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The Multilingualism Paradox in EU Law

— In Our Own Language Version We Trust?

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Abstract
EU law is equally authentic in 24 languages. This is a unique achievement of the European Union (EU), which also greatly enhances the legal certainty within its legal order by enabling individuals to ascertain their rights and obligations under EU law in their own language. Moreover, it is settled case law of the European Court of Justice (ECJ) that EU regulations are not enforceable against individuals in an EU Member State if the regulation has not been officially published in the language of that Member State. At the same time, however, reliance on one's own language version is only relative. Indeed, it is settled case law that individuals cannot rely solely on a particular language version of EU law read in isolation. The true meaning of EU law must be determined by a purposive interpretation in the light of all language versions. One or more language versions may therefore prove to be inaccurate. This paper examines this paradox. It argues that individuals should not have to bear the burden of linguistic inconsistencies.

Keywords
multilingualism, law, EU, legal certainty, reliance on one linguistic version

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1. Introduction

The multilingualism of the EU creates a paradox in terms of legal certainty. While it serves the purpose of enhancing such certainty by ensuring that individuals can ascertain their rights and obligations under EU law in their own language, it also inevitably creates a degree of uncertainty. Indeed, individuals cannot rely solely on their own language version. This paper examines the relevant case law of the European Court of Justice (ECJ) in this respect, recently updated by the important Consorzio judgment (C-561/19, ECLI:EU:C:2021:799).

This issue is closely linked to the quality of the translation of EU law and methods for detecting discrepancies between language versions. However, it should be stressed from the outset that this article approaches the issue from a purely legal rather than a linguistic perspective. As such, I will not refer to the many valuable linguistic studies on translation issues and inconsistencies in EU law. Indeed, it has been pointed out that there can be various levels of discrepancies in multilingual law, ranging from obvious translation errors and inaccuracies to terminological and conceptual inconsistencies. National legal systems in the EU are diverse, even among EU Member States that share the same language, such as Germany and Austria, and different legal families exist, not only rooted in the classical distinction between civil and common law, but also in a common past, for example within the Austro-Hungarian Empire (Ziller, 2015: 449 and 452). A common European legal culture is still underdeveloped (Bajčić, 2023: 271). Seemingly identical concepts may therefore not have the same meaning in EU law as in national law, nor between national laws (Bahanov, 2022: 471 et seq.; Marketou, 2021; Leung, 2019; Rideau, 2013: 41). Semantic variance can therefore occur even when the translation is (at first glance) perfect (see, in this sense, Taylor, 2011).

Another assumption, supported by the existing literature, is that not all linguistic inconsistencies are detected. This can be explained by the fact that most of the application and interpretation of EU law takes place at the level of national courts in the various EU Member States. It is unlikely that national judges, working primarily if not exclusively in their own language, will notice all linguistic inconsistencies. For most EU Member States, this is still largely uncharted territory. As far as can be ascertained, the EU has never undertaken a wide-ranging study of the impact of multilingualism on the application and interpretation of EU law by national courts.[1] The most comprehensive study in this area is that of Derlén, who examined the situation in Denmark, England and Germany (Derlén, 2009).[2]

1 The European Commission has launched a process of consultation and discussion on divergences between national contract laws and their impact on the internal market (see Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan, OJ C 63, 15.3.2003, 1).

2 The author discusses a total of 186 cases in which one or more foreign language versions were used. In a limited study, I examined the situation in the Netherlands, from which it appears that Dutch judges do not use a systematic approach to identify linguistic divergences in EU law (Van der Jeught, 2018).

On the substantive side of the issue, legal scholars have focused their research primarily on the question of legal certainty in the context of multilingualism and the equal authenticity of all 24 language versions of EU law. In this regard, most authors essentially argue that all legal norms are indefinite and that full predictability of the interpretation of a given rule by the courts is an illusion. It is argued that the trust placed in the ECJ circumvents the problem of multilingualism and leads to an acceptable and reliable solution for all language versions (see, for example, Paunio, 2013: 193; Van Meerbeeck, 2016: 137, 139, 145). Other authors, on the other hand, consider the issue to be highly problematic in terms of the predictability of the law (Schilling, 2010: 61).

In this article, I argue, in essence, that while reliance on judicial reasoning and interpretation is, of course, essential and resolves linguistic issues in a mostly satisfactory manner *in abstracto*, it leaves a sense of injustice *in concreto*. Indeed, it seems from some selected case law that insufficient account is taken of the potential adverse effects on individuals when their own language version is overridden. This article will focus on this aspect of the problem.

In what follows, I will briefly recall the principle of equal authenticity of all language versions of EU law (under 2), as well as the relevant case law of the ECJ regarding linguistic divergences (and relative substantive trust in a single language version, as opposed to absolute formal trust) (under 3). In point 4, I will make some suggestions for shifting the burden of the adverse consequences of linguistic divergences away from the individual, before concluding (under 5).

