CONFERENCE ARTICLES

MULTILINGUAL EU LAW: A NEW WAY OF THINKING

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This study addresses an essential characteristic of the EU legal order: its legislation is multilingual and equally authentic in all language versions. In this paper, I use corpus analysis to examine the issue of divergences between language versions that come to light in EU case-law. This paper pursues three specific objectives: 1) to study the use of comparison between language versions by the Court of Justice of the European Union (CJEU), 2) to consider the methods of interpretation that the CJEU applies when considering multilingualism, and 3) to delve into the types of divergences and try to elucidate whether they can be attributed to translation problems. This applied study helps to shed light on the implications multilingualism has for the creation and interpretation of EU law. In order to understand how legal translation and interpretation actually work in the EU, I adopt a reasoned approach to face the challenges posed by the multilingual architecture of EU law, a new way of thinking that considers linguistic issues as important as legal issues.

Keywords: multilingual EU law, legal translation, divergences, interpretation, legal certainty

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I. INTRODUCTION

When studying the legal nature of the EU it is common to highlight the binding character of EU legislation and its invocability or direct effect. In this study, I emphasise another important feature of EU legislation: the fact that it is multilingual and equally authentic in all language versions.[1] EU law produces rights and obligations for individuals and this 'justifies the rendering of the legislation in all official languages', as a way to ensure equality before the law.[2]

As a consequence, translation plays a fundamental role in the development and application of multilingual EU law. Translators create texts that are legally binding;[3] they are key actors in law-making because drafting takes

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1 See Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335, para 18.

2 Lucie Pacho Aljanati, *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.* Doctoral thesis 2015, available at: http://hdl.handle.net/10803/314190

3 On the role of translators as text producers, see, for example, Susan Šarčević, *New Approach to Legal Translation* (Kluwer Law International 1997); Susan Šarčević, 'Challenges to the Legal Translator' in Peter M. Tiersma and Lawrence. M. Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 191.

place through translation.[4] Therefore, the creation of EU legislation includes the work of drafters, translators and lawyer-linguists, who normally act as legal revisers and supervise the linguistic concordance of the language versions.[5] The term 'language version' is used instead of 'translation' because all EU texts are equally authoritative. But can rules carry identical legal implications in all languages? Divergences between the different languages are inevitable. In case of doubt, the Court of Justice of the European Union (CJEU) is responsible for interpreting EU law (Art. 267 TFEU) and acts as the guarantor of uniform application and interpretation of EU legislation, always based on the premise that all versions constitute the same legal instrument.

In this paper, I use corpus analysis[6] to examine issues of divergences that come to light in EU case-law. Searches in the CVRIA database were carried out using the key term 'language versions'. This allows the retrieval of cases in which different language versions were invoked. The period chosen covers 01/01/2017 until 30/06/2017. This corpus analysis pursues three specific objectives. First, I study the use of comparison between language versions. I observe whether comparison is used to reconcile diverging language versions or to support an interpretation when no divergences are present (Section II). Second, I consider the methods of interpretation that the CJEU applies. For this, I divide cases into two main groups: those involving linguistic criteria of interpretation and those resorting to metalinguistic criteria of interpretation (Section III). Metalinguistic methods attempt 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.[7] Section III

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4 See Ingemar Strandvik, 'EU Translation – Legal Translation in Multilingual Lawmaking', Conference proceedings: The Eleventh International FIT/EULITA Forum: The Life of Interpreters and Translators - Joy and Sorrow?

5 On the shared legal-linguistic revision, see, for instance, Manuela Guggeis and William Robinson, 'Co-revision': Legal-Linguistic Revision in the European Union 'Co-decision' Process' in Cornelis Jaap W. Baaij (ed), The Role of Legal Translation in Legal Harmonisation (Wolters Kluwer 2012) 51 and Aljanati (n 2) 64.

6 A corpus typically implies a finite body of texts, sampled to be maximally representative and able to be stored electronically. See Tony McEnery and Andrew Wilson, *Corpus Linguistics* (Edinburgh University Press 2007) 29.

7 Pierre Pescatore 'Interprétation des lois et conventions plurilingues dans la Communauté européenne' (1984) 25(4) Les Cahiers de Droit 996.

also deals with interpretive techniques to solve divergences. It explores the issue of legal certainty in relation to multilingualism. Finally, I delve into the types of divergences and try to elucidate whether they can be attributed to translation problems. In addition, the examples shed light on the way the CJEU constructs meaning (Section IV).

This applied study brings to light some of the implications that multilingualism has for the creation and interpretation of EU law. I sustain that, in order to understand how legal translation and interpretation actually work in the EU, it is necessary to adopt a new way of thinking, which regards not only legal matters but also linguistic ones. Thus, I adopt a non-positivist perspective to address how meaning is construed and how legal certainty is reconciled with multilingualism.[8] These research questions necessitate interdisciplinary insights. I adopt an approach that deals with judicial interpretation from a linguistic perspective, regarding translation as key for the existence of EU legislation.

II. Use of Comparison between Different Language Versions

This section examines the use of comparison between language versions. I observe whether comparison is used to reconcile diverging language versions or to support an interpretation when no divergences are present.

The search in the CVRIA database was done by selecting the following criteria:

Period or date = 'Date of delivery'

Period = 'from 01/01/2017 to 30/06/2017'

Documents = Documents published in the ECR: Judgments;

Documents not published in the ECR: Judgments

Text = 'language versions'

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8 On non-positivist perspectives in relation to meaning, see, for instance, Ralph Christensen and Michael Sokolowski, 'Wie normative ist Sprache? Der Richter zwischen Sprechautomat und Sprachgesetzgeber' in Ulrike Haß-Zumkehr (ed), *Sprache und Recht* (Walter de Gruyter 2002) 65.

Regarding the key term, I carried out many searches in previous studies using several key words. I concluded that the term 'language versions' extracts almost all instances of comparison between different language versions.[9] In addition, in the present study I do not limit the search to any policy area.

Fourteen judgements were obtained. The initial question that arose was whether all instances of comparison dealt with a divergence between different language versions. In ten cases (71%), comparison concerned some kind of divergence. However, there were four cases (29%) in which no divergence was present but the CJEU used comparison to confirm an interpretation, normally by stating that all language versions converged.

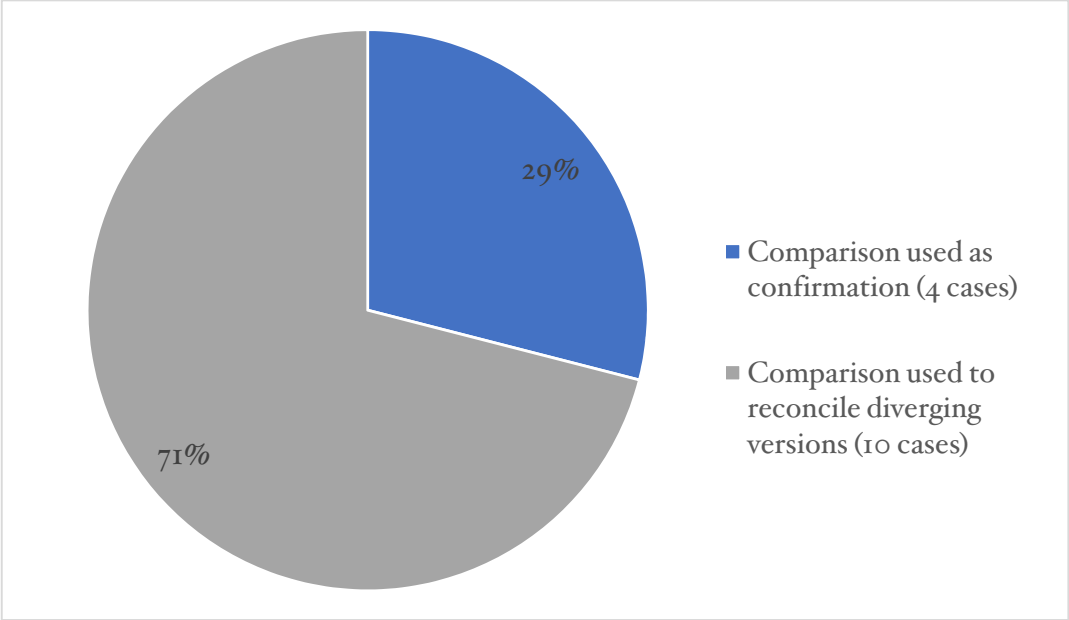

Figure 1: Use of comparison

If we consider the total number of judgements that the CJEU issued during the chosen period, these fourteen judgements represent only 3% of the cases. This figure is in line with the results obtained from larger and different

9 Christensen and Sokolowski (n 8); Fernando Prieto Ramos and Lucie Pacho Aljanati, 'Comparative Interpretation of Multilingual Law in International Courts: Patterns and Implications for Translation' in Fernando Prieto Ramos (ed), *Institutional Translation for International Governance. Enhancing Quality in Multilingual Legal Communication* (Bloomsbury 2017).

periods, which means the period selected for this study is highly representative.[10]

Moreover, looking at the type of proceedings, most cases (79%) are references for a preliminary ruling. These are the typical proceedings in which issues of linguistic divergences are treated. In these cases, the referring court has doubts as to the interpretation of a certain provision and the CJEU, in the framework of its competences (Art. 267 TFEU), has the final word in deciding how it must be interpreted.[11]

