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Multilingual interpretation of European Union law

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Abstract

IT *La politica attuata nella CEE con il regolamento N. 1/1958 per garantire i diritti linguistici dei cittadini prevede che tutte le lingue ufficiali degli Stati membri abbiano lo stesso status. La Corte di giustizia europea ha più volte confermato l'uguale valore di tutte le versioni linguistiche. Questa scelta ha dato vita ad una vera e propria sfida per gli estensori della normativa e gli interpreti. Esistono pochissime esperienze simili in epoca contemporanea; forse solo il Sudafrica ha una simile varietà di lingue ufficiali. La reazione di molti osservatori è stata spesso colorata di scetticismo: il minimo che si possa dire, in generale, è che i giudici saranno difficilmente in grado di prendere in considerazione in modo efficace tutte le (ora) 24 versioni di una qualsiasi legislazione rilevante. La situazione più probabile è che un interprete cercherà conferma della propria lettura di una disposizione controversa nelle lingue più simili alla propria (o in una lingua straniera che per ragioni storiche sia ampiamente conosciuta in un determinato territorio). All'interno della giurisprudenza della Corte di giustizia una delle conseguenze più evidenti è l'inclinazione prevalente verso un'interpretazione teleologica: solo tenendo conto delle finalità di un regolamento o di una direttiva annunciate nei considerando iniziali e nei lavori preparatori una regola ambigua può essere chiarita, visto che i diversi testi sono equivalenti e nessuno di loro ha la posizione di testo "autentico".*

Keywords: lingue ufficiali, Corte europea di giustizia, interpretazione di testi multilingue

EN *The policy implemented within the EEC by Regulation N. 1/1958 to guarantee the citizens' linguistic rights provides that all the official languages of the Member states have the same status. The ECJ has repeatedly confirmed the equal value of all the linguistic versions. This ambitious choice has created a real challenge for the drafters of legislation and interpreters alike. Very few similar experiences exist in contemporary times, perhaps only South Africa has a similar variety of official languages. The reaction of many observers has often been tainted of skepticism: the least that can generally be said is that judges will hardly be able to effectively consider all the (now) 24 versions of any piece of relevant legislation. The most likely situation is that an interpreter will seek confirmation of his/her reading of a disputed provision in the languages most similar to one's own (or in a foreign language that for historical reasons is widely known in a certain territory). Within the ECJ case law one of the most evident consequences is the prevailing inclination toward a purposive interpretation: only having regard to the aims of a regulation or a directive announced in the opening recitals and in the preparatory works can an ambiguous rule be clarified, if the several texts are equivalent and none of them has the standing of "authentic" text.*

Keywords: official languages, European Court of Justice, interpretation of multilingual texts

MULTILINGUAL INTERPRETATION OF EUROPEAN UNION LAW

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Index

1. - Introduction. The multilingual option.

A long-standing decision from 1958 still affects the present situation of languages within the EU.

At the time, when the languages used in the six original member States of the *European Common Market* were very few when compared with today's 24 languages, it seemed quite logical to provide in EEC Regulation 1/1958 that

"Article 1

The official languages and the working languages of the institutions of the Community shall be Dutch, French, German and Italian".

Under this rule, workloads could be managed reasonably well, considering that minor (in terms of number of native speakers) languages such as the Luxembourg language (*Lëtzebuergesch*), or Belgium's Flemish spoken, were not granted the title of "official languages"[1].

The commitment to multilingualism is also repeated in art. 20, 2 (d) of the 2007 *Treaty on the Functioning of the EU*, according to which:

"Citizens of the Union shall enjoy …

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the

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[1] Some regional languages, such as Basque, Catalan, Galician, Scottish Gaelic and Welsh have a "*co-official*" status in the sense that the documents are translated into these languages, on the basis of specific agreements with the Member States where these languages are used and with the economic support of those States. The Ministers of Foreign Affairs reached the agreement in 2005 (http://euobserver.com/news/19323). See, for example, http://ec.europa.eu/unitedkingdom/about_us/office_in_wales/welsh_language_en.htm.

> Union in any of the Treaty languages and to obtain a reply in the same language".

Problems related to the management of several versions of European documents have obviously become much more serious with the joining of several new countries, especially those belonging to Central and Eastern Europe. This is the reason why so much discussion is taking place on the "language policy after the enlargement"[2].

A specific consideration deserves attention. A rather critical remark made by Advocate general Jacobs[3] points out that:

> "It is a fiction to say that the legislature has considered all the language versions. What of legislation adopted by the Six? Each accession increases the number of texts that were not originally authentic in all the current languages.
> It would, however, be contrary to the accession treaties to suggest that only those language versions existing at the time the legislation was adopted are authentic".

We should therefore consider that some texts have become authentic "ex post", after the Member State using a different language has actually joined the Union. As a result, from the beginning of our reflections on the subject, we must contend with issues relating to compromise. For instance, there is an element of fiction in saying that the Irish version of a 1967 regulation is authentic, since Ireland only joined the "European club" in 1973.

The European Court of Justice (ECJ) has dealt with equality issues between all the languages. In the *Skoma* case (C-161/06) at point 37, it ruled that regarding legislation that existed prior to a State's accession:

> "an act adopted by a Community institution, such as the regulation at issue in the main proceedings, cannot be enforced against natural and legal persons in a Member State before they have the opportunity to make themselves

[2] B. POZZO, V. JACOMETTI (eds.), *Le politiche linguistiche delle istituzioni comunitarie dopo l'allargamento*, Milan, Giuffré, 2006; Isabel Schübel -Pfister, *Enjeux et perspectives du multilinguisme dans l'Union européenne: après l'élargissement, la «babelisation»*, *Revue du Marché Commun et de L'union Européenne*, 2005, 332; some interesting data in Isidor Marí and Miquel Strubell (Open University of Catalunya), *The linguistic regime of the European Union: Prospects in the face of enlargement,* available at: <*www.europadiversa.org/eng/.../strubell_mari_eng...*>.

[3] Lecture on "*How to interpret legislation which is equally authentic in twenty languages*", Brussels 2003, http://ec.europa.eu/dgs/legal_service/seminars/agjacobs_summary.pdf

> acquainted with it by its proper publication in the *Official Journal of the European Union"*[4].

This is a consequence of the need for legal certainty, ruling that that legislative acts enacted before the accession of a State to the Community (now Union) must be translated into the language of all member States to be made binding on the citizens. Publication on the *Official Journal* is part of the process of making the law accessible to citizens.

2. - Advantages and disadvantages

On the positive side of the arrangement reached in 1958, two arguments attract our attention.

Firstly, everyone agrees that cultural diversity is an important asset, and that different languages reflect differences in culture. Linguistic issues are highly sensitive and are part of the identity of many ethnic groups in Europe. Often, demands for independence are linked to the existence of a particular language in a specific area that sets part of the population apart from the rest of the country (the obvious reference is to Catalonia, the Basque country, the Flemish region in Belgium, Scotland and so on).

Secondly, when legislation is expressed in more than one language, it may well be that the intent of the legislator is better explained by comparing the various versions of the same text. Where the intent may result fuzzy in one language, another version may be more explicit.

