The Interpretation of Multilingual EU Legislation

The Practice of the European Court of Justice and its Consequences for Legal Certainty

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Introduction

An important characteristic of the European Union (EU) is that it is a multilingual organisation. This is, of course, a consequence of the fact that the Member States of the EU all have their own national language or languages, which are closely connected to their national identity. However, the EU is more than just an international organisation. It has also created a legal order which for various reasons is quite unique in the world. One of those reasons is the large number of official languages in which legal texts are legally binding and equally authentic for the purpose of interpretation. All legislation, whether expressed in one or more languages, may raise questions with regard to the exact interpretation of a particular provision. A logical consequence of drafting legislation in more than one language is that problems of interpretation are exacerbated when divergences occur between the different language versions of a provision.

An example which is often used to illustrate this phenomenon can be found in a case concerning an infringement procedure initiated by the Commission against the United Kingdom.[1] The facts of the case were the following: British trawlers had engaged in joint fishing expeditions in the Baltic Sea with Polish trawlers before Poland was an EU Member State. The British vessels would cast the nets; the Polish vessels would trawl for fish. The Polish vessels would hand the nets over to British vessels without raising them out of the water. The British would bring the fish on board. If the fish were deemed to have been caught by the Polish ships, then a tariff would be due because the fish were classified as goods originating outside the Community. Fish caught by Community vessels were classified as originating within the Community so no customs duty had to be paid. The British fishermen relied on the English version of the applicable regulation to support their refusal to pay the customs duty. The text of the regulation indicated that no duty was payable on:

> "products of sea-fishing and other products *taken from the sea* by vessels registered or recorded in that country and flying its flag"[2]

The United Kingdom argued that the fish were taken from the sea by the British trawlers not by the Polish vessels. It focused on the extraction of the fish out of the water.[3] The Commission, argued on the other hand that the fish were already taken from the sea at the moment they were separated from the surrounding sea by the fishing nets.[4] The expression italicised above differs in the various language versions. The Greek, French, Italian and Dutch versions support both interpretations, while in the German version the word "*gefangen*" (caught) is used, which is in line with the interpretation of the Commission but excludes that of the United Kingdom. This then is the interpretation problem the ECJ may face as a consequence of the multilingual nature of EU legislation: one language version allows for interpretation A, four language versions allow for both A and B and one language version allows only for

[1] Case 100/84 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1985] ECR 1169.
[2] *Ibidem,* para. 7, emphasis added.
[3] *Ibidem,* para. 11-12.
[4] *Ibidem,* para. 9-10.

interpretation B. In the end the ECJ decided in favour of the Commission after having considered the purpose of the regulation in question.[5]

In this thesis it will first be investigated how the European Court of Justice (ECJ) deals with the interpretation of multilingual legislation in the case of diverging language versions. Secondly, it will be examined whether its interpretative practice is compatible with the principle of legal certainty.

In order to answer these questions the first chapter will introduce several issues in connection with the relationship between law, language and translation. In addition, the chapter sets out the language regime which has been created within the EU. Because the problem of interpreting multilingual legal texts does not only occur in the context of the EU, however, chapter 2 focuses on public international law. More specifically, the chapter deals with the interpretation of multilingual treaties and describes the general and specific methods laid down for treaty interpretation in the Vienna Convention on the Law of Treaties (VCLT). The third chapter contains the analysis of the interpretation practice of the ECJ when it is confronted with divergences between different language versions of EU legislation. In addition, this practice will be compared to the rules contained in the VCLT. Since the analysis of the ECJ's practice reveals some points of uncertainty, in chapter four an attempt will be made to answer the question whether the practice of the ECJ is compatible with the principle of legal certainty. Therefore, the content of this principle in EU law will first be investigated in more detail. After that the consequences of several aspects of the ECJ's practice will be assessed in the light of the principle of legal certainty. More specifically it will be examined whether the practice of the ECJ conflicts with the legitimate expectations individuals might derive from the language version of an EU legal instrument they are able to read. Finally, some conclusions will be drawn and a number of recommendations will be made.