2. The Law in 24 Languages

2.1. The Principle of Equal Authenticity: Legal and Judicial Basis

EU primary law is equally authentic in 24 languages. This principle follows clearly from the relevant Treaty provisions. Article 55 of the Treaty on the European Union (TEU) states:

> This Treaty, drawn up in a single original in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.

Article 358 of the Treaty on the Functioning of the European Union (TFEU) simply refers to Article 55 of the TEU, stating that the provisions of the latter Article also apply to the TFEU.

While the legal basis for the equal authenticity of EU primary law is thus clear, the same cannot be said for EU secondary law. An often ignored fact is that Article 254 TFEU simply states that legislative (and non-legislative) acts shall be published in the Official Journal of the European Union. There is no mention of equal authenticity.[3] Nor does Regulation 1/1958, which lays down the language regime of the EU institutions, grant equal authenticity to the language versions of secondary EU legislation (regulations, directives, decisions). It merely stipulates in its Article 4 that regulations and other documents of general application must be drafted in the official languages of the EU. Article 5 states that the Official Journal of the European Union shall be published in the official languages. At best, these provisions can be interpreted as an implicit recognition of equal authenticity, and the ECJ has confirmed this interpretation in its case law, albeit in a mere obiter dictum:

> To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic (Case C-283/81 CILFIT, EU:C:1982:335, par. 18).

It is interesting to note that some fifteen years earlier, when the Court first had to deal with linguistic discrepancies between language versions, it did not mention the question of equal authenticity at all (Case 19/67, Van der Vecht, ECLI:EU:C:1967:49).

In any case, all 24 Treaty and official languages currently enjoy equal legal status. This was not always the case. Irish, a Treaty language since Ireland's accession in 1973, did not become an official EU language until 2007. However, due to a shortage of translation staff and Irish language technology resources at the time, the scope of this status was derogated until December 31, 2021. During this period, only regulations adopted jointly by the European Parliament and the Council were translated into Irish (Regulation (EC) No 920/2005, extended by Council Regulation 2015/2264).[4] A similar transitional derogation applied to the Maltese language from the accession of Malta on May 1, 2004 until May 1, 2007 (Council Regulation 930/2004).

2.2. ECJ Case Law on Linguistic Discrepancies

There is a considerable body of ECJ case law on the issue of linguistic discrepancies (Van der Jeught, 2015: 126 et seq.). The judgment that is usually cited in this context is Cilfit (C-283/81, EU:C:1982:335). In that judgment, the Court not only established the equal authenticity of all language versions, but also resolved the question of how to deal with

[3] It should be noted that the Accession Treaties provide that the texts of the acts of the institutions drawn up in the languages of the acceding States are authentic from the date of accession under the same conditions as the "texts drawn up in the present […] languages". See, for example, Article 58 of the Act of Accession which entered into force on May 1, 2004 (OJ L 236, 23.9.2003).

[4] On June 21, 2021, the Commission adopted the report 'An Ghaeilge san AE: ar an mbóthar go stádas iomlán faoi 2022' – this report looks at the potential for translating Union documents and legislation into Irish. Further information on this report is available at: ec.europa.eu/info/news/irish2022 (accessed 15 Aug 2024).

linguistic discrepancies. In this regard, the Court famously stated that as a direct consequence of equal authenticity "an interpretation of a provision of Community law thus involves a comparison of the different language versions" (par. 18). In the next paragraph (19), the Court points to another complexity of EU law:

> It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.

In order to understand the scope of the doctrine laid down by the Court in these extremely important paragraphs, it is necessary to recall the background to the dispute, namely the scope of the duty imposed on the highest national courts to refer preliminary questions to the ECJ. In this context, the Italian *Corte di Cassazione* wanted to know whether, in cases where there was no doubt as to interpretation, it was still obliged to refer questions to the ECJ at the request of the parties. Indeed, a literal reading of Article 267 TFEU (then Article 177 of the EEC Treaty) seemed to indicate that the obligation to refer questions to the ECJ was absolute and did not allow any exceptions for national courts against whose decisions there was no judicial remedy under national law. In its judgment, the ECJ developed its famous doctrine of *acte éclairé* (the question has already been dealt with by the ECJ) and *acte clair* (there is no reasonable doubt as to the interpretation). In these cases, even the highest national courts may refrain from referring a preliminary question to the ECJ. At the same time, however, the ECJ sets the bar quite high and uses the multilingualism of EU law as a warning to national courts not to take things too lightly and not to assume too quickly that there are no problems of interpretation. First, national judges must compare the different language versions (admittedly, at the time of the Cilfit judgment, *only* four); second, national judges must be aware of the fact that legal concepts do not necessarily have the same meaning in EU law and in the law of the various Member States (the Court thus recalls its doctrine of autonomous concepts in EU law, which it had already established almost 20 years earlier in the Unger judgment (Case 75/63, EU:C:1964:19).

