen die Umgehung der in den Absätzen 1, 2 und 3 genannten Maßnahmen bezweckt oder bewirkt wird.

EN

The participation, **knowingly and intentionally**, in activities the object or effect of which is, directly or indirectly, to circumvent the measures referred to in paragraphs 1, 2 and 3 shall be

¹⁰⁰⁴ *Ibid.*, paragraph 44.

¹⁰⁰⁵ Case C-72/11 *Afrasiabi and Others*, EU:C:2011:874.

¹⁰⁰⁶ *Ibid.*, paragraph 31.

¹⁰⁰⁷ *Ibid.*, paragraph 32.

prohibited.

FR

Il est interdit de participer **sciemment et volontairement** à des activités ayant pour objet ou pour effet direct ou indirect de contourner les mesures visées aux paragraphes 1, 2 et 3.

Both the English and German language versions of Article 16(4) tended to confirm the first interpretation of that term, since they used the terms ‘intentionally’ (which could be translated *absichtlich*) and the term ‘absichtlich’ respectively.¹⁰⁰⁸

The CJEU referred to the Opinion of the Advocate General and recalled the need to interpret the provision by referring to the purpose and general scheme of the rules of which it formed part (method M2.2.).¹⁰⁰⁹ The Advocate General examined different language versions:

As the referring court notes, there are some terminological differences. The Spanish-language version uses the terms ‘consciente’ and ‘deliberada’, the English, ‘knowingly’ and ‘intentionally’, the Italian, ‘consapevolmente’ and ‘deliberatamente’, the Portuguese, ‘consciente’ and ‘intencional’, the Romanian, ‘voluntară’ and ‘deliberată’, and the Slovak, ‘vedomá’ and ‘úmyselná’. Under the language versions of Article 7(4) of the Regulation, the term ‘volontairement’ is therefore rendered by the words ‘intentionally’ or ‘deliberately’, without distinction (21).¹⁰¹⁰

He added that the terms ‘intentionally’ and ‘knowingly’ had to be interpreted in an autonomous and uniform manner throughout the Union and their meaning had to be sought taking into account the principle of the autonomy of criminal law and of its general principles.¹⁰¹¹

The CJEU concluded that for the purposes of Article 7(4) of Regulation No 423/2007, the terms ‘knowingly’ and ‘intentionally’ implied firstly an element of knowledge and secondly an element of intent.¹⁰¹² The terms ‘knowingly’ and ‘intentionally’ implied cumulative requirements of knowledge and intent.¹⁰¹³ As the Italian Government and the Commission pointed out earlier in the judgment, the cumulative nature of the factors corresponding to

¹⁰⁰⁸ *Ibid.*

¹⁰⁰⁹ Case C-72/11 *Afrasiabi and Others*, EU:C:2011:874, paragraph 65.

¹⁰¹⁰ Case C-72/11 *Afrasiabi and Others*, Opinion of AG Bot, EU:C:2011:737, point 80.

¹⁰¹¹ *Ibid.*, point 81.

¹⁰¹² *Ibid.*, paragraph 66.

¹⁰¹³ *Ibid.*, paragraph 68.

‘knowingly’ and ‘intentionally’ was clear taking into account the use of the coordinating conjunction ‘and’.¹⁰¹⁴

In *Eulitz*,¹⁰¹⁵ the national court sought to determine whether Article 13A(1)(j) of the Sixth Directive had to be interpreted as meaning that teaching and examination work which a graduate engineer performed at an education institute established as a private-law association could constitute ‘school or university education’ within the meaning of that provision. Article 13A(1)(j) read as follows:

DE

den von Privatlehrern erteilten Schul- und Hochschulunterricht;

ES

las clases dadas a título particular por docentes y que se relacionen con la enseñanza escolar o universitaria;

EN

tuition given privately by teachers and covering school or university education;

FR

les leçons données, à titre personnel, par des enseignants et portant sur l'enseignement scolaire ou universitaire;

The wording of the German version differed from the terms used in all other language versions to the extent that, in the other versions, the exemption specified did not refer directly to ‘school or university education’, but to a related concept expressed in English as ‘tuition ... covering’ such education.¹⁰¹⁶ The CJEU applied method ‘M2.8. Real intention of the author’.¹⁰¹⁷ Then it recalled that the terms used to specify the exemptions in Article 13 of the Sixth Directive were to be interpreted strictly, since they constituted exceptions to the general principle. Nevertheless, the interpretation of those terms had to be consistent with the objectives pursued by those exemptions.¹⁰¹⁸ The CJEU concluded that Article 13A(1)(j) of the Sixth Directive had to be interpreted as meaning that teaching work which a graduate engineer

¹⁰¹⁴ *Ibid.*, paragraph 64.

¹⁰¹⁵ Case C-473/08 *Eulitz*, EU:C:2010:47.

¹⁰¹⁶ *Ibid.*, paragraph 21.

¹⁰¹⁷ *Ibid.*, paragraph 22.

¹⁰¹⁸ *Ibid.*, paragraph 27.

performed at an education institute established as a private-law association could constitute ‘tuition ... covering school or university education’ within the meaning of that provision.¹⁰¹⁹

As we explained in section 5.1.3., in Case T-324/05 *Estonia v Commission*,¹⁰²⁰ the CJEU observed that the term ‘stocks’ did not have an unequivocal meaning in the various language versions of the legal documents in question.¹⁰²¹ For example, the term ‘stocks’ was used in the French and English versions of the Act of Accession and in Regulation No 60/2004. In the Spanish, Italian, Polish and Estonian versions the terms used were respectively *existencias*, *scorta*, *zapas* and *varu*.¹⁰²² The Court examined the connotations these terms had in the various language versions and noted some divergences:

An examination of the usual meaning of each of these terms reveals that, in Italian, Polish and Estonian, the word ‘stock’ may be used without distinction for the reserves built up by commercial operators and for those set aside by households. In English, French and Spanish, the word is rather more a business term, but may also relate to reserves built up by households.

However, the Court argued that it was necessary to consider not only its wording but also the context in which it occurred and the objectives of the rules of which it was part (method M2.1.).¹⁰²³ It added that ‘if a text when read as a whole remains ambiguous, the function of the words in question must be examined in the light of the intention and purpose of the legislation in question’.¹⁰²⁴

6.2.5. Terms with different connotations: Group 2

The cases in Group 2 are: *Systeme Helmholtz*,¹⁰²⁵ *Scattolon*,¹⁰²⁶ *Delphi Deutschland*,¹⁰²⁷ *CLECE*,¹⁰²⁸ *Horvath*,¹⁰²⁹ *Jouini and Others*,¹⁰³⁰ *Athinaiki Chartopoiia*,¹⁰³¹ (requests for

¹⁰¹⁹ *Ibid.*, paragraph 38.

¹⁰²⁰ Case T-324/05 *Estonia v Commission*, EU:T:2009:381.

¹⁰²¹ *Ibid.*, paragraph 111.

¹⁰²² *Ibid.*, paragraph 112.

¹⁰²³ *Ibid.*, paragraph 115.

¹⁰²⁴ *Ibid.*, paragraphs 116 and 117.

¹⁰²⁵ Case C-79/10 *Systeme Helmholtz*, EU:C:2011:797.

¹⁰²⁶ Case C-108/10 *Scattolon*, EU:C:2011:542, paragraph 63.

¹⁰²⁷ Case C-423/10 *Delphi Deutschland*, EU:C:2011:315.

¹⁰²⁸ Case C-463/09 *CLECE*, EU:C:2011:24.

¹⁰²⁹ Case C-428/07 *Horvath*, EU:C:2009:458.

¹⁰³⁰ Case C-458/05 *Jouini and Others*, EU:C:2007:512.

¹⁰³¹ Case C-270/05 *Athinaiki Chartopoiia*, EU:C:2007:101.

preliminary ruling), T-66/11 *Present-Service Ullrich v OHMI - Punt Nou*¹⁰³² (appeal) and *Sison v Council* (action for compensation for damage).

*Systeme Helmholtz*¹⁰³³ concerned the interpretation of Article 14(1)(b) of Directive 2003/96. The provision read as follows (emphasis added):

ES

los productos energéticos suministrados para su utilización como carburante en la navegación aérea distinta de la **navegación aérea de recreo privada**.

DE

Lieferungen von Energieerzeugnissen zur Verwendung als Kraftstoff für die Luftfahrt mit Ausnahme der **privaten nichtgewerblichen Luftfahrt**.

EN

energy products supplied for use as fuel for the purpose of air navigation other than in **private pleasure-flying**.

FR

les produits énergétiques fournis en vue d'une utilisation comme carburant ou combustible pour la navigation aérienne autre que l'**aviation de tourisme privée**.

The CJEU admitted the terms used in the various language versions had different connotations:

Whereas a number of language versions of that provision use terms which appear to refer only to leisure activities, such as the French and English versions which refer to ‘aviation de tourisme privée’ or ‘private pleasure-flying’, the German version of that directive refers, at least in the body of Article 14(1)(b) of Directive 2003/96, to the concept of ‘private non-commercial aviation’ (‘private nichtgewerbliche Luftfahrt’) which appears to embrace all non-commercial activities.¹⁰³⁴

However, as those diverging concepts were expressly defined in the second subparagraph of Article 14(1)(b) of Directive 2003/96, the CJEU contended that it was in the light of that

¹⁰³² Case T-66/11 *Present-Service Ullrich v OHMI - Punt Nou (babalu)*, EU:T:2013:48.

¹⁰³³ Case C-79/10 *Systeme Helmholtz*, EU:C:2011:797.

¹⁰³⁴ *Ibid.*, paragraph 28.

definition that the scope of the tax exemption provided for under Article 14(1)(b) of Directive 2003/96 had to be interpreted.¹⁰³⁵

The cases *Scattolon*,¹⁰³⁶ *CLECE*,¹⁰³⁷ and *Jouini and Others*¹⁰³⁸ concerned the interpretation of Article 1 of Council Directive 2001/23/EC (previously Article 1(1) of Directive 77/187). In the oldest of the three cases, i.e. *Jouini and Others*, the referring court sought to ascertain whether Article 1(1) of Directive 2001/23 applied to a situation such as that in the main action, in which there was a transfer of employees between two temporary employment businesses.

With regard to the requirement that there be a legal transfer, there is settled case law to the effect that the scope of Article 1(1) of Directive 2001/23 cannot be appraised solely on the basis of textual interpretation. Article 1(1) read as follows (emphasis added):

ES

La presente Directiva se aplicará a los traspasos de empresas, de centros de actividad o de partes de empresas o centros de actividad a otro empresario **como resultado de una cesión contractual o de una fusión.**

DE

Diese Richtlinie ist auf den Übergang von Unternehmen, Betrieben oder Unternehmens- bzw. Betriebsteilen auf einen anderen Inhaber **durch vertragliche Übertragung oder durch Verschmelzung** anwendbar.

EN

This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer **as a result of a legal transfer or merger.**

FR

La présente directive est applicable à tout transfert d'entreprise, d'établissement ou de partie d'entreprise ou d'établissement à un autre employeur **résultant d'une cession conventionnelle ou d'une fusion.**

¹⁰³⁵ *Ibid.*, paragraph 29.

¹⁰³⁶ Case C-108/10 *Scattolon*, EU:C:2011:542, paragraph 63.

¹⁰³⁷ Case C-463/09 *CLECE*, EU:C:2011:24.

¹⁰³⁸ Case C-458/05 *Jouini and Others*, EU:C:2007:512.