The fact that language and multilingualism play an important role in the EU has led to a sizeable body of literature. All sorts of questions have been raised with regard to languages in the EU by authors from a wide range of disciplines, varying from economics to translation studies. In legal literature the interpretation practice of the ECJ has attracted a great deal of attention and has been subject to a fair amount of criticism. In addition, legal writers are usually aware of the multilingual nature of EU legislation, for instance because of well-known case-law of the ECJ, such as the *CILFIT* case.[6] However, attention for the specific consequences of the multilingual nature of EU legislation for the way that legislation is interpreted has been limited. Although the problem of multilingual interpretation is recognised by most authors it has only rarely been the subject of in-depth studies. The ECJ's interpretation practice in case of diverging language versions is sometimes dealt with in the single paragraph of a book, a brief article or a short contribution to a book. Notable exceptions are the works by Schübel-Pfister, who focuses on the interpretation practice of the ECJ, and Derlén, who focuses on the practice of national courts. The aim of this thesis is to give the topic of multilingual interpretation in EU law and the consequences of the ECJ's practice in this regard the attention it deserves.

[5] *Ibidem,* para. 16-22.
[6] Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.

Chapter 1

The Relationship between Law and Language and the EU Language Regime

1.1 The Relationship between Law and Language

Law depends on language as a means of recognition, expression and communication and it is only through language that the law can function. Language is an essential instrument for lawyers but it also governs the law by giving shape to it.[7] Especially in multilingual contexts the dependence of the law on language can raise problems because language influences the way people look at the world. In other words, speakers of different languages conceptualise the world in different ways. [8]

Engberg defines legal interpretation as "finding the right or relevant meaning of words or phrases in cases where there is 'doubt due to lack of the necessary clarity or transparency required for the application of the law.'"[9] Although it is by no means easy to find the right or relevant meaning in legal instruments drafted in one language, this task is even more difficult when the instrument to be interpreted is equally authentic in more than one language, because this means that all language versions will have to be consulted to establish such a meaning with certainty. The additional difficulty is not simply that a comparison of the different language versions means more work for the interpreter, but stems from the fact that legal texts expressed in different languages are never entirely identical.[10] According to translation theorist Kjær "establishing equivalence between legal texts across languages is as impossible as squaring a circle."[11] In other words, divergences between different language versions of the same legal instrument are inevitable.

1.2 Causes of Divergences between Language Versions

Divergences or discrepancies between language version can have different causes. A possible cause is related to inherent differences between languages. There may be differences in the structure (i.e. grammar, syntax) of languages, which can lead to differences in meaning. The extent to which such inherent differences cause problems may differ depending on the relationship between languages. The difficulties will be smaller when languages belong to the same linguistic family, such as Dutch and German, and greater when they are completely unrelated, as is the case with English and Finnish.

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[7] Schübel-Pfister I., *Sprache und Gemeinschaftsrecht – Die Auslegung der mehrsprachig verbindlichen Rechtstexte durch den Europäische Gerichtshof* Berlin: Duncker & Humblot, 2004, pp. 39-40.
[8] *Ibidem,* p.41.
[9] Engberg, J. 'Statutory Texts as Instances of Language(s): Consequences and Limitations on Interpretation' *Brooklyn Journal of International Law* 29, 2003, p.1136; the internal quotation is from Dascal, M. & Wróblewski, J. 'The Rational Law-Maker and the Pragmatics of Legal Interpretation' *Journal of Pragmatics* 15, 1999, p. 428.
[10] Van Calster, G. 'The EU's Tower of Babel - The Interpretation by the European Court of Justice of Equally Authentic Texts drafted in more than one Official Language', *Yearbook of European Law* 17, 1997, p. 369.
[11] Kjær, A.L. 'The Every-Day Miracle of Legal Translation' *International Journal for the Semiotics of Law*, 2008, p. 67.

Another cause might be a lack of words having exactly the same meaning in the languages in question.[12] An example of a very common French expression which lacks an exact equivalent is "*sans préjudice*". Also, one of the languages concerned may only have a general word for a concept which can be expressed more specifically in another language or in one language a word can only be used in the singular while in another a plural is possible.