The Cilfit judgment is therefore based on an obligation-oriented approach and does not lay down a realistic method for national judges to assess linguistic inconsistencies. In fact, it places an unreasonable burden on national judges to compare all authentic languages in every case involving EU law that comes before them. As noted above, the idea behind the Court's doctrine is to safeguard the referral mechanism: it is obvious that the ECJ is best placed to carry out these linguistic checks.

By contrast, the first time the Court of Justice was actually asked to rule on specific divergences between official language versions was in 1967. This resulted in a judgment that is currently largely ignored (Case 19/67, Van der Vecht, EU:C:1967:49). Unjustly, as the judgment and its reasoning are interesting and have been consistently upheld to the present day. For a better understanding, it is worth briefly recalling the facts of the case.

Mr Van der Vecht was employed by a Dutch company but carried out his duties in neighbouring Belgium. To this end, his employer organised accommodation for him on the Dutch side of the border and bus transport to Belgium every working day. Unfortunately, one day there was a bus accident in which Van der Vecht was seriously injured. He claimed damages from his Dutch employer, who apparently had no insurance either in the Netherlands or in Belgium. It was therefore necessary to determine whether Belgian or Dutch insurance law applied to the case. The employer argued that the accident had occurred on Belgian territory and that Van der Vecht had worked exclusively in Belgium. A relevant EEC regulation on workers' social security rights contained a phrase (in the Dutch version) which seemed to suggest that Belgian law was the relevant law. The phrase read as follows: "een bedrijf […] waarbij zij gewoonlijk werkzaam zijn" (an undertaking […] by which they are normally employed). Although the Dutch judge did not compare this phrase with other languages, he had some doubts about its interpretation and referred a question on the matter to the ECJ. The ECJ acknowledged that the scope of the phrase in Dutch seemed to convey a different meaning than in the other languages. The Dutch wording seemed to suggest that a worker who was employed solely for the purpose of working in the territory of a Member State in which he did not have his permanent residence and in which the undertaking which employed him was not established, was not covered by Dutch insurance.

In this conundrum, the Court established the doctrine which it has consistently followed ever since, 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 […] languages (par. 442).

The Court then compares the Dutch version with the other languages. The French version reads: "un établissement dont il (le travailleur) relève normalement" (an establishment to which he (the worker) is normally attached), while the Italian and German versions contain comparable, if not identical, terms. Interestingly, the European Commission refers in its submissions to the preparatory documents of the said regulation, which were drafted exclusively in French. For this reason, Advocate General Gand states in his Opinion that the French version, which is unambiguous and clear, must be regarded as *authoritative* in this matter of interpretation (ECLI:EU:C:1967:38: 362).

However, the Court does not take this position, but simply refers to the meaning of the provision as it appears from the three other versions taken together. Since then, the ECJ has consistently held that the true meaning of a given provision of EU law must be determined by a purposive and systematic interpretation in the light of all the language versions. Which of these methods of interpretation carries the most weight in the final assessment may vary from case to case (Pozzo, 2008), although it is argued that in order to protect the effectiveness of EU law, the purposive method is the dominant one

(Ćapeta, 2009: 16), even if it leads to an interpretation that contradicts the clear meaning of a norm (Šarčević, 2013: 16).

This doctrine has remained unchanged for many years, despite the fact that the number of official legislative languages has steadily increased from 4 to 24, making the task of national judges to compare the various equally authentic versions, which was already quite a challenge to begin with, completely unrealistic.

In 2021, however, the Court of Justice had the opportunity to update its Cilfit judgment. Indeed, in Consorzio (Case C-561/19, EU:C:2021:799), the ECJ Grand Chamber largely confirmed the Cilfit judgment (the principle of equal authenticity (par. 42), the obligation to compare all language versions (par. 43) and the doctrine of autonomous concepts in EU law (par. 45)), using exactly the same wording. However, in a crucial paragraph (44), the Court pointed out that

> [w]hile a national court or tribunal of last instance cannot be required to examine, in that regard, each of the language versions of the provision in question, the fact remains that it must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified.

The Court thus finally relieves national judges of the (unrealistic) obligation to compare all language versions. Instead, the Court seems to be introducing a two-step procedure. The first step concerns *awareness* of linguistic discrepancies. This threshold of doubt is not defined. The main burden of proof seems to lie with the parties. In any event, judges will have to *verify* whether the linguistic arguments put forward by the parties are credible (which implies some form of linguistic comparison, although not all languages have to be taken into account). The second step would then be for the judges to decide whether to refer the matter to the ECJ or to resolve the (linguistic) issue themselves, since the Court of Justice has stopped short of imposing a general obligation to refer linguistic issues to it (although it seems to implicitly recommend doing so).