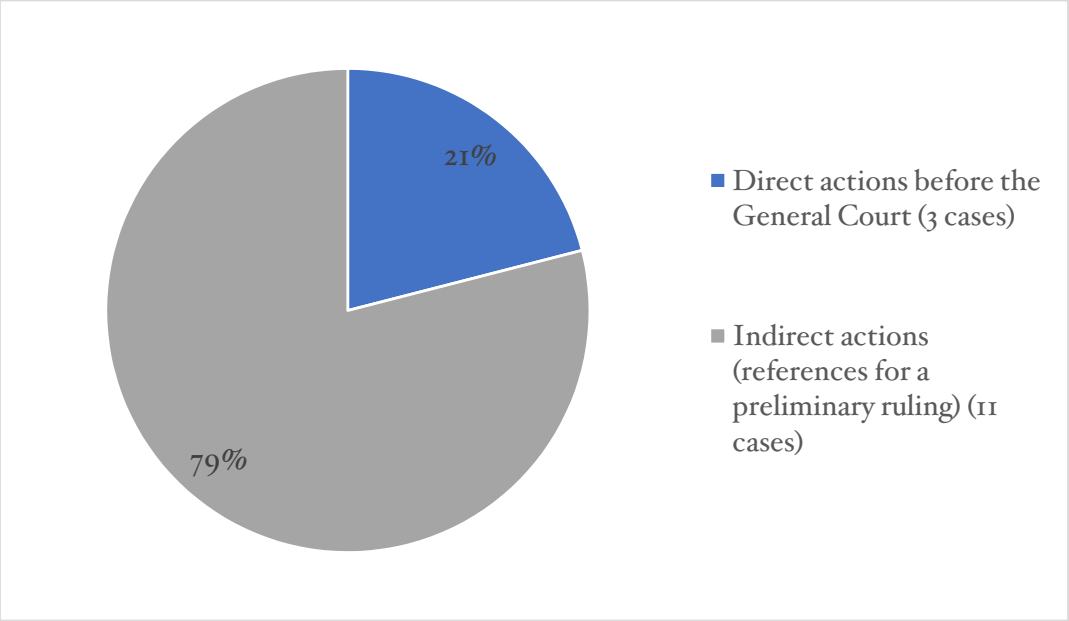

Figure 2: Types of proceedings

In addition, all cases were further classified into three different groups:[12]

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 confirmation

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10 Pacho Aljanati (n 2); Prieto Ramos and Pacho Aljanati (n 9).

11 Pacho Aljanati (n 2).

12 I follow the classification used in previous studies: Pacho Aljanati (n 2) and Lucie Pacho Aljanati, 'Multilingual Interpretation by the CJEU in the Area of Freedom, Security and Justice' in Joanna Jemielniak and Anne-Lise Kjær (eds), *Language and Legal Interpretation in International Law* (Oxford University Press 2018).

Cornelis Jaap Baaij mentions a similar classification: 'discrepancies posing interpretation problems', 'unproblematic discrepancies' and 'no discrepancies'.[13] However, he does not provide details on these three categories and moves on to analyse the interpretive strategies, i.e. he analyses the method of interpretation that the CJEU applies. Joxerramon Bengoetxea differentiates 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.[14] 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.[15] In contrast, the justification of a decision in a clear case tends to be straightforward.[16] 'Clear case' 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'.[17]

I call Group 1 'hard cases' because the CJEU deals with problematic divergences that require metalinguistic interpretation. However, for Group 2 I use the term 'soft cases' and not 'clear cases' because the judgements 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.[18]

I 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 analysis focuses on an examination of the types of divergences, refining and exploring the linguistic

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13 Cornelis Jaap W. Baaij, 'Fifty years of Multilingual Interpretation in the European Union' in Peter Tiersma and Lawbrence Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 219.

14 Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1993) 183.

15 Ibid 168.

16 Ibid 173.

17 Ibid 184.

18 Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013) 80, citing Bengoetxea (n 14).

and translation issues in greater detail. The focus is on Group 1 and Group 2. For this part, comparison is limited to English, French, German and Spanish, as these are my working languages.

The following graph shows the distribution of the cases:

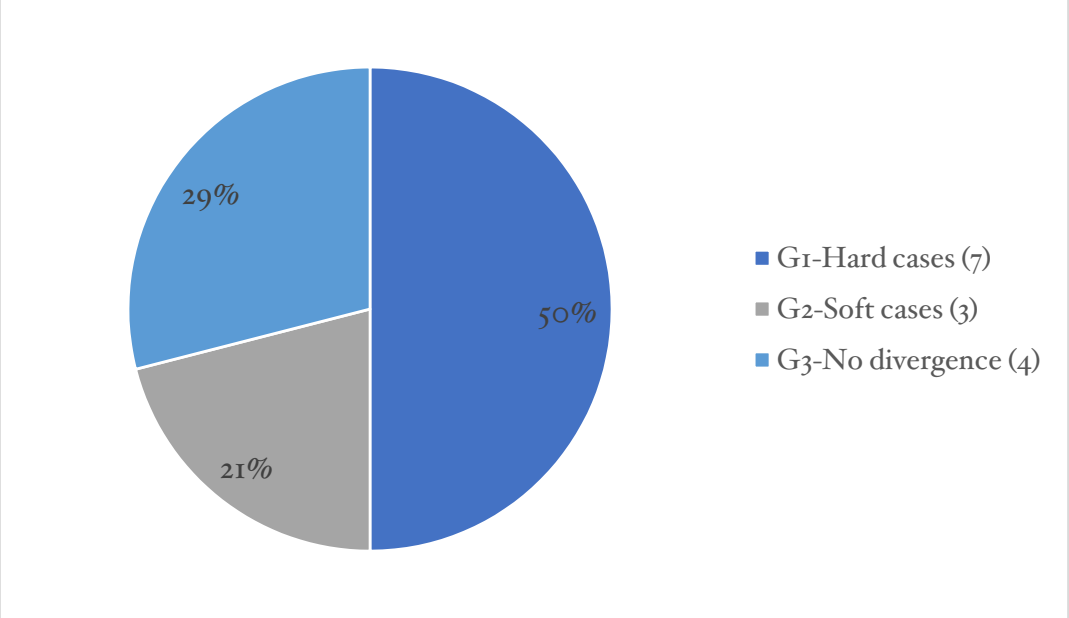

Figure 3: Distribution of cases

I also observe whether the divergence appears at an early stage (the referring court or one of the parties have already noted a divergence) or at a later stage (normally in cases where the referring court poses a question for a preliminary ruling and the Advocate General or the Court unveils the divergence at a later stage when trying to answer the question). The results show that in Group 1, in three cases the divergence was detected at an early stage, while in four cases the divergence appeared later. In Group 2, two of the cases present a divergence that appeared at an early stage and one case concerns a divergence that was noted at a later stage. The stage of discovering the divergence matters because it indicates who initiates comparison and why.

Group 1 – Hard Cases: Divergences Treated as a Problem of Interpretation

G1 – Divergences Detected at an Early Stage

In the *Sharda Europe* case,[19] the Court used the expression 'as the referring court states' in order to acknowledge that there was a divergence between the wording of the Spanish version and that of the other official language versions. The provision in question was the first subparagraph of Article 3(2) of Directive 2008/69 (emphasis added in italics):

ES	2. Como excepción a lo establecido en el apartado 1, todo producto fitosanitario autorizado que contenga una de las sustancias activas enumeradas en el anexo como única sustancia activa, o junto con otras sustancias activas incluidas todas ellas en el anexo I de la Directiva 91/414/CEE, será objeto de una nueva evaluación, *a más tardar, el 31 de diciembre de 2008*, por parte de los Estados miembros de acuerdo con los principios uniformes previstos en el anexo VI de la citada Directiva, sobre la base de una documentación que reúna los requisitos establecidos en su anexo III y que tenga en cuenta la parte B de la entrada en su anexo I por lo que respecta a las sustancias activas enumeradas en el anexo.
DE	(2) Abweichend von Absatz 1 unterziehen die Mitgliedstaaten jedes zugelassene Pflanzenschutzmittel, das einen der im Anhang genannten Wirkstoffe entweder als einzigen Wirkstoff oder als einen von mehreren Wirkstoffen enthält, die sämtlich bis *spätestens 31. Dezember 2008* in Anhang I der Richtlinie 91/414/EWG aufgeführt waren, einer Neubewertung nach den einheitlichen Grundsätzen gemäß Anhang VI der Richtlinie 91/414/EWG. Sie stützen sich dabei auf Unterlagen, die den Anforderungen des Anhangs III dieser Richtlinie genügen, und berücksichtigen den Eintrag in Anhang I Teil B der genannten Richtlinie in Bezug auf die im Anhang genannten Wirkstoffe.
EN	2. By way of derogation from paragraph 1, for each authorised plant protection product containing one of the active substances listed

[19] Case C-293/16 *Sharda Europe BVBA v Administración del Estado and Syngenta Agro, SA* EU:C:2017:430.

	in the Annex as either the only active substance or as one of several active substances all of which were listed in Annex I to Directive 91/414/EEC *by 31 December 2008 at the latest*, Member States shall re-evaluate the product in accordance with the uniform principles provided for in Annex VI to Directive 91/414/EEC, on the basis of a dossier satisfying the requirements of Annex III to that Directive and taking into account part B of the entry in Annex I to that Directive concerning the active substances listed in the Annex.
FR	2. Par dérogation au paragraphe 1, tout produit phytopharmaceutique autorisé contenant l'une des substances actives mentionnées dans l'annexe, en tant que substance active unique ou associée à d'autres substances actives, toutes inscrites à l'annexe I de la directive 91/414/*CEE au plus tard le 31 décembre 2008*, fait l'objet d'une réévaluation par les États membres, conformément aux principes uniformes prévus à l'annexe VI de ladite directive, sur la base d'un dossier satisfaisant aux conditions de son annexe III et tenant compte de la partie B de l'inscription à son annexe I concernant les substances actives mentionnées dans l'annexe.