A further cause is that legal concepts are often rooted in a particular legal tradition and culture, making them virtually untranslatable. Terms from common law countries, for instance, simply do not always have an equivalent in civil law countries. When terms do have an exact linguistic equivalent this does not always mean it is also a legal equivalent since it is possible that the legal definition of a term differs between countries. For the EU this problem does not only play a role between Member States which share an official language, for example Germany and Austria, but also between the Member States and the EU. Indeed, the ECJ has stated in the *CILFIT* case that "legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States".[13]

The meaning of words may also change in the course of time, causing words that once had the same meaning to have a different meaning at the time of interpretation.[14] A possible reason for this can be that the social reality in a country has changed resulting in a change in attitude towards a particular concept. It is also possible that a certain concept has been given an entirely different meaning by the legislature at a certain point in time. An example of this is the amendment made to the Dutch Civil Code with regard to the concepts of "*goederen*" en "*zaken*". The category of "*goederen*" now includes "*zaken*" and other property rights. Before 1992, however, the relationship between the concepts was actually the reverse, "*zaken*" being the broader term which included "*goederen*" as a subcategory. For Community law this reversal was irrelevant because the term goods had already been given a Community definition.[15]

Divergences may also be caused by the translation process. Translators are fallible human beings so mistakes can never be excluded. Because of the ever-growing stream of EU legislation EU translators often work under considerable time pressure, which naturally increases the risk of translation errors. A way to deal with the time pressure is to divide the translation of a text between different translators. However, this can have negative consequences for the substantive coherence and terminological consistency of translated texts.[16]

Translation is often complicated by the fact that the quality of source texts leaves a great deal to be desired, resulting in translation errors that can hardly be avoided. A possible reason for the lack of quality is that the original text on which the translations into the other language versions are based was not written by a native speaker of the

[12] United Nations, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 225.
[13] *CILFIT*, para. 19.
[14] Kuner, C. 'The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning' *International and Comparative Law Quarterly* 40, p. 957.
[15] Case 7/68 *Commission of the European Communities v Italian Republic* [1968] ECR 423.
[16] Schübel-Pfister, p. 110-111.

drafting language.[17] Also, because of the often very technical nature of EU legislation texts are drafted by people who possess the necessary technical knowledge but are not always experienced in drafting legal instruments.

It must be pointed out, however, that there are mechanisms within the EU institutions to prevent drafting and translation errors from occurring. In this regard an important role is played by the lawyer-linguists working within the institutions. It is their job "to guarantee perfect concordance between the various language versions of the legislative acts."[18] First, the translators will do heir work, which necessarily implies they make certain choices. In order to make these choices they interpret the text on a linguistic level. Subsequently, the lawyer-linguists will check whether the texts as interpreted by the different translators correspond to the will of the lawmakers and whether all language versions are identical in this respect.[19] Although the source text is the basis for the comparison, it is not unchangeable. It is possible to solve problems that come to light during the translation or verification process by changing the original text.[20]

Apart from the *ex ante* monitoring of the target texts by the lawyer-linguists, the institutions also try to improve the quality of drafting of the source texts, both in general and specifically with regard to the prevention of translation problems. For that purpose a Joint Practical Guide has been developed.[21] Guideline 5 deals specifically with the multilingual character of EU legislation and instructs drafters on aspects of style, terminology and constructions that must be avoided or should be given preference in order to facilitate translation.

A last cause of discrepancies is that they are noted but are deliberately left uncorrected because the negotiators are unable to reach consensus on the wording of the relevant provision in each language version.[22] This is especially true for treaties but applies to EU legislation as well because both categories of legal instruments are forms of negotiated or diplomatic law.

A final point that should be made is that the interpretation of a multilingual instrument is not by definition more problematic than the interpretation of an instrument drafted in a single language. Interpretation is sometimes complicated by the existence of different language versions but it may also be facilitated. If the meaning of a term in one language version is clear and convincing while in the other(s) it is ambiguous, comparison would make interpretation of the legal instrument as a whole easier.[23]

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[17] *Ibidem,* p. 111-112; Hartley, T.C. 'Five Forms of Uncertainty in European Community Law' *Cambridge Law Journal* 55, 1996, p. 272.