On the negative side, of course, the main complaint concerns the complex mechanisms necessary to maintain 24 parallel versions of all documents[5], the uncertainty connected with the fact that the various versions may be divided into majority and minority groups (or into even more fragmented groups) and the observation that in fact, apart from official declarations of equality, English has largely taken over, at least as *working* language at the institutional level.
A study performed some years ago by the Commission observed that researchers

> "in 2001 found for the first time that more documents had been drafted in English than French (55% and 42% respectively). Just a few years later in

[4] *Skoma*-Lux sro v Celní ředitelství Olomouc, C-161/06, 11 December 2007, accessed at <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130de109b4cf672c245aca63ca33c885be1bc.e34KaxiLc3eQc40LaxqMbN4ObhmKe0?text=&docid=71342&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=103447>.

[5] According to Larry M. SOLAN, *The Interpretation of Multilingual Statutes by the ECJ*, 34 *Brooklyn J. International Law*, 2008-9, p. 276 managing many linguistic versions results in

> "a daunting task for a court that must resolve disputes over a statute's applicability … The opportunity for inconsistencies among the various language versions is so profound that it would not be surprising if the entire system collapsed under its own weight".

The author is more optimistic, as shown in the following pages.

> 2009 a survey of Commission staff found that over 90% regarded English as their main drafting language. The 2009 survey found, however, that only a small minority of those writing in English are native speakers, just 13%. Rather alarmingly 54 % of drafters 'rarely or never have their documents checked by a native speaker'."[6]

Obviously the discrepancies between what is done in practice during the political negotiations (English as *lingua franca*) and the multilingual final version of the agreed documents reflect real needs. Providing simultaneous translation for all meetings of all working groups is simply not feasible, and the use of "bridge languages" ("langues-pivot") helps at least in the safeguarding of the principle of multilingualism.

There actually is an area in European Union law where the French language still competes with English: the case law (*jurisprudence*) of the ECJ. Under the *Rules of procedure* of the European Court of Justice[7], the language used during the trial (*procedural language*) depends on the requests of the parties to the case[8]. However, according to the internal arrangement of the court, discussions between the judges take place in French, in order to establish one shared language that may directly be used without the mediation of translators[9]. The internal agreement has been made to allow for a common means of communication, so that judges can address each other on a shared basis. When Eastern European countries joined the EU, some debate took place on the possibility of moving towards English as a substitute common language, but the existing practice finally won majority consent. This choice influences the

[6] Report on the survey in the DGT publication *Languages and Translation*, Issue 1, at p. 4ff: http://ec.europa.eu/dgs/translation/publications/magazines/languagestranslation/documents/issue_01_en.pdf.

[7] http://europa.eu/legislation_summaries/institutional_affairs/institutions_bodies_and_agencies/ai0049_en.htm, artt. 36 ss.

[8] Art. 37, 1: "In direct actions, the language of a case shall be chosen by the applicant … 3. In preliminary ruling proceedings, the language of the case shall be the language of the referring court or tribunal."

[9] See: G. GALLO, *Organizzazione e caratteristiche dell'attività di traduzione nell'ambito della Corte di Giustizia delle Comunità Europee*, in POZZO, JACOMETTI (eds.), *Le politiche linguistiche delle istituzioni comunitarie dopo l'allargamento*, Milano, 2006, p. 251; B. ODDONE, *La traduzione giuridica alla Corte di Giustizia delle Comunità Europee. Problemi e tecniche*, *ivi*, p. 277 ss.; H. BRADY, *Twelve Things Everyone Should Know About the European Court of justice, "The ECJ thinks in French"*, p. 35, 2014, available at: http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/hugo_brady_12_things_ecj_22.07.14-9313.pdf. David EDWARD expresses the opinion of one of the past judges at the ECJ, *How the Court of Justice works*, E.L.R., 1995, p. 539, at p. 546. Recently also: Rüdiger STOTZ (Director General, Directorate Library, Research and Documentation, Court of Justice of the European Union), *The interpretation of legal texts by the Court of Justice of the European Union*, at the *Second European Symposium on Improving the Comprehensibility of Legal Provisions*, Berlin, November 11, 2014, <http://www.bmjv.de/SharedDocs/Kurzmeldungen/DE/2014/20141112_Symposium_Verst%C3%A4ndlichkeit_Rechtsvorschriften.html>.

organization of the linguistic services: French translators are generally under greater pressure, leading to a larger number of civil servants appointed[10].

In the parallel institution of the Council of Europe, the Strasbourg European Court of Human Rights, judges may discuss in either English or French as both these languages are official languages of the Council of Europe[11]. That said, a certain trend toward English as working language may be detected in the Council.

Linguists belonging to countries that have recently joined the EU have observed that the past influence of French on the *acquis communautaire* is noticeable. This is especially true in the comparison of the style of documents before and after the joining of common law countries, which has affected the structure and terminology of European Union law[12].

In the past, several proposals have been put forward with the aim of simplifying the linguistic arrangement. One radical project was designed by the so-called *Druon Manifest,* which proposed the use of the French language as the most apt to express legal notions in Europe [13]. An alternative option, proposed by the Scandinavian countries, was for each speaker in a public debate in the European institutions to use his/her own native language, but would be required to listen to replies, discussions, questions in English, to diversify the active and passive use of English (generally better managed in the passive situation, rather than in expressing complex notions with an appropriate terminology)[14]. A rather extreme proposal suggested that a limited number of official languages could be selected for discussions, as long as everyone agrees to express himself/herself in a language different from his/her native one. Finally, we should mention that the conclusions of the *Barcelona European Council* meeting in 2002 suggested that all citizens should learn not only a second

[10] B. ODDONE, *La traduzione giuridica alla Corte di Giustizia delle Comunità Europee. Problemi e tecniche*, in POZZO, JACOMETTI, *Le politiche linguistiche delle istituzioni comunitarie dopo l'allargamento*, Milano, 2006, p. 277 ss..

[11] Translation into the 38 other languages (for 47 member States) takes place at a later stage: not every document is translated ("The selection of the most important cases is made by the Bureau following a proposal by the Jurisconsult": <http://www.echr.coe.int/Pages/home.aspx?p=caselaw&c=#n1367580026604_pointer>); see also: <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC/translations&c=>

[12] S. Šarčević, *Legal translation: preparation for accession to the European Union*, Reijeka 2001 and M. Bajčić, *Challenges of Translating EU Terminology,* in M. Gotti, C. William, *Legal Discourse across Languages and Culture,* Bern, 2010.

[13] *Manifeste pour le français, langue juridique de l'Europe*, 2004, available at the website of the *«francophonie»:* <http://www.francophonie-avenir.com/Index_MD_Manifeste-Druon_pour_que_le_francais_soit_la_langue_juridique_de_l%27Europe.html>

[14] The Swedish "Language Council" (a semi-official body) has actually envisaged the possibility of the preservation of Swedish as an active tool of expression, but that the passive role may be carried out in English (translation would be ensured only from Swedish and not into Swedish) (*Draft Action Programme for the Promotion of the Swedish Language*, published with an English translation by the Swedish Language Council in 1998: <http://www.spraknamnden.se/SSN/handleng.htm>)

international language to communicate in business, but also a third independently chosen language, to help preserve languages less required for efficiency reasons, but still practiced within the EU[15]. As it was argued in 2008

> "the European Union should advocate the idea of personal adoptive language. The idea is that every European should be encouraged to freely choose a distinctive language, different from his or her language of identity, and also different from his or her language of international communication"16.

