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CJEU Case Law as a Source of Law in National Courts

— Language and Multilingualism

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Abstract
A number of theories have demonstrated how the distinction between legislation and adjudication is becoming blurred, with judgments no longer treated solely as matters for the parties to the case, but as sources of law in their own right. Case law is increasingly being produced and consumed in a manner akin to legislation. On the production side, it is clear that the Court of Justice of the European Union (CJEU), well-known for its formulas and tests, contributes to the use of case law as a source of law. This article develops the discussion in two ways. Firstly, it concentrates on the consumer perspective, by discussing the use of CJEU case law in national courts. Secondly, it advances the discussion from language in general, in the sense of drafting, to multilingualism – the existence of not one but many official languages – and the consequences for the use of CJEU case law as a source of law. This article demonstrates that national courts are prepared to engage with CJEU case law on a very detailed level, scrutinizing the wording and even comparing different language versions of the judgment to understand the correct way to apply the rule-like pronouncements of the CJEU. This scrutiny includes awareness of de jure and de facto originals of CJEU judgments, but goes still further through the use of the established approach for multilingual interpretation of EU legislation. It also highlights the use of standard phrases in CJEU case law and the consistency of translation.

Keywords
multilingual interpretation, textualization of precedent, Court of Justice of the European Union, national courts

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1. Introduction – Missing Perspectives

For a surprisingly long time, the academic discussion regarding precedent has been locked in a common law/civil law dichotomy, concentrating on the binding effect of judgments and thus the idea of stare decisis. According to this view, judgments develop the law in common law systems, while they are only interpretations of statutory law in civil law systems (Teuben & Tai, 2008: 832). This distinction is oversimplified, giving the impression of a unified approach to precedent within the respective legal culture. It also fails to account for various forms of precedent, thus exaggerating the existing differences between them. A distinction must be made between vertical precedent (i.e. lower courts' use of judgments delivered by higher courts) and horizontal precedent (i.e. the use of judgments by courts on the same hierarchical level). Even more specific, scholars are often interested in self-precedent, the attitude of a court to its own, previous judgments, where it normally enjoys significantly greater freedom. Consequently, one cannot compare the attitude of, for example, the Court of Justice of the European Union (CJEU) to its own case law with the approach of a lower, national court to case law from a higher court (Derlén & Lindholm, 2017: 652–655).

Another perspective missing from the discussion is the linguistic perspective, the subject of this volume. This perspective can be employed in a number of different ways, but the present contribution takes its point of departure in the blurring of the line between legislation and adjudication, as developed by Tiersma and Komárek and outlined in Section 2 below. These theories emphasise that case law is increasingly being produced and consumed in a manner akin to legislation. This article explores these issues by focusing on two relationships. First, the relationship between language in general (in the sense of drafting) and multilingualism (the existence of not one but many official languages). Second, the interplay between national courts and the CJEU. By examining the use of multilingualism by national courts in the interpretation of CJEU case law, this article highlights the attention paid to the specific wording of case law and the flexibility of national courts.

The addition of the perspective of national courts is central. While the attitudes of the CJEU vis-à-vis its own previous decisions are of significant interest (Derlén & Lindholm, 2015; Derlén & Lindholm, 2014), they do not provide a complete picture. Without the cooperation of national courts and authorities, the imperatives of the CJEU would simply amount to an echo in the hallowed halls of its Luxembourg palace. National courts are crucial partners for the CJEU, transforming EU law from paper to reality, but also imposing limits and serving as a reality check on the understanding of EU law (Derlén, 2015a). This article uses a number of pre-Brexit cases from English courts, interpreting a judgment from the CJEU, as a primary illustration of the relationships mentioned above, along with examples from Danish, German and Swedish courts (see further Derlén, 2015a). It demonstrates that national courts are ready to engage with the case law of the CJEU in considerable detail, but also reveals varying levels of awareness of the formal

as well as the informal language regime of the CJEU (outlined in section 3). Namely, the use of standardized phrases as a way to understand and interpret CJEU judgments and the use of other language versions as added value in interpretation, even when they have no official status. This approach of national courts should be taken into account when considering the language regime of the CJEU, including the translation process at the Court.

2. Legislation and Adjudication – Blurring the Lines

Tiersma has demonstrated the existence of a tendency towards textualization of precedent in the common-law tradition. Part of this includes greater attention being paid to the exact wording of the judgment. Tiersma summarizes this approach succinctly: "The words of [a judgment] are not evidence of the law, as they once were. They are the law" (Tiersma, 2007: 1278).

The common law has thus undergone a significant transformation, from the long-established view of a legal tradition residing in the minds of the legal profession, to something that resides in print and even in online legal databases. The publication of judgments such that they are available to everyone has significant impacts on justice system actors. Judges will devote more time and effort in their drafting, and lawyers using databases to search for information rather than a digest or legal encyclopaedia will search for and read "snippets of critical text", rather than the typical analysis of the decision of the case (Tiersma, 2007: 1277).