The divergence is clear because in the Spanish version the date of 31 December 2008 constitutes the deadline by which the Member States must carry out a re-evaluation. In contrast, in the German, English and French versions this date refers to the listing of the active substances contained in the authorised plant protection product that is to be re-evaluated by the Member States. The Court seemed to compare other language versions as well: 'The same is true, inter alia, of the Greek, Italian and Dutch versions of that provision'.[20]

The Court explained that the Spanish version was the one that differed from the rest: 'More specifically, the wording of all those language versions, with the exception of the Spanish version [...]'. According to the Court, this provision indicates that 'the plant protection product concerned must be re-evaluated if all the active substances composing it, together with those listed

[20] *Sharda Europe* (n 19) para 19.

in the Annex to Directive 2008/69, had been listed in Annex I to Directive 91/414 by 31 December 2008 at the latest'.[21]

Immediately after that, the Court invoked the idea that all versions constitute the same legal instrument and must be read jointly: 'the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be given priority over the other language versions in that regard'.[22] The Court then moved on to a teleological interpretation by referring to the 'general scheme and purpose of the rules'.[23] After examining the context and the purpose of the Directive,[24] the Court confirmed that the date of 31 December 2008 corresponds to 'the deadline by which all the active substances contained in that plant protection product, other than those listed in the Annex to Directive 2008/69, must have been included on the list in Annex I to Directive 91/414'.[25] Finally, in this case there was no Opinion of the Advocate General that could provide any other information.[26]

The second case that I analyse in this group is *Pinckernelle*.[27] From a reading of the judgement of the Court, it seems that the divergence appeared later, because no mention is made as to who detected the problem. However, after examining the Opinion of the Advocate General I realised that the divergence was in fact spotted earlier: 'The written observations of the City of Hamburg, Germany, Italy and the Commission all feature discussion of

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21 *Sharda Europe* (n 19) para 20.

22 Ibid para 21.

23 Ibid.

24 Ibid paras 22-24.

25 Ibid para 25.

26 Not all cases have an Opinion of the Advocate General.

27 Case C-535/15 *Freie und Hansestadt Hamburg v Jost Pinckernelle* EU:C:2017:315.

the various language versions of Article 5 of the REACH Regulation[28] with respect to the meaning of 'placed on the market'.[29]

The Commission argued that there were eight language versions (Danish, Latvian, Hungarian, Romanian, Slovakian, Swedish, Slovenian, and Czech versions) in which the words 'in the Community' in Article 5 of the REACH Regulation applied both to manufacture and to placing on the market. Three language versions (Spanish, Lithuanian and German) were ambiguous, and ten (Bulgarian, Estonian, Finnish, Greek, Italian, Dutch, Polish, Portuguese, French and English) appeared to attach the territorial limitation 'in the Community' only to manufacture.[30]

ES	Sin perjuicio de lo dispuesto en los artículos 6, 7, 21 y 23, no se fabricarán *en la Comunidad* ni se comercializarán sustancias, como tales o en forma de preparados o contenidas en artículos, a menos que se hayan registrado de conformidad con las disposiciones pertinentes del presente título que así lo exijan.
DE	Vorbehaltlich der Artikel 6, 7, 21 und 23 dürfen Stoffe als solche, in Gemischen oder in Erzeugnissen nur dann in der Gemeinschaft hergestellt oder in Verkehr gebracht werden, wenn sie nach den einschlägigen Bestimmungen dieses Titels, soweit vorgeschrieben, registriert wurden.
EN	Subject to Articles 6, 7, 21 and 23, substances on their own, in preparations or in articles shall not be manufactured *in the Community* or placed on the market unless they have been registered in accordance with the relevant provisions of this Title where this is required.

[28] Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) 793/93 and Commission Regulation (EC) 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (Text with EEA relevance) [2006] OJ L 396.

[29] Ibid, EU:C:2016:996, Opinion of AG Tanchev, para 35.

[30] *Pinckernelle* (n 27) para 38.

FR	Sous réserve des articles 6, 7, 21 et 23, des substances telles quelles ou contenues dans des préparations ou des articles ne sont pas fabriquées *dans la Communauté* ou mises sur le marché si elles n'ont pas été enregistrées conformément aux dispositions pertinentes du présent titre, lorsque cela est exigé.

A more detailed analysis of the four languages I compare in this study shows that the Spanish and German versions are ambiguous (it is not clear whether 'in the Community' refers to both the manufacture and the placing in the market) whereas in the English and French versions the expression 'in the Community' is explicitly linked to the manufacture of substances.

It is interesting that before engaging in comparison the Court sustained that 'for the purpose of interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part'.[31] Then it compared and remarked the diverging interpretations. After that, it continued with an examination of the context.[32] After a careful analysis, the Court concluded that the expression 'placing on the market' relates to the internal market of the EU. Therefore, the expression 'in the Community' is modifying both the manufacture and placing on the market.

In the *Al Chodor* case,[33] the referring court pointed out that the language versions of Article 2(n) of theDublin III Regulation[34] diverged (emphasis added):

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31 *Pinckernelle* (n 27) para 31.

32 Ibid (n 26) paras 34-43.

33 Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others* EU:C:2017:213.

34 Regulation (EU) 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member States responsible for examining an application for international protection lodges in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31.

ES	«riesgo de fuga»: la existencia de razones basadas en criterios objetivos definidos *por ley* que, en un caso concreto, permitan pensar que un solicitante, un nacional de un tercer país o un apátrida sujeto a un procedimiento de traslado pueda fugarse.
DE	„Fluchtgefahr' das Vorliegen von Gründen im Einzelfall, die auf objektiven *gesetzlich festgelegten* Kriterien beruhen und zu der Annahme Anlass geben, dass sich ein Antragsteller, ein Drittstaatsangehöriger oder Staatenloser, gegen den ein Überstellungsverfahren läuft, diesem Verfahren möglicherweise durch Flucht entziehen könnte.
EN	'risk of absconding' means the existence of reasons in an individual case, which are based on objective criteria defined *by law*, to believe that an applicant or a third country national or a stateless person who is subject to a transfer procedure may abscond.
FR	«risque de fuite», dans un cas individuel, l'existence de raisons, fondées sur des critères objectifs définis par *la loi*, de craindre la fuite d'un demandeur, un ressortissant de pays tiers ou un apatride qui fait l'objet d'une procédure de transfert.

From a comparison of these versions, we can observe that the German language version of the provision refers to objective criteria 'laid down in legislation'. Other language versions refer to criteria defined 'by law' (in the general sense). In addition, the referring court noted that the European Court of Human Rights interprets the term 'law' broadly.[35] According to the Czech court, 'that term is not limited solely to legislation, but also includes other sources of law'.[36]

[35] Also see the Opinion of the AG who sustains the concept of 'law' as referred to in the Regulation has an independent meaning distinct from that of the concept of 'law' as referred to in the ECHR. *Salah Al Chodor* (n 33) Opinion of AG Saugmandsgaard Øe, para 42.

[36] *Salah Al Chodor* (n 33) para 21.

When the Court started answering the question posed by the referring court, it claimed that a textual interpretation was not helpful in that case:

> [...] a purely textual analysis of the notion of 'defined by law' cannot determine whether case-law or a consistent administrative practice are capable of coming within that concept. In the different language versions of that regulation, the term equivalent to the term 'loi (legislation)' has a different scope.[37]

The Court added that the wording used in some versions is similar to the concept of *droit* (law in the general sense), which can have a wider scope than *loi* (legislation). In addition, other language versions have a more restrictive scope.[38] The difference in scope is significant. The conclusion was that the objective criteria required implementation in the national law of each Member State.[39] Linguistic interpretation was clearly not enough in this case and the Court had to examine the purpose and general scheme of the rules.[40]

G1 – Divergences Detected at a Later Stage

In the *ERGO Poist'ovňa* case,[41] a divergence appeared regarding the Czech, Latvian and Slovak language versions. As I do not command any of these languages, I will limit myself to mentioning the arguments of the Court. It explained that in most of the language versions the provision in question provided that 'the right to commission can be extinguished only 'if and to the extent that' it is established that the contract between the third party and the principal will not be executed'.[42] However, the Czech, Latvian and Slovak language versions of the provision did not contain wording which could be translated as 'to the extent that'.[43]

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37 *Salah Al Chodor* (n 33) para 31.

38 Ibid.

39 Ibid para 28

40 Ibid para 32.

41 Case C-48/16 *ERGO Poist'ovňa, a.s. v Alžbeta Barlíková* EU:C:2017:377.

42 *ERGO Poist'ovňa* (n 41) para 34.