A great loss stemming from the increased use of English as a working language lies in the lost opportunity for the clarification of concepts that are connected to the co-drafting of documents in more than one language. Research conducted on behalf of the EU Commission on 'Document quality in public administrations and international organisations' has evidenced that several multilingual States consider the parallel drafting of documents in more than one language very helpful in the clarification of policy, to avoid use of expressions that belong only to one of the cultures involved, and so on. In Canada for instance

> "When French versions of Canadian laws were mere literal translations of the English version, the results were rather 'stilted in terms of style', so that jurists who had to interpret the text were forced to refer to the source language. Such a translation technique was perceived as being in contradiction with the principle of language equality. Therefore, the method used to draw up laws in French and English had to evolve to avoid literal translation and to ensure that, as regards private law, it can be understood in the legal context of both civil and common law"17.

The adoption of co-drafting has given rise to perceived changes in federal legislation:

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15. Cf Council of the EU, Presidency conclusions, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/71025.pdf Also, in the same direction, C*onclusions on language competences to enhance mobility*, Brussels 2011, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/126373.pdf.

16 The policy of encouraging the learning of two foreign languages rather than one was recommended in the "Maalouf Report" of 2008 (*A rewarding challenge, How the Multiplicity of Languages could Strengthen Europe*), retrieved at: http://www.poliglotti4.eu/docs/a_rewarding_challenge.pdf. The group of intellectuals "for Intercultural Dialogue set up at the initiative of the European Commission" included 9 distinguished scholars of different disciplines. As an incidental remark, the report also notes "as regards the language of international communication, we are well aware that most people would today opt for English".

17 WELLINGTON, Louise M., *Bijuralism in Canada: Harmonization Methodology and Terminology*, Canada, Department of Justice, 2001, available at:
< http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b4-f4/bf4.pdf>

> '[…] the historical rigidities of bilingual drafting have been relaxed to a degree. It is no longer necessary for the French version to track the sentence structure and wording of the English version. […] On the English side, common law drafting has evolved toward a higher level of generality and abstraction, which has brought it more in line with civilist style.'[18]

Unfortunately the research has also demonstrated that several international institutions have renounced the previous practice of negotiating legal texts in several languages in parallel, due to economic concerns that have suggested that the co-drafting process be dropped, at least at the level of working groups[19].

3. - Consequences of having all linguistic versions as authentic.

The most obvious consequence of the deliberate choice to avoid the selection of a privileged language is that no one can safely refer to one single version of a normative text: the minimum precaution that must be taken is that of comparing a number of linguistic versions[20].

a) Fundamental legislation (primary law).

The problem does not concern only secondary legislation, but also the fundamental documents that have established the EU itself.

As an example we may recall that on the issue of how to raise a reference for a preliminary ruling (art. 177 of the 1957 Treaty, now art. 267 of the Treaty on the functioning of the EU) a certain discrepancy exists between the literal English and German versions of the same provision. The German text (Abs 3) seems to imply that the issue must be argued by one of the parties to the case and that the judge of last instance must forward the question to the European Court of Justice[21].

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[18] Government of Canada, *Cabinet Directive on Law-Making*, 1999. See Government of Canada Privy Council Office, *Guide to making Federal Acts and Regulations* (2nd ed.), 2001, Part II, 'Making Acts'.

[19] For instance within the U.N., the UNOV(U.N. Office Vienna) respondents to the research questionnaire have emphasized that because of budgetary tightening, greater rigor is applied in deciding whether a document should be edited and/or translated; for example following the proliferation of working groups for various commissions, it was decided that working group documents would not be edited or translated: Document quality control in public administrations and international organisations, Brussels, 2013, http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=HC0113339, p. 231.

[20] On the difficulty involved in this exercise: Peter Tiersma, Lawrence Solan , *The Oxford Handbook of language and law*, 2012 .

[21] Art. 267, 3: "Wird eine derartige Frage in einem schwebenden Verfahren bei einem einzelstaatlichen Gericht gestellt, dessen Entscheidungen selbst nicht mehr mit Rechtsmitteln des innerstaatlichen Rechts angefochten werden können, so ist dieses Gericht zur Anrufung

The correct interpretation given by the ECJ has clarified that

> "The mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177.
> On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion".[22]

b) Secondary legislation.

Regarding secondary legislation, on the issue of comparing the various linguistic versions, the ECJ has repeatedly stated the following principle:

> "when a single decision is addressed to all the member states the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, and in the light in particular of the versions in all four languages".[23]

And since the *Cilfit* case (1982), it is a settled principle that

> "community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision

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des Gerichtshofs verpflichtet". The sentence causing some doubt is the first ("wird eine … Frage … bei einem einzelstaatlichen Gericht gestellt").
The English version: "Where any such *question is raised* in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court".
In French: "Lorsqu'une telle question est soulevée dans une affaire pendante devant une juridiction nationale dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne, cette juridiction est tenue de saisir la Cour".
The German version would have been closer to the other languages if it had been structured in the following manner: "Stellt sich eine Frage" (R. STOTZ, *Die Auslegung von Rechstexten durch den Gerichtshof der Europäischen Union*, *quoted above*, Berlin, 11 November 2014) .

[22] Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, point 9, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0283&from=EN>

[23] ECJ Case 29/69 *Erich Stauder v. City of Ulm*, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61969CJ0029&from=EN>. References by the court are to Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraphs 18 and 19; Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16; and Case C-239/07 *Sabatauskas and Others* [2008] ECR I-7523, paragraphs 38 and 39.

> of community law thus involves a comparison of the different language versions".[24]

More recently the ECJ reiterated this approach[25] by stating:

> 38 "It is settled case-law that the wording used in one language version of a provision of European Union law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement for uniform application of European Union law".

In the case concerned, in a request for a preliminary ruling (on Directive 2004/18, a directive on public procurement for building activities for public bodies)[26], interpreters found that in defining the concept of 'public works contracts':

> "36 While the majority of the language versions use the term 'work' for both the second and the third variants, the German version uses two different terms, that is to say, 'Bauwerk' (work) for the second variant and 'Bauleistung' (*building activity*) for the third."

The conclusion was that

> "the provisions of Directive 2004/18 do not apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land but has not yet formally decided to award that contract".

[24] *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0283&from=EN

[25] ECJ Case C-451/08, *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben*, judgment of 25 March 2000, retrieved at: http://www.quigggolden.com/sites/default/files/sigma/court/ECJ%202010-2012/C-451-08_en.htm.

[26] The Court (par. 37) also found that "the German version of Article 1(2)(b) is the only one which provides that the activity referred to in the third variant must be realised not only 'by whatever means' but also 'by third parties' ('durch Dritte')". The full title of the legislative text is: Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts* (OJ 2004 L 134, p. 114).

Linguists interested in legal issues have often scrutinized ECJ case law to elaborate on the process by which a common core of meaning is identified by European judges[27].

c) Independent meaning.

Beyond the necessary comparison of various linguistic versions, the ECJ has also clearly stated that expressions used in European legislation have an independent meaning from that assigned to the similar sounding phrases in the Member States. This means that even if some expressions recall domestic experiences, interpreters should be wary in assuming that there actually is any identity between national and supranational legal terms[28]. Readers are often confronted with the notion of a "sui generis" expression in ECJ case law [29]. The judges regularly point out that European terms may not easily fit in the domestic web of legal concepts.