Similarly, Komárek has developed two different models of reasoning with previous decisions – the traditional case-bound model and the legislative model. Facts are central to the former, making it possible to apply or avoid the ruling based on the features of the situation at hand. The latter is characterised by judgments drafted in an abstract manner, with their interpretation emphasising rule-like pronouncements by the courts thereby limiting the role of facts and following the patterns of legislation (Komárek, 2013: 157–160). These models are based on different values and conceptions of judicial authority rather than one being superior to the other, as in the traditional view of a limited capability for case law reasoning in the civil law tradition. The legislative model, by contrast, is grounded in the hierarchical ideal of authority, including the special role of higher courts to supervise those lower and to make rule-like pronouncements, rather than focusing on decisions in individual cases (ibid.: 162–166).

As observed by Komárek, the CJEU – in particular in the context of preliminary rulings – clearly reflects this hierarchical understanding, with the Luxembourg court serving as a superior authority on the interpretation of EU law (ibid.: 166). The court is well-known for its formulas and tests, including among its most famous: the Dassonville for-

mula regarding measures having equivalent effect to quantitative restrictions on the internal market; the Plaumann-test regarding when private parties are considered to be individually concerned by an EU measure and thus able to initiate judicial review; and the Schöppenstedt-formula regarding the conditions for EU liability in damages (Komárek, 2013: 156). The use of such formulas, coupled with the tendency of the CJEU to cut-and-paste text from one judgment to another leads, as Komárek observes, to "a very textual approach to the [CJEU]'s previous decisions". Statements by the court are therefore interpreted in the same way as legislated rules, with heavy emphasis on the wording of the court rather than the factual circumstances (ibid.: 156).

The use of the legislative model of reasoning with previous decisions is, as Komárek puts it, "an affair of two actors". While the court rendering the decision can enable the approach by choosing very abstract language, with formulas and tests such as those discussed above, practical use of a judgment still depends on the receiving court (ibid.: 160). It has already been established that the CJEU will frequently employ abstract language, inviting the use of the legislative model. This article studies the other actor: the receiving national courts. The following discussion demonstrates that they tend to engage in a highly textual approach, putting great emphasis on the exact wording of the CJEU.

3. The Language Regime of the Court of Justice of the European Union

As this article aims to expand the discussion of case law as a source of law from language in general to the impact of multilingualism, a short introduction to the CJEU language regime is necessary. Only the Court of Justice is discussed here, but the General Court follows the same approach (Rules of Procedure of the General Court, art. 44–49).

Multilingualism before the Court both follows, and deviates from, the general language regime for the European Union. The main rule as regards primary and secondary EU law is full multilingualism, meaning that the norms are made available in all official languages and all language versions are equally authentic. It follows explicitly from the statements in articles 55 TEU, 358 TFEU and 225 EURATOM that the treaties were "drawn up in a single original" in all 24 languages. While this is patently not true from a historical perspective, it does lay down the principle of full multilingualism and equal authenticity (Doczekalska, 2009: 355–359). When it comes to secondary legislation the same rule applies. Regulation 1/58 does not make it as clear as with respect to the treaties, but the statement in the amended Article 1 that all 24 languages constitute "official languages and […] working languages" demonstrates that full multilingualism is applicable in this area as well. Limitations have been in effect for Maltese and Irish for practical reasons (Derlén, 2018: 348).

The language regime of proceedings before the CJEU is not regulated by the aforementioned Regulation 1/58. Article 7 of that regulation explicitly defers to the Rules of Procedure of the Court of Justice when it comes to deciding the languages to be used in proceedings. Full multilingualism plays a part in matters handled by the CJEU in the sense that all 24 official languages can be used as the language of a case, following Article 36 of the Rules of Procedure. However, once the language of the case has been determined (normally by the applicant (Rules of Procedure, art. 37)) the proceedings will take place in that language. This includes its written and oral aspects (Rules of Procedure, art. 38), with the final judgment authentic only in the language of the case. The latter follows from Article 41 of the Rules of Procedure, which states that the documents are authentic in the language of the case. Here authentic is clearly used in the sense of authoritative or binding. The German version of Article 41 uses the concept *verbindlich*, the Swedish version *ska äga vitsord*, and the Danish version *retsgyldige*, all indicating that the version in the language of the case is legally binding and takes precedence over other versions.

Consequently, a single, de jure original exists of every judgment of the CJEU, even though publications of the Court are issued in all the official languages (Rules of Procedure, art. 40). Gallo explains the existence of a single original, in the language of the case, with the fact that the national court and the parties are bound by the judgment and must be able to understand it (2006: 181). This is naturally true, but one could take the argument a step further and argue that the national court and the parties to the dispute must not only be able to understand the judgment, but also to rely upon it, in their own language.

However, another original is competing with the official, de jure original as identified by Article 41. The internal working language of the CJEU is French, which means that the judgment is drafted in French and then translated into the language of the case (Derlén, 2014: 300–301). Consequently, both a de jure and a de facto original exist. In spite of being the text actually drafted by the Court, the French language version of a judgment has no formal importance unless French was also the language of the case. As will be demonstrated below, national courts are generally aware of the special position of French.