It is regrettable that the ECJ remains rather vague in this respect. It would certainly have been helpful if the Court had been more precise in defining the duties of national judges. It is worth recalling the wise words of Advocate General Capotorti in his Opinion in the Cilfit case: "It is by interpreting a provision that it is possible to determine whether its meaning is clear or obscure" (3436).

3. The Relative Substantive Trust in a Single Language Version

It follows from the Cilfit and Consorzio judgments that only relative reliance can be placed on each and every version of EU law. At a general level, this far-reaching doctrine to some extent undermines the idea of equal authenticity, as some or more language versions may be set aside.

This doctrine also raises issues of legal certainty for individuals. Although not explicitly enshrined in EU primary or secondary law, the ECJ has recognised legal certainty as one of the fundamental general principles of EU law (see e.g. Case C-231/15, Prezes Urzędu Komunikacji Elektronicznej, EU:C:2016:769, par. 29; Case C-98/14, Berlington Hungary, EU:C:2015:386, par. 77; Case C-201/08, Plantanol, EU:C:2009:539, par. 46). On the formal level of legal certainty requirements (publicity/accessibility of the law), the ECJ has consistently held, notably in its landmark Skoma-Lux judgment (ECJ, Case C-161/06 Skoma-Lux, EU:C:2007:773, par. 32 et seq.; see also Case C-560/07 Balbiino, EU:C:2009:341, par. 29 and Case C-146/11, Pimix, EU:2012:450, par. 42 et seq.), that EU regulations are not enforceable against individuals in an EU Member State if the regulation has not been officially published in the language of that Member State. This applies even if the individuals concerned were able to acquaint themselves with the provisions of the regulation in question by other means.[5]

The facts of the Skoma-Lux case are relevant. Skoma-Lux was a wine importer and wine trader. On September 30, 2004, the Czech Customs Office in Olomouc (Czech Republic) imposed a fine on it for repeated infringements of customs legislation. Skoma-Lux had committed a customs offence by providing incorrect information on the customs classification of Kagor red wine. Among other things, it had infringed a provision of an EU Commission regulation (implementing the Community Customs Code). Skoma-Lux asked a Czech judge to annul the administrative fine. It argued that the EU regulation in question did not apply to it because it had not been published in Czech at the time of the infringements. The Czech customs authorities refuted this plea, stating that the Czech Ministry of Finance had published the Czech version of the relevant customs provisions in electronic form, that Skoma-Lux had been able to familiarise itself with these provisions at customs offices and that this company, which had been active in international trade for a long time, was aware of the relevant (EU) legislation. The Czech judge referred the case to the ECJ. In the ensuing proceedings before the ECJ, the European Commission admitted that the official version in Czech had only been published in a special edition of the Official Journal on August 27, 2004 (after the date of the infringements). However, it argued that the possibility of obtaining the legislation in another language version or by electronic means should be taken into account. It pointed out that the customs regulation in question had been published in the Czech language on the EUR-Lex website on November 23, 2003 and in printed form on April 30, 2004 and had been displayed at the premises of the Office for Official Publications of the (then) European Communities. The Commission, supported by some Member States, argued that in such a case the (EU) legislation, although not published, should apply as it could be proved that the person concerned had actual knowledge of it.

[5] It should be noted that failure to publish in all languages does not affect the validity of the act itself. The consequences of non-publication are limited to enforceability against individuals.

In its judgment, the Court was adamant. It clearly stated that (EU) legislation which has not been published in the Official Journal in the language of a new Member State, where that language is an official language of the European Union, cannot be imposed on individuals in that State, even if those individuals could have learned of those provisions by other means.

On the formal side, therefore, legal certainty prevails (and rightly so). On the substance, however, there is only relative certainty. A case that illustrates this paradox is the Endendijk judgment (Case C-187/07, EU:C:2008:197). In 2005, Dutch cattle farmer Dirk Endendijk was prosecuted in the Netherlands for tethering calves in contravention of Dutch legislation based on an EU directive. In his defence, Endendijk argued that the Dutch language version of the annex to the directive referred several times to a metal tether, which effectively excluded the use of *chains* (*kettingen*), whereas he had used a rope for tethering (which was not expressly prohibited). The Dutch judge referred a preliminary question on this matter to the ECJ. However, the Court rejected the linguistic argument, citing its established case law, as explained above, according to which the scope of the obligation in question could not be examined solely on the basis of the Dutch version.[6] It pointed out that other language versions, such as the German ("Anbindevorrichtung"), the English (*tether*), the French (*attache*) and the Italian (*attacco*), referred to a more general term. The ECJ therefore concluded that the word *chains* used in the Dutch version was contrary to the objective pursued by the EU legislators: a calf is tethered where it is tied by any means. Endendijk had therefore committed a criminal offence.