[27] Larry Solan, *Statutory Interpretation in the EU: The Augustinian Approach*, Brooklyn Law School Research Papers, 2007, available at: http:/ssrn.com/abstract=998167 (accessed March 3, 2015). At page 21: in the case *Pretura unificata di Torino v. X*, [1988] *ECR* 5099 the notion of "emergency" is identified by comparing several language versions of a regulation on water contamination. The author also recalls another case where the German version deviated from all other languages: *Lubella v. Hauptzollamt Cottbus* [1996] *ECR* I-5105 (bitter cherries - *Suesskirschen* - rather than sweet one). Cp. Susan Šarčević (ed.), *Language and Culture in EU Law: Multidisciplinary Perspectives*, London, Ashgate, 2013.

[28] ECJ case283/81, *CILFIT* [1982] ECR 3415, para 19:

> "*Even where the different language versions are entirely in accord with one another, … 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*" .

And para. 20:

> *"Every provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole , regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied ".*

[29] Cp. Advocate General Kokott, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, point 31-32:

> **"**It cannot be denied that in some language versions of the Treaties there is a certain degree of similarity between the term 'regulation' within the meaning of the second paragraph of Article 288 TFEU and the expression 'regulatory act'[…] However, to equate the expressions 'regulation' and 'regulatory act' on the selective basis of a few language versions of the FEU Treaty would disregard the fact that the European Treaties are now equally authentic in 23 different languages (Article 55(1) TEU and Article 358 TFEU). In many EU official languages there is certainly no etymological link between the terms 'regulation' and 'regulatory act'. 32. It must therefore be assumed that the expression 'regulatory act' is a ***sui generis*** term of EU law, in whose interpretation regard must be had to the objective of the Treaty provision in question, the context in which it is used, and its drafting history", available at: http://curia.europa.eu/juris/document/ document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=req&docid=132541&occ=first&dir=&cid=82647OPINION OF ADVOCATE GENERAL.

d) Extrinsic means of interpretation.

In front of such a complex situation, the words themselves may be insufficient, even if expressed in several languages.
Here too we may consider some of Advocate General Jacobs' observations:

> "It has sometimes been suggested that the judgment in *Cilfit* seems to impose an exacting requirement to national courts in calling on the national courts to compare all the language versions. But in fact the principle that all language versions are equally authentic means that no single version is authentic. Linguistic discrepancies can rarely be resolved just by comparison of different versions. National courts would be better advised to apply the ECJ's approach to interpretation and to seek an effective and appropriate solution having regard to the context and the purpose"[30].

In technical legal terms this consideration emphasizes the need for a purposive interpretation (also defined "teleological"): as no single text is "authentic", the reader must consider the intention of legislator in the drafting of a text[31]. To this end, the history of the provision (e.g. pre-existing rules that have been amended) and the preparatory works – as it will be clarified further in a following paragraph – may be relevant.

Several years ago, A. Gambaro observed that the literal comparison of texts is often insufficient and that

> "In these circumstances more than in others, the interpreter is induced to search for the intention of the legislator which does not have much in common with intention in a psychological sense. It is more a matter of attributing to the rules a sense which is in conformity with the purpose assigned to them.
> In effect, in Community case law, the teleological criterion prevails even if it is used in an unrefined way compared to the masterful teachings of Aharon Barak [*Purposive Interpretation in Law* (2005)]. Evidence of this can be found in the *Océano case* (case C. 240/98)".

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[30] Advocate General Jacobs in the above-mentioned conference. Comp. also his conclusions in Case C-292/00, *Davidoff & Cie SA* v *Gofkid Ltd*, point 34, available at: < http://curia.europa.eu/juris/document/document.jsf?text=&docid=47256&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=56345>:

> " Where a legislative provision is clear, it is in principle unnecessary and undesirable to look behind the terms adopted. That having been said, however, in the present case the drafting history of the Directive - which is closely linked to that of the Regulation - tends to support a literal interpretation".

[31] A. Gambaro, *Interpretation of Multilingual Legislative Texts*, International Academy of Comparative Law, Utrecht Congress, 2006, *General Reports to the XVIIth International Congress*, available at: *http://www.ejcl.org/113/abs113-4.html*

This well-known case[32] concerned the application of Directive 93/13 EEC and its article (6, 1) stating that unfair clauses in contracts that have been agreed upon with consumers "shall not be binding on the consumer". The expression, flexible in its meaning, needed judicial clarification.

Consideration of the purpose of a specific rule is also relevant with regards to the principles governing EU activity in particular in accordance with the "effet utile" notion (or "effectivité"/"effectiveness" principle)[33] that emphasizes the effort to give full effect to European interventions[34].

This purposive approach has also been justified on the basis of a fundamental international treaty: the 1969 Vienna convention on the law of treaties, specifically Article 33. According to this provision, if a comparison of different language versions of a text reveals differences, the interpretation that best reconciles the text and the purpose should be adopted.[35]

Many recent ECJ decisions, which make reference to a long list of precedents, can be found where an interpretation giving effect to the purpose of the European legislator is favoured[36].

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[32] *Océano Grupo Editorial SA contro Roció Murciano Quintero* (C-240/98), ECJ judgment of 27 June 2000, available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45388&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=343701. The problem concerned uncertainty of the power of a court to establish its own motion (*ex officio*) that an unfair clause would be unenforceable.

[33] Case C-429/07, *Inspecteur van de Belastingdienst v X BV*, point 36-39, <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd4bb4e11a1e6242fd9970be69e6e28e09.e34KaxiLc3qMb40Rch0SaxuPaxj0?text=&docid=74993&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=99746>

[34] Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato* v *Lucchini,* point 61 mentioning the "settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation". <http://curia.europa.eu/juris/document/document.jsf?text=&docid=62742&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=112127>

[35] According to Advocate General Jacobs, this approach "may be compared with, but is not the same as, other bodies confronted with multilingual texts such as the European Court of Human Rights and the World Trade Organisation": seminar, quoted above, on "*How to interpret legislation which is equally authentic in twenty languages*", Brussels 2003, retrieved at : *ec.europa.eu/dgs/legal.../agjacobs_summary.pdf*

[36] E.g. Case C-487/12, *Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia*, point 31:

> "Where there is divergence between the various language versions of a European Union legal text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, in particular, judgments in *Bouchereau*, 30/77, EU:C:1977:172, paragraph 14; *Italy* v *Commission*, C-482/98, EU:C:2000:672, paragraph 49; and *Eleftheri tileorasi and Giannikos*, C-52/10, EU:C:2011:374, paragraph 24)".

4. Common law jurisdictions: a cautious attitude.

A certain suspicion has sometimes surrounded this teleological approach to interpretation, especially in common law countries where, traditionally, any reading of legislation that deviates from the literal meaning of the exact words used by the legislator is very cautiously used [37].