The fact that even the judgment in the language of the case is a translation from the French version obviously creates the potential for errors. Special care is taken to ensure the best possible translation from the French original into the language of the case. This has traditionally included having the translation examined by the native-speaking judge (Brown & Kennedy, 2000: 24; 284), for example the Swedish judge if the language of the case is Swedish. The use of this approach was confirmed by Advocate General Sharpston in *Farrell* (Case C-413/15). Despite this attention mistakes are made, resulting in errors in the judgment in the authentic language version. Obvious errors can be corrected according to the procedure in Article 103 of the Rules of Procedure, as was the case in *Åkerberg Fransson* (Case C-617/10). However, it is still possible to find examples of cases where the CJEU has been forced to handle divergences in meaning between different language

versions of a judgment, presumably due to errors in translation (see Derlén, 2014: 301–305). Furthermore, due to workload and resource constraints, the practice of having a native-speaking judge examine the translation is no longer regularly followed (McAuliffe, 2020: 74).

The complications continue however, given the peculiarities of drafting at the CJEU. As demonstrated by McAuliffe, the cut-and-paste tendency (mentioned above) is not accidental but rather part of the Court's drafting traditions. Judgments are drafted in French, but by "référendaires" whose native language is normally not French. These référendaires work partly in their own language, partly in French, falling back on self-made glossaries of common phrases used by the Court, which they nevertheless tend to view as constraining. This is enforced by the so-called "lecteurs d'arrêts", responsible for reading the judgments to ensure that the French is fluent but also precise, and who insist on using easy-to-translate terms. This all leads to a sort of Court French; a rigid, basic and rather pompous language, repeated between different judgments. Most of all, it means that even the "original" French version is in many cases a translation, by non-francophone référendaires, working with cut-and-paste phrases from old judgments (McAuliffe, 2013).

In summary, the language regime of the CJEU is intricate, encompassing monolingualism, multilingualism and several different conceptions of the original wording. Generally, multilingual aspects of case law have received comparatively limited attention as compared to the same issues for secondary legislation (Derlén, 2014: 296). The idea behind a different language regime for case law versus secondary legislation would seem to be that judgments are primarily a concern for parties to the dispute. However, this underestimates the impact and importance of CJEU case law as well as the way in which it is used. The following sections demonstrate that national courts have approached CJEU judgments in a manner quite similar to that of interpreting primary or secondary EU law.

4. The Approach of National Courts: The *Kittel* Example

The approach of national courts is perhaps best illustrated by English courts' reception of *Kittel*, a 2006 judgment from the Court of Justice (Joined cases C-439/04 and C-440/04). *Kittel* concerned value added tax, more specifically so-called carousel fraud (Wolf, 2011: 32–33). The Court concluded that national courts could refuse VAT deduction

> where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT

even when the objective criteria for VAT deduction were fulfilled (Joined cases C-439/04 and C-440/04: para. 59). The judgment was followed by a flurry of cases before English courts. The abstract nature of the phrase, coupled with the importance of the judgment, resulted in a level of scrutiny similar to that which is involved in the interpretation of legislation. For example, in *Mobilx Ltd v Revenue and Customs Commissioners* (2010), Lord Justice Moses engaged in detail with *Kittel* and the references therein to previous CJEU judgments. He concluded, by emphasising the use of words such as *therefore* and *in the same way* in paragraphs 56–59 of *Kittel*, that *knew or should have known* must have the same meaning as *knowing or having any means of knowing* in the previous case law of the CJEU (EWCA Civ 517: paras. 16–44; 50–52).

However, the multilingual character of CJEU judgments adds another dimension to their interpretation. The potential language issues in *Kittel* were discussed in *Megtian Ltd v Revenue and Customs Commissioners* (2008). That case explicitly turned on the application of *Kittel*, and the appellant argued that only a trader whose immediate supplier was fraudulent could lose the right to claim input tax where he knew or should have known of the fraud. The respondent, HM Revenue and Customs, claimed that the trader could lose the right to claim input tax even if the fraud occurred in a chain of transactions. In support of her argument, the appellant pointed to the French version of *Kittel*, described as "the original language of the case", and contended that the English and French versions diverged in meaning. Specifically, that the French word *impliquée* supported a narrower interpretation of the case than the English *connected*. The tribunal discussed the French wording, using a French-English dictionary, but did not find that the French version necessarily carried a different meaning. It reserved judgment on the issue in the absence of evidence from a qualified interpreter but – after a lengthy discussion of the wording and context of *Kittel* – dismissed the appeal.

The intense scrutiny of the wording in *Kittel* – in particular the phrases *knew or should have known* and *connected with* – and whether the English phrase correctly represented the view of the CJEU, continued in a number of cases before English courts. It was brought up in the *Livewire* (EWHC 15) and *Mobile Export* (EWHC 797) cases before the Chancery Division of the High Court in 2009. In the former case, Mr. Justice Lewison noted that the language of the case in *Kittel* was French and cited extensively from the French version of the case. He discussed a number of phrases, including *connected with*, and observed some differences in nuance, indicating that the English wording "convey[s] the impression of a rather less intimate involvement in the fraud than the French text seems to require". Nevertheless, as the issue had not been fully argued before him, he still proceeded based on the English language version (EWHC 15: paras. 57–61).

Mobile Export concerned an appeal against interlocutory decisions by a VAT and Duties Tribunal, including an issue of evidence. Before the Tribunal the appellant had submitted materials from the French VAT authorities, indicating that the latter adopted a narrower view of when *Kittel* would be applicable. The Tribunal refused to admit the

French materials, and Sir Andrew Park at the Chancery Division upheld the decision and dismissed the appeals. However, he added the following:

> Where a tribunal in the United Kingdom is concerned to determine the ambit of the Kittel decision it should do so on the basis of the decision of the ECJ taking account, if it wishes to do so and if it is invited to do so, of the text of that decision not just in English but in other languages (EWHC 797: para. 24).