The CJEU did not examine the divergence in detail. It claimed that, on account of the differences between the language versions and the divergences between the laws of the Member States with regard to the concept of legal transfer, the Court had given that concept a sufficiently flexible interpretation, which was to safeguard employees in the event of a transfer of their undertaking.¹⁰³⁹

In order to have some more information on the divergences between the various language versions, we need to refer back to the first case that examined the concept of ‘legal transfer’: Case 135/83 *Abels*.¹⁰⁴⁰ In this case the Court contended that the terms used in the English and Danish versions had a wider scope than the terms used in the other language versions:

A comparison of the various language versions of the provision in question shows that there are terminological divergencies between them as regards the transfer of undertakings. Whilst the German ('vertragliche Übertragung'), French ('cession conventionnelle'), Greek ('συμβατική εκχώρηση'), Italian ('cessione contrattuale') and Dutch ('overdracht krachtens overeenkomst') versions clearly refer only to transfers resulting from a contract, from which it may be concluded that other types of transfers such as those resulting from an administrative measure or judicial decision are excluded, the English ('legal transfer') and Danish ('overdragelse') versions appear to indicate that the scope is wider.¹⁰⁴¹

The Court also pointed out that the concept of contractual transfer was different in the insolvency laws of the various Member States.¹⁰⁴² The Court stated that the scope of the provision could not be appraised solely on the basis of a textual interpretation. Its meaning had to be clarified in the light of the scheme of the directive, its place in the system of Community law in relation to the rules concerning insolvency and its purpose.¹⁰⁴³

[*Delphi Deutschland*](#)¹⁰⁴⁴ concerned the interpretation of subheading 8536 69 of the Combined Nomenclature ('the CN') in Annex I to Council Regulation (EEC) No 2658/87.

ES

Portalámparas, clavijas y **tomas de corriente (enchufes):**

¹⁰³⁹ *Ibid.*, paragraph 24.

¹⁰⁴⁰ Case 135/83 *Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, EU:C:1985:55.

¹⁰⁴¹ *Ibid.*, paragraph 11.

¹⁰⁴² *Ibid.*, paragraph 12.

¹⁰⁴³ *Ibid.*, paragraph 13.

¹⁰⁴⁴ Case C-423/10 *Delphi Deutschland*, EU:C:2011:315.

DE

Lampenfassungen und Steckvorrichtungen:

EN

Lamp holders, plugs and sockets

FR

Douilles pour lampes, fiches et prises de courant:

The referring court raised the question whether subheading 8536 69 of the CN also covered the connectors at issue in the main proceedings. It pointed out that the English and French language versions used, with respect to subheading 8536 69 of the CN, the words ‘plugs and sockets’ and *fiches et prises de courant* respectively, which is more like *Stecker* and *Steckdosen*.

As we explained in section 5.3.1.2., the CJEU contended that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes was to be sought in their **objective characteristics and properties as defined in the wording** of the relevant heading of the CN and in the section or chapter notes (method M1.3.).¹⁰⁴⁵ It then supported the objective characteristics and properties of the goods with the explanatory notes,¹⁰⁴⁶ though recognizing that the notes did not have legally binding force.¹⁰⁴⁷

As illustrated in section 5.3.1.1., in [Horvath](#),¹⁰⁴⁸ the Court did not mention any divergence. It just contented that the expression ‘*particularités topographiques*’ in the French version had to be compared, for example, with the expression ‘landscape features’ in the English version of that regulation.¹⁰⁴⁹ However, the Advocate General did remark some divergence between different language versions.¹⁰⁵⁰ He made a very detailed study the geographical concept of landscape, even examining the Greek origin of the word ‘topography’.¹⁰⁵¹

¹⁰⁴⁵ *Ibid.*, paragraph 23.

¹⁰⁴⁶ *Ibid.*, paragraph 28.

¹⁰⁴⁷ *Ibid.*, paragraph 24.

¹⁰⁴⁸ Case C-428/07 *Horvath*, EU:C:2009:458.

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ *Ibid.*, paragraph 36.

¹⁰⁵¹ *Ibid.*, paragraph 36.

We commented [Athinaiki Chartopoiia](#),¹⁰⁵² in section 5.3.1.3. The Court held that the terms used in the various language versions of Directive 98/59 to refer to the concept of ‘establishment’ were somewhat different and had different connotations, signifying variously ‘establishment’, ‘undertaking’, ‘work centre’, ‘local unit’ or ‘place of work’ (see *Rockfon*, paragraphs 26 and 27).

As indicated above, in *Rockfon*,¹⁰⁵³ the Court detailed the terms used in the various language versions:

The various language versions of the Directive use somewhat different terms to convey the concept in question: the Danish version has 'virksomhed', the Dutch version 'plaatselijke eenheid', the English version 'establishment', the Finnish version 'yritys', the French version 'établissement', the German version 'Betrieb', the Greek version 'επιχείρηση', the Italian version 'stabilimento', the Portuguese version 'estabelecimento', the Spanish version 'centro de trabajo' and the Swedish version 'arbetsplats'.

The Court held in *Rockfon* that the concept of ‘establishment’, which was not defined in that directive, had to be interpreted by reference to the purpose and general scheme (method M2.2.).¹⁰⁵⁴

In section 5.3.4., we demonstrated that Case T-66/11 [Present-Service Ullrich v OHMI - Punt Nou](#)¹⁰⁵⁵ presented a problem in the use of the term ‘publicity’ instead of ‘advertising’. The terms had different connotations and the CJEU revealed the divergence rooted in a translation problem.

Finally, section 5.3.3. analysed Case T-341/07 [Sison v Council](#),¹⁰⁵⁶ which concerned the interpretation of the concept of ‘competent authority’. It was not clear whether the provisions at issue were to be interpreted by reference and *renvoi* to national law or whether they possessed an autonomous meaning in European Union law.¹⁰⁵⁷ The Court then pointed out that the concept had different scopes in the national legal systems.

¹⁰⁵² Case C-270/05 *Athinaiki Chartopoiia*, EU:C:2007:101.

¹⁰⁵³ Case C-449/93 *Rockfon*, EU:C:1995:420.

¹⁰⁵⁴ Case C-270/05 *Athinaiki Chartopoiia*, EU:C:2007:101, paragraph 23 and Case C-449/93 *Rockfon*, EU:C:1995:420, paragraph 28.

¹⁰⁵⁵ Case T-66/11 *Present-Service Ullrich v OHMI - Punt Nou (babalu)*, EU:T:2013:48.

¹⁰⁵⁶ Case T-341/07 *Sison v Council*, EU:T:2011:687.

¹⁰⁵⁷ *Ibid.*, paragraph 63.

6.2.6. Concepts not defined

As we explained in section 5.2.4., there are four cases (*BLV Wohn*,¹⁰⁵⁸ *Møller*,¹⁰⁵⁹ *Kozłowski*¹⁰⁶⁰ and *Emirates Airlines*)¹⁰⁶¹ that we included in Group 1 even though divergences were not the main problem; rather, the concepts had not been defined in the legislation. In [BLV Wohn- und Gewerbebau](#), the CJEU dealt with the concept of ‘construction work’ (*Bauleistungen*) and ‘works of construction’. In [Kozłowski](#), the CJEU had to ascertain the scope of the term ‘resident’ and how the term ‘staying’ complemented its meaning. In [Emirates Airlines](#), the CJEU disregarded the fact that the German version contained the extra word ‘flight’. The main concern was the scope of the concept of ‘flight’ which was not defined in the legislation, because of which it was necessary to resort to teleological-systematic interpretation.

Moreover, in [Møller](#), the reference for a preliminary ruling concerned the interpretation of subheading 6.6(c) of Annex I to Council Directive 96/61/EC.¹⁰⁶² The national court asked whether the expression ‘places for sows’ in the subheading was to be interpreted as meaning that it included places for gilts.¹⁰⁶³ Some versions like the English or German ones used a term with a narrower meaning. The main problem was that Directive 96/61 did not define what was meant by a ‘sow’. The Court first applied method M2.7.¹⁰⁶⁴ Then it invoked the need to interpret the provision by reference to the purpose and general scheme (method M2.2.).¹⁰⁶⁵

With regard to the usual meaning of the term ‘sow’, the CJEU noted that Article 2 of Directive 91/630 stated that the definitions that it contained were given ‘for the purposes’ of that directive, that is to say, that those definitions were specific to it. Therefore, the definition of the term ‘sow’ in that article could not be regarded as allowing the usual meaning of the term. As we have already pointed out, *Møller* is an example of the tension between the ‘usual meaning’ rule and the EU specific meaning.

In any event, the CJEU recognised that the the term ‘sow’ did not have a univocal meaning in all the official languages of the European Union. That term could also be understood as

¹⁰⁵⁸ Case C-395/11 *BLV Wohn- und Gewerbebau*, EU:C:2012:799.

¹⁰⁵⁹ Case C-585/10 *Møller*, EU:C:2011:847.

¹⁰⁶⁰ Case C-66/08 *Kozłowski*, EU:C:2008:437.

¹⁰⁶¹ Case C-173/07 *Emirates Airlines*, EU:C:2008:145.

¹⁰⁶² *Ibid.*, paragraph 1.

¹⁰⁶³ *Ibid.*, paragraph 21.

¹⁰⁶⁴ *Ibid.*, paragraph 25.

¹⁰⁶⁵ *Ibid.*, paragraph 26.

referring only to female pigs which have already farrowed once, as in the German and English version.¹⁰⁶⁶ As a consequence, the CJEU had to examine the general scheme and purposes of Directive 96/61 (method ‘M2.2. Directly teleological-systematic interpretation’).¹⁰⁶⁷

6.3. Lack of consistency

We have found problems of terminological consistency in ten cases: five in Group 1 and five in Group 2.

6.3.1. Lack of consistency: Group 1

The cases in Group 1 are: *Geistbeck and Geistbeck*,¹⁰⁶⁸ *Walz*,¹⁰⁶⁹ *Sabatauskas and Others*,¹⁰⁷⁰ *Tele2 Telecommunication*,¹⁰⁷¹ (requests for preliminary ruling) and Case C-370/07 *Commission v Council*¹⁰⁷² (action for annulment).

In *Geistbeck and Geistbeck*,¹⁰⁷³ the referring court had doubts concerning the method of calculating the ‘reasonable compensation’ payable under Article 94(1) of Regulation No 2100/94 to the holder of the protected right and the damages due under Article 94(2) of that regulation.¹⁰⁷⁴ The Geistbecks argued that, in so far as the terms used in the fourth indent of Article 14(3) and in Article 94(1) of Regulation No 2100/94 were almost identical, the ‘reasonable compensation’ due under Article 94(1) of Regulation No 2100/94 had to be based on the remuneration for authorised planting.¹⁰⁷⁵ However, the CJEU dismissed this argument since it noted some inconsistency in the terminology used:

[...] although the terms ‘*rémunération équitable*’ are used in both those provisions in the French-language version of Regulation No 2100/94, the same is not true of other language versions, particularly the German and English versions, as the Advocate General mentioned in point 43 of his Opinion. [...].¹⁰⁷⁶

This divergence indicated that the terms could refer to different concepts: ‘[...] it cannot be inferred from the similarity of the expressions used in those provisions of Regulation No

¹⁰⁶⁶ *Ibid.*, paragraph 27.

¹⁰⁶⁷ *Ibid.*, paragraph 28.

¹⁰⁶⁸ Case C-509/10 *Geistbeck*, EU:C:2012:416.

¹⁰⁶⁹ Case C-63/09 *Walz*, EU:C:2010:251.

¹⁰⁷⁰ Case C-239/07 *Sabatauskas and Others*, EU:C:2008:551.

¹⁰⁷¹ Case C-426/05 *Tele2 Telecommunication*, EU:C:2008:103.