The Endendijk case provides a clear illustration of how the interpretation of multilingual EU law can, to some extent, run counter to the principle of legal certainty, since citizens have a right to their own language version, but can only rely on it to a limited extent. Another example in this respect is the Röser judgment (Case 238/84, EU:C:1986:88), which, incidentally, also dealt with a wine-related issue. Hans Röser was prosecuted for infringing the provisions of an EU regulation. In his cellars in Kitzingen (Germany), he had enriched 1 659 litres of *Federweißer* wine by adding grape must concentrate from grapes harvested in Italy. Such a mixture of grapes from different wine-growing zones was not permitted, but Mr Röser claimed that the prohibition applied only to the final product (table wine) and not to the basic and intermediate products which he allegedly produced.

The German judge of first instance acquitted Röser (on the basis of the German language version). The appeal judge found Röser's argument plausible, but referred the matter to the ECJ. The ECJ accepted that Röser's defence had some merit, based on the German version of the regulation:

[6] The Court also dismissed the action on the grounds that the exception in question only applied to calves that were housed in groups at the time of being fed milk. This was not the case with the Endendijk calves, which were kept in individual pens.

> It is true that the German version […] is unclear in that regard and is open to another interpretation, namely that the prohibition on carrying out the process of enrichment more than once or outside the wine-growing zone in which the grapes have been harvested applies only to the specified processing of the products mentioned in that article (par. 20).

However, in accordance with its doctrine of linguistic comparison, the Court found that the obligations imposed on Mr Röser were clear in other language versions:

> […] it is apparent from a comparative examination of the different language versions, and in particular of the English, French and Italian versions, in which there is no ambiguity, that [the provision at issue] must be understood as authorizing such processes, carried out as a single operation in the wine-growing zone where the grapes have been harvested, only in so far as they take place at the time when the products referred to in that provision are turned into wine suitable for yielding table wine or into table wine. Moreover, that interpretation is compatible with the aim of that provision, which forms part of a body of rules which strictly regulate practices involving enrichment (par. 22).

A combination of linguistic arguments and purposive interpretation made Röser's obligations clear and he could be prosecuted accordingly. In the words of Advocate General Mancini in his Opinion,

> that is undoubtedly a very severe conclusion, but it is also the only conclusion which is in keeping with both the wording of the rules in question and the organization of the market in wine (EU:C:1985:500, 800).

Another example concerns a customs dispute involving a Danish and a German company in relation to the transport of wheat to the United Kingdom (Case 250/80, Schumacher, ECLI:EU:C:1981:246). The regulation in question required the parties concerned to make a declaration to the customs authorities. However, in some language versions the information to be provided corresponded to the French expression "destiné à être mis à la consummation" (intended for home consumption), while in other versions it corresponded to the expression "intended for free circulation". The following versions coexisted:

> Intended for entry for home use (EN)
>
> Bestemt til afsætning til forbrug (DK)
>
> Für den freien Verkehr bestimmt (DE)
>
> Destine à être mis à la consommation (FR)
>
> Destinato ad essere immesso in consumo (IT)
>
> Bestemd om in het vrije verkeer te worden gebracht (NL)

The facts of the case are rather complicated and largely irrelevant to the issue at hand. Suffice it to say that the company in question had based its customs declaration on the requirements of the German version. The company was later charged with deliberately making false declarations. A Danish judge referred questions to the ECJ. In its judgment, the Court confirmed the existence of a linguistic problem:

> There is, it is true, a linguistic divergence between the German version […], upon which the defendants relied, and the corresponding Danish version, but it is clear, with regard thereto, that the Court must adopt an interpretation […] which is uniform throughout the Member States, since a differing interpretation would involve distortions conflicting with the objectives of the Treaty of Rome (2471).

Admittedly, the case is somewhat atypical in that the Danish company did not raise the language issue in its defence. It is indeed not unlikely, as the Court seems to *suspect in casu*, that the Danish company deliberately used the German version as a loophole in the system. In any case, it was in vain, since the Court, on the basis of a purposive interpretation, simply states that the criterion is that the products must actually be placed on the market of destination, clearly avoiding the language issue altogether.

4. The Way Forward: Shifting the Burden of Legal (Linguistic) Uncertainty

It is hard to avoid a feeling of inconsistency, or even a vague sense of injustice, when comparing the various cases in this respect. On the one hand, the Court confirms the equal authenticity of all language versions (Cilfit and Consorzio) and the unenforceability of a language version that has not been properly published (Skoma-Lux). In the latter case, even evidence of possible knowledge of the law by other means is irrelevant. On the other hand, even if individuals rely in good faith on a single (authentic) language version, that version may turn out to be inaccurate in comparison with other language versions. Individuals cannot trust their language version read in isolation. Endendijk and Röser had followed the Dutch and German language versions respectively, but should have consulted other language versions which would have made their obligations clear.