English courts continued to do precisely that, discussing the potential differences between the English and French wordings of *Kittel*. Traders continued to emphasise the French version, as the language of the case and the real drafting language of the CJEU. They argued in favour of a more limited application, for example in *POWA Ltd v Revenue and Customs Commissioners* (2012 UKUT 50 TCC). HM Revenue and Customs, on the other hand, rejected giving preference to the French version, asserting that all language versions of a judgment of the CJEU are equally authentic (*Mavisat Ltd v Revenue and Customs Commissioners*, 2012 UKFTT 253 TC).

One strategy adopted by traders to demonstrate their position was to point to the English translations of the same French phrases, primarily *impliqué dans*, in other judgments. In *POWA* the appellant referred to *Teleos* (Case C-409/04) and *Netto* (Case C-271/06) on the same issue. In the latter cases *impliqué dans* in the French version was rendered as *involved in* in the English version, rather than *connected with* (2012 UKUT 50 TCC: paras. 26–27). Similarly, in *Spearmint Blue* (2012 UKFTT 103 TC) and *Matrix Europe* (2011 UKFTT 792 TC), traders pointed to *Criminal Proceedings against R* (Case C-285/09), where *impliqué dans* was rendered as *aimed at* in the English version. In *Midland Mortgages* (2011 UKFTT 631 TC) and *S&I Electronics* (2012 UKUT 87 TCC), all three of the above-mentioned CJEU cases were employed to cast doubt on the correct translation of *impliqué dans*. The traders emphasised that the French wording had remained the same, but the English wording varied (UKFTT 631 TC: para. 139). Further, that the CJEU had meant to correct the erroneous wording used in *Kittel* by employing different, narrower phrases in the English language versions of the later cases (2012 UKFTT 103 TC: para. 33; 2012 UKUT 50 TCC: para. 27; 2012 UKUT 87 TCC: para. 28).

The traders, however, were unsuccessful in all the aforementioned cases. Mr. Justice Roth in *POWA* accepted that, as English was the language of the case in *Teleos*, the translation of *impliqué dans* as *involved in* had to be correct, an impression which he confirmed by consulting a French dictionary. Nevertheless, this did not make any substantive difference, as Roth found that *Kittel* applied even when the taxable person was not dealing directly with the fraudulent trader. He emphasised the circumstances of *Kittel*, specifically that the taxable person was dealing directly with the fraudulent trader, meaning that the wording used must be understood in this context, not as a general limitation (2012 UKUT 50 TCC: paras. 26–36). Similarly, the Tribunal in *S&I Electronics* observed that the concept of *impliqué dans* was used in different contexts in *Teleos* and *Netto* as compared to *Kittel*, giving them different meanings (2012 UKUT 87 TCC: para. 30). The

Tribunal in *Spearmint Blue* concluded that while the English phrase used in *Criminal proceedings against R* was *aimed at*, this did not constitute an endorsement by the CJEU of that particular phrasing. Rather, it simply reflected the circumstances of that case, where a trader had acted fraudulently and clearly aimed at evading VAT (2012 UKFTT 103 TC: paras. 34–35). The Tribunal in *Midland Mortgages* concluded that it was bound by a higher court's interpretation of the case, and that there was a clear link between the trader and the fraudulent activities (2011 UKFTT 631 TC: para. 139). Finally, the Tribunal in *Matrix Europe* found the distinction between *connected with* and *aimed at* to be "insignificant at most". It also expressed reluctance to re-interpret the English language version of the judgment, produced by a "no doubt highly qualified translator", without any expert witness evidence (2011 UKFTT 792 TC: paras. 17–24).

Despite this, interpretative disputes continued. In *Universal Enterprises* the trader argued that the French *savait ou aurait dû savoir que* should be translated as *would have had to have known* or *could not but have known*, rather than *knew or should have known* (2015 UKUT 0311 TCC). The latter had, according to the trader, a particular meaning in English common law, including both actual and constructive knowledge, while the alternative expressions only included actual knowledge. The Tribunal concluded that it did not have the required linguistic skills to settle the issue of the correct translation of the French version of *Kittel*, and since it was already established that the trader knew of the fraudulent transactions, it was not necessary to do so. As concisely summarised by the Tribunal: "Whatever uncertainty may or may not attend the correct English translation of the French expression '… aurait dû savoir que …', there seems to be no doubt concerning 'savait'" (ibid.: para 68).

The cases discussed above demonstrate how issues related to the drafting of judgments – here the general phrasing of the *Kittel* judgment and the ensuing efforts regarding its interpretation – are connected to issues of multilingualism. This includes uncertainties regarding the language regime of the CJEU. The next section of this article breaks down and discusses the lessons from these cases and adds further examples from national courts.