It would be difficult to express the opposition between the two traditions better than in Lord Denning's words, in a decision delivered by the English Court of Appeal[38], while comparing the English and the continental approach to legal interpretation:

> "The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them.
> They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved. In consequence, the Judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation - which was not foreseen - the Judges hold that they have no power to fill the gap. To do so would be a "naked usurpation of the legislative power", see *Magor and St. Mellons R.D.C.* ***v*** *. Newport Borough Council* (1952) A.C. 189. The gap must remain open until Parliament finds time to fill it.
> How different is this Treaty. It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the Judges, or by Regulations or Directives. It is the European way.
> Seeing these differences, what are the English Courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. To quote the words of the European Court in the *Da Costa case* (1963) 2 *C.M.L.R.* at page 237, "they must deduce from the wording and the spirit of the Treaty the meaning of the Community rules." They must not confine themselves to the English text. They must consider,

[37] K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, 3 rd ed., Oxford, 1998, p. 265; W. Twining, D. Miers, *How to do Things with Rules*, 4th Ed., London, Butterworths, 1999; F. MANN, *Uniform Statutes in English Law*, *L. Q. R.,* 1983, p. 376 ff.

[38] *H.P. Bulmer v. J Bollinger SA* [1974] EWCA Civ 14**,** http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/1974/14.html&query=Bulmer+and+v+and+Bollinger+and+%281974%29&method=boolean (par. 10, *The Principles Of Interpretation).*

> if need be, all the authentic texts, of which there are now eight, see *Sociale Verzekeringsbank* (1968) 7 *C.M.L.R.* 151".

Common lawyers' preference for a literal reading may be influenced by the generally prompt reaction of the UK legislator when shortcomings and loopholes in the legislation are pointed out by the courts.

In a study, published by P. Atiyah and R. Summers several years ago[39], this aspect of the UK legal system was emphasised to explain the difference of attitude between US and English courts. In the USA, courts have often used a purposive approach and have made early recourse to preparatory works of legislation to argue an interpretation issue, while the English tradition has been rather reluctant to adopt a similar approach. It is only recently (1992) that the courts have admitted the use of preparatory works in judgments[40]. The authors of this study attributed the difference of approach to the different processes of legislation and especially to the readiness of the legislator in the UK to pass an amendment of an act when a gap or an ambiguity is discovered much more readily than in the USA (both at State and federal levels).

A similar observation is expressed by Advocate General Jacobs, reasoning that

> "the reason why it is more necessary for the ECJ to take a purposive approach considering the difficulty of amending the Treaty—or of amending legislation in the case of Council acts. The ECJ cannot take the approach of many English courts which determine the meaning of a provision, acknowledge that that meaning may have unfortunate consequences, but state that it is up to the legislator to alter the text if it does not like those consequences".[41]

5. Some criticisms.

On a general level, we must observe that there is indeed an element of optimism in the expectation that in reading EU texts, judges and lawyers will go beyond the reading of a couple of versions of the same document: any further enquiries will be prevented by the simple fact that most do not know more than a couple of foreign languages[42].

Observers more closely involved with the functioning of EU institutions have also expressed some scepticism.

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[39] P. Atiyah, R. Summers, *Form and Substance in Anglo-American law*, Oxford, Clarendon Press, 1987.

[40] *Pepper (inspector of taxes) v. Hart* [1992] UKHL 3, available on line: http://www.bailii.org/uk/cases/UKHL/1992/3.html

[41] Advocate General Jacobs, in his speech delivered in Brussels in 2003 during the seminar on "How to interpret legislation which is equally authentic in twenty languages", *ec.europa.eu/dgs/legal.../agjacobs_summary.pdf).*

[42] Mattias *Derlén*, A *Castle in the Air – Practical Problems of the Multilingual Interpretation of European Community Law*, Umeå Studies in Law No. 16, Umeå, 2007.

The effort to find a precise solution to interpretation issues may conflict with the deliberate choice of some legislation to maintain a certain level of vagueness, as has sometimes been noticed by judges of the ECJ. An enlightening conference held by former ECJ judge Konrad Schiemann on the issue of "The advantages of obscurity: the drafting of EU legislation and judgments"[43] illustrated the need for some flexibility in European sources and the strategies followed by the ECJ to avoid taking position on issues that are not ripe for decision and are extremely controversial (one such example can be found in the missing definition of "embryo")[44].

It is however worthwhile underlining that the ECJ seems to conduct a rather thorough examination of the various linguistic versions, as exemplified in cases where the judges compare several texts, such as comparing the Dutch version of an article in a directive with 9 other versions.[45]

6. Where to look for the purpose of legislation?

The ECJ has often indicated that the introductory part of EU legislative acts is relevant in defining the aims of the provisions approved by the European legislator.

In the area of air passengers' rights, the *Sturgeon*[46] case seems archetypal[47].

There, the court (par. 41) stated:

[43] Sir Konrad Schiemann , at the Institute of Advanced Legal Studies in London (October 2013): http://www.ial-online.org/2013/10/recording-the-advantages-of-obscurity-the-drafting-of-eu-legislation-and-judgments/

[44] Many situations go beyond the explicit regulation of EU law: in the case C-506/06, *Mayr v. Bäkerei und Conditorei Gerhard Floeckner*, the Court of Justice had to decide whether *in vitro* fertilization of ova (before transfer into the uterus) may be considered "pregnancy" in order to decide whether an employee qualified for protection from dismissal on grounds of equal treatment for women and men. Decision available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130de6fd7f5c9f95b43b8a473c03fdca4b60b.e34KaxiLc3eQc40LaxqMbN4Obx8Ne0?text=&docid=72369&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=302980

[45] Case C-445/09, *IMC Securities BV v Stichting Autoriteit Financiële Markten*, point 26, < http://curia.europa.eu/juris/document/document.jsf?text=&docid=107264&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=84038#Footnote*>.

[46] Joined Cases C-402/07 and C-432/07 Sturgeon and Others [2009] I-10923, curia.europa.eu/juris/liste.jsf?language=en&num=C-402/07, retrieved at http://curia.europa.eu/juris/document/document.jsf?text=&docid=73703&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=486590

[47] The conclusion reached in *Sturgeon* have been further extended in the following joined Cases C-581/10 *Nelson and Others v Deutsche Lufthansa AG* and C-629/10 *TUI Travel and Others v Civil Aviation Authority,* Decision of 23 October 2012, retrieved at: *http://curia.europa.eu/juris/document/document.jsf?text=&docid=128861&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=253017*

"as the Court has made clear in its case-law, it is necessary, in interpreting a provision of Community law, to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, *inter alia*, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 50, and Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 34).

42 In that regard, the ***operative part*** of a Community act is indissociably ***linked to the statement of reasons*** for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 97 and the case-law cited)".[emphasis added]

In the specific investigation on the issue whether delayed passengers could ask for the same compensation paid to passengers who have had their flight cancelled, the Court said:

"49 In view of the objective of Regulation No 261/2004, which is to strengthen protection for air passengers by redressing damage suffered by them during air travel, situations covered by the regulation must be compared […].

50 In this instance, the situation of passengers whose flights are delayed should be compared with that of passengers whose flights are cancelled.

51 In that connection, Regulation No 261/2004 seeks to redress damage in an immediate and standardised manner and to do so by various forms of intervention which are the subject of rules relating to denied boarding, cancellation and long flight delay (see, to that effect, *IATA and ELFAA*, paragraph 43).

52 Regulation No 261/2004 has, in those measures, the objective of repairing, inter alia, damage consisting, for the passengers concerned, in a loss of time which, given that it is irreversible, can be redressed only by compensation.

53 In that regard, it must be stated that that damage is suffered both by passengers whose flights are cancelled and by passengers whose flights are delayed if, prior to reaching their destinations, the latter's journey time is longer than the time which had originally been scheduled by the air carrier."