¹⁰⁷² Case C-370/07 *Commission v Council*, EU:C:2009:590.

¹⁰⁷³ Case C-509/10 *Geistbeck*, EU:C:2012:416.

¹⁰⁷⁴ *Ibid.*, paragraph 16.

¹⁰⁷⁵ *Ibid.*, paragraph 26.

¹⁰⁷⁶ *Ibid.*, paragraph 28.

2100/94 that they refer to the same concept'.¹⁰⁷⁷ In his Opinion, the Advocate General contended that 'as no conclusions can be drawn from that linguistic difference, the provisions should be examined in their respective contexts, taking into account, in particular, their objectives' (method M2.3.).¹⁰⁷⁸

In section 5.2.4., we commented that the *Walz*¹⁰⁷⁹ case concerned an inconsistency in the use the term 'damage' in the Montreal Convention.

In *Sabatauskas and Others*,¹⁰⁸⁰ the CJEU dealt with the concept of 'access to the system'. The Court explained that it was necessary to investigate whether a distinction had to be drawn between the concepts of 'access' and 'connection'.¹⁰⁸¹ The Lithuanian version used two different terms in two articles while the other language versions used one term:

In that regard, differences between certain language versions of the Directive should be noted. In a number of language versions, both the first sentence of Article 20(1) and the first sentence of Article 20(2) use the word 'access'. This is, for example, the case in the following language versions: Spanish ('acceso'), German ('Zugang'), English ('access'), French ('accès') and Italian ('accesso'). However, in the Lithuanian version of the Directive the word 'prieiga' ('access') is used in Article 20(1) whilst Article 20(2) uses the word 'prisijungti' which may be translated into English by 'connect'. The word 'prisijungti' is also used in recitals 2 and 6 of the Lithuanian version of the Directive, whereas the other language versions referred to use the word 'access' or its equivalent.¹⁰⁸²

The CJEU applied method M2.5.¹⁰⁸³ Then it explained that the terms 'access' and 'connection' appeared in the Directive with different meanings. The term 'access' was linked to the supply of electricity and the term 'connection' was used, in particular, in a technical context and related to physical connection to the system.¹⁰⁸⁴

¹⁰⁷⁷ *Ibid.*

¹⁰⁷⁸ Case C-509/10 *Geistbeck*, Opinion of AG EU:C:2012:416.

¹⁰⁷⁹ Case C-63/09 *Walz*, EU:C:2010:251.

¹⁰⁸⁰ Case C-239/07 *Sabatauskas and Others*, EU:C:2008:551.

¹⁰⁸¹ *Ibid.*, paragraph 36.

¹⁰⁸² *Ibid.*, paragraph 37.

¹⁰⁸³ *Ibid.*, paragraphs 38 and 39.

¹⁰⁸⁴ *Ibid.*, paragraphs 40 and 41.

We noted in section 4.3.3. that [Tele2 Telecommunication](#)¹⁰⁸⁵ case presented an inconsistency in the French language version. The CJEU applied the methods M2.2. ‘Directly teleological-systematic interpretation’¹⁰⁸⁶ and M2.6. ‘Independent and uniform interpretation’.¹⁰⁸⁷

Case C-370/07 [Commission v Council](#)¹⁰⁸⁸ was previously described in section 5.1.3. It concerned an inconsistency in the EC Treaty.

6.3.2. Lack of consistency: Group 2

The cases in Group 2 are: *Homawoo*,¹⁰⁸⁹ *Budějovický Budvar*,¹⁰⁹⁰ *Kirin Amgen*,¹⁰⁹¹ *S.P.C.M. and Others*¹⁰⁹² and *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*¹⁰⁹³ (requests for preliminary ruling).

[Homawoo](#)¹⁰⁹⁴ was explained in section 5.3.1.2. and [Budějovický Budvar](#)¹⁰⁹⁵ was explained in section 5.3.1.1. [Kirin Amgen](#),¹⁰⁹⁶ related to the interpretation of the concept of ‘grant’ as appeared in Regulation No 1768/92. As no definition was provided in the Regulation, the CJEU first stated that it was necessary to consider not only its wording but also the context.¹⁰⁹⁷ When analysing the wording, the CJEU mentioned that in the majority of the language versions the concept of ‘obtaining’ a marketing authorisation was used both in Article 19 and in Articles 3(b) and 7 of that regulation. However, certain language versions of that regulation, in particular the English version, used a different expression in Articles 3(b) and 7 of Regulation No 1768/92, namely ‘granted’.¹⁰⁹⁸ The articles in the English version read as follows (emphasis added):

Article 3(b)

a valid **authorization** to place the product on the market as a medicinal product **has been granted** in accordance with Directive 65/65/EEC or Directive 81/851/EEC, as appropriate;

¹⁰⁸⁵ Case C-426/05 *Tele2 Telecommunication*, EU:C:2008:103.

¹⁰⁸⁶ *Ibid.*, paragraph 25.

¹⁰⁸⁷ *Ibid.*, paragraph 26.

¹⁰⁸⁸ Case C-370/07 *Commission v Council*, EU:C:2009:590.

¹⁰⁸⁹ Case C-412/10 *Homawoo*, EU:C:2011:747.

¹⁰⁹⁰ Case C-482/09 *Budějovický Budvar*, EU:C:2011:605.

¹⁰⁹¹ Case C-66/09 *Kirin Amgen*, EU:C:2010:484.

¹⁰⁹² Case C-558/07 *S.P.C.M. and Others*, EU:C:2009:430.

¹⁰⁹³ Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*, EU:C:2007:391.

¹⁰⁹⁴ Case C-412/10 *Homawoo*, EU:C:2011:747.

¹⁰⁹⁵ Case C-482/09 *Budějovický Budvar*, EU:C:2011:605.

¹⁰⁹⁶ Case C-66/09 *Kirin Amgen*, EU:C:2010:484.

¹⁰⁹⁷ *Ibid.*, paragraph 41.

¹⁰⁹⁸ *Ibid.*, paragraph 42.

Article 7

1. The application for a certificate shall be lodged within six months of the date on which the authorization referred to in Article 3 (b) to place the product on the market as a medicinal product was granted.

Article 19

Any product which, on the date on which this Regulation enters into force, is protected by a valid basic patent and for which the first authorization to place it on the market as a medicinal product in the Community was obtained after 1 January 1985 may be granted a certificate.

The Court seemed to overlook this terminological inconsistency relying on the majority of the language versions (method M1.1.). It contended that the obtaining of a marketing authorisation occurred at the time when it was granted.¹⁰⁹⁹ It then continued its interpretation with an examination of the purpose of the Regulation.¹¹⁰⁰

*S.P.C.M. and Others*¹¹⁰¹ concerned the interpretation and validity of Article 6(3) of Regulation (EC) No 1907/2006. The referring court sought clarification of the concept of ‘monomer substance’. The CJEU noted some inconsistency in the English and French versions:

The fact that the words ‘monomeric units’ are used in Article 6(3) of the REACH Regulation rather than the words ‘monomer units’, which appear in Article 3(5) of the English and French versions of the REACH Regulation, cannot affect that finding.¹¹⁰²

The Court explained that the words ‘monomeric units’ had been added at the request of Sweden and the Swedish language version used the same words ‘monomer units’ in Articles 3(5) and 6(3) of the Regulation.¹¹⁰³ In her Opinion, the Advocate General suggested that the divergence rooted in an inappropriate translation: ‘Those minor differences probably derive from imprecise translation during the discussions in the Council [...]’.¹¹⁰⁴ Apart from clarifying the question by looking at other language versions (M1.1.), the Court added that

¹⁰⁹⁹ *Ibid.*

¹¹⁰⁰ *Ibid.*, paragraph 45-48.

¹¹⁰¹ Case C-558/07 *S.P.C.M. and Others*, EU:C:2009:430.

¹¹⁰² *Ibid.*, paragraph 25.

¹¹⁰³ *Ibid.*, paragraph 26.

¹¹⁰⁴ Case C-558/07 *S.P.C.M. and Others*, Opinion of AG Kokott, EU:C:2009:142.

‘that finding cannot be called into question by the examination of the general scheme of the regulation’.¹¹⁰⁵

*JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*¹¹⁰⁶ related to the interpretation of Article 13B(d)(6) of Sixth Council Directive 77/388/EEC. The referring court asked whether the term ‘special investment funds’ in Article 13B(d)(6) of the Sixth Directive was capable of including closed-ended investment funds, such as ITCs.¹¹⁰⁷ The Court noted some inconsistency in the use of the expression:

Moreover, even if certain language versions, such as, in particular, the Spanish, French, Italian and Portuguese versions of Article 1(3) of the UCITS Directive, when they designate undertakings for collective investment constituted under the law of contract, as opposed to funds constituted under trust law or under statute, use the same expression as that which appears in Article 13B(d)(6) of the Sixth Directive, that is not the case in other language versions, such as the English, Danish and German versions (see, to that effect, *Abbey National*, paragraph 55).¹¹⁰⁸

Article 1(3) of the UCITS Directive read as follows (emphasis added):

ES

De conformidad con el Derecho nacional, estos organismos pueden revestir la forma contractual (**fondos comunes de inversión** gestionados por una sociedad de gestión) o de “trust” (‘unit trust’), o la forma estatutaria (sociedad de inversión).

DE

Diese Organismen können nach einzelstaatlichem Recht die Vertragsform (von einer Verwaltungsgesellschaft verwaltete **Investmentfonds**), die Form des Trust (‘unit trust’) oder die Satzungsform (Investmentgesellschaft) haben.

EN

Such undertakings may be constituted according to law, either under the law of contract (as **common funds** managed by management companies) or trust law (as unit trusts) or under statute (as investment companies).

¹¹⁰⁵Case C-558/07 *S.P.C.M. and Others*, EU:C:2009:430, paragraph 28.

¹¹⁰⁶ Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*, EU:C:2007:391.

¹¹⁰⁷ *Ibid.*, paragraph 23.

¹¹⁰⁸ *Ibid.*, paragraph 33.

FR

Ces organismes peuvent, en vertu de la loi, revêtir la forme contractuelle (**fonds communs de placement** gérés par une société de gestion) ou de trust (unit trust) ou la forme statutaire (société d'investissement).

Article 13B(d)(6) of the Sixth Directive read as follows (emphasis added):

ES

la gestión de **fondos comunes de inversión** definidos como tales por los Estados miembros;

DE

die Verwaltung von durch die Mitgliedstaaten als solche definierten **Sondervermögen durch Kapitalanlagegesellschaften**

EN

management of **special investment funds** as defined by Member States;

FR

la gestion de **fonds communs de placement** tels qu'ils sont définis par les États membres;

The divergence was not analysed as a problem of interpretation. This is confirmed by the use of the concessive clause 'even if...'. The CJEU clarified the lack of consistency by referring to other language versions (M1.1.).

6.4. Combined problems

As we explained in section 5.3.1.1., in *Gebr. Weber*¹¹⁰⁹ two different problems were tackled. On the one hand, the Court mentioned the conceptual problem of 'replacement' and solved it teleologically with method M2.3. On the other hand, there was the problem with the wording and the use of the plural noun in Spanish (*otras formas de saneamiento*), which was solved by referring to other language versions (M1.1.).

In *Helmut Müller*,¹¹¹⁰ the CJEU first remarked a lack of consistency in the use of the term 'works' in the German language version. In most of the language versions of Directive 2004/18, there were three variants to the concept of 'public works contracts' provided for in

¹¹⁰⁹ Joined Cases C-65/09 and C-87/09 *Gebr. Weber*, EU:C:2011:396.