43 The AG enters into a bit more detail and compares the expressions in a footnote: See, for example, the Spanish ('en la medida'), Danish ('i det omfang'), German ('soweit'), Estonian ('ulatuses'), French ('dans la mesure où'), Italian ('nella misura in cui'), Lithuanian ('tik tiek, kiek'), Maltese ('sal-limiti li'), Dutch ('voor zover'),

The Court resorted to metalinguistic criteria of interpretation. It recalled that 'provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union'.[44] Here the Court makes clear that all languages constitute the same legal instrument. It then invoked the purpose and general scheme:

> 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 (judgment of 1 March 2016, *Alo and Osso*, C-443/14 and C-444/14, EU:C:2016:127, paragraph 27).[45]

In the *Popescu* case,[46] the Court dealt with the concept of 'entitlement to drive granted before 19 January 2013'. As the divergence concerned the Romanian version, which I do not command, I will not enter into much detail. The provision in question used the expression *drept de conducere acordat*, including the word *drept* which normally refers to the right itself, not the document attesting a right granted, and the word *acordat* which literally means 'accorded' or 'granted', and may refer both to a right and to a document attesting that right.[47]

In addition, both the Advocate General and the Court observed that a literal interpretation of the expression *droit de conduire délivré* in the French version could suggest that the wording of the said provision implies that 'only express entitlements to drive deriving from an instrument formally issued, generally in the form of an individual administrative act, before 19 January 2013 would not be affected, in accordance with that provision, by the requirements of that directive'.[48]

In the face of the differences between various language versions, the Court recalled that 'the wording used in one language version of a provision of EU

Polish ('o ile'), Portuguese ('na medida em que'), and Romanian ('în măsura în care') language versions. *ERGO Poist'ovňa* (n 38) Opinion of AG Szpunar, para 26.

44 *ERGO Poist'ovňa* (n 41) para 37.

45 Ibid para 37.

46 Case C-632/15 *Costin Popescu v Guvernul României and Others* EU:C:2017:303.

47 Ibid para 32.

48 *Popescu* (n 46) para 33.

law cannot serve as the sole basis for the interpretation',[49] in this way confirming the impossibility of relying on a single language version. 'Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages'.[50] The Court used the determiner 'all', which would imply that all official languages are deemed to be compared. Immediately after that, it stated that '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 general scheme and purpose of the rules of which it forms part'.[51]

From a reading of the judgement it is not possible to know how many languages were in fact compared. The Court used the expression 'differences between various language versions' without specifying which ones.[52] The Advocate General delved a bit more into the comparison. He commented on the wording in the French version and observed that 'an equivalent approach could be apparent from other language versions of that provision', adding in the footnote: 'See, inter alia, the Danish, German, Croatian, Portuguese and Slovak versions'.[53]

After examining the general scheme and the purpose of the Directive,[54] the Court concluded that following a schematic and a teleological interpretation, 'Article 13(2) of the directive relates only to the holding of driving licences and official documents equivalent to them which expressly authorise their holders to drive'.[55] Therefore, the objectives pursued by the directive and also the context of Article 13 led to an interpretation contrary to that proposed by Mr. Popescu.[56]

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49 Ibid para 35.

50 *Popescu* (n 46).

51 Ibid.

52 Ibid para 34.

53 Ibid, Opinion of AG Saugmandsgaard Øe, para 42.

54 Ibid para 36-45.

55 Ibid para 46.

56 Ibid, Opinion of AG Saugmandsgaard Øe, para 40.

Moreover, in *GE Healthcare* case,[57] there was a problem of interpretation regarding Article 160 of Regulation No. 2454/93 (emphasis added):

ES	Cuando el comprador pague un canon o un derecho de licencia a un tercero, las condiciones mencionadas en el apartado 2 del artículo 157 sólo se considerarán cumplidas si el vendedor, o *una persona vinculada al mismo*, pide al comprador que
DE	Zahlt der Käufer eine Lizenzgebühr an einen Dritten, so gelten die Voraussetzungen des Artikels 157 Absatz 2 nur dann als erfüllt, wenn der Verkäufer oder *eine mit diesem verbundene Person die Zahlung an diese dritte Person* vom Käufer verlangt.
EN	When the buyer pays royalties or licence fees to a third party, the conditions provided for in Article 157 (2) shall not be considered as met unless the seller or a *person related to him* requires the buyer to make that payment.
FR	Lorsque l'acheteur verse une redevance ou un droit de licence à un tiers, les conditions visées à l'article 157 paragraphe 2 ne sont considérées comme remplies que si le vendeur ou une *personne qui lui est liée* requiert de l'acheteur d'effectuer ce paiement.

As the Advocate General explained in his Opinion, the German language version of Article 160 seems to refer to 'a third party separate from both the seller and the person related to the seller'.[58] From a comparative reading it can be seen that none of the other language versions contains a second reference to the 'third party' to whom royalties or licence fees are paid.[59]

The referring court sought to know 'whether the condition laid down in Article 160 of Regulation No. 2454/93 is satisfied in a situation where the 'third party' to whom the royalty or licence fee is payable and the 'person related' to the seller are the same person'.[60] In that regard, the applicant in the main proceedings, GE Healthcare, relied essentially on the German

57 Case C-173/15 *GE Healthcare GmbH v Hauptzollamt Düsseldorf* EU:C:2017:195.

58 Ibid EU:C:2016:621, Opinion of AG Mengozzi, para 61.

59 *GE Healthcare* GmbH (n 57) para 66.

60 Ibid para 63.

language version and claimed that 'the person requiring payment of the royalty or licence fee and the third party to whom the royalty or licence fee is payable cannot be identical'.[61]

In order to answer the question, the Court first reminded that the wording in one language version cannot constitute the only basis for interpretation because 'such an approach would be incompatible with the requirement that EU law be applied uniformly'.[62] In addition, it emphasised that 'where there is a divergence between the various language versions', it is necessary to examine the general scheme and the purpose of the rules. With this reasoning the Court seems to confirm that when we are faced with divergences between language versions, metalinguistic criteria of interpretation are required.

In the Opinion, the Advocate General sustained that the main problem of interpretation was not the fact that the German version added the expression 'third party':

> This is not, however, the deciding factor. The obligation on the buyer to make 'that payment' obviously refers to the payment of royalties or licence fees which the buyer is required to make to the 'third party'.

Both the Advocate General and the Court explained that what mattered in fact was not so much 'the person to whom the payment of royalties or licence fees is made'.[63] The important point was 'whether or not the buyer of the imported goods is able to acquire them from the seller without paying royalties or licence fees'.[64] The Court concluded that it was 'for the national court to ascertain whether that is the position in the main proceedings'.[65]

Finally, in the *Vilkas* case,[66] there was a certain divergence between the various language versions of Article 23(3) of the Framework Decision as regards the conditions for applying the rule set out in the first sentence of that provision.

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61 Ibid para 64.

62 *GE Healthcare* GmbH (n 57) para 65.

63 Ibid EU:C:2016:621, Opinion of AG Mengozzi, para 66.

64 Ibid.

65 *GE Healthcare GmbH* (n 57) para 69.

66 Case C-640/15 *Minister for Justice and Equality v Tomas Vilkas* EU:C:2017:39.

ES	3. Cuando cualquier *circunstancia ajena al control* de alguno de los Estados miembros afectados impida entregar a la
DE	(3) Ist die Übergabe der gesuchten Person innerhalb der in Absatz 2 genannten Frist aufgrund von Umständen, die sich *dem Einfluss der Mitgliedstaaten entziehen,* unmöglich, setzen sich die vollstreckende und die ausstellende Justizbehörde unverzüglich miteinander in Verbindung und vereinbaren ein neues Übergabedatum. In diesem Fall erfolgt die Übergabe binnen zehn Tagen nach dem vereinbarten neuen Termin.
EN	3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by *circumstances beyond the control* of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.
FR	3. Si la remise de la personne recherchée, dans le délai prévu au paragraphe 2, s'avère impossible *en vertu d'un cas de force majeure* dans l'un ou l'autre des États membres, l'autorité judiciaire d'exécution et l'autorité judiciaire d'émission prennent immédiatement contact l'une avec l'autre et conviennent d'une nouvelle date de remise. Dans ce cas, la remise a lieu dans les dix jours suivant la nouvelle date convenue.

The Court observed that the Greek, French, Italian, Portuguese, Romanian and Finnish versions of that provision made the application of the rule conditional on the impossibility to carry out the surrender by reason of a case of *force majeure* in one of the Member States concerned. However, other language versions of the same provision, such as the Spanish, Czech, Danish, German, Greek, English, Dutch, Polish, Slovak and Swedish versions, referred instead to it not being possible to carry out the surrender on account of circumstances beyond the control of the Member States concerned.[67]

[67] *Vilkas* (n 66) para 46.