5. Four Lessons from the *Kittel* Saga

5.1. (Multilingual) Attention to Detail

The most fundamental lesson from the *Kittel* cases is that national courts are ready to engage with the case law of the CJEU on a very detailed level, scrutinizing the wording and even comparing different language versions of a judgment to understand the correct way to apply the rule-like pronouncements of the Luxembourg court. Dissecting the

wording using dictionaries or calling for expert witnesses on the topic[1] indicates the detailed attention paid to the exact phrases used by the Court as well as their translation. It is also the same approach used by national courts when engaging in multilingual interpretation of treaties and secondary legislation (Derlén, 2009), indicating that case law is treated simply as another normative product of the European Union.

In *Kittel* the language of the case was French, as pointed out by traders as well as the courts, making the choice of language straightforward. However, national courts have demonstrated that they are ready to consult other language versions of a judgment, even if the language of the case was the language of the court. In other words, national courts have not rejected the use of other languages, even when this could be done on formal grounds. For example, in *Honeywell* the German Federal Constitutional Court discussed the CJEU's decision in *Mangold* (Case C-144/04) and consulted the English and French language versions of the judgment as part of an attempt to understand the arguments employed by the Court of Justice (2010 2 BvR 2661/ 06: paras. 57–58). Obviously, the language of the case in *Mangold* was German, but this did not discourage the Constitutional Court from considering other language versions.

Similarly, in *Nestlé v Cadbury* (2016 EWHC 50) the Chancery Division of the High Court of Justice engaged in a discussion of the reply from the CJEU (Case C-215/14) to a request for a preliminary ruling, including the issue of whether the CJEU had correctly understood the questions posed by the Chancery Division. The court analysed the language regime of the CJEU in some detail, noting that only the language of the case (here English) was authentic and making references to the Rules of Procedure of the Court. It still went on to consider the wording of question 1 of the preliminary ruling in French, German, Dutch, Italian, Latvian and Polish. The French and German versions contained some errors in translation, while the other languages followed the English version (2016 EWHC 50: paras. 13–22). The Chancery Division continued to scrutinize the Opinion of the Advocate General and the judgment from the CJEU, in French and English, noting that the Judge Rapporteur was from Luxembourg and therefore presumably Francophone. This would, according to the English court "tend to reinforce the likelihood of the judgment having been drafted in French", but it still noted that English was the authentic version (ibid.: para. 39). The Chancery Division concluded that it doubted whether the CJEU had fully understood the questions posed, that it was therefore tempted to refer the question again, but that it was not realistic to expect a "materially different result" (ibid.: paras. 47–48).

This readiness and commitment of national courts to engage with other language versions of CJEU judgments, in order to understand their correct application, has profound implications. For example, in the absence of a single official language the idea, championed by the CJEU most notably in *CILFIT* (Case 283/81: para. 19), that EU legal

[1] See the discussion concerning *Megtian*, *POWA* and *Matrix Europe* in Section 4 above.

concepts can be fully autonomous (i.e. independent of national legal concepts) is doubtful. Law is, in the words of Glanert, carried by language (Glanert, 2006: 157). Therefore, the supposedly autonomous concept would not change the existing, culture-bound meanings in the national language, as demonstrated by Engberg when it comes to the differences between *consumer/forbruger/Verbraucher* (Engberg, 2015: 177–178). However, Engberg reminds us not to underestimate the importance of interpersonal communication. Personal experiences and communication can form new knowledge, gradually altering culture-bound meanings (ibid.: 178–179). While the argument cannot be fully developed here, I would contend that this communication is largely built into EU law and can happen significantly faster than normally envisioned in theory. One could say that multilingual interpretation holds the key to solving the problems created by multilingual drafting. National judges are, in my experience, aware of the autonomous meaning of EU concepts and ready to put national definitions and understandings aside (see, for further discussion: Derlén, 2009). This holds true even for fundamental legal terms, as evidenced by a case from a Swedish Court of Appeal (RH 2010: 23). That case concerned the interpretation of Article 5 of Regulation 44/2001 (also known as the Brussels I Regulation (2001 OJ L 12: 1–23)), including the meaning of *tort, delict* or *quasi-delict* (*skadestånd utanför avtalsförhållanden* in the Swedish version) in Article 5.3 of the regulation. To interpret the concept, the Swedish Court of Appeal turned to the case law of the CJEU, more specifically the Swedish, English and German versions of the *Kalfelis* and *Tacconi* judgments (Case 189/87; Case C-334/00). The Court of Appeal concluded, based on the English and German versions, that the interpretation indicated by the Swedish concept was too narrow, requiring instead an extensive interpretation. Another Swedish Court of Appeal had come to the same conclusion, by comparing the wording of Article 5.3 itself in Swedish, English, French and German. That court concluded that the Swedish version unduly concentrated on damages and had to be interpreted broadly to include other forms of procedure as well (NJA 2007 s. 287).

However, the readiness of national courts to engage in multilingual interpretation of CJEU case law comes with certain limitations. In some of the English cases discussing *Kittel* the courts were hesitant to attach too much weight to a foreign language version without expert evidence. Similarly, in *Volkswagen v Revenue and Customs Commissioners* (2011), the Tax Tribunal emphasised the need for expert evidence when interacting with foreign language versions of CJEU case law (UKFTT 556 TC). As part of a VAT dispute the respondents pointed to the French versions of the *Rompelman* (Case 268/83) and *Midland Bank* (Case C-98/98) judgments, but the Tribunal found that no reliance could be placed on a foreign language text in the absence of expert evidence, emphasising that knowledge on the part of the Tribunal of the language in general was insufficient to capture the relevant nuances (UKFTT 556 TC: paras. 58–60). While perhaps understandable, such an approach becomes problematic, not least from a *iura novit curia* perspective (see further Derlén, 2009: 314–326).