¹¹¹⁰ Case C-451/08 *Helmut Müller*, EU:C:2010:168.

Article 1(2)(b) of the directive.¹¹¹¹ While the majority of the language versions used the term ‘work’ for both the second and the third variants, the German version used two different terms: *Bauwerk* (work) for the second variant and *Bauleistung* (building activity) for the third.¹¹¹² Article 1(2)(b) read as follows (emphasis added):

ES

Son «contratos públicos de obras» los contratos públicos cuyo objeto sea bien la ejecución, o bien conjuntamente el proyecto y la ejecución de **obras** relativas a una de las actividades mencionadas en el anexo I o de una **obra**, bien la realización, por cualquier medio, de una obra que responda a las necesidades especificadas por el poder adjudicador. Una «obra» es el resultado de un conjunto de obras de construcción o de ingeniería civil destinado a cumplir por sí mismo una función económica o técnica.

DE

„Öffentliche Bauaufträge“ sind öffentliche Aufträge über entweder die Ausführung oder gleichzeitig die Planung und die Ausführung von Bauvorhaben im Zusammenhang mit einer der in Anhang I genannten Tätigkeiten oder eines **Bauwerks** oder die Erbringung einer **Bauleistung durch Dritte**, gleichgültig mit welchen Mitteln, gemäß den vom öffentlichen Auftraggeber genannten Erfordernissen. Ein „Bauwerk“ ist das Ergebnis einer Gesamtheit von Tief- oder Hochbauarbeiten, das seinem Wesen nach eine wirtschaftliche oder technische Funktion erfüllen soll.

EN

‘Public works contracts’ are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a **work**, or the realisation, by whatever means, of a **work** corresponding to the requirements specified by the contracting authority. A ‘work’ means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

FR

Les «marchés publics de travaux» sont des marchés publics ayant pour objet soit l'exécution, soit conjointement la conception et l'exécution de travaux relatifs à une des activités

¹¹¹¹ *Ibid.*, paragraph 34.

¹¹¹² *Ibid.*, paragraph 36.

mentionnées à l'annexe I ou d'un **ouvrage**, soit la réalisation, par quelque moyen que ce soit, d'un **ouvrage** répondant aux besoins précisés par le pouvoir adjudicateur. Un «ouvrage» est le résultat d'un ensemble de travaux de bâtiment ou de génie civil destiné à remplir par lui-même une fonction économique ou technique.

Moreover,, there was an addition in the German version. It was the only one which provided that the activity referred to in the third variant had to be realised not only ‘by whatever means’ but also ‘by third parties’ (*durch Dritte*).¹¹¹³

The Advocate General also noted the two differences in the German language version. On the one hand, there was the terminological inconsistency¹¹¹⁴ in the use of the term ‘works’ in German. The activity referred to in the third variant was not described as ‘a work’ (*Bauwerk*) but as ‘building activity’ (*Bauleistung*), with the result that the subsequent definition of ‘a work’ appeared, in the German version, to apply only to the second variant and not to the third. On the other hand, the third variant specified a condition that did not appear in the other language versions.¹¹¹⁵

The AG argued that the existence of these textual problems was a strong incentive for not attempting to find the ‘correct’ interpretation of provisions through a strictly literal analysis of the provisions in question. The only possible guides in seeking the meaning to be attributed to the provisions were systematic interpretation and teleological interpretation, combined with a good sense of interpretation.¹¹¹⁶ Accordingly, the CJEU applied method ‘M2.5 Wording not enough or not helpful + in case of divergence purpose and scheme’.¹¹¹⁷

6.5. Which methods of interpretation for which types of divergences?

Regarding the method of interpretation applied for each type of divergence, the following table summarises the use of linguistic and metalinguistic methods:

Types of divergences and methods of interpretation	Total
1) Structural-grammatical	55
Linguistic	21
Metalinguistic	34
2) Lexical-conceptual	27

¹¹¹³ *Ibid.*, paragraph 37.

¹¹¹⁴ Case C-451/08 *Helmut Müller*, Opinion of AG Mengozzi, EU:C:2009:710, point 23.

¹¹¹⁵ *Ibid.*, point 24.

¹¹¹⁶ *Ibid.*, point 25.

¹¹¹⁷ Case C-451/08 *Helmut Müller*, EU:C:2010:168, paragraph 38.

Linguistic	5
Metalinguistic	21
Other	1
3) Lack of consistency	10
Linguistic	5
Metalinguistic	4
Other	1
4) Combined problems	2
Linguistic	1
Metalinguistic	1
Grand Total	94

There is a clear difference between structural-grammatical and lexical-conceptual divergences. While structural-grammatical problems combine both linguistic and metalinguistic methods, lexical-conceptual problems require, in their majority, metalinguistic interpretation. In addition, problems that hinge on lack of consistency combine both linguistic and metalinguistic methods.

6.6. Types of legal instruments where divergences appeared

There was only one case of a divergence in the EC Treaty (Case C-370/07 [Commission v Council](#))¹¹¹⁸ and the Court applied metalinguistic interpretation. In addition, most divergences appeared in regulations and directives. In these cases both linguistic and metalinguistic methods have been used:

¹¹¹⁸ Case C-370/07 *Commission v Council*, EU:C:2009:590.

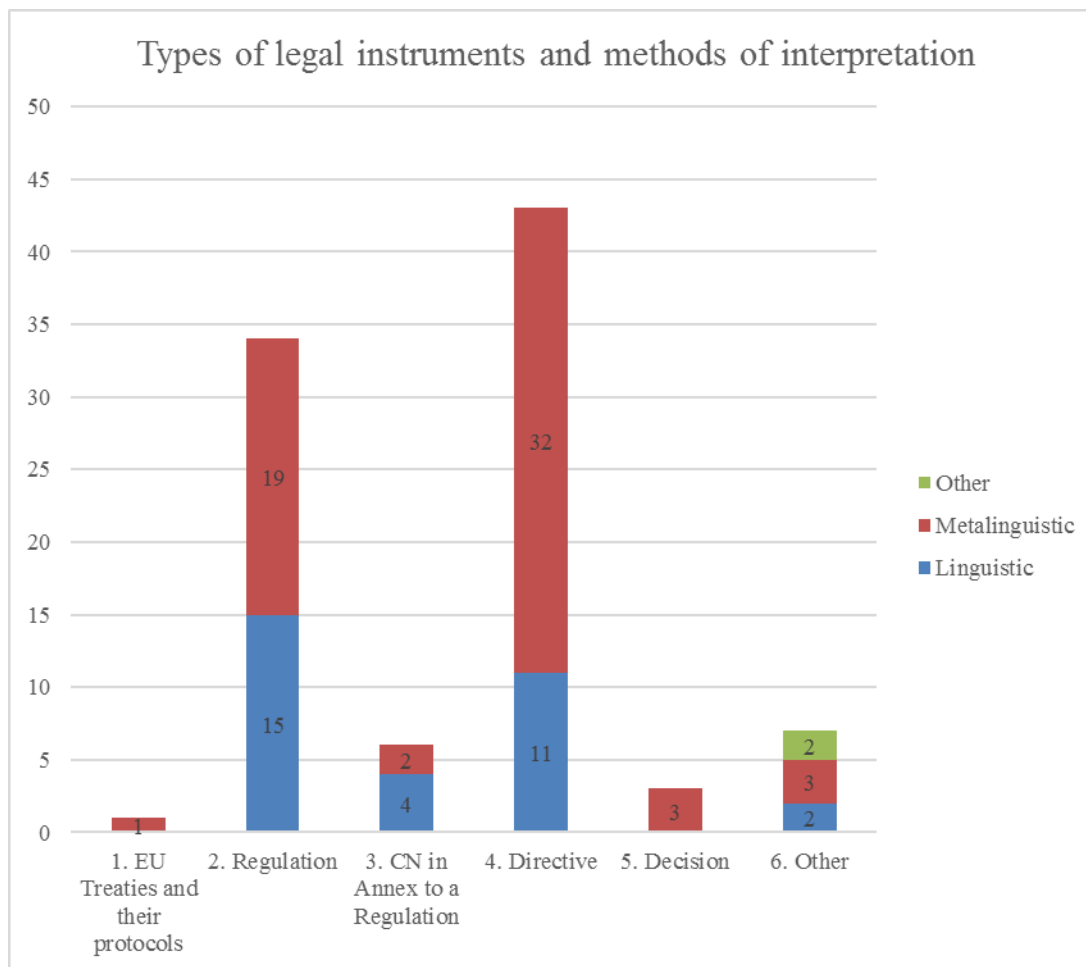


Figure 14: Types of legal instruments and methods of interpretation

Although metalinguistic interpretation prevails, the figures show that linguistic interpretation has also been used. We have separated the cases that concern the interpretation of the Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87) and the amended version by Commission Regulation (EC) No 2204/1999 because they have a highly technical character. The CN is a method for designating goods and merchandise which was established to meet the requirements both of the Common Customs Tariff and of the external trade statistics of the EU.¹¹¹⁹ Baaij claims that in most judgments that involve Common Custom Tariff legislation the Court took a literal approach (Baaij 2012:225). In the period we have analysed, there was a total of six cases on the CN. In two of them, i.e. *Kurcums Metal*¹¹²⁰ and *Pacific World and FDD International*,¹¹²¹ the Court first applied a metalinguistic method.

¹¹¹⁹ See <http://goo.gl/zIL1lz> [last consulted on 15/04/2015].

¹¹²⁰ Case C-558/11 *Kurcums Metal*, EU:C:2012:721.

¹¹²¹ Case C-215/10 *Pacific World and FDD International*, EU:C:2011:528.

One of the cases (*Sunshine Deutschland Handelsgesellschaft*)¹¹²² concerned, in fact, the explanatory notes to the CN, which have no binding force.

Finally, the category of ‘Other’ includes legal instruments such as Guidelines (Joined Cases T-349/06, T-371/06, T-14/07, T-15/07 and T-332/07 *Germany v Commission*)¹¹²³ or the Montreal Convention (*Walz*).¹¹²⁴

6.7. Causes for divergences and methods of interpretation

As this systematic analysis of the case law has shown, divergences can be of different types. Some of the cases present divergences that could have been avoided. They are due to a translation problem or an inconsistent amendment of the instruments. However, other cases present divergences that are inevitable or more difficult to avoid.

In Group 1 and Group 2 we have analysed a total of ninety-four judgments. The causes for divergences are distributed as follows:

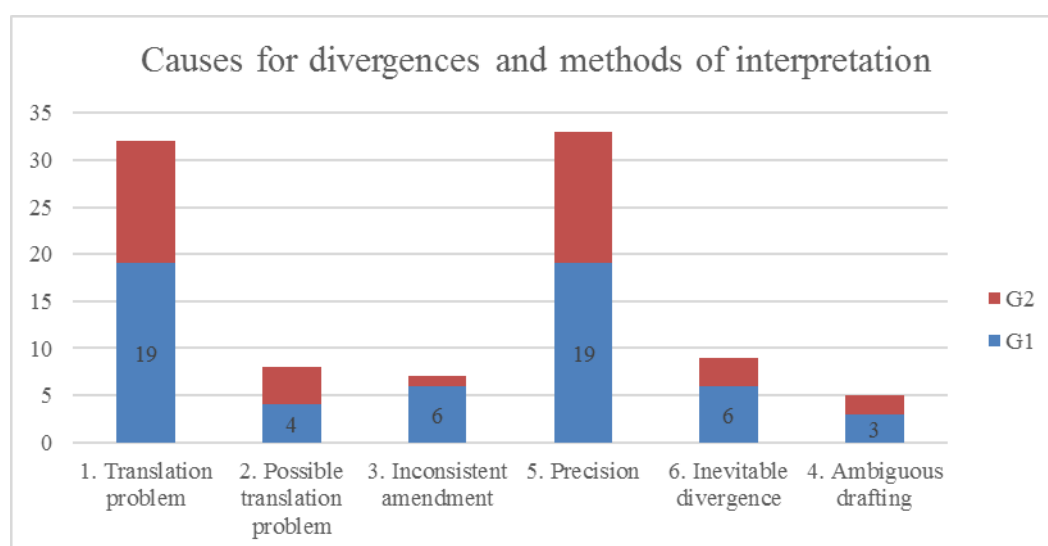


Figure 15: Causes for divergences and methods of interpretation

The methods of interpretation used for each of the causes can be seen as follows:

Causes for the divergences and methods of interpretation	Total
1. Translation problem	32

¹¹²² Case C-229/06 *Sunshine Deutschland Handelsgesellschaft*, EU:C:2007:239.