The Court recalled the need for uniform interpretation and the impossibility to consider the text in isolation:

> The need for a uniform interpretation of a provision of EU law makes it impossible for the text of a provision to be considered, in case of doubt, in isolation but requires, on the contrary, that it should be interpreted on the basis of both the actual intention of the legislature and the objective pursued by the latter, in the light, in particular, of the versions drawn up in all languages.[68]

Here the Court highlighted the need to consider 'the actual intention of the legislature', taking into account all language versions. After analysing the origin of the provision in question,[69] the Court concluded that expression used in Article 11(3) referred to a situation which could not have been foreseen and could not have been prevented, as the concept of *force majeure* is usually understood.[70]

Group 2 – Soft Cases: Divergences Not Treated as a Problem of Interpretation

G2 – Divergences Detected at an Early Stage

In the *Khorassani* case,[71] the referring court detected some divergence and the Court acknowledged it but did not treat it as a problem of interpretation.

The provision in question is Section A of Annex I to Directive 2004/39 (emphasis added):

ES	Recepción y transmisión de órdenes de clientes *en relación con* uno o más instrumentos financieros.
DE	Annahme und Übermittlung von Aufträgen, die ein oder mehrere Finanzinstrument(e) *zum Gegenstand haben*.
ENF	Reception and transmission of orders *in relation to* one or more financial instruments.

68 *Vilkas* (n 66) para 47.

69 Ibid paras 48-51.

70 Ibid para 51-52.

71 Case C-678/15 *Mohammad Zadeh Khorassani v Kathrin Pflanz* EU:C:2017:451.

FR	Réception et transmission d'ordres *portant sur* un ou plusieurs instruments financiers.

The Court explained that depending on the language version, the terms 'in relation to' may suggest a more or less direct link between the orders and the financial instrument(s).[72]

The Court used a concessive clause to clarify the question by comparing the different language versions:

> [...] 'although the referring court observes a certain divergence between the different language versions [...] it should be noted that the term 'order' [...] remains the same in the language versions cited by the referring court, being the German-, Spanish-, English- and French-language versions'. [...][73]

The Court contended that the term 'order' remained the same in the language versions cited by the referring court, being the German, Spanish, English and French language versions.[74] It concluded that the words 'in relation to one or more financial instruments' merely served to specify which type of order was being referred to, that is to say, the orders relating to the purchase or the sale of such financial instruments.[75]

In the *NEW WAVE CZ* case,[76] it was also the referring court that noted some differences between the various language versions of Directive 2004/48. The Czech, English and French versions of the directive used respectively the words 'in connection with proceedings' (*v souvislosti s řízením*), 'in the context of proceedings', and 'within the framework of proceedings' (*dans le cadre d'une action*). According to that Court, the French version introduced a closer connection between the proceedings and the application for information.[77] The Court removed the divergence by comparing the different language versions:

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72 *Khorassani* (n 71) para 27.

73 Ibid.

74 Ibid.

75 Ibid para 28.

76 Case C-427/15 *NEW WAVE CZ, a.s. v ALLTOYS, spol. s r. o.* EU:C:2017:18.

77 Ibid para 16.

> [...] as the referring court observes, some language versions [...] do indeed use expressions which could be interpreted as being of a narrower scope than those used in other language versions [...]. The fact remains, however, [...] that it does not follow from any of those language versions that [...].

In order to confirm its interpretation, the Court also analysed the wording of Article 8(1) of Directive 2004/48[78] and the objective of the Directive.[79]

G2 – Divergences Detected at a Later Stage

Finally, in the *Onix Asigurări* case,[80] the Court recognised that there was some divergence between the language versions of Article 40(6) of Directive 92/49, but that the linguistic divergence was not the main problem of interpretation.

ES	6. Los apartados 3, 4 y 5 no afectarán a la facultad de los Estados miembros interesados de adoptar, en casos de urgencia, las medidas apropiadas para prevenir las irregularidades *cometidas en su territorio*. Ello implica la posibilidad de impedir que una empresa de seguros siga celebrando nuevos contratos de seguros en su territorio.
DE	(6) Die Absätze 3, 4 und 5 berühren nicht die Befugnis der Mitgliedstaaten, in dringenden Fällen geeignete Maßnahmen zu ergreifen, um Unregelmässigkeiten *in ihrem Staatsgebiet* zu verhindern oder zu ahnden. Dies schließt die Möglichkeit ein, ein Versicherungsunternehmen zu hindern, weitere neue Versicherungsverträge in ihrem Staatsgebiet abzuschließen.
EN	6. Paragraphs 3, 4 and 5 shall not affect the emergency power of the Member States concerned to take appropriate measures to prevent irregularities *within their territories*. This shall include the possibility of preventing insurance undertakings from continuing to conclude new insurance contracts within their territories.
FR	6. Les paragraphes 3, 4 et 5 n'affectent pas le pouvoir des États membres concernés de prendre, en cas d'urgence, des mesures

78 *NEW WAVE CZ* (n 76) para 22.

79 Ibid para 23.

80 Case C-559/15 *Onix Asigurări SA v Istituto per la Vigilanza Sulle Assicurazioni (IVASS)* EU:C:2017:316.

	appropriées pour prévenir les irrégularités *commises sur leur territoire*. Ceci comporte la possibilité d'empêcher une entreprise d'assurance de continuer à conclure de nouveaux contrats d'assurance sur leur territoire.

The Court pointed out that 'certain language versions of that provision, in particular those in Spanish and French, refer to irregularities 'committed' in the territory of the Member State concerned, which may indicate that this provision applies only where irregular acts have already been carried out'.[81]

Then the Court invoked the need for uniform interpretation of EU regulations and contended that 'where there are doubts', the text of a provision cannot 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'.[82] Here the Court used the 'criterion of doubt', as it has been designated by Mattias Derlén.[83]

From a comparative reading of the Article, the Court concluded that 'all the language versions use the verb 'to prevent' or a similar word to describe the subject matter of the measures which may be adopted'. As a consequence, the provision refers to the adoption of measures to prevent irregularities in the future.[84] It does not make sense to interpret it as irregular acts that have already been carried out.[85]

The Court reconciled the diverging versions by comparing them. However, in order to answer the question posed by the referring court it highlighted that 'the wording of Article 40(6) of Directive 92/49, considered in isolation,

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81 *Onix Asigurări* (n 80) para 38.

82 Ibid para 39.

83 Mattias Derlén, *Multilingual Interpretation of European Union Law* (Kluwer Law International 2009) 32; Mattias Derlén, 'In Defence of (Limited) Multilingualism: Problems and Possibilities of the Multilingual Interpretation of European Union Law in National Courts' in Anne-Lise Kjær, Silvia Adamo (eds), *Linguistic Diversity and European Democracy* (Ashgate 2011) 145.

84 *Onix Asigurări* (n 80) para 40.

85 In the Opinion, the AG did not compare so it is not possible to provide any further insight into the matter.

does not enable an answer to be given to the question referred. In those circumstances, it is necessary to consider the context in which that provision occurs, and the objectives pursued by that directive'.[86]

Group 3: No Divergence but Comparison is Used as Confirmation

In this group I have analysed three cases of direct actions before the General Court and one case of a reference for a preliminary ruling. The Court used comparison to confirm an interpretation, usually by stating that all language versions converged in meaning.

In *Ball Beverage Packaging Europe v EUIPO – Crown Hellas Can (Canettes)*,[87] it used the following expression: 'that finding follows also from Article [...], which in all the language versions, refers to [...]'. In *Deza v ECHA,*[88] the Court used comparison to support an interpretation, although it did not state that all language versions converged.[89] In *Hernández Zamora v EUIPO - Rosen Tantau (Paloma)*,[90] the Spanish version, which in that case was the authentic version,[91] was compared with the other versions to confirm an interpretation: 'the Spanish version is also consistent with the language versions of the wording of the goods covered by the earlier mark, other than the English version'.[92] In *Rosneft*,[93] the Court observed that 'none of the language versions of Article [...] expressly refers to the 'processing of payments'. That being the

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86 *Onix Asigurări* (n 80) para 41.

87 Case T-9/15 *Ball Beverage Packaging Europe Ltd v European Union Intellectual Property Office* EU:T:2017:386.

88 Case T-115/15 *Deza, a.s. v European Chemicals Agency* EU:T:2017:329.

89 Ibid and EU:T:2017:329, para 173.

90 Case T-369/15 *Hernández Zamora, SA v European Union Intellectual Property Office* EU:T:2017:106.

91 The Court explained as follows: 'Article 120(3) of Regulation No 207/2009 provides that 'in cases of doubt, the text in the language of [EUIPO] in which the application for the EU trade mark was filed shall be authentic'. In the present case, it is therefore the Spanish version of the wording of the goods covered by the earlier mark that is authentic'. Case T-369/15 *Hernández Zamora, SA v European Union Intellectual Property Office* EU:T:2017:106, para 40.

92 *Zamora* (n 90).

93 Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* EU:C:2017:236.

case, reference must be made to the general structure and objectives of that regulation'.

III. Legal Certainty and Methods of Interpretation

This section explores the issues of legal certainty in relation to multilingualism. One can think legal certainty is incompatible with multilingualism, but I sustain both concepts can be balanced. I then mention different methods of interpretation that the CJEU applies and I explain my own classification of interpretive techniques to solve divergences.