It is true that the ECJ's task is not an easy one. It has to rule *in abstracto* when interpreting EU law in the preliminary reference procedure. In its older case law, the ECJ has hinted at an incompatibility between legal certainty and the need for uniform interpretation of divergent language versions, "in as much 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" (Case 80-76, North Kerry Milk Products, EU:C:1977:39, par. 11).

The ECJ has not repeated this disclaimer in recent case law. Nevertheless, the tension between multilingual interpretation and legal certainty is evident. In the following, I will outline three possible ways forward.

4.1. Conceptual Consistency in EU Law

An obvious starting point is the quality of EU law in all language versions. If divergences are prevented or detected at an early stage, legal certainty is enhanced. As Ioriatti aptly

puts it, EU translation is not only a linguistic transposition activity, but also the "engine of the mechanism aimed at transforming EU law into a new European language" (2023). The general *lackadaisical* (Leal, 2022: 196) treatment of language issues by the EU does not really apply to the legislative process. In fact, the European Commission's Directorate-General for Translation pays particular attention to the conceptual consistency of legal acts, as "clear and correct laws are a prerequisite for a functioning democracy" (European Commission, DGT Translation Quality Guidelines, 2015: 5). Implicitly, however, the finger is pointed at a relevant *political* issue in this regard – namely, the often unavoidable need for some textual ambiguity for the EU legislators to reach a compromise – when the DGT document states (no pun intended, we may assume) that translators should check with the translation requester *if it is unclear whether ambiguity is intended*. Conversely, the existence of multiple language versions can also be a great advantage, as they can highlight inconsistencies.

An interesting question in this context concerns the use of artificial intelligence (AI). The question is how the increased use of AI will affect the issues discussed in this article. On the one hand, it could be argued that early detection systems could greatly benefit from the use of AI. An obvious translation error in the Dutch version (the divergent use of the word *ketting* in Dutch), which led to the Endendijk case mentioned above, could most likely have been detected through the use of AI during the various stages of the legislative process. Conceptual inconsistencies can also be identified during the same legislative process, so that human intervention can focus on these potentially flawed aspects of the texts. On the other hand, AI translation may also increase the risk of (hidden) discrepancies, where different language versions appear to be congruent *prima facie*, but in fact are not. In such a case, human intervention may actually be much more time-consuming than estimated. In this context, it is of the utmost importance to properly assess the impact of AI, and not just see it as a useful tool to replace human translators and lawyer-linguists. This will certainly be a topic of much research in the coming years.

Moreover, after the Endendijk judgment, it still took 7 years for the legislators to correct the Dutch version.[7] In my view, there should be a red flag procedure to ensure that such obvious linguistic problems can be rectified within a reasonable timeframe to avoid other similar problems.

[7] The applicable text was Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves (OJ L 340/28). The ECJ delivered its judgment on 3 April 2008. The directive was later codified (Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves, OJ L 10/7), but the Dutch version was only corrected in 2015 (OJ L 10/46), thus removing the linguistic discrepancy (identified by the ECJ in its judgment) with other versions.

4.2. The Consequences *in abstracto vs. in concreto*

As has been said, the ECJ's task is a daunting one. It has to interpret EU law, and a literal comparison of the different language versions is a useful and objective method. *In abstracto*, therefore, the reasoning underlying such judgments clearly benefits from a method of linguistic comparison, thereby enhancing general trust and legitimacy.

However, a potential shortcoming concerns the effects *in concreto*. Legal certainty must indeed work primarily for the benefit of the individual and not for the powers-that-be, in this case the EU (Van Meerbeeck, 2016: 138). Indeed, it seems far from fair that citizens like Endendijk or Röser (giving them the benefit of the doubt that they acted in good faith) should have to bear the negative consequences of a legal provision that was unclear in their own language. Indeed, this was the reasoning of the ECJ in its Skoma-Lux judgment. It held that an approach which allowed the enforceability of an act which had not been properly published would result in individuals having to "bear the adverse consequences" of a failure by the EU administration (Case C-161/06, Skoma-Lux, EU:C:2007:773, par. 42; see also ECJ case law on legal certainty and legitimate expectations, e.g. Case C-1/02, Borgmann, EU:C:2004:202, par. 30–31; Case C-236/02, Slob, EU:C:2004:94, par. 37; Case C-143/93, Van Es, EU:C:1996:45, par. 27; Case C-98/91, Herbrink, EU:C:1994:24, par. 9; Case C-81/91, Twijnstra, EU:C:1993:196, par. 24).