The conclusion reached by the Court has caused strong reactions, as a previously unaddressed situation has been brought within the scope of the

Regulation on the strength of an argument referring to the introductory part of the legislative text. The UK commentators have been rather upset by this approach, as evidenced in the titles of some articles published right after the delivery of the judgment[48].

In an extra-judicatory comment, judge Malenovský (who acted as rapporteur in the IATA and ELFAA 2006 case) has explicitly referred to the recital introducing the policy of the legislation and affirming the need for an increased protection of air passengers[49]. Starting with this consideration, the court in the Sturgeon case concluded that a difference between passengers who have had a flight cancelled and those who may have suffered a long delay, but have reached the destination under the original number of the flight would be unjustified, violating the principle of equality[50].

Strikingly enough, the Court has set aside arguments presented on the preparatory works of the Regulation where the issue of delayed flight had been raised but not included in the final version of the regulation[51].

The Advocate General Sharpston in her conclusions in the Sturgeon case, observes[52]

[48] In the UK, comments by Lord Mance have been especially critical (referring to a "bold interpretative approach": *X v. Mid Sussex Citizens Advice Bureau* [2012] UKSC 59, para 44). In France, F. Le Bot, 'La protection des passagers aériens dans l'Union Européenne' (2013) *Revue trim. dr. europ*., 753, 771: comments in academic literature speaking of "constructive reading" and "*contra legem* interpretation".

[49] Jiří Malenovský, *EU Passenger Rights*, Collège d'Europe, (Bruges, September26-27, 2014), Conference "EU Law in the Member States. Air Passenger Rights, 10 Years on", https://www.coleurope.eu/events/conference-eu-law-member-states-air-passenger-rights-10-years.

[50] Point 38-39 of the Sturgeon case:

> "as the Polish Government notes in its written observations, the distinction the Regulation introduces between cancellation and delay may lead to passengers who find themselves in objectively similar situations being treated differently.
>
> 39. That unavoidably raises the (fundamental) question as to whether the Regulation violates the principle of equal treatment".

[51] An extensive discussion on the preparatory works of the regulation took place in the first of a series of cases involving this rather controversial piece of legislation. In the 2006 ECJ case *IATA and Elfaa*, C-344/04, par. 49-59 the discussion considered the process by which the initial text was amended (especially art. 5 was re-drafted by the *Conciliation Committee* provided for in Article 251 EC). Available at: curia.europa.eu/juris/document/document.jsf?text=&docid=57285&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=593132.

[52] Opinion of Advocate General Sharpston, delivered on 2 July 2009, Joined Cases C-402/07 and C-432/07, *Sturgeon v Condor Flugdienst GmbH and others*, par. 31, retrieved at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=76092&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=597895

> "In the explanatory memorandum to its original proposal for a regulation[53], the Commission noted, at point 20, that '[c]ancellation by an operator … represents a refusal to supply the service for which it has contracted, except in exceptional circumstances beyond its responsibility, such as political instability, severe weather conditions, inadequate security and unexpected safety failures.[…].' At point 23, it stated: 'Although passengers suffer similar inconvenience and frustration from delays as from denied boarding or cancellation, there is a difference in that an operator is responsible for denied boarding and cancellation (unless for reasons beyond its responsibility) but not always for delays. Other common causes are air traffic management systems and limits to airport capacity. As stated in its communication on the protection of air passengers, the Commission considers that in present circumstances operators should not be obliged to compensate delayed passengers.'

In the advocate General comments (par. 32)

> "It is not all that easy to discern the logic behind the distinction that the Commission was there drawing."

What is striking in this case is that a certain hypothesis had been considered by the Commission and deliberately disregarded. There was a conscious decision not to include the protection of passengers experiencing long delays.
Yet the Court, in its judgment on this case, has finally given more weight to the issue of equality than to coherence with the *preparatory works* of the regulation.

We should also consider that preparatory works are occasionally not very helpful: tracing the reasons for changes in terminology is often frustrating. For instance, the process of selecting the most appropriate words to indicate the defence that the air company may use in the opposition to compensation demands, by invoking extreme conditions (art. 5), is rather puzzling.
In the process of approval of regulation 261/2004 a change in terminology occurred:

> "Initially, reference was made to "*Act of God*" which was then substituted by *exceptional circumstances*"[54].

[53] Proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance for air passengers in the event of denied boarding and cancellation or long delays of flights COM(2001) 784 final ('Explanatory memorandum to the original Commission proposal')
[54] N. CARNIMEO, *Passengers Protection: Development and Analysis*, in *Aviation Space Journal*, 2013, retrieved at: http://www.ingfo.unibo.it/servizi/rivista/The_Aviation_Space_Journal_n%201_2013.pdf

When reading the *Proposal for a regulation*[55] one is struck by the Commission's observation (at point 20), that '[c]ancellation by an operator … represents a refusal to supply the service for which it has contracted, except in **exceptional** circumstances beyond its responsibility, such as political instability, severe weather conditions, inadequate security and unexpected safety failures" [emphasis added].

This definition did not last until the final version of the regulation.
Advocate General Shrapston in her conclusions on the *Sturgeon* case says:

> "in the text of Article 5 of the Regulation as adopted, … the 'exceptional circumstances' referred to by the Commission are re-christened 'extraordinary circumstances'[56].

The frequent changes of expression have not been very helpful in clarifying which events are included in this clause of "force majeure"[57] and long discussions are on-going even after an intervention by National Enforcement Bodies of the various states that have agreed on a "Draft list of extraordinary circumstances" during a meeting held on 12 April 2013[58].

In general terms, we should consider that the use of legislative preparatory works has increased in later years. This is due to the fact that in the early period of uniform legislation not all materials were accessible[59] and the Court of justice

[55] Proposal *of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights,* COM(2001) 784 final *('Explanatory memorandum to the original Commission proposal').*

[56] In a previous opinion (case *Kramme*, Case C-396/06, par. 50), Advocate General Shrapston had already explained that: "The *travaux préparatoires* also support a literal interpretation. In the course of them, 'force majeure' was altered to 'extraordinary circumstances'. According to the Council's statement in the *Common Position*, that change was made in the interest of legal clarity". Retrieved at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=63514&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=599820#, Footnote25.

[57] Traditionally international texts on transport law have used the notion of "force majeure" to limit the liability of the carrier: e.g. Alexis Lemarié, *La force majeure en droit du contrat de transport maritime*, Editions universitaires européennes, 2012.