¹¹²³ Joined Cases T-349/06, T-371/06, T-14/07, T-15/07 and T-332/07 *Germany v Commission*, EU:T:2008:318.

¹¹²⁴ Case C-63/09 *Walz*, EU:C:2010:251.

Other	2
Metalinguistic	18
Linguistic	12
2. Possible translation problem	8
Metalinguistic	4
Linguistic	4
3. Inconsistent amendment	7
Metalinguistic	6
Linguistic	1
4. Ambiguous drafting	5
Metalinguistic	3
Linguistic	2
5. Precision	33
Metalinguistic	23
Linguistic	10
6. Inevitable divergence	9
Metalinguistic	6
Linguistic	3
Grand Total	94

In the divergences that we consider to be translation problems, metalinguistic interpretation was used in eighteen cases, while linguistic interpretation was applied in twelve cases. In the cases where the divergence is more a matter of precision, metalinguistic methods were more often used than linguistic ones. In the rest of the causes for divergences both linguistic and metalinguistic methods are combined.

6.7.1. Translation problems

Most of the translation problems are structural-grammatical as shown in the following chart:

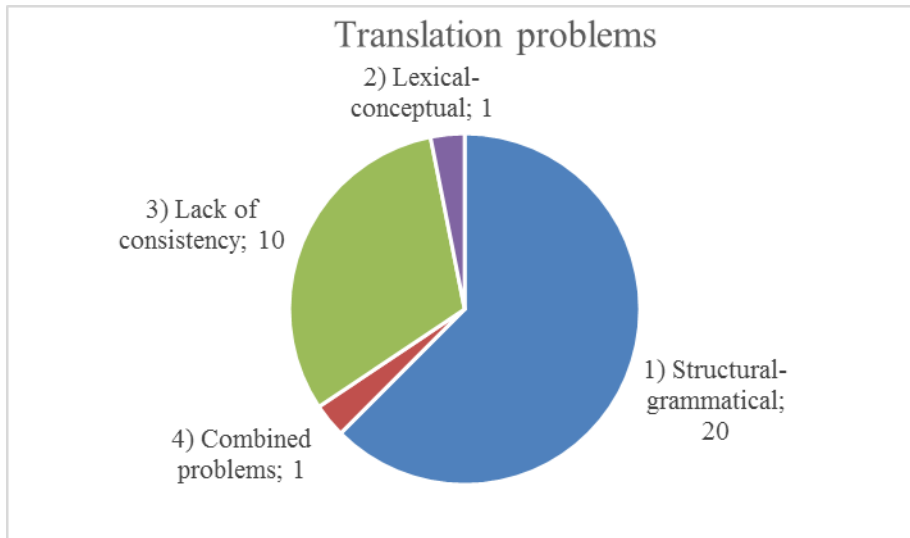


Figure 16: Types of translation problems

The divergences that are thought to hinge on a translation problem are detailed as follows:

- **Structural-grammatical – Punctuation:** Use of the comma in some versions and use of the correlative conjunction ‘either...or’ in English.

Case: [Able UK](#).¹¹²⁵

Comment: It was not clear to which part of the sentence the adverbial phrase of condition qualified because some language versions did not use a comma. Besides, the English language version’s wording was grammatically incorrect. Able had doubts as to the VAT liability of the dismantling service which it provided and argued that the supply was exempt pursuant to Article 151(1)(c) of the VAT Directive.

As point 1.4.2. of the Joint Practical Guide requires, drafting should be grammatically correct and respect the rules of punctuation. More precisely, point 5.2.3. of the Guide states that ‘The grammatical relationship between the different parts of the sentence must be clear’. Therefore, drafters and translators should pay special attention to adverbials and use appropriate punctuation to make clear which parts of the sentence are related.

- **Structural-grammatical – Conjunction:** Use of the disjunctive coordinating conjunction ‘or’ instead of the copulative coordinating conjunction ‘and’ in the German version.

Case: [DR and TV2 Danmark](#).¹¹²⁶

¹¹²⁵ Case C-225/11 *Able UK*, EU:C:2012:252.

¹¹²⁶ Case C-510/10 *DR and TV2 Danmark*, EU:C:2012:244.

Comment: The conjunction ‘or’ expresses a choice between two mutually exclusive possibilities. As the German version used the disjunctive conjunction, the referring court was not sure whether the two conditions set out in recital 41 in the preamble to Directive 2001/29 had to be understood as being alternative or cumulative in nature.

Lawyer-linguists who carry out the revision procedure (see section 2.2.1.1.2. should verify the use of conjunctions in the different language versions to avoid divergences like this one.

- **Structural-grammatical – Omissions or additions**

Cases: All judgments found in section 6.1.5. and section 6.1.6.

Comment: A basic rule in translation is to avoid adding or omitting information, and this becomes even more imperative in legislation. As in the EU there can be confusion with the original, that is to say, legally speaking, there is no single original version, revision by lawyer-linguists is essential. During the shared legal-linguistic revision divergences concerning omissions or extra information should be removed.

- **Structural-grammatical – Other aspects of syntax:** Use of modal verbs and verb tenses.

Cases: [*Internetportal und Marketing*](#),¹¹²⁷ [*Choque Cabrera & Zurita García*](#)¹¹²⁸ and [*Hofmann*](#).¹¹²⁹

Comment: It is very important for translators to know how to use the different modal verbs and verb tenses. The divergences found in these cases could have been avoided with more appropriate translations. For example, in *Internetportal und Marketing* it was the German version that diverged from the rest. It used the present tense, which introduced a categorical tone, while the other versions used a modal verb, which introduced an example. Similarly, in *Choque Cabrera & Zurita García* the Spanish version made an incorrect use of the future tense, which expresses an obligation instead of a possibility.

- **Lexical-conceptual – Terms with different connotations:** ‘Publicity’ v ‘advertising’

Case: [*Present-Service Ullrich v OHMI - Punt Nou*](#).¹¹³⁰

¹¹²⁷ Case C-569/08 *Internetportal und Marketing*, EU:C:2010:311.

¹¹²⁸ Joined cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera*, EU:C:2009:648.

¹¹²⁹ Case C-419/10 *Hofmann*, EU:C:2012:240.

¹¹³⁰ Case T-66/11 *Present-Service Ullrich v OHMI - Punt Nou (babilu)*, EU:T:2013:48.

Comment: In the Spanish language version of the list of goods and services covered by the earlier trade mark, which was the authentic language version of the case, the services were described as ‘*Publicidad; gestión de negocios comerciales; administración comercial; trabajos de oficina*’. This wording corresponded with that used in the official Spanish version of the class heading for Class 35. In the English version of the list of goods and services covered by the earlier trade mark, the term *publicidad* had been translated as ‘publicity’. However, the official English version of the Nice Classification and the list of the services in Class 35 used the term ‘advertising’, not ‘publicity’.

The applicant argued that the word ‘publicity’ was not synonymous with the word ‘advertising’ and it had to be taken to mean ‘public relations’. Indeed, in the field of communication, they are two distinctive tools. The Spanish term *publicidad* covers in English both ‘advertising’, which refers to paid announcement, and ‘publicity’, which refers to institutional and/or non-paid announcement (Fuentes Olivera & Arribas-Baño 2008:94).

In any event, the Court did not enter into details about the difference between the two concepts. It attributed the divergence to a translation problem. It is clear that it would have been avoided if translators had referred to the wording used in the official version of Class 35, which used the term ‘advertising’, not ‘publicity’.

- **Consistency – Lack of consistency in a term’s usage in different articles of an instrument or lack of consistency in a term’s usage between the headline and the content of an article.**

Cases: All judgments found in section 6.3.

Comment: The Joint Practical Guide distinguishes two types of consistency: formal consistency, concerning only questions of terminology, and substantive consistency in a broader sense, concerning the logic of the act as a whole (Guideline 6.1.). In order to avoid ambiguities, contradictions or doubts as to the meaning of a term, the Guide provides that ‘consistency of terminology means that the same terms are to be used to express the same concepts and that identical terms must not be used to express different concepts’. Therefore, any term must be used ‘in a uniform manner to refer to the same thing and another term must be chosen to express a different concept’ (Guideline 6.2.).

All cases analysed in section 6.3. refer to formal consistency. We consider that these types of divergences can be avoided with appropriate mechanisms to ensure consistency. Translators

must, of course, follow Guideline 6.1 and 6.2. very closely and lawyer-linguists should pay special attention to consistency during the shared legal-linguistic revision.

- **Combined problems - Lack of consistency in a term's usage within an article and addition.**

Case: [Helmut Müller](#).¹¹³¹

Comment: The German language version contained two problems. First, there was terminological inconsistency in the use of the term 'works' in German. The activity referred to in the third variant was not described as 'a work' (*Bauwerk*) but as 'building activity' (*Bauleistung*), with the result that the subsequent definition of 'a work' appeared, in the German version, to apply only to the second variant and not to the third. Second, the third variant specified that the activity in question was to be executed 'by third parties' (*durch Dritte*), a condition that did not appear in the other language versions.

6.7.2. Possible translation problems

There are nine cases whose cause is not completely clear but which could be due to a translation problem.

- **Structural-grammatical – Other aspects of syntax**

Cases: [Gelt](#),¹¹³² [Heinrich Heine](#),¹¹³³ [Consiglio Nazionale degli Ingegneri](#),¹¹³⁴ T-161/05 [Hoechst v Commission](#)¹¹³⁵ and T-405/05 [Powerserv Personalservice v OHMI - Manpower \(MANPOWER\)](#).¹¹³⁶

Comment: In these cases there is normally one language version that uses a different formulation. For example, in *Gelt* the Advocate General explained in his Opinion¹¹³⁷ that the uncertainty could be attributed to the wording of the German version which, with regard to the materialisation of future sets of circumstances or events, referred to the yardstick of 'sufficient probability' (*man mit hinreichender Wahrscheinlichkeit Davon ausgehen kann*), as

¹¹³¹ Case C-451/08 *Helmut Müller*, EU:C:2010:168.

¹¹³² Case C-19/11 *Geltl*, EU:C:2012:397.

¹¹³³ Case C-511/08 *Heinrich Heine*, EU:C:2010:189.

¹¹³⁴ Case C-311/06 *Consiglio*, EU:C:2009:37.

¹¹³⁵ Case T-161/05 *Hoechst v Commission*, EU:T:2009:366.

¹¹³⁶ Case T-405/05 *Powerserv Personalservice v OHMI – Manpower*, EU:T:2008:442.