The ECJ has to provide a uniform interpretation of all language versions of EU law and cannot come up with *ad hoc* solutions for a particular language or case. National judges could, however, take some account of such adverse effects on an individual. Interestingly, this approach was eventually (implicitly) taken by the Dutch court in the Endendijk case. Once the ECJ had ruled that a *chain* could also be a *rope*, the Dutch court had no choice but to find that Endendijk had indeed committed a criminal offence. However, as an attenuating circumstance, it took into account that Endendijk's contribution had clarified the scope of EU rules. Accordingly, the court did not impose a fine (Rechtbank Zutphen, 20.10.2008, NL:RBZUT:2008:BG0605).

However, as I have previously argued (Van der Jeught, 2018), this approach may not be in line with current ECJ case law, as the following example illustrates. The case concerned a customs declaration for the import of rice paper from Vietnam. A Dutch company, Heuschen & Schrouff, an importer of foodstuffs and food ingredients, had made an error in the customs declaration of the rice paper in question. However, the error was due to the fact that the Dutch version of the applicable EU regulation differed from other language versions. Nevertheless, the Dutch authorities imposed a fine three years after the fact. The case was brought before the Gerechtshof Amsterdam (Case 01/90096 DK X. B.V., NL:GHAMS:2004:AR7276). This court examined other language versions (English, French, German and Finnish) and confirmed that they did not match the wording of the Dutch version (par. 6.1.2). It also pointed out that the Dutch authorities themselves had erred for a long time (by applying the inconsistent Dutch version) (par. 6.2.2). The Dutch court held that a taxable person cannot be expected to check customs regulations in a

language other than the authentic language of the EU Member State in which the customs formalities are carried out (*in casu* Dutch). It was therefore not reasonable to expect the company in question to have detected the error. There was nothing to suggest that Heuschen & Schrouff had not acted in good faith. Indeed, it had complied with all the rules applicable to the customs declaration. Accordingly, the Dutch judge annulled the tax authorities' demands for payment (par. 6.2.4).

On appeal (*casssatie*), the Hoge Raad (Dutch Supreme Court) referred the matter to the ECJ for a preliminary ruling. The ECJ reiterated its established case law and held that although the Dutch version of the wording of the customs provision in question, "unlike a number of other language versions", did not expressly specify the goods in question, other language versions did (Case C-375/07, Heuschen & Schrouff, ECLI:EU:C:2008:645, par. 45–46). Heuschen & Schrouff had therefore infringed EU law.

A further complication was that the European Commission was also involved in the sense that the Dutch customs authorities had asked it for an opinion on the matter. The Commission had decided that the Dutch authorities should recover the fine imposed on Heuschen & Schrouff because it had been *negligent*. In separate proceedings, the Dutch company appealed against the Commission's decision before the General Court of the EU and subsequently before the Court of Justice, but without success (Cases T-382/04 and C-38/07P, Heuschen & Schrouff Oriëntal Foods Trading BV v Commission of the European Communities, EU:C:2008:641). The obvious negligence of the Dutch company was confirmed and, interestingly and in stark contrast to the Skoma-Lux ruling, reference was made to the professional experience of the importer and his duty to investigate and seek all possible clarification to ensure that he was not infringing (EU) rules. The ECJ also stated that the Dutch judge should have waited for the European Commission's decision in order to avoid a contradictory ruling (Case C-375/07, par. 66). In any event, the Commission was not bound by a national court's decision in this respect (par. 69). The Dutch Supreme Court therefore had no choice but to overturn the judgment of the Dutch judge at first instance and impose a fine on Heuschen & Schrouff.

Understandably, for the sake of uniformity, the ECJ once again gave a general and abstract interpretation of the EU legislation in question. In a sense, the European Commission did the same. However, the concrete result seems unsatisfactory.

Arguably, a national judge should always be able to take into account the fact that the individual acted in good faith. Ideally, the ECJ could also explicitly leave room for national courts to make exceptions in specific cases. Judges would then feel reassured by the ECJ that if a language version is found by the ECJ to be incorrect or ambiguous in the light of other language versions, there should be no liability or other adverse consequences for the person concerned. Indeed, it seems illogical that an individual should be let off the hook if their own language version is unavailable, even if a deliberate breach of EU law can be proven, but that there should be an obligation to compare language versions in all other cases. In any case, national courts may be reluctant to enforce ECJ rulings against individuals acting in good faith.

It seems indeed imperative to exclude the enforcement of incorrect or ambiguous obligations in one or more language versions in the case of criminal prosecution. It should be recalled that, in the field of criminal law, legal certainty takes the form of the principle of legality, a fundamental human right. This principle is well summed up in the famous maxim *nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law). Individuals must be able to ascertain from the wording of the law, if necessary through the interpretation of the courts, what acts and omissions will render them criminally liable (ECHR, Case 10249/03, Scoppola, par. 93–94). An *inevitable element of judicial interpretation* is acceptable provided that the resulting development *is consistent with the essence of the offence and could reasonably be foreseen* (ECHR, Cases 34044/96, 35532/97 and 44801/98 Streletz, Kessler and Krenz, par. 50).