[58]http://ec.europa.eu/transport/themes/passengers/air/doc/neb-extraordinary-circumstances -list.pdf

[59] Some considerations by Advocate General Kokott are significant: Case C-583/11, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, point 32: "Drafting history … has not played a role thus far in the interpretation of primary law, because the '*travaux préparatoires*' for the founding Treaties were largely not available. However, the practice of using conventions to prepare Treaty amendments, like the practice of publishing the mandates of intergovernmental conferences, has led to a fundamental change in this area. The greater transparency in the preparations for Treaty amendments opens up new possibilities for interpreting the Treaties which should be utilised as supplementary means of interpretation if, as in the present case, the meaning of a provision is still unclear having regard

inclined to exclude references to documents that were not reflected in the final version of an official act[60]. Lately, the policy has somewhat relaxed, as shown in several recent cases.[61]

As a limit to investigations on the policy implemented by EU legislative texts we have to consider that sometimes it is hard to delve into the introductory comments ("recitals") that precede the actual binding articles, as they may be extensive. Occasionally they are much more numerous than the specific provisions. Such is the case of e.g. directive 2013/48/EU on the right of access to a lawyer in criminal proceedings [62]: 59 recitals for only 18 articles; and EU Directive 95/46/EC - *The Data Protection Directive* : 72 recitals and 34 articles [63]. The more controversial the issue, the more the number of recitals seems to increase: compromise is often reached by inserting an issue in the introduction, rather than in the body of the regulating text[64].

to its wording, the regulatory context and the objectives pursued". Accessed at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=132541&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=116521>

[60] C-292/89, The Queen and The Immigration Appeal Tribunal , ex parte Gustaff Desiderius Antonissen, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=96732&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=114059 >, Point 17: "The national court referred to the declaration recorded In the Council minutes at the time of the adoption of the aforesaid Regulation No 1612/68 … on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families" point 18_ "However, such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question".

[61] Case C-58/08, *Vodafone Ltd et al. V Secretary of State for Business, Enterprise and Regulatory Reform*, accessed at <curia.europa.eu/juris/document/document.jsf?text=&docid=79665&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=115728>, point 45, 55 and 58 of the judgment quoting "the explanatory memorandum to the proposal for a regulation and point 2.4 of the impact assessment".

[62] Directive of the European Parliament and of the Council, of 22 October 2013 *on the right of access to a lawyer in criminal proceedings …and in European arrest warrant and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*. Retrieved at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF

[63] http://www.dataprotection.ie/viewdoc.asp?DocID=91&m=

[64] Sebastian JECKEL (Head of Division, Permanent Representation of the Federal Republic of Germany to the European Union), *An overview of the EU legislative* process; *Scope and limits of comprehensibility in the drafting process*; Bärbel HEINKELMANN (Officer, Commission GD JUST) , *Scope and limits of comprehensibility in the drafting process, The European Commission as an Example*, at the *Second European Symposium on Improving the Comprehensibility of Legal Provisions*, Berlin, November 11, 2014, http://www.bmjv.de/SharedDocs /Kurzmeldungen/DE/2014/2014111 2_Symposium_Verst%C3%A4ndlichkeit_Rechtsvorschriften.html.

7. - Two equally criticized approaches.

As mentioned above, European drafters try to avoid giving the impression that legal notions used in Brussels actually belong to the legal tradition of one of the member States: this is both because it may cause suspicion in some of the other member States, and also because not all the implications of a domestic concept may suit the structure and competences of European institutions. Often legal concepts are closely connected with judicial or administrative procedures and remedies to enforce some of the consequent rights. It would be a great risk to assume that a notion borrowed from one of the States' experiences also carries the same web of mechanisms deemed necessary to implement it at the State level. As it is well known, the competence of the EU in procedural matters is still limited.

Therefore some expressions such as "*estoppel*", "*effet utile*", "*proportionality*" that may stem from English common law[65], French administrative law or the German constitutional tradition are recognized in European terminology, yet interpreters should isolate these terms from their roots, abandon any expectation rooted in their national education and connect them with the EU context.

The problem with this approach is that it is rather demanding on the audience.

It is not clear how far interpreters can really monitor distinct ways of reading legal terminology and avoid (even inadvertent) expectations of certain consequences as a result of a familiar notion.

It is also unclear what exact meaning the transplanted term should take, at least when the ECJ has not had an opportunity to clarify it (a process that may take some time, as a real case must arise and be brought to the Court's attention).

Unfortunately lawyers pose similar arguments also when the European legislator creates a neologism. In this case as well, one may expect questions revolving around the exact meaning of a term and complaints on the "fuzzy" nature of EU legislation.

EU Regulation 261/2004 on air passengers' rights provides a recent example of the difficulty of striking the right balance between traditional expressions that may cause unwanted assumptions about the implications of the words and alternative or new meanings. As mentioned above, the airways company is exempted from some of its obligations to assist passengers if the flight is delayed or cancelled due to "extraordinary circumstances" (art. 5, n. 3). The expression

[65] As is well known, Judge Pierre Pescatore drew a comparison (which was later very successful) between the attitude adopted by the European Court in the famous *Ratti* case (C 148/78) and the prohibition of acting in a contradictory way:

> "the Court brings for the first time into its ruling an element which may be linked to the English concept of 'estoppel', if I may use so loosely an expression which has, as I am told, a more technical meaning in English law" (*The doctrine of 'direct effect': an Infant Disease of Community Law*, 8 *E.L.R.*, 1983, p. 155, at p. 169.

is in itself flexible, as the regulation presents examples and does not specify a full list of cases that may fall within the range of this provision[66] and has been criticized for deviating from the traditional and familiar notion of "force majeure"[67].

Notwithstanding these uncertainties of meaning, the choice of a "neutral language" is often a deliberate choice in the drafting of international texts, to avoid clauses that would automatically result in an assumption by the reader stemming from his or her background.

Many examples of attempts to harmonise the rules of certain sectors that are especially affected by international transactions are available in uniform law texts. In the UNIDROIT *Principles of international commercial contracts*, the obvious examples are "agreed payment for non-performance" (instead of "penalty clause" or "liquidated damages clause"), and "hardship" (instead of "excessive benefit" or other expressions)[68].

8. - Problems of translation or problems of clarity?

Negotiations of legislative texts are always complex procedures where compromises must be accepted. At the international level this difficulty is increased because negotiators have limited comprehension of each other's legal background.

An unforgettable piece of ironic representation of a conference drafting an international uniform law was written by Gyula Eörsi, and bears the title: *Unifying the Law*. (A *Play in One Act, with a Song*)[69].

This masterpiece of satirical writing on legal issues reflects all the possible misunderstandings, strategic manoeuvres and linguistic devices utilised to hide disagreement and reach an apparent consent. The expression "a dog shall bark" during the fictional discussions described by Eörsi is carried through all shades of meanings to reach a final workable, very wide and undetermined meaning.

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[66] European Court of Justice, Judgment in Case C-12/11, *McDonagh v. Ryanair* ("not exhaustively defined in the Regulation, even though Recitals 14 and 15 of its preamble provide several examples, including notably air traffic management decisions and meteorological conditions incompatible with the operation of the flight concerned").

[67] N. Carmineo*, cit.*, "it would be desirable to insert a definitive list of exceptional circumstances in the Regulation, possibly accompanied by the provision of traditional exemptions, such as Act of God and force majeure or at least have the Commission publish guide-lines on the interpretation of exceptional circumstances, in order to ensure uniform application".

Cp. *Air Passenger Rights: Consumer Complaints 2005, A Summary & Analysis of Consumer Complaints reported to the European Consumer Centre Network*, par. 5.3, p. 23: "The use of "exceptional circumstances" on the evidence sent to ECCs indicates that there is a lack of clarity about what it covers", report available at: http://ec.europa.eu/consumers/archive/topics/air_passenger_complaints2005.pdf

[68] http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14311

[69] Published originally in 25 *American Journal of Comparative Law*, 1977, p. 658 ff.