1. A Note on Legal Certainty

Law complies with the function of legal certainty when those to whom legal norms are addressed can be informed as to where they stand, so that they can act with full knowledge of the consequences of their behaviour.[94] Legal certainty requires that legal norms be clear (foreseeable) and accessible.[95]

On the one hand, multilingualism allows access to EU legislation in all official languages, thus ensuring a central aspect of legal certainty. The concrete task of making multilingual legislation is done thanks to translation. Without translation there would be no EU legislation. On the other hand, the need to compare different language versions can be seen as the impossibility to rely on a single language version. However, systematic comparison between the twenty-four language versions is very difficult and this applied study has shown that even the CJEU does not use comparison on a routine basis. As a consequence, one could argue that the impossibility to rely on a single language version is detrimental to legal certainty. Nevertheless, the requirement to compare helps to balance the fact that EU legislation is multilingual, and divergences between different language versions are sometimes inevitable. As with many principles in law, in some situations there will be conflicting principles and it is not a question of eliminating one or the other; it is rather a matter of finding a balance between them. This following graph summarises this idea:

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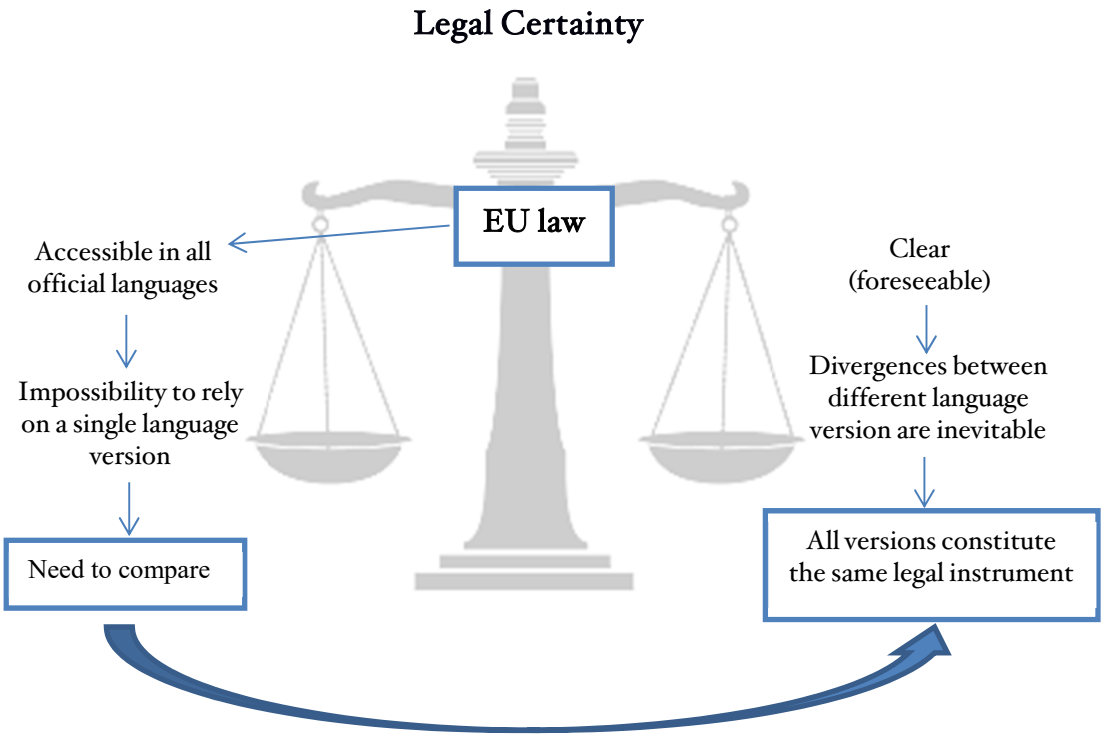
94 Josep Joan Moreso and Josep Maria Vilajosana, *Introducción a la teoría del derecho* (Marcial Pons 2004).

95 Pacho Aljanati (n 2) 103.

Figure 4: Balancing legal certainty and multilingualism



Susan Šarčević remarked that 'whether and to what extent the authentic texts of EU legislation actually have the same meaning is a matter of interpretation'.[96] The CJEU is responsible for interpreting EU legislation (Art. 267 TFEU) based on the premise that no language version prevails over the others and it is necessary to interpret them uniformly.[97]

In this applied study there are three cases that touch upon the question of legal certainty most directly. In *Popescu*, the applicant relied on the Romanian language version for its interpretation, but the Court then arrived at a conclusion contrary to that proposed by Popescu. In *GE Healthcare*, the applicant relied on the German language version, which turned out to be the only version that differed from the rest. These parties learned that their arguments could not be based only on the wording in their national language.

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96 Susan Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union'(2013) 3(1) International Journal of Law, Language and Discourse 1.

97 See Case 19/67 *Van der Vecht* EU:C:1967:49, *CILFT* case (n 2) and Case 30/77 *Regina v Bouchereau* EU:C:1977:172, para 14.

The *Sharda Europe* case is more complex and it illustrates the idea of balance exposed above. First it is necessary to make a reconstruction of the facts.

1.	On 14 January 2009, Sharda submitted an application for re-evaluation of the authorisation it had for the placing on the market of a plant protection product which contained one of the active substances listed in the Annex to that directive. That application was granted by the competent national authorities.
2.	Syngenta brought an administrative action seeking to have the authorisation issued for the plant protection product withdrawn. The administrative action was brought before the Secretaría General Técnica del Ministerio de Medio Ambiente, Rural y Marino (Technical General Secretariat of the Ministry for Environmental, Rural and Marine Affairs, Spain). Syngenta alleged that the application for re-evaluation of that product had been submitted after 31 December 2008. It claimed that this date constituted the deadline for the submission of such an application for re-evaluation under Article 3(2) of Directive 2008/69. The Technical General Secretariat dismissed the action.
3.	Syngenta brought an appeal against that decision before the Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid, Spain). This High Court annulled the re-evaluation procedure on the ground that the application for re-evaluation had been submitted after the expiry of the deadline set in Article 3(2) of Directive 2008/69.
4.	Sharda brought an appeal against that judgement before the Tribunal Supremo (Supreme Court, Spain). It claimed that this date did not preclude the submission of applications for re-evaluation after 31 December 2008.
5.	The Tribunal Supremo (Supreme Court) was not certain whether this date constituted a deadline for carrying out the re-evaluation or for listing the active substances. It decided to stay the

	proceedings and pose the question to the CJEU for a preliminary ruling.
6.	The CJEU finally stated that this date corresponded to the deadline by which all the active substances contained in that plant protection product had to be included on the list in Annex I to Directive 91/414.

Thanks to comparison between different language versions it was possible to bring to light that Sharda's claim was right. The Tribunal Superior de Justicia annulled the re-evaluation procedure but this was not the right interpretation. If it had compared the Spanish version with other versions the divergence would have come to light earlier. This case is a good example of how comparison can guarantee uniform application of EU law.

2. Methods of Interpretation

In the literature, it is generally agreed that there are three main methods that the CJEU applies: literal, systematic and teleological.[98] Authors sometimes use different terminology, but the essence of the methods is practically the same. Some legal scholars add two more methods: historical and comparative law interpretations. For example, Hans Kutscher[99] refers to literal interpretation, schematic interpretation, teleological interpretation, historical interpretation and comparative law interpretation. Similarly,

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98 See, for instance, Anna Bredimas, *Methods of Interpretation and Community Law* (North-Holland 1978); Bengoetxea (n 13); Joxerramon Bengoetxea, Neil MacCormick and Leonor Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Gráinne de Búrca and Joseph H. H. Weiler (eds), *The European Court of Justice* (Oxford University Press 2001); Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10(5) German Law Journal 534; Elina Paunio, *Legal certainty in multilingual EU law: language, discourse and reasoning at the European Court of Justice* (Ashgate 2013); Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013).

99 Hans Kutscher, *Methods of interpretation as seen by a judge at the Court of Justice* (Luxembourg 1976).

Neville Brown and Francis G. Jacobs[100] as well as Albertina Albors Llorens[101] talk about literal interpretation, contextual interpretation, teleological interpretation, historical interpretation and comparative law as aids to interpretation. Isabel Schübel-Pfister[102] uses the following categories: *Wortlautauslegung*, *systematische Auslegung*, *teleologische Auslegung*, *historische Auslegung*, and *Rechtsvergleichende Auslegung*.[103]

When dealing with divergences between various language versions, 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. For example, Pierre Pescatore[104] divides the criteria into *solution réductrice* and *solution métalinguistique,*[105] and Baaij refers to the literal approach and the teleological approach.[106] Derlén,[107] makes a more detailed analysis of the methods and establishes three categories: classical reconciliation, reconciliation and examination of the purpose, and radical teleological method.

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100 L. Neville Brown, Francis G. Jacobs, *The Court of Justice of the European Communities* (3rd ed.) (Sweet & Maxwell 1989).

101 Albertina Albors Llorens, 'The European Court of Justice, more than a teleological court' (1999) 2 Cambridge Yearbook of European Legal Studies 373.

102 Isabel Schübel-Pfister, *Sprache und Gemeinschaftsrecht: die Auslegung der mehrsprachig verbindlichen Rechtstexte durch den Europäischen Gerichtshof* (Duncker & Humblot 2004).

103 Similarly, Buck refers to *grammatikalische Auslegung*, *systematische Auslegung*, *teleologische Auslegung* and *historische Auslegung.* Carsten Buck, *Über die Auslegungsmethoden des Gerichtshofs der Europäische Gemeinschaft* (Peter Lang 1997).