¹¹³⁷ Case C-19/11 *Geltl*, Opinion of AG Mengozzi, EU:C:2012:153.

opposed to the majority of the other language versions of that provision which essentially referred to the yardstick of reasonable expectation.¹¹³⁸

Furthermore, there are some cases that present divergences in a language other than the ones examined in this study. Thus, we cannot determine whether the causes really stemmed from translation problems. In *Latchways and Eurosafe Solutions*,¹¹³⁹ the problem was in the Dutch language version. *Djurgården-Lilla Värtans Miljöskyddsförening*¹¹⁴⁰ concerned the Swedish language version. In *Profisa*,¹¹⁴¹ the problem was in the Lithuanian language version.

6.7.3. Inconsistent amendment of the instrument

The Joint Practical Guide lays down some guidelines on amendments. Guideline 18 provides as follows:

Every amendment of an act shall be clearly expressed. Amendments shall take the form of a text to be inserted in the act to be amended. Preference shall be given to replacing whole provisions (articles or subdivisions of articles) rather than inserting or deleting individual sentences, phrases or words.

The Guide mentions the potential problem with translations and recommends avoiding amendments carried out only on certain portions of a text:

18.3. In the interests of clarity and in view of the problems of translation into all the official languages, it is recommended that amendments should not be made by inserting or deleting sections of text, other than dates or figures.

All the cases analysed in this group present divergences that were caused because of an inconsistent amendment of the provisions in the different language versions.¹¹⁴²

○ Structural-grammatical – Punctuation

Case: C-41/09 [Commission v Netherlands](#).¹¹⁴³

Comment: In some versions, a comma had been substituted for a semi-colon, but not all language versions had been amended accordingly and this led to ambiguity in the legal interpretation.

¹¹³⁸ *Ibid.*, paragraph 63.

¹¹³⁹ Case C-185/08 *Latchways and Eurosafe Solutions*, EU:C:2010:619.

¹¹⁴⁰ Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*, EU:C:2009:631.

¹¹⁴¹ Case C-63/06 *Profisa*, EU:C:2007:233.

¹¹⁴² In this respect, see section 2.3. on ‘meaning-changing corrigenda’.

¹¹⁴³ Case C-41/09 *Commission v Netherlands*, EU:C:2011:108.

- **Structural-grammatical – Omissions or additions**

Cases: C-85/11 [Commission v Ireland](#)¹¹⁴⁴ and C-86/11 *Commission v United Kingdom*.¹¹⁴⁵

Comment: The word ‘any’ had been added in the English language version but not in the other language versions.

- **Structural-grammatical – Other aspects of syntax**

Cases: [Stoppelkamp](#),¹¹⁴⁶ [Laki](#),¹¹⁴⁷ Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie v Commission*¹¹⁴⁸ and [BVG](#).¹¹⁴⁹

Comment: A certain formulation was amended but not consistently in all language versions. For example, in *Stoppelkamp*, the phrase ‘taxable person established abroad’ had been substituted for the phrase ‘taxable person who is not established within the territory of the country’. However, the German version had not been amended accordingly and this caused uncertainty. Similarly, in Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie v Commission* the Court found that the wording in French had been changed from *infractions continue ou continueés* to *infractions continue ou répétée*. However, not all language versions of this provision had been amended the same way.¹¹⁵⁰

The *BVG* case was slightly different because it did not concern an amendment but rather the adaptation of a provision from the Brussels Convention 1968 to Regulation No 44/2001 (Brussels I Regulation).

6.7.4. Ambiguous drafting

We have found five cases in which the wording is ambiguous in all language versions. It is not just one language version that differs from the rest and which could be considered an unfortunate translation.

- **Structural-grammatical – Conjunction**

Case: T-129/09 [Bongrain v OHMI - apetito \(APETITO\)](#).¹¹⁵¹

¹¹⁴⁴ Case C-85/11 *Commission v Ireland*, EU:C:2013:217.

¹¹⁴⁵ Case C-86/11 *Commission v United Kingdom*, EU:C:2013:267.

¹¹⁴⁶ Case C-421/10 *Stoppelkamp*, EU:C:2011:640.

¹¹⁴⁷ Case C-351/10 *Laki*, EU:C:2011:406.

¹¹⁴⁸ Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie v Commission*, EU:T:2013:259.

¹¹⁴⁹ Case C-144/10 *BVG*, EU:C:2011:300.

¹¹⁵⁰ *Ibid.*, paragraphs 77-79.

¹¹⁵¹ T-129/09 *Bongrain v OHMI - apetito (APETITO)*, EU:T:2011 :193.

Comment: This case presented uncertainty as to the interpretation of the provision because the drafting was ambiguous in general. The applicant claimed that the provision separated the goods into three parts, as marked by the coordinating conjunction ‘and’. The CJEU ruled out this interpretation.

- **Structural-grammatical – Other aspects of syntax**

Cases: *M and Others*,¹¹⁵² *Schutzverband der Spirituosen-Industrie*,¹¹⁵³ *Euro Tex*,¹¹⁵⁴ *Sunshine Deutschland Handelsgesellschaft*.¹¹⁵⁵

Comment: A common ambiguity in syntax appears, for example, with adverbials. That was the problem in *M and Others* and *Schutzverband der Spirituosen-Industrie*. We have already commented the question of adverbials in section 7.7.1. Of course, punctuation should be used properly so that the grammatical relationship between the adverbial and the rest of the sentence is clear.

6.7.5. A question of precision

The Joint Practical Guide provides the golden rule that EU legislative acts shall be drafted clearly, simply and precisely (Guideline 1). Translators face the difficult task of striking a balance between simplicity and precision. As the Guide admits, ‘simplification is often achieved at the expense of precision and vice versa’. The Guide remarks that this balance may vary according to the addressees of the provision, hence the importance of an appropriate analysis of the communicative situation.

The cases in this group presented divergences that are a matter of precision. Perhaps they could have been avoided with a more precise expression or term.

- **Structural-grammatical – Conjunction**

Case: Joined Cases T-204/08 and T-212/08 *Team Relocations v Commission*.¹¹⁵⁶

Comment: ‘both...and’/sowohl...als versus además de/outre. The German and English versions present equivalent correlative conjunctions that indicate equivalence between two elements, while the Spanish and French versions use conjunctions that indicate addition.

- **Structural-grammatical – Other aspects of syntax**

¹¹⁵² Case C-340/08 *M and Others*, EU:C:2010:232.

¹¹⁵³ Case C-457/05 *Schutzverband der Spirituosen-Industrie*, EU:C:2007:576.

¹¹⁵⁴ Case C-56/06 *Euro Tex*, EU:C:2007:347.

¹¹⁵⁵ Case C-229/06 *Sunshine Deutschland Handelsgesellschaft*, EU:C:2007:239.

¹¹⁵⁶ Joined Cases T-204/08 and T-212/08 *Team Relocations and Others v Commission*, EU:T:2011:286.

Cases: [Bark](#),¹¹⁵⁷ [RVS Levensverzekeringen](#),¹¹⁵⁸ [Söll](#),¹¹⁵⁹ [Omejc](#),¹¹⁶⁰ [Codirex expeditie](#),¹¹⁶¹ [Velvet & Steel Immobilien](#)¹¹⁶² (requests for preliminary ruling), T-374/04 [Germany v Commission](#),¹¹⁶³ T-576/08 [Germany v Commission](#)¹¹⁶⁴ (actions for annulment), F-23/10 [Allen v Commission](#)¹¹⁶⁵ (action before the Civil Service Tribunal) and C-54/09 P [Greece v Commission](#)¹¹⁶⁶ (appeal).

Comment: These cases presented wording that created uncertainty in interpretation. For example, in *RVS Levensverzekeringen*, most versions used an expression equivalent to ‘assume commitments’ while the English version used ‘cover commitments’. Similarly, in *Omejc*, most version used a verb equivalent to ‘prevents’ while the German version used an expression equivalent to ‘makes impossible’.

○ **Lexical-conceptual – Term with a more restrictive meaning**

Cases: [Promociones y Construcciones BJ 200](#),¹¹⁶⁷ [Asbeek Brusse and de Man Garabito](#),¹¹⁶⁸ [A](#),¹¹⁶⁹ [Astrid Preissl](#),¹¹⁷⁰ [IMC Securities](#)¹¹⁷¹ [Vorarlberger Gebietskrankenkasse](#),¹¹⁷² [Endendijk](#).¹¹⁷³

Comment: These cases posed some doubts because the scope of the concepts used was not clear. For example, in *Promociones y Construcciones BJ 200*, the Spanish language version used the expression *procedimiento obligatorio de liquidación* (‘compulsory liquidation procedure’), while most language versions used the expression ‘compulsory sale procedure’. In order to bring the Spanish version in conformity with the rest, the expression *procedimiento de venta forzosa* could have been used. Similarly, in *A*, the English version used the term ‘international routes’, while most of the other language versions used a term equivalent to ‘international traffic’.

¹¹⁵⁷ Case C-89/12 *Bark*, EU:C:2013:276.

¹¹⁵⁸ Case C-243/11 *RVS Levensverzekeringen*, EU:C:2013:85.

¹¹⁵⁹ Case C-420/10 *Söll*, EU:C:2012:111.

¹¹⁶⁰ Case C-536/09 *Omejc*, EU:C:2011:398.

¹¹⁶¹ Case C-400/06 *Codirex expeditie*, EU:C:2007:519.

¹¹⁶² Case C-455/05 *Velvet & Steel Immobilien*, EU:C:2007:232.

¹¹⁶³ Case T-374/04 *Germany v Commission*, EU:T:2007:332.

¹¹⁶⁴ Case T-576/08 *Germany v Commission*, EU:T-2011:166.

¹¹⁶⁵ Case F-23/10 *Allen v Commission*, EU:F:2011:162.

¹¹⁶⁶ Case C-54/09 P *Greece v Commission*, EU:C:2010/451.

¹¹⁶⁷ Case C-125/12 *Promociones y Construcciones BJ 200*, EU:C:2013:392.

¹¹⁶⁸ Case C-488/11 *Asbeek Brusse and de Man Garabito*, EU:C:2013:341.

¹¹⁶⁹ Case C-33/11 *A*, EU:C:2012:482.

¹¹⁷⁰ Case C-381/10 *Astrid Preissl*, EU:C:2011:638.

¹¹⁷¹ Case C-445/09 *IMC Securities*, EU:C:2011:459.

¹¹⁷² Case C-347/08 *Vorarlberger Gebietskrankenkasse*, EU:C:2009:561.

¹¹⁷³ Case C-187/07 *Endendijk*, EU:C:2008:197.

- **Lexical-conceptual – Term with a more general meaning**

Case: [SGS Belgium and Others](#),¹¹⁷⁴ and [Götz](#).¹¹⁷⁵

Comment: These cases also present uncertainty as to the scope of the concepts because one language version uses a term with a broader meaning than the terms used in the other language versions. In *SGS Belgium and Others*, the Dutch version used the term *verloren* ('lost'), a term that was more generic than the terms used in other language versions, which employed the term 'perished'. In *Götz*, it was the German version that used the term *Verkaufsstelle*, a term which had a broader meaning than the terms employed in the other languages: 'staff shop'/*économat/economatos*.

6.7.6. Inevitable differences

- **Structural-grammatical – Other aspects of syntax**

Cases: [Genil 48 and Comercial Hostelera de Grandes Vinos](#),¹¹⁷⁶ [Elsacom](#),¹¹⁷⁷ [Pacific World and FDD International](#)¹¹⁷⁸ and T-339/06 [Greece v Commission](#).¹¹⁷⁹

Comment: In these cases there are some differences in wording but they seem inevitable because each utilises the most natural way to express the provisions in the various languages. For example, in *Genil 48 and Comercial Hostelera de Grandes Vinos* there was some doubt because the French version used the expression *dans le cadre de* ('within the framework of'), while other versions used an expression equivalent to 'as part of'. We consider that the expression *dans le cadre de* is the most natural expression in French to translate 'as part of'. Translators face the difficult task of rendering legislation as precise as possible while also respecting the natural way to express ideas. The same applies to *Elsacom* ('within' and *dentro de/spätestens/au plus tard*) and T-339/06 *Greece v Commission* ('no later than' and 'by').