Beyond the literary dimension, an interesting historical testimony is offered by one of the delegates who actually took part in the final approval of the 1930 Geneva Convention on bills of exchange[70]. While discussing the ambiguity of art. 17 (agir "*sciemment au détriment du débiteur*")[71], A. Giannini, the Italian delegate to the conference, asked his colleagues:

> "êtes-vous contents de cette formule? Non. Lui donnez-vous votre vote? Oui. Je lui donne mon vote parce que personne n'est content. Cela veut dire que c'est l'unique formule qui puisse rallier tous le suffrages"[72].

When considering the workings of the European legislator one must observe that

> "The Community legislative process is characterized by the political input and the fact that it sometimes appears that the need to have a text prevails over the actual content of the act, although efforts to improve that situation have been visible more recently. One consequence is a lack of clarity, whether conscious or unconscious"[73].

The distribution of legislative texts between opening recitals ("whereas") and specific rules (articles) does not necessarily help in the interpretation process, as sometimes some premises are not transformed into specific articles and it is not always clear how much interpreters should consider themselves bound by considerations only quoted in the preamble. The strategy of leaving unsettled matters as opening considerations at the beginning of the document does not help in terms of clarity.
In a well-known case, *IATA and ELAA* judgment (Case C-344/04), the ECJ specified that:

> "76 However, it must be stated with regard to those submissions, first, that while the preamble to a Community measure may explain the latter's content (see *Alliance for Natural Health*, paragraph 91), it cannot be relied upon as a ground for derogating from the actual provisions of the measure in question (Case C-162/97 *Nilsson and Others* [1998] ECR I-7477, paragraph 54, and Case C-136/04 *Deutsches Milch-Kontor* [2005] ECR I-0000, paragraph 32)".

[70] Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930), available at: http://www.jus.uio.no/lm/bills.of.exchange.and.promissory.notes.convention.1930/doc.html#57
[71] In the English (unofficial) version: "Persons sued on a bill of exchange cannot set up against the holder defences founded on their personal relations with the drawer or with previous holders, unless the holder, in acquiring the bill, has *knowingly acted to the detriment* of the debtor" [Italics added].
[72] *Rapport du Comité de rédaction,* in *Comptes-rendus,* Geneva, 1930, p. 293.
[73] Advocate General Jacobs, conference quoted above.

9. Predictability. Conclusions.

To conclude on the expectation to foresee how the ECJ will interpret a legal provision of European law, criticisms according to which the interpretation by reference to systemic and teleological considerations is contrary to the principle of legal certainty should be considered, especially those that are contrary to the predictability of enforcement. According to this view, teleological interpretation, disregarding the wording of a rule, means that adjudication within the context of EU law particularly unpredictable.

> "Eliminating linguistic discrepancies by way of interpretation may be argued to run contrary to the principle of legal certainty given that one or more language versions may have to be interpreted in a manner that is not in accordance with the ordinary usage of words … the Court has stated that it is appropriate to reach a solution that does not prefer any one of the language versions. To do so, the Court resorts to the teleological method of interpretation that takes as its starting point the *telos*; that is, the purpose and objectives of the rule in question as well as contextual and systemic considerations"[74].

To counterbalance this accusation we should consider that, when confronted with texts expressed in many languages, interpreters (and especially the European Court of Justice) have to reconcile several concerns. The final result is the product of a very complex web of conditions.

First of all, primary sources must be respected: no legal provision may be read outside of the European institutional framework. The literal meaning may have to give way to a presumption of conformity with the general framework. So that for example, the principle of equality may take precedence over the explicit expression used in a regulation or a directive.

Secondly, when facing problems of interpretation, the concern to safeguard the validity of EU acts whenever possible, rather than invalidating them, plays its role. This concern is not so strongly felt at the domestic level of the member States, except perhaps when constitutional provisions are involved. At the national level one can reasonably expect that the Parliament will find the opportunity to correct a rule that has proved to be defective when actually implemented and submitted to judicial review. Given the very complex and time-consuming process by which legislative acts are approved at the European level, it is not surprising that interpreters try hard to reconcile differences between several languages rather than surrendering to the fact that the legislation is too vague to be implemented.

[74] Elina PAUNIO, *Legal Certainty in Multilingual EU Law*, Language, *Discourse and Reasoning at the European Court of Justice*, Ashgate, 2013,p. 1; more in detail: p. 51 ff.. Previously: H. Jalte RASMUSSEN, *Towards a Normative Theory of Interpretation of Community Law, University of Chicago Legal Forum*, 1992, 135-178.

Other concerns that may affect the final understanding of a rule depend on the need to harmonize, where possible, European law with the national law of the member States, while trying to avoid open clashes that would cause conflict with lawyers educated in their own tradition. This explains why the ECJ, when confronted with a flexible definition, or an undefined legal institution, often refers to a comparative interpretation. As an example we may quote the situation involving the so called lawyer-client privilege (legal professional privilege)[75]: in one instance the ECJ had to decide whether the protection of communications between a party and his/her lawyer could also include in-house lawyers, that is to say, lawyers employed by a firm rather than self-employed. As no express definition was included in the European sources nor could a common agreement be found in the States' legal systems, the Court had to embark both on a comparative examination of the prevailing trend and consider the meaning of the requirement of "independence" that should qualify the position of a lawyer in front of his client[76]. Similarly the notion of "family member" in the law pertaining to immigration and asylum seekers was enlarged to include other "relatives" (such as grandchildren) on the basis of "humanitarian" grounds taking into account the differences between the scope of the words used (for example) in the English version of a regulation[77].

In conclusion, it must be recognised that the Court does not have many other strategies at hand if not to attempt to harmonize the various versions of a text by looking to the aim of the legislator. A different notion of legal predictability emerges at the EU level: "legal certainty is also said to exist when judicial decision-making is acceptable, consequently fulfilling the imperatives of rationality and moral acceptability"[78].

The effort by the ECJ to regularly quote precedents shows a certain degree of care in making decisions predictable. The way in which precedents are recalled may seem unfamiliar to common law lawyers as the Court tends to refer to the most recent affirmation of a certain trend, rather than going back to the first episode in which a certain principle has been upheld, as would be most obvious in a common law setting. It is rather in the literature that we read comments retracing recent cases to famous leading cases such as *Costa*, *Ratti* or

[75] Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30ddc89b67778e7b4833a06cccc5ef6dea0e.e34KaxiLc3qMb40Rch0SaxuPaxj0?text=&docid=82839&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=176455>

[76] Advocate General Kokott was especially explicit on the importance of guaranteeing the lawyer's autonomy advising a client, par. 61: http://curia.europa.eu/juris/document/document.jsf?text=&docid=83189&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=100171#Footnote1

[77] Case C-245/11, *K v Bundesasylamt*, paragraphs 39, 41-42, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=129325&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=84483#Footnote*>

[78] Elina PAUNIO, *Legal Certainty in Multilingual EU Law*, *quoted* above, p. 2 and p. 101 ff.

Francovich and so on. This may be a disadvantage as it is not always easy to initially distinguish whether a certain interpretative trend is recent or long established. The varying level of acuity in comments on the predictability of the ECJ case law depends partly on the different expectations that lawyers belonging to various legal traditions have in relation to judicial review. Some continental Constitutional courts engage in interpretations of the legislation that integrate/fill incomplete provisions (in light of the Constitution). This experience may affect the lawyers' reactions also in the face of "creative" readings by international courts, making them seem less shocking for civil lawyers than for common lawyers.