104 Pierre Pescatore, 'Interprétation des lois et conventions plurilingues dans la Communauté européenne' (n 7).

105 Berteloot uses the same categories in German: *reduzierende' Methode* and *meta-linguistische Methode.* Pascale Berteloot, 'Die Europäische Union und ihre mehrsprachigen Rechtstexte' in Isolde Burr & Friedrich Müller (eds), *Rechtssprache Europas* (Duncker & Humblot 2004).

106 Cornelis Jaap W. Baaij, 'Fifty years of Multilingual Interpretation in the European Union' (n 13); Cornelis Jaap W. Baaij, *Legal integration and language diversity: The case for source-oriented EU translation* (Digital Academic Repository, University of Amsterdam 2015).

107 Derlén, *Multilingual Interpretation of European Union Law* (n 83).

I refer to linguistic interpretation and metalinguistic interpretation. Metalinguistic interpretation is equivalent to the teleological-systematic interpretation in that it goes beyond the words, also called 'teleo-systemic' interpretation.[108] As Kutscher affirms, teleological interpretation is closely linked to schematic interpretation and it is difficult to draw a clear line between them.[109]

This applied study shows that linguistic arguments were used in the cases in Group 2 (soft cases):

Linguistic Interpretation	
NEW WAVE CZ	* Comparison to clear the divergence.
Onix Asigurări	* The need for a uniform interpretation of EU regulations makes it impossible, **where there are doubts**, 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**. * Comparison to clear the divergence.
Khorassani	* It is necessary to consider **not only its wording but also the context** in which it occurs and the objectives pursued by the rules of which it is part. * Comparison to clear the divergence.

Throughout the case-law, the CJEU settled the normative requirement to compare different language versions by claiming that when interpreting a certain provision, 'where there are doubts', we must do it 'in the light of the versions existing in the other official languages' (as in the *Onix Asigurări* case).

[108] Joxerramon Bengoetxea *The Legal Reasoning of the European Court of Justice* (n 14) 250.

[109] Hans Kutscher, *Methods of interpretation as seen by a judge at the Court of Justice* (n 99) I-40.

In other earlier cases the Court did not mention 'in case of doubt' or 'where there are doubts'. In *Kraaijeveld* it referred to comparison as a requirement: 'interpretation of a provision of Community law involves a comparison of the language versions.'[110] In addition, in the *Ferriere* case, the Court stated that all language versions must be consulted even if the version at hand is clear and unambiguous in isolation.[111]

On the contrary, metalinguistic arguments were used in the Group 1 cases (hard cases).

Metalinguistic Interpretation	
Popescu, *GE Healthcare,* *ERGO* *Poist'ovňa*	* The wording used in **one language version** of a provision of EU law **cannot serve as the sole basis for the interpretation** of that provision **or be given priority over the other language versions**. * The wording used in **one language version** of a provision of EU 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. * Provisions of EU law must be interpreted and applied uniformly **in the light of the versions existing in all EU 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 **general scheme and purpose** of the rules of which it forms part.

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

[111] Case C-219/95 P *Ferriere Nord v Commission,* EU:C:1997:375, para 15.

Sharda Europe	* The wording used in **one language version** of a provision of EU law **cannot serve as the sole basis for the interpretation** of that provision or be given priority over the other language versions. * The need for uniform application and, therefore, for uniform interpretation of an EU measure precludes one version of the text being considered in isolation, but requires that the measure be interpreted by reference to the **general scheme and purpose** of the rules of which it forms part.
Pinckernelle	* For the purpose of interpreting a provision of EU law it is necessary to consider **not only its wording but also the context** in which it occurs **and the objectives** pursued by the rules of which it is part. * Comparison revealed a divergence * Analysis of the context to clarify the question
Al Chodor	* Where the various language versions differ, **the scope of the provision** in question **cannot be determined on the basis of an interpretation which is exclusively textual**, but must be interpreted by reference to the **purpose and general scheme** of the rules of which it forms part.
Vilkas	* The need for a uniform interpretation of a provision of EU law makes it impossible for the text of a provision to be considered, **in case of doubt,** in isolation but requires, on the contrary, that it should be interpreted on the basis of both the **actual intention of the legislature and the objective pursued by the latter, in light,** in particular, **of the versions drawn up in all languages.**

In *Popescu, GE Healthcare, ERGO Poist'ovňa* and *Sharda Europe*, the Court used practically the same arguments. In *Pinckernelle* and *Al Chodor*, the Court mentions that textual interpretation is not enough: we need to move on to the context and purpose of the rules. Finally, in *Vilkas*, the Court resorted to the intention of the legislature. In fact, the Court analysed the history of the provision in order to figure out what the intention was. The Court first observed that the wording used in the article in question had its origin in a

previous Convention.[112] Then, different language versions of this Convention were compared. The Court also examined the explanatory report relating to the Convention in its various language versions.[113] In addition, the Court also studied the explanatory memorandum to the Commission's proposal that led to the adoption of the Framework Decision.[114] The Court was then able to deduce the intention of the legislature: 'These various factors contribute to demonstrating that the use in various language versions of that latter concept does not indicate that the EU legislature intended to' [...].[115]

IV. Types of Divergences

This section focuses on the types of divergences that came to light in the study of the case-law. In Group 1 and Group 2, I examined 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.[116]

Therefore, it is not possible to establish rigid categorisation. 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, Kerstin Loehr provides a classification between two main groups: *Divergenzen im Text* and *Divergenzen im Denken*.[117] *Divergenzen im Text* are

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112 *Nord v Commission* (n 111) para 48.

113 Ibid para 50.

114 Ibid para 51.

115 Ibid para 52.

116 Sharon O'Brien, 'Controlling Controlled English. An Analysis of Several Controlled Language Rule Sets Obtaining the Rule Sets', Conference proceedings*: Joint Conference combining the 8th International Workshop of the European Association for Machine Translation and the 4th Controlled Language Application Workshop (EAMT and CLAW)* 2003 106, citing Thomas Bloor and Meriel Bloor, *The Functional analysis of English: a Hallidayan approach* (Arnold 1995) 15.

117 Kerstin Loehr, *Mehrsprachigkeitsprobleme in der Europäischen Union* (Peter Lang 1997) 57.

textual divergences which are possible to avoid, and *Divergenzen im Denken* are conceptual divergences which are harder to avoid.

Both Šarčević[118] and Schübel-Pfister[119] mention the classification proposed by Loehr. Šarčević remarks that divergences can be studied within the lexical field, but that they can also appear in the syntactical and pragmatic fields.[120] Schübel-Pfister explains that Loehr's linguistic perspective coincides partially with a legal perspective. 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*.[121]

Geert Val Calster[122] 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 a text uses a category which does not figure in the other(s).

Pablo Dengler provides a similar classification to that of Van Calster. He looks at the degree of divergence. If the language versions differ completely, he calls it *divergencia abierta* (open divergence). If the language versions do not differ completely but their scope is somewhat different, he calls it *divergencia*

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118 Susan Šarčević, 'Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften' in Maurizio Gotti and Susan Šarčević, *Linguistic Insights 46* (Peter Lang 2006).

119 Isabel Schübel Pfister, *Sprache und Gemeinschaftsrecht* (n 102).

120 Šarčević (n 118) 125.

121 Schübel-Pfister (n 102) 106.

122 Geert Van Calster, 'The EU's Tower of Babel — The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in more than one Official Language' (1997) 17(1) Yearbook of European Law 374.

parcial (partial divergence).[123] He 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.

In addition, Lawrence Solan mentions that there can be problems of 'word choice' or 'grammatical nuances'.[124] In one of his works, Baaij divides the types of discrepancies into 'translation errors' and 'semantic scope'.[125] In the case of 'translation errors', discrepancies entail the use of distinctly different terms in the various language versions. He 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''.[126] However, in my 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'.[127] In a later work he divides the case into 'semantic and syntactic discrepancies'.[128]

Most authors tend to distinguish divergences that appear at a grammatical-syntactical level and those that appear at a lexical-semantic level. Both

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123 Pablo Dengler, 'Derecho de la UE y multilingüismo: el problema de las divergencias entre versiones lingüísticas' in Alonso Araguás et al, *Translating Justice* (Comares 2010) 83.

124 Lawrence Solan, 'Statutory Interpretation in the EU: the Augustinian Approach' in Frances Olsen, Alexander Lorz, R. and Dieter Stein, *Translation Issues in Language and Law* (Palgrave Macmillan 2009).

125 Cornelis Jaap W. Baaij, 'Fifty years of Multilingual Interpretation in the European Union' (n 13).

126 Ibid 229.

127 Ibid.

128 Baaij (n 106).

Loehr[129] and Šarčević[130] 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'.[131] The classification I propose is, therefore, not guided strictly according to the three fields (syntax, semantics and pragmatics) but they are all related to it. 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'. I therefore classify divergences according to:

1) Structural-grammatical divergences

2) Lexical-conceptual divergences

As the cases were described in detail in section 2, I summarise the types of divergences in the following tables.