The principle of legality also includes the rule of leniency. In case of doubt, ambiguous provisions should be interpreted in favour of the accused, as expressed in the Latin maxim: *in dubio pro reo* (in doubt, for the accused). In the area of criminal law, therefore, individuals should be given the benefit of the doubt if their own language version is incorrect or ambiguous, and the obligations in question should not be enforceable against them. However, it may be argued that the scope of such a general principle of leniency should not be unlimited, for example in cases of bad faith or in cases of obvious editorial errors or omissions in a given language version which were easily detectable by the persons concerned. Such circumstances would have to be assessed by the national judge according to the same criteria as in purely national criminal law.

5. Conclusions

In his Opinion in the Consorzio case, Advocate General Bobek does not mince his words. He calls the issue of the duty of national judges to refer preliminary questions to the ECJ, and more particularly the exception to that duty, and above all its enforcement,

> the metaphorical sleeping dogs of EU law. We are all aware that they are there. We are all able to discuss or even write scholarly treatises about them. However, in real life, it is best that they be left undisturbed. Pragmatically (or cynically) speaking, the entire system of preliminary rulings functions because no one in fact applies Cilfit, certainly not to its letter. Often, the idea of a dog is better than having to deal with the living animal (Opinion, par. 2).

As regards linguistic discrepancies, the Consorzio judgment is certainly a step forward, as it removes the unrealistic and unenforceable obligation for national judges to compare all language versions of EU law in all cases involving EU legislation, but it remains rather unclear how they should proceed. The role of lawyers seems essential: it is they who have to find arguments in other language versions. Judges seem to have a more

passive role in assessing these linguistic arguments and, if necessary, referring questions to the ECJ. No longer a task similar to that of Dworkin's Judge Hercules (comparing all language versions in every case), again in the words of Bobek (Opinion, par. 104).

Nevertheless, it remains regrettable that there is an absence of both a formal procedure and a coherent doctrine in this respect that adequately acknowledges multilingualism. It is evident that the role of the ECJ is pivotal, as it is the sole entity with the capacity to undertake a genuine linguistic comparison in instances of alleged or actual divergences. Nevertheless, it is imperative to emphasise the necessity for national judges to assume a more active role. In the future, the ECJ could more explicitly define the tasks of national judges and strongly encourage, or even make mandatory, linguistic comparison as a default step when national judges deal with EU law.

This is a daunting task for judges who usually work in a national (monolingual) context. However, the integration of Artificial Intelligence (AI) technology has the potential to transform the feasibility of this task, providing national judges with a practical detection system for comparing language versions. In instances where there is even the slightest suspicion of divergence between equally authentic linguistic versions of EU law, it is imperative that a preliminary reference is made to the ECJ. The *ex post* application of AI has the potential to engender a profound change and greater relevance of EU legal multilingualism. Furthermore, AI can also be of great use in the *ex ante* legislative phase, with neural translation helping to detect discrepancies in translations during the legislative process. Discrepancies such as those described in this article (see the Endendijk case) could thus potentially be prevented. Nevertheless, it is important to exercise caution and to continue monitoring the overall impact of AI on the quality of legislation. More time is necessary to determine its overall impact. It is my conviction that the primary function of AI should be that of an auxiliary instrument to enhance the quality of legislation, rather than as a means to merely reduce the number of translation personnel. Should the latter be the case, there is a risk of a decline in quality resulting in greater legal insecurity, with potentially deleterious and inequitable consequences, particularly for individuals.

In this respect, the prevailing doctrine does exhibit significant deficiencies. The multilingualism paradox, which is characterised by the right of individuals to their own language version, yet simultaneously the impossibility of relying entirely on it due to its potential inaccuracies, may be conducive to an increase in distrust towards national courts and EU law, particularly in instances where one or more language versions need to be disregarded.

The following suggestion is hereby put forward as a potential resolution to the current dilemma. While the ECJ may continue to provide a uniform interpretation *in abstracto*, offering a uniform interpretation to diverging language versions, it could allow national courts *in concreto*, in the individual case before them, to demonstrate leniency and take into account that the individuals concerned acted in good faith on the basis of their own (albeit inaccurate) language version. The ideal scenario would involve the ECJ

explicitly granting national courts the discretion to determine the responsibility of the individuals concerned, regardless of the uniform interpretation of EU law. Within the criminal law context, the basis for a linguistic 'rule of leniency' can be found in the principle of legality.

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