[18] Guggeis, M. 'Multilingual Legislation and the Legal-linguistic Revision in the Council of the European Union' in Pozzo, B. & Jacometti, V. (eds.) *Multilingualism and the Harmonisation of European Law* Alphen aan den Rijn: Kluwer Law International, 2006, p. 109.

[19] *Ibidem.* p. 115.

[20] Piris, J-C. 'The Legal Orders of the European Community and of the Member States: peculiarities and influences in drafting' *Amicus Curiae* 58, 2005, p. 23.

[21] European Communities *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions*, 2003. <http://eur-lex.europa.eu/en/techleg/pdf/en.pdf> accessed on 28 May 2010.

[22] Shelton, D. 'Reconcilable Differences? The Interpretation of Multilingual Treaties' *Hastings International and Comparative Law Review* 20, 1997, p. 622.

[23] Bredimas, A. *Methods of Interpretation and Community Law* Amsterdam: North Holland, 1978, p. 38.

However, prudence is required because it cannot be excluded beforehand that an ambiguous term was inserted intentionally in order to make a provision acceptable to all actors involved in the lawmaking process. This possibility may not be disregarded given the negotiated law character of EU legislation.

1.3 Languages, linguistic diversity and multilingualism in the EU

The European Union currently consists of 27 Member States, all of which have one or more official languages. For political reasons most of those official languages have been included in the legal framework of the EU.[24] A specific political reason to do so was related to the situation in Belgium at the time of the conclusion of the Treaty Establishing the European Economic Community (EEC Treaty) in 1957, which was characterised by political tensions between Flemish and Walloon political parties and in society in general concerning the issue of language. This caused Belgium to insist on the inclusion of Dutch as an official Treaty language, which in turn led Italy to do the same, which resulted in the EEC Treaty being drawn up in four languages: Dutch, French, German and Italian.[25] A more general political reason to give equal weight to all languages is that it demonstrates that the EU respects the equal value of all its Member States.[26]

The language regime of the EU, currently consisting of 23 official languages[27], is unique in comparison to the regimes of other international organisations. The United Nations, for example, uses six official languages[28] while the Council of Europe and NATO have only two: English and French. An important reason for this difference is a legal one. The EU – unlike the other organisations mentioned – passes legislation which is directly binding on its Member States and their citizens. Since people cannot be expected to comply with rules they cannot understand, it is both a legal obligation and a practical necessity for the EU to provide citizens with legislation in their own languages.[29]

In this respect the situation in the EU is comparable to that in states with more than one official language, such as Belgium, Switzerland or Canada. In addition to enabling citizens to understand the legislation addressed to them, multilingual legislation reflects an existing political situation as well as the desired equal treatment of different people and linguistic groups living together in a state.[30] Equal treatment – both of the Member States themselves and of their undertakings and citizens – is, of course, a very important issue in the context of the EU as well, since it touches upon the acceptability of the EU as an organisation and of the legislation it adopts. This acceptability could be seriously undermined by perceived discrimination, especially in

[24] Van Calster, p. 368.
[25] Horspool, M. 'Over the rainbow: Languages and law in the future of the European Union' *Futures* 38, 2006, p. 159.
[26] Schübel-Pfister, pp. 83-84.
[27] The official languages of the EU are: Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish
[28] Arabic, Chinese, English, French, Russian, and Spanish.
[29] Toscani, G. 'Translation and Law – The Multilingual Context of the European Union Institutions', *International Journal of Legal Information* 30, 2002, p. 288.
[30] Van Calster, p. 365

the context of an issue, which as a consequence of its close relationship with (national) identity, is as sensitive as language.

Multilingualism has become an important principle in the EU despite the obvious practical problems it causes for communication and the additional costs that are associated with it. An obvious example of a practical problem caused by multilingualism is that documents need to be translated and speeches need to be interpreted simultaneously in order to be understandable for all concerned. Another problem is the day-to-day communication on the work-floor of the institutions, bodies and agencies of the EU.