5.2. Awareness of De Jure and/or De Facto Originals

As part of their examination of CJEU judgments, national courts have demonstrated some awareness of the language regime of the Court. However, it does seem to be generally less well-known, as compared to the language regime of EU legislation, and some mistakes and misunderstandings can be found. For example, the Tribunal in *Volkswagen* (mentioned above), claimed that the "original language" of *Midland Bank* was Italian (2011 UKFTT 556 TC: para. 61), while it is actually English, being a preliminary reference from an English court (Case C-98/98, footnote 1). Another misunderstanding was evident in the argument of HM Revenue and Customs in *Mavisat* (2012 UKFTT 253 TC), that all language versions of CJEU judgments are equally authentic (cf. the discussion in section 5.4 below).

Naturally, examples can be found of national courts explicitly referring to the special status of the language of the case, giving that language particular attention. There are further examples besides the aforementioned *Nestlé v Cadbury* and many of the cases in the *Kittel* saga. *Logstor* for instance, from the Swedish Patents Court in which that Court notes, as part of a discussion concerning *Bertelsmann* (Case C-413/06) and *TetraLaval* (C-12/03), that the language of the case (in both contexts) was English, and quoted from that language version (2016 PMT 7499-16). It concluded that the English version presented a higher burden of proof, and therefore re-interpreted the Swedish version of the judgment in light of the English wording. Similarly, in *RÅ 2009 ref. 49*, the Swedish Taxation Board observed that the language of the case in *CSC* (Case C-235/00) was English and quoted from the English version.

In other judgments, national courts demonstrate that they are aware of the de facto language regime of the CJEU, i.e. the existence of a working language. For example, in *FII Group v Revenue and Customs Commissioners* (2008), the Chancery Division (EWHC 2893 Ch) performed a detailed analysis of the answer provided by the CJEU (C-446/04) to a request for a preliminary ruling in the dispute at hand. In two of the paragraphs it was unclear whether the CJEU was referring to nominal or effective rate of tax, and the Chancery Division sought assistance from the French version of the judgment, referring to the "original French text" (EWHC 2893 Ch: para. 55).

Similarly, in a number of cases involving the interpretation of the CJEU's decision in *Mercredi* (Case C-497/10), English courts and tribunals were clearly aware of the special position of French. For example, in *DL v EL* (2013 EWCA Civ 865), heard by the Court of Appeal and which concerned the removal of a child from the country of habitual residence and the interpretation of the Brussels II Regulation 2201/2003: Therein, Lord Justice Thorpe expressed scepticism about the English wording of *Mercredi*. He cited extensively from the French wording of the judgment, noting that while English was the language of the case "the language of the judgment" was French. He also observed that the German language version of the judgment was clearly translated from the French text,

not the authentic English version. Based on the French version, the concept of *permanence* in the English version was read as *stability* (EWCA Civ 865: paras. 69–79).[2]

The issue of originals is an important part of interaction with CJEU case law. Firstly, the need to consult an original indicates reading the judgment not as a settlement of an individual dispute, but as a source of law itself. Secondly, the fundamental disagreement concerning what constitutes the original in this context is significant, as it could potentially lead to conflicting outcomes in similar cases. An interesting example of this is *Laval*, from the Swedish Labour Court, discussed in section 5.4 below.

5.3. Standard Phrases and Consistent Translations

One of the most interesting aspects of the *Kittel* cases discussed above is how the parties, and national courts, make use of other judgments from the CJEU to assess whether the English translation is correct. In other words, actors on the national legal scene have noticed the standardized form of the Court's judgments and the recurrence of phrases, at least in the French versions, and is using this to understand and interpret the English language version.

We saw traders adopt this approach in *POWA*, *Spearmint Blue*, *Matrix Europe*, *Midland Mortgages* and *S&I Electronics*, and while they were not successful in persuading the courts and tribunals of the suggested interpretation of the English language version, this did not mean a general rejection of the method per se. If we concentrate on this, setting aside the material question of whether any differences in meaning exist between the French and English language versions, as well as the discussion in *Midland Mortgages* concerning existing precedent from a higher court, the discussions of the English tribunals reveal three main approaches.

The first is represented by Mr Justice Roth in *POWA*. When confronted with comparisons with the wordings in the English language versions of *Teleos* and *Netto*, Roth preferred to consult the former case only. The reason given for this was that English was the language of the case in *Teleos* (the language of the case in *Netto* was German, see Case C-271/06, footnote 1). This might be seen as a formal approach, taking the English wording of other judgments into consideration only when it was the language of the case and thereby authentic. However, there are also more pragmatic reasons for proceeding in this manner. Since the Court pays special attention to the language of the case, as discussed above, it is reasonable to assume that this is the best possible translation of the French original.

[2] This issue regarding the translation of the English version of *Mercredi* was also discussed in a number of other judgments, see e.g. *In the matter of A (Children)* (2013 UKSC 60, para. 51); *BP v DP (Children) (Wrongful Retention: Anticipatory Breach)* (2016 EWHC 633 (Fam), para. 44); *KMIvSMO* (2017 SC HAM 22, para. 16); *R v A* (2013 EWHC 692 (Fam), para. 80).