- **Lexical-conceptual – Terms with different connotations**

Cases: [BLV Wohn- und Gewerbebau](#),¹¹⁸⁰ [Møller](#),¹¹⁸¹ [Kozłowski](#),¹¹⁸² [Emirates Airlines](#),¹¹⁸³ and T-341/07 [Sison v Council](#).¹¹⁸⁴

¹¹⁷⁴ Case C-218/09 *SGS Belgium and Others*, EU:C:2010:152.

¹¹⁷⁵ Case C-408/06 *Götz*, EU:C:2007:789.

¹¹⁷⁶ Case C-604/11 *Genil 48 and Comercial Hostelera de Grandes Vinos*, EU:C:2013:344.

¹¹⁷⁷ Case C-294/11 *Elsacom*, EU:C:2012:382.

¹¹⁷⁸ Case C-215/10 *Pacific World and FDD International*, EU:C:2011:528.

¹¹⁷⁹ Case T-339/06 *Greece v Commission*, EU:T:2008:568.

¹¹⁸⁰ Case C-395/11 *BLV Wohn- und Gewerbebau*, EU:C:2012:799.

¹¹⁸¹ Case C-585/10 *Møller*, EU:C:2011:847.

¹¹⁸² Case C-66/08 *Kozłowski*, EU:C:2008:437.

Comment: As we explained in section 5.2.4., in *BLV Wohn, Kozłowski and Emirates Airlines*, the problem was not one of divergence; rather, the concepts had different connotations and were not defined in the legislation. In addition, in T-341/07 *Sison v Council* there was no definition of the concept of a ‘competent authority’ and it was not clear whether the provisions at issue had to be interpreted by reference and *renvoi* to national law or whether they possessed an autonomous meaning in European Union law.¹¹⁸⁵

¹¹⁸³ Case C-173/07 *Emirates Airlines*, EU:C:2008:400.

¹¹⁸⁴ Case T-341/07 *Sison v Council*, EU:T:2011:687.

¹¹⁸⁵ *Ibid.*, paragraph 63.

CONCLUSIONS

Our interest in the translation of EU legislation has led us to explore the connection and interdependence of drafting and translation, on the one hand, and the application and interpretation of EU law, on the other. The question of divergences between different language versions is at the heart of the challenge of rendering EU legislation in twenty-four official languages. Such a delicate topic requires an interdisciplinary approach, as undertaken in this study.

This dissertation has had three main objectives. The first objective has been to shed light on translation's role in the development and application of EU legislation. The second one has been the applied study of divergences, with special attention to the methods of interpretation applied by the CJEU in order to overcome them. The third objective has been the assessment of divergences with a view to elucidating whether they hinge on a translation problem or they are rather inevitable differences between different language versions. A mixed methodology combining both qualitative and quantitative methods was the key to addressing the second and third major objectives.

With regard to the **first main objective**, we have studied translation in relation to the legal and institutional context in which it is embedded. Part I has dealt with the EU as a multilingual legal order and translation's role in the production of multilingual EU law. The contextualisation provided in Chapter 1 has been instrumental to understanding the legal nature of the EU and the communicative conditions that frame the production of multilingual EU legal texts. A thorough analysis of the language regime has helped us confirm our hypothesis that multilingualism per se is not a problem or obstacle. Rather, when approached reasonably, it is an asset that must be protected. The reduction of the language regime has not been an option so far. In addition, there is an imperative legal need that makes it impossible to have only one language, which would probably be English as the main language for drafting and negotiation. For all this, we maintain that the focus should be on the relationship between multilingualism and the methods of interpretation applied by the CJEU.

In addition, since translators of EU legislation are incorporated into the legislative process, they become producers of binding rules in the target language, the process of which is described in Chapter 2. This chapter has described the main procedure for the elaboration of legislation, that is, the ordinary legislative procedure, in order to illuminate translation's place among the necessary set of procedures and expertise required for the proper functioning of the EU. Both translators and lawyer-linguists are fundamental actors in the drafting process. We

should highlight the importance of the shared legal-linguistic revision carried out by lawyer-linguists from the Parliament and the Council. This procedure is crucial during the legislative process in order to achieve multilingual concordance between language versions, i.e., to convey the same meaning in all language versions.

Moreover, in their role as text producers, translators need to evaluate the pragmatic aspects of the communicative situation in order to define the appropriate translation strategy. An analysis of the extra-linguistic factors helps translators become aware of the special legal nature of the EU. Above all, translation is carried out within the EU legal order, which is a legal order in its own right¹¹⁸⁶ in constant interaction with the national legal systems. For this reason, translators then face semantic instability since terms can acquire an independent EU meaning.¹¹⁸⁷

The semiotic approach we have adopted in Chapter 3 has been crucial to understanding how meaning is created in context. The value of a sign changes depending on its relations with other signs in the system, which is why meaning is dynamic. We need to move away from a positivistic perspective, from the assumption that meanings are rule-governed and stable. In fact, meanings only exist through use and they are constantly subject to potential change through the impact of context and communication.

From this dynamic perspective, translation intersects with judicial interpretation in the construction of multilingual legal meaning in the EU, since the legal success of a translation is determined by its uniform interpretation and application; hence the importance of legal hermeneutics for translators. They need both linguistic and legal competences because they necessarily deal with questions of interpretation. For the analysis of the translation of EU legislation, we have accordingly adopted a holistic approach that includes the examination of the methods of interpretation applied by the CJEU when reconciling diverging language versions.

Chapter 3 also explores the balance between legal certainty and multilingualism. Some paradoxes come to light regarding legal certainty. Law must meet two requirements: it must be accessible to the citizen and its effects must be foreseeable. The fact that EU law produces rights and obligations for individuals justifies the rendering of the texts in all official languages. Multilingualism in the EU is necessary because citizens need to have access to EU

¹¹⁸⁶ Case 6/64 *Flaminio Costa v ENEL*, EU:C:1964:66.

¹¹⁸⁷ See, for instance, Case 327/82 *Ekro*, EU:C:1984:11.

legislation in their own language. However, the first paradox is that the equal authenticity of all language versions makes it impossible to rely on a single language version. The second paradox is that legislation must be clear and precise and its application foreseeable by individuals. However, the question remains: ‘Can rules carry identical legal implication in all official languages?’

Absolute equivalence between twenty-four language versions of a legal text is difficult to attain, and some degree of divergence between language versions seems to be inevitable. The CJEU has admitted that certain divergence is sometimes unavoidable:

It is settled case-law that the interpretation of a provision of European Union law must, as a rule, take account of possible divergence between the different language versions of that provision (see, inter alia, Case C-382/02 *Cimber Air* [2004] ECR I-8379, paragraph 38).¹¹⁸⁸

The fact that linguistic versions can differ, sometimes in significant ways, undermines a central aspect of legal certainty, that of the predictability of outcomes in judicial decisions. In order to reconcile legal certainty and multilingualism we have adopted the conception of ‘communicative legal certainty’ proposed by Paunio (2011; 2013). In this view, *telos* and other dynamic methods of interpretation are of particular significance for the construction of meaning in multilingual EU law. Teleological interpretation is highly important for the CJEU, and one can conceptualise legal certainty from the point of view of the CJEU’s legal reasoning, which we have explored in the second part of this study. The examination of the interpretation criteria applied by the CJEU has helped elucidate the Court’s legal reasoning. In the end, the determination of whether and to what extent the authentic texts of EU legislation actually have the same meaning depends on interpretation.

Concerning legal certainty, the CJEU pointed out that the elimination of linguistic discrepancies can sometimes jeopardise legal certainty because words would have to be interpreted against their natural meaning:

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

¹¹⁸⁸ Case C-33/11 *A Oy*, EU:C:2012:482, paragraph 24.

of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words.¹¹⁸⁹

The corpus analysis in Part II has demonstrated the delicate task that translators face when striking a balance between the ordinary meaning of terms and special EU meanings, and between precision and simplicity. In order to achieve such a balance, they need to evaluate the pragmatic aspects of each particular communicative situation, considering the nature of the legal instruments and the addressees.

With regard to our **second main objective**, i.e., examining the methods of interpretation applied by the CJEU to overcome divergences between different language versions, part of our contribution has been our classification of the methods into two groups (linguistic interpretation and metalinguistic interpretation) and a detailed analysis of different arguments in each category. Chapter 4 has elaborated on the methods of interpretation that the CJEU normally applies: literal interpretation, systematic interpretation, teleological interpretation, historical interpretation and comparative law interpretation. Our classification into linguistic interpretation and metalinguistic interpretation has been helpful to examine specifically how the CJEU has reconciled diverging texts: whether literal interpretation (linguistic) was enough or whether the CJEU had to go beyond the word and apply other methods (metalinguistic).

Regarding the purpose of comparison, Chapter 5 has detailed three groups:

Group 1: Hard cases — divergences treated as a problem of interpretation

Group 2: Soft cases — divergences not treated as a problem of interpretation

Group 3: No divergences but comparison was used as a tool

We found it essential to start our analysis by distinguishing between the three groups for the following reasons:

- The fact that comparison between different language versions was used did not necessarily entail divergence. In Group 3, comparison was used as a tool to support an interpretation or to confirm that all language versions converged in meaning.
- Commencing the analysis of case law according to type of interpretation method was somewhat difficult because the CJEU often combines different methods. We have proved that the CJEU often started with linguistic comparison and then moved on to

¹¹⁸⁹ Case 80/76 *North Kerry Milk Products v Minister for Agriculture*, EU:C:1977:39, paragraph 11.

teleological or systematic interpretation. Thus, resorting to linguistic interpretation at a first stage does not mean that the method of interpretation is simply ‘literal’.

- Starting the analysis according to the type of divergence (structural-grammatical, lexical-conceptual, lack of consistency) also posed some difficulty because in Group 2 the CJEU sometimes admitted a divergence but did not treat that as a problem; the divergence was solved by looking at other language versions or by examining the context and objectives. Needless to say, in Group 3 the cases presented no divergences, so the classification per type of problem could not apply.

Group 1 (42%) dealt with ‘hard cases’ that required, for the most part, metalinguistic interpretation (fifty-six cases).

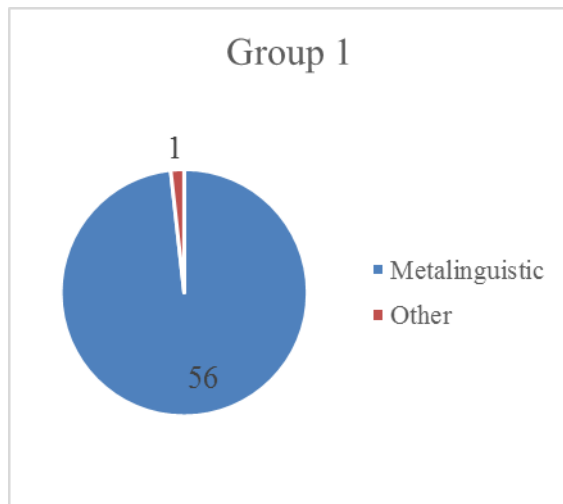


Figure 17: Methods of interpretation in G1

The most recurrent argument (in twelve cases) was ‘M2.5. Wording not enough or not helpful + in case of divergence purpose and scheme’. This further supports the conclusion that the CJEU often starts with linguistic interpretation and then continues with metalinguistic arguments.