A clear indication of the EU's commitment to multilingualism can be found in two communications the Commission has issued on the subject.[31] According to the 2005 communication "[t]he Commission's multilingualism policy has three aims:

> • to encourage language learning and promoting linguistic diversity in society;
> • to promote a healthy multilingual economy, and
> • to give citizens access to European Union legislation, procedures and information in their own languages".[32]

The third aim, especially with regard to legislation, is particularly relevant for this thesis.

The importance attached to languages and linguistic diversity in the EU is also evidenced by the Charter of Fundamental Rights of the European Union, which has become binding on the EU institutions with the entry into force of the Lisbon Treaty. Article 21 of the Charter prohibits discrimination on the ground of language and according to Article 22 of the Charter the Union shall respect linguistic diversity. A concrete example of this respect can be found in Article 21(4) of the Charter which gives every person the right to write to the EU institutions in one of the languages of the Treaties as part of the right to good administration.[33]

The languages of the Treaties can nowadays be found in Article 55 of the Treaty on European Union (TEU) which reads:

> "1. This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.
>
> 2. This Treaty may also be translated into any other languages as determined by Member States among those which, in accordance with their constitutional

[31] *A New Framework Strategy for Multilingualism* (COM(2005)596 final) followed by *Multilingualism: an asset for Europe and a shared commitment* (COM(2008)566 final).
[32] COM(2005)596 final, p. 3.
[33] This right corresponds to the citizenship rights laid down in Article 20(2)(d) and the last paragraph of Art 24 of the Treaty on the Functioning of the European Union.

order, enjoy official status in all or part of their territory. A certified copy of such translations shall be provided by the Member States concerned to be deposited in the archives of the Council."

In the context of this thesis there are two important things to note with regard to this provision. The first is that the texts in the languages mentioned in Article 55(1) are equally authentic. Van Calster defines authentic texts as "those which are deemed to prevail in case of a difference or incompatibility between the different versions".[34] This means that all language versions of the Treaty are legally binding and have equal status for the purpose of interpretation. It follows from Article 55(2) that there is a clear distinction between the authentic "texts" in the 23 official EU languages and "translations" of the Treaty in other languages. Such translations are not legally binding and therefore are not authoritative for interpretation purposes. Van Calster uses the term "official translations" and defines these as "translations which, after the coming into force of the law or the treaty, are prepared by the government(s) or by an official (international) body".[35] The second thing to note is that while there are 23 texts or language versions of the Treaty together these texts form a single Treaty. So there is one Treaty which has 23 different manifestations, not 23 Treaties. This seems a logical observation but, as will be shown below, this is crucial for the uniform interpretation of EU legal instruments.

Another thing to note is that, historically, not all Community Treaties were drawn up in equally authentic texts. The Treaty establishing the European Coal and Steel Community did not contain any provision on languages. Article 100 ECSC simply stated that the Treaty was drawn up in "a single original". This was considered to be a conclusive argument to establish that only the French text was authentic.[36] Therefore, in principle, the French version of the ECSC Treaty was the only text that could be used to interpret the provisions of that Treaty. However, Stevens gives an example in which the ECJ actually favoured the Dutch official translation of a provision of the ECSC-Treaty without explicitly mentioning this in its judgement.[37] In addition, the official translations were sometimes used merely to confirm an interpretation based on the authentic French text.[38]

A final remark on Article 55 TEU is that it creates the impression that the Treaty was drafted simultaneously in all different languages. This is not the case, however. The Treaty of Lisbon was first drafted in French and subsequently translated in the other languages, as was the case with the earlier treaties.