The second approach is demonstrated by *Matrix Europe*, where the tribunal was unwilling to re-interpret the English language version without expert witness evidence. This relates to the discussion in Section 5.1 above.

The final, most frequent and perhaps most interesting response to the use of the wording of other judgments concerns context. In *POWA*, *S&I Electronics* and *Spearmint Blue* the tribunals emphasised the different contexts of *Kittel* as compared to *Teleos*, *Netto* and *Criminal Proceedings against R*. The specific wording of the judgments was affected by the questions posed by the referring court and the factual circumstances of the underlying dispute. This includes the fact that the taxable person was dealing directly with the fraudulent trader in *Kittel*, and that the trader had himself acted fraudulently in *Criminal Proceedings against R*.

This illustrates a fundamental problem. We know that the CJEU tends to use general formulas and tests (see *Kittel*), leading to intense scrutiny of the wording by national courts, including comparing and discussing different language versions of the judgment. However, at the same time a conflicting tendency can be observed, where the Court of Justice arguably (and understandably) adapts its response to the questions posed by the national court. National courts thus have to decide if a particular phrase is supposed to be a general test, or simply relates to the circumstances of the case in question. This opens the door to different interpretations, and thus poses a challenge for the uniform application of EU law.

5.4. The Single Meaning Approach to Interpretation of Case Law

The final tendency that can be observed regarding the approach of national courts to CJEU case law is the use of the single meaning approach. In adopting this, the court will assume that the different language versions carry equal weight and together create the meaning of the provision in question (for further discussion, see Derlén, 2015a: 54–56). When it comes to the interpretation of treaties and secondary legislation, this is a natural approach – if not the only one – (Derlén, 2011: 144–152), since all language versions are equally authentic (see Section 3 above). However, the CJEU has stressed the importance of a multilingual method even when a single language is formally authoritative, such as the interpretation of the Coal and Steel Community Treaty (Derlén, 2018: 343), and in the interpretation of its own case law (Derlén, 2014: 301–305).

National courts have occasionally followed this methodology, viewing other language versions as added value in the interpretation of CJEU case law even if the language in question was neither the language of the case nor the drafting language (French). The following outlines a few examples (for further examples, see Derlén, 2015a: 63–67).

It is sometimes difficult to appreciate the rationale of national courts choosing to consult language versions other than the language of the case or French. In some judgments the court explicitly confirms the special position of the language of the case while

still consulting other languages. It is clear in such instances that the other language versions are understood as added value in the interpretative process, despite formally being only translations. This was the situation in *Habitats*, from the German Federal Administrative Court (decision of April 17, 2010: 9 B 5.10). There the Court observed that the German version of *Commission v Finland* contained a translation error, when compared with the authentic Finnish version (Case C-342/05). Despite noting that only the language of the case was authentic, and referring to the Rules of Procedure of the CJEU, the Court still consulted the English, French, Spanish, Italian, Portuguese, Greek and Dutch language versions as well, remarking that all of them except the Dutch version followed the Finnish version, before concluding that the German version was erroneous (9 B 5.10: para. 9). It did not explain why it felt it necessary to discuss other language versions, but the impression is that it added to the evidence of the German version suffering from a translation error.

In some situations, it is unclear whether the actor is aware of the formal language regime of the CJEU, or whether they believe that it follows the full multilingualism of the treaties and secondary legislation. The argument by HM Revenue and Customs in *Mavisat* that all language versions of CJEU judgments are equally authentic clearly belongs to the latter category. Other cases are less clear, as the court is simply quiet on the issue of the language of the case and its special position, even if the language of the case is de facto consulted. For example, in *RÅ 2003 ref 80* the Swedish Taxation Board discussed the English, Danish and German versions of *Henriksen* (Case 173/88), without mentioning that Danish was the language of the case or giving it special weight (see further Derlén, 2015a: 66–67).

National courts sometimes consult several language versions, but leave out French, or even the language of the case. An example of the former is the above-mentioned *RÅ 2003 ref 80*, and an example of the latter is *Trav och Galopp* (2012 HovR T 2179-11). In the latter, the Swedish Court of Appeal interpreted *Directmedia* (Case C-304/07) based on the Swedish, English and French language versions, without consulting the German language of the case.

Particularly interesting are the cases where neither the language of the case nor French is used, but rather another foreign language version. The typical example here is falling back on the English version of the judgment (Derlén, 2015b: 301–302). For example, in *Samvirkende Købmænd* (2008 case number 2008-0016416), the Danish Competition Appeal Board interpreted *Parking Brixen* (Case C-458/03) using the English language version, not consulting the German language of the case nor the French version. Similarly, in *TeliaSonera* (RK 2012:3), the Swedish Administrative Court of Appeal discussed the Swedish and English versions of *KPN*, without consulting the French version or the Dutch language of the case (Case C-109/03).