1. Structural-Grammatical Divergences

Addition of syntactic unit in one language version	
GE Healthcare	The German version contained the additional term *Zahlung an diese dritte Person.*
Other aspects of syntax	
Sharda Europe	It is not clear which part of the sentence the adverbial clause of time modifies.
ERGO Poist'ovňa	Three language versions did not contain wording which could be translated as 'to the extent that'.
Onix Asigurări	In a noun phrase: irregularities *within* their territories v irregularities *committed in* their territories.
Pinckernelle	It is not clear which part of the sentence the adverbial phrase modifies.

[129] Kerstin Loehr, *Mehrsprachigkeitsprobleme in der Europäischen Union* (n 117) 17.

[130] Šarčević (n 118) 125.

[131] John Lyons, *Semantics* (Cambridge University Press 1977) 114.

Popescu	The problem was the expression in Romanian (*drept de conducere acordat)*.

2. Lexical-Conceptual Divergences

Khorassani	The German version used an expression that had a more restricted meaning (*zum Gegenstand haben* v. 'in relation to').
Al Chodor	The problem revolved around the use of the term 'defined by law' v. laid down in legislation.
Vilkas	The problem revolved around the use of the term *force majeure* v. 'circumstances beyond the control'.
NEW WAVE CZ	The problem revolved around the use of the term 'in the context of proceedings' v. within the framework of proceedings.

When we delve into the types of divergences, a common question that can be considered is whether discrepancies between different language versions are to be attributed to a translation problem. A defective translation is indeed the reason for linguistic divergence in some of the cases. For example, in *Sharda Europe* the provision in Spanish was not expressed correctly. Translators must have utmost care with adverbials because syntactic aspects can lead to semantic problems. We have seen that depending on the position of the adverbial, it can modify one part of the sentence or the other, having serious legal consequences.

In other cases, the responsibility of translators in not so clear. For this reason, instead of saying whether a certain translation is correct or incorrect, I think that it would be more appropriate to talk about adequacy.[132] In the *Vilkas*

[132] See, for instance, Le Chen and Kin Kui, 'Terminological equivalence in legal translation: A semiotic approach'(2008) 172 Semiotica 33; Fernando Prieto Ramos, 'International and supranational law in translation: From multilingual lawmaking to adjudication'(2014a) 20(2) The Translator, 313; Fernando Prieto Ramos, 'Quality Assurance in Legal Translation: Evaluating Process, Competence and Product in the Pursuit of Adequacy' (2015) 28(1) International Journal for the Semiotics of Law 11.

case, the problem of interpretation revolved around the concept of *force majeur*. Some language versions did not use this term and expressed the same idea with a different expression. It could be argued that 'circumstances beyond the control' expresses the same idea. However, as the CJEU explained in the judgement, there is settled case-law in various spheres of EU law that deal with the concept of *force majeure*.[133] Translators who are aware and informed should take into account if a certain term has been interpreted in the context of EU law. Translations will normally achieve a higher level of adequacy if translators carry out a good contextualization of the translation task.[134]

In addition, I do not think it is fair to attribute all shortcomings to multilingual interpretation to translation.[135] In this regard, we must bear in mind that legal norms are expressed in natural language; as a consequence, ambiguity, vagueness and open texture are inevitable, even if legislation is monolingual.[136] This suggests that we need to move away from a positivist approach that relies on a 'strong language theory'.[137] Supporters of this theory assume that legal norms carry 'autonomous and pre-interpretive meaning'.[138] This implies that 'judicial decisions would be exempt from value judgements

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133 Case C-640/15 *Minister for Justice and Equality v Tomas Vilkas* EU:C:2017:39, para 53.

134 On parameters for contextualising, see, for example, Fernando Prieto Ramos, 'Interdisciplinariedad y ubicación macrotextual en traducción jurídica' (2009) 13(4) Translation Journal 1. On an integrative approach for reaching higher levels of adequacy with appropriate problem-resolving mechanisms, see Fernando Prieto Ramos, 'Parameters for Problem-Solving in Legal Translation-Implications for Legal Lexicography and Institutional Terminology Management' in Le Cheng, King Kui Sin and Anne Wagner (eds.), *The Ashgate Handbook of Legal Translation* (Ashgate 2014); Prieto Ramos, 'Quality Assurance' (n 132).

135 For example, Bobek claimed that 'The enduring problem, however, is the quality of the translations of the Community legislation: inconsistency in terminology, mistakes in translation, parts of legislation. which are incomprehensible'. Michal Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: 'Don't Do as I Say'?' (2007) 10 Cambridge Yearbook European Legal Studies 12.

136 On natural language and interpretation problems, see Moreso and Vilajosana (n 94) 152-157.

137 Christensen and Sokolowski (n 8) 65.

138 Paunio (n 98) 113.

and deprived of discretion'.[139] In order to understand how multilingual EU law actually works, we need to consider that meaning is created in context and depends on the discourses in which it occurs.[140] Legal concepts are not fixed entities; 'they can and do change'.[141]

V. Conclusions

This applied study has addressed three main points. First, as for the use of comparison, I have found that most cases of comparison of language versions carried out by the CJEU (71%) involve some kind of divergence; the rest (29%) are cases in which comparison is used to confirm an interpretation. Second, from the total number of cases that include some divergence, 70% are 'G1-Hard cases'. This study has revealed a correlation between the 'hard cases' and metalinguistic interpretation. Third, regarding the types of divergences, most cases (70%) are 'structural-grammatical' divergences and the rest are 'lexical-conceptual' divergences. No correlation can be established between the type of divergence and the method of interpretation; i.e. 'structural-grammatical' divergences involve either metalinguistic or linguistic interpretation.

The study of divergences that emerge between different language versions is of paramount importance because it touches upon the question of uniform application and interpretation of EU law. The cases explored here provide an overview of the type of linguistic issues that come to light in multilingual interpretation by the CJEU.

I propose an informed and reasoned approach to deal with the implications of EU law multilingualism in relation to four points. The first point concerns the creation of EU law. The role of translators as key actors in law-making must be kept in mind. They produce legislation that is legally binding and, therefore, there should be more collaboration between drafters, translators and lawyer linguists. Translators could have a greater role by participating

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139 Ibid.

140 Jan Engberg, 'Word meaning and the problem of a globalized legal order' in Peter. M. Tiersma and Lawrence M. Solan (eds.), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 180.

141 Anne-Lise Kjær, 'A Common Legal Language in Europe?' in Mark Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Hart 2004) 388.

more in certain discussions when deciding the content of legislation. This would help translators understand the nuances of certain provisions, as EU law is 'negotiated legislation' and legislation normally passes through three institutions (the ordinary legislative procedure being 'the main decision-making procedure used for adopting EU legislation').[142] Efforts should be focused on improving the legislative technique so that legislation is as clear as possible. As Strandvik also maintains, it is necessary to raise awareness and provide 'formal training in legislative drafting, terminology and translation'.[143] It may not be possible to remove the challenges that are inherent to translation. However, 'by raising awareness about them, we can try to approach them differently, untangle and review our norms, beliefs and values, and update our working routines'.[144]

The second point concerning a new approach relates to the application and interpretation of EU legislation. No strict division between the different tasks surrounding the creation and interpretation of EU law can be drawn. Translators need to be aware of the hermeneutic principles that the CJEU applies when interpreting EU law, especially when the Court reconciles diverging language versions. Bengoetxea explains that 'genuine multilingual legal reasoning occurs at the stage of translation much more so than at the stage of drafting or even deliberation'. The translator 'is bound by a closed and circumscribed universe of meaning'.[145]

The third aspect of this new way of thinking is to accept that divergences are inevitable. It is not a question of establishing English, for example, as the only source text for drafting and interpretation of EU legislation.[146] Ambiguity and vagueness are inherent to natural languages. National courts should be more familiar with linguistic issues in EU law, even if only to have the

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142 See Consilium Europa <http://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure>, accessed 23 October 2017.

143 Ingemar Strandvik, 'On Quality in EU Multilingual Lawmaking' in Susan Šarčević (ed.), *Language and Culture in EU Law: Multidisciplinary Perspectives* (Ashgate 2015) 162.

144 Ibid.

145 Joxerramon Bengoetxea, 'Multilingual and Multicultural Legal Reasoning- the European Court of Justice' in Anne-Lise Kjær and Silvia Adamo (eds.), *Linguistic Diversity and European Democracy* (Ashgate 2011) 118.

146 Proposal by Baaij (n 106) 45.

awareness that different linguistic versions can make the interpretation at hand a bit more complex than they often assume.

The fourth feature of this new way of thinking refers to the great potential that comparison between language versions offers. Comparison can help to elucidate unclear provisions and discover divergences that would otherwise go unnoticed. We must keep in mind that apparent clarity is 'no guarantee of absence of divergence'.[147] How can we know that a text is clear if we do not check the other language versions? We must recall Watkin's idea, which claims that awareness of the inherent flexibility of language should be enough to persuade us that comparison is a necessary step.[148]

This study has shown, however, that linguistic comparison was employed in only about 3% of the total amount of cases decided by the CJEU. This demonstrates there is a wide gap between the normative requirements to compare different language versions and the reality of its application.[149] I consider that the CJEU, as the guarantor of uniform application and interpretation of EU legislation, has the capacity and duty to become a real multilingual court.

147 Derlén (n 83).

148 Thomas Glyn Watkin, 'Bilingual Legislation: Awareness, Ambiguity, and Attitudes' (2016) 37(2) Statute Law Review 116.

149 See Bobek (n 135) 1.