Moreover, in hard cases we have considered whether divergences were detected at an early or later stage. From a total number of forty-seven requests for preliminary rulings in G1, ten cases presented divergences detected at an early stage by the referring court, one of the parties or the interveners. In the rest of the cases the divergence was revealed when comparing different language versions. Probably, many of these differences between the language versions would have gone unnoticed if it had not been for comparison. In addition, it is

difficult to know how many discrepancies are overlooked when comparison between language versions is not done.

Group 2 (27%) included ‘soft cases’ that were largely solved via linguistic interpretation (thirty-two cases).

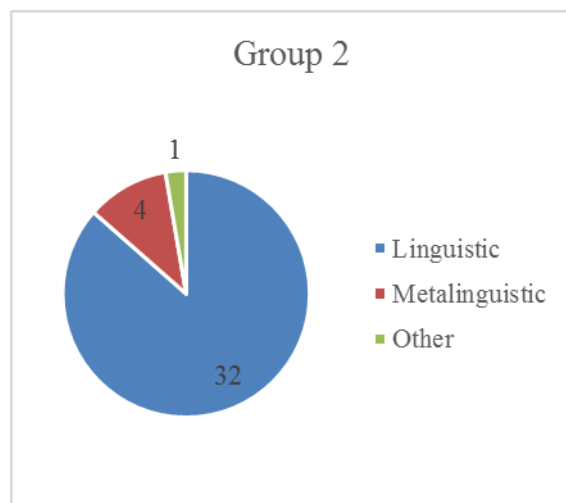


Figure 18: Methods of interpretation in G2

In most cases (nineteen), the Court solved the problem by looking at other language versions (method M1.1.). Typically, the CJEU used a concessive clause admitting the divergence but then stating that the other language versions were clear. For example: ‘While it is true that’ [...] ‘the fact remains that a large number of language versions [...]’.

Group 3 (31%) gathered the cases in which there was no divergence and where comparison was used as a tool. The CJEU has consistently maintained that the equal authenticity of all language versions implies that the rules must be interpreted and applied in the light of the versions existing in the other languages. The results obtained in this study are notable because they show that comparison is not only a requisite of procedural justice but also an added value in interpretation, as shown in the examples in Group 3.

Finally, for our **third main objective**, i.e., the assessment of divergences in order to determine whether they can be attributed to a translation inadequacy, Chapter 6 has provided a fine-grained classification of the types of divergences and an analysis of their possible origin. Before delving into the possible causes for divergences, data was triangulated to clarify two aspects. The first one is whether there was a correlation between the methods of interpretation and the kinds of divergences, and the second one is whether the type of legal instrument influenced the possibility of a text presenting divergences.

As for the relationship between the types of divergences and the methods of interpretation, structural-grammatical problems leading to divergence combined both linguistic and metalinguistic methods of interpretation, while lexical-conceptual problems primarily required metalinguistic interpretation:

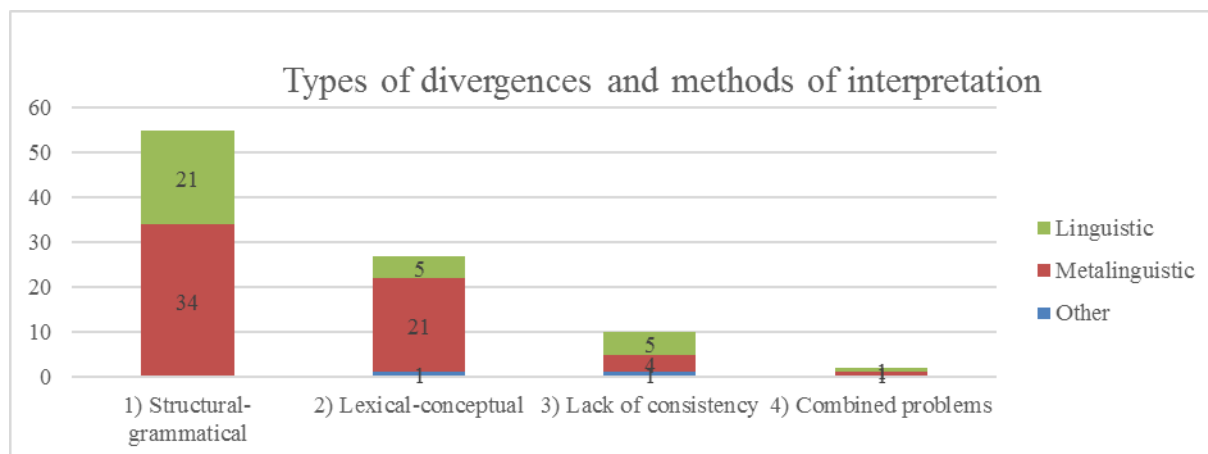


Figure 19: Types of divergences and methods of interpretation

In any event, metalinguistic methods prevail. From the total number of judgments analysed in Groups 1 and 2 (ninety-four cases), sixty cases involved metalinguistic methods, thirty-two cases linguistic methods and two cases other methods. This shows that the CJEU often starts with linguistic interpretation but then needs to go beyond the linguistic confines and resort to metalinguistic interpretation.

Concerning the types of legal instruments where divergences appear, most problems have been found in directives (forty-three cases). This may be because directives are often drafted in more general terms in order to leave Member States some margin of discretion to transpose the provisions into their national legal systems. However, a large number of divergences have also appeared in regulations (thirty-four cases). The rest of the cases appeared in the Treaties (one case), in decisions (three cases) or in other types of instruments (seven cases).

With reference to the origin of discrepancies, the following chart summarises the possible causes for divergences in Groups 1 and 2:

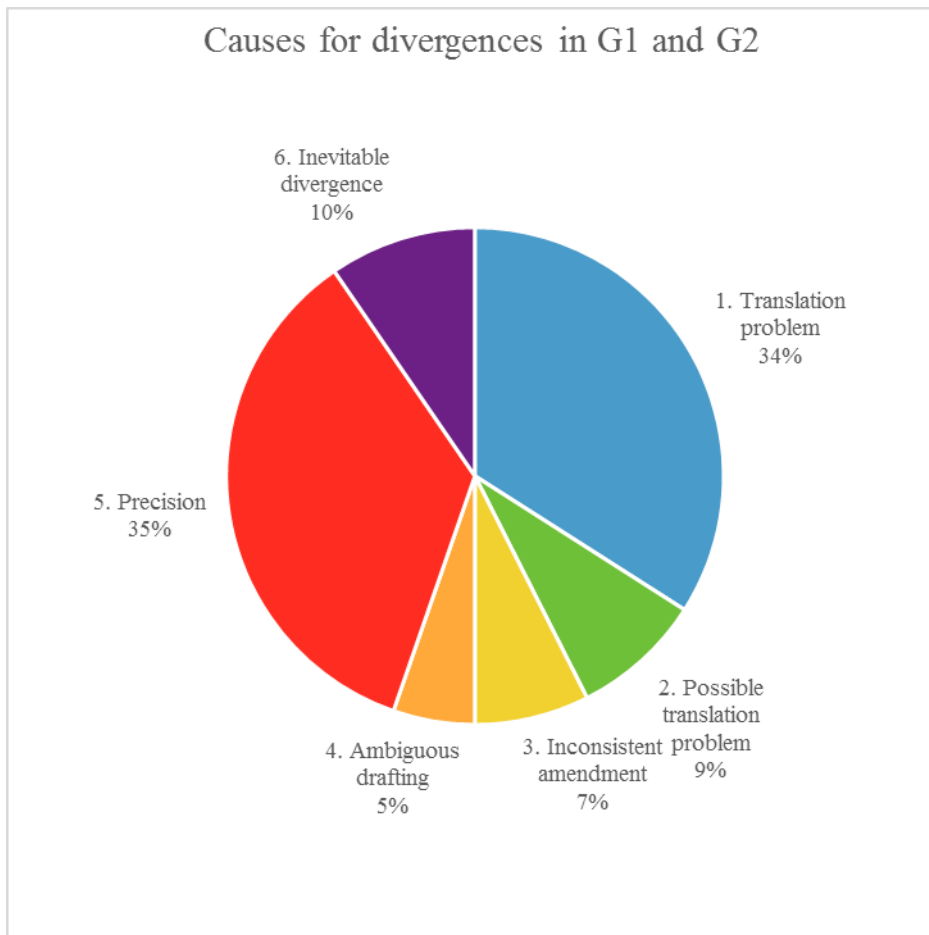


Figure 20: Causes for divergences in G1 and G2

We have found thirty-two cases (34%) that involved a translation problem (nineteen cases in G1 and thirteen in G2). A similar number of judgments, thirty-three cases (35%), dealt with matters of precision. These divergences cannot be regarded as translation problems but they might have been avoided with more accurate terms or expressions. In addition, there were eight cases (9%) whose cause is not very clear but which are suspected to originate from a translation problem. Five cases (5%) present wording that was ambiguous in all language versions; not only one language version diverged from the rest. Some divergences that could have been avoided are those relating to an inconsistent amendment of the legal instruments (7%). Finally, nine of the cases (10%) concern inevitable divergences.

The corpus analysis has also allowed us to confirm that the most frequent type of divergence is structural-grammatical (58%). Lexical-conceptual divergences occupy the second place, accounting for 29% of the divergences, while 11% of the cases involve lack of consistency and 2% present more than one problem.

Although lexical-conceptual divergences may be more difficult to avoid, many structural-grammatical differences could be avoided with better mechanisms to ensure concordance between different language versions. Lawyer-linguists play an essential role in guaranteeing multilingual consistency between all versions. It is also fundamental that drafters, translators and lawyer-linguists work closely together in order to communicate whether certain provisions might be problematic. EU legislation is often ‘negotiated legislation’ which must meet the requirements and needs of a plurality of actors. In addition, while legislation is debated in the different institutions, translators do not always take part in debates and negotiations. It would be useful for at least one lawyer-linguist to follow the whole legislative process. This could help clarify why certain wording was proposed or what the drafter’s intention was.

The examples provided in this dissertation might be integrated into the training of legal translators, both to avoid similar problems in the future and to illustrate the CJEU’s legal reasoning. Translators must be aware of the importance of the Court’s interpretation methods since they take part in the production of EU legislation.

The creation, application and interpretation of multilingual EU legislation cannot be studied separately because they complement with each other. This dissertation adopted an interdisciplinary approach with the aim of striking a balance between two disciplines: EU Law and Legal Translation Studies. These two fields are extremely rich and further research can be done into different aspects of the study from different perspectives.

From the point of view of corpus analysis, the two corpora built, i.e., the judgments and the legal instruments containing the divergences, could be further exploited in order to study, for instance, stylistic questions. Additional research can also be done adopting a diachronic approach in order to examine other periods in CJEU case law and evaluate whether the increase in the number of official languages has had an impact on the quantity of divergences. From a comparative perspective, it would be interesting to explore other settings where the production of multilingual law relies on translation, particularly as the translation of EU legislation shares common challenges with translation in other international settings.

More broadly, as globalisation is changing the relationship between law and language, it would be worth investigating, among other research avenues, the impact of transnationalisation on legal discourses in different languages. In that context, the study of new varieties of English and their bearing on translation deserves further attention, particularly in institutional settings.

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C-457/05 *Schutzverband der Spirituosen-Industrie*, EU:C:2007:576.

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C-408/06 *Götz*, EU:C:2007:789.

C-62/06 *ZF Zefeser*, EU:C:2007:811.

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