Even if the language of the case and/or the French versions are consulted, it is possible that they are not accorded particular weight or attention. In *Laval* (AD 2009 nr. 89) the Swedish Labour Court had requested a preliminary ruling from the CJEU and was

then trying to interpret the answer (Case C-341/05). Different interpretations were presented by, on one hand, the Swedish (language of the case), German and French versions and, on the other, by the Danish and English versions of the judgment. Without discussing that translations, by nature, carry no special standing (neither formally nor practically speaking), the Labour Court found the interpretation offered by the latter group of language versions to be more persuasive.

The use of the single meaning approach among national courts indicates a blurring of the line between the interpretation of CJEU case law as compared to treaties and secondary legislation. Other language versions, even though they are translations with no formal standing or special attention from the CJEU, are seen as added data in the interpretative process, in the same manner as in the interpretation of other binding EU law sources.

6. Conclusions – CJEU Case Law as Normative Texts in National Courts

This article aims to contribute to the discussion of the linguistic perspective on precedent, focusing on the blurring of the line between legislation and case law, and emphasising the contribution of multilingualism in the EU context. It takes its point of departure in the theories developed by Tiersma and Komárek concerning the textualization of precedent and the legislative model of reasoning with previous decisions, supplementing these with a consideration of national courts. As pointed out by Komárek, two actors matter when it comes to deciding how judgments are used. Great attention is normally placed on the CJEU, the creator of precedent, and we know that it makes use of formulas and abstract tests. However, this paper adds the perspective of the consumer of judgments – the national courts – and how they receive these decisions.

This paper also advances the discussion from language in general to multilingualism, demonstrating how the language regime of the CJEU plays a part in the interpretation of its case law. The language regime itself is rather special, with the existence of multiple originals, and further complicated by the tendency of the Court to cut-and-paste text from previous judgments.

Based on a flurry of cases before English courts concerning the interpretation of *Kittel*, as well as examples from other national courts, a number of tendencies are observed. Firstly, national courts are obviously eager consumers of CJEU case law, ready to engage in detailed analysis of the wording of judgments, including on a multilingual level. This holds true even when their own language was the language of the case (thus authentic), and they have demonstrated a readiness to question national understandings and culture-bound definitions in the interpretative process.

Secondly, some uncertainty and/or misunderstandings regarding the language regime of CJEU case law can be identified in national courts. However, in other situations they have shown themselves to not only be aware of the formal language regime, but also of the special position of French and the reality of drafting at the CJEU. Examples can be found of national courts recognising and relying on the language of the case, but they have also not hesitated to fall back on the French wording, even when it was not the language of the case, to understand the intention of the Court.

Thirdly, the cut-and-paste method of the CJEU has not gone unnoticed by national actors. Parties to disputes before English courts have pointed to the consistency of the French wording and the variances in the English translations as part of the interpretation of the latter. This has elicited a number of responses from English courts, illustrating the difficulties of this method. This includes procedural issues, such as the possible need for expert evidence, but also a matter of more fundamental importance. English courts have argued that the specific wording of CJEU judgments is dependent on context, specifically the questions posed by the national court and the factual circumstances of the underlying dispute. The combination of abstract formulas and case-specific phrases is therefore problematic, as it can create uncertainty when it comes to the applicability of a CJEU judgment.

Finally, the dedication to detailed analysis of CJEU judgments also leads to the adoption of the single meaning approach, where national courts consult languages other than the language of the case and French as part of the interpretative process. Despite only being translations, these other language versions are regarded as additional tools in attempting to understand the intention of the CJEU. National courts proceeding in this manner therefore adopt the same approach to the interpretation of case law as they do in the interpretation of treaties and secondary legislation. CJEU case law is thus regarded as yet another normative EU text, not a decision in an individual case.

The last step is closing the loop between the Court of Justice and national courts, by reflecting on what lessons the CJEU can learn from the tendencies discussed above. By adopting abstract formulas and tests, and by relying extensively on its own case law as a source of law, the Court has created a fertile ground for the textualization of precedent and national courts have clearly followed along. However, the multilingual character of CJEU judgments gives rise to particular challenges. The fact that national courts will scrutinize the wording of a judgment in several language versions, not limited to French and the de jure original, has potential implications for the language regime and the translation process at the Court of Justice. The use of languages other than the language of the case and French, by national courts, Advocates General, as well as the CJEU itself (Derlén, 2014), supports more radical reform of the language regime. This currently appears to be based on a view of CJEU judgments as mostly important to the parties, neglecting the use of those judgments as a general source of law. However, moving to equal authenticity of all official languages is not without its challenges. Firstly, according to Article 253 TFEU, a change of the rules of procedure would require the approval of the

Council of the EU. Secondly, formalizing the importance of other language versions could create uncertainty for national courts and parties to an underlying dispute, as they would need to engage with more languages to determine the meaning of a CJEU judgment.

However, there are potential consequences for the translation process at the Court of Justice even in the absence of fundamental changes to the language regime. We know that special attention has traditionally been given to the translation into the language of the case from French. To spend the same amount of time and energy for every language version does not appear realistic, but given indications of general use of the English version of judgments, even when it is not the language of the case, this translation at minimum should benefit from heightened attention by the Court (Derlén, 2018: 351–356). More generally, special attention should be given to the consistency of terminology within a language when it comes to abstract phrases and tests adopted by the CJEU. This might aid in avoiding the situation described above, in which the exact English version of a phrase changed from case to case but the French original remained constant.

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