The ECJ does not, however, deal exclusively with questions of treaty interpretation. Given the large volume of legal instruments that have been adopted over the years, problems of interpretation will much more often concern secondary legislation. The

[34] Van Calster, p. 364.
[35] *Ibidem*.
[36] Opinion of Advocate General Lagrange of 2 June 1955 in Case C-5/55 *Associazione Industrie Siderurgiche Italiane (ASSIDER) v High Authority of the European Coal and Steel Community* [1954-6] ECR 140.
[37] Stevens, L. 'The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments: the Regime Linguistique in the Court of Justice of the European Communities' *Northwestern University Law Review* 62, 1967, p. 725; Case 18/60 *Louis Worms v High Authority of the European Coal and Steel Community* [1962] ECR 195.
[38] Case 6/60 *Jean-E. Humblet v Belgian State* [1960] ECR 559.

legal basis for the language regime with regard to secondary legislation can now be found in Article 342 of the Treaty on the Functioning of the European Union (TFEU). This provision reads:

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

On the basis of a predecessor of this provision (Article 217 EEC) the Council adopted Regulation 1/58 determining the languages to be used by the European Economic Community.[39] This was in fact the very first regulation to be adopted under the EEC Treaty, which is again an indication of the importance attached to languages in the EU. As is the fact that the language regime is still subject to unanimity voting within the Council. The regulation, which is often referred to as the EU's Language Charter,[40] has been amended whenever the accession of new Member States required the inclusion of new languages. The consolidated version of the first article of the regulation now lists the 23 languages of the EU and defines them as both the "official languages" and the "working languages" of the institutions. Since all languages are given equal status, the provision is said to embody the so-called principle of linguistic equality.[41] The EU has never made an official distinction between official and working languages, although the Council has declared that the institutions may do so on their own responsibility in their rules of procedure.[42] The legal basis for such a decision is Article 6 of Regulation 1/58 which allows the institutions to "stipulate in their rules of procedure which of the languages are to be used in specific cases".

With regard to the interpretation of secondary legislation the most important provision of Regulation 1/58 is Article 4. It reads:

> "Regulations and other documents of general application shall be drafted in the official languages."

This is the provision which establishes the legal equivalence of the different language versions of regulations and directives. Directives are usually of general application, as opposed to decisions which normally have a specific addressee. There is no explicit reference to authentic texts as is the case in the Treaty but the use of the word "drafted" clearly indicates that all language versions of documents of general application have the same legal status and all of them must therefore be deemed to be authoritative for interpretation purposes. Again, the fiction is created that all language versions are created simultaneously, while in practice one language will be used as the source text for the translation of the other language versions. Legislative texts are mostly drafted in English, followed by French and German.[43] Regulations and, when

[39] OJ 17, 6.10.1958, p. 385-386 (DE, FR, IT, NL) English special edition: Series I Chapter 1952-1958 p. 59.
[40] E.g. in Tosi, A. (ed.) *Crossing Barriers and Bridging Cultures – The Challenges of Multilingual Translation for the European Union*, Clevedon: Multilingual Matters, 2003.
[41] Stevens, p. 703.
[42] Van Calster, p. 368.
[43] European Commission, *Translating for a Multilingual Community* p. 6 <http://ec.europa.eu/dgs/translation/publications/brochures/translating_eu_brochure_en.pdf>, accessed at 27 May 2010.

of general application, directives must be placed in the *Official Journal of the European Union*, which according to Article 5 of the regulation "shall be published in the official languages."

The Articles 2 and 3 are again concerned with the languages which may be used in the written communication between citizens and the EU institutions. Member States or persons subject to the jurisdiction of a Member States may select one of the official languages for the drafting of documents which they send to the institutions. The reply shall be drafted in the language selected. Documents sent by the EU institutions to Member States or a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

Despite its commitment to multilingualism and language diversity, even the EU is not, in practice, a fully multilingual organisation. This would simply not be practical, especially given the large number of languages and the enormous amount of possible language combinations (506 with 23 languages) the EU is confronted with. As mentioned above, there is no official distinction between official and working languages. Nevertheless, it could be said that the *de facto* working languages of the institutions are English, French and to some extent German.[44] The Commission refers to these languages as its "procedural languages".[45]

As noted above, Article 6 of Regulation 1/58 gives the institutions the possibility to lay down in their rules of procedure which of the languages are to be used in specific cases. All institutions have used this possibility to limit the effects of full multilingualism to cope with time and budgetary constraints. The European Parliament, for instance, provides translation into different languages "according to the needs of its Members".[46]

The ECJ has a special language regime. Its Rules of Procedure provide in Article 29 that all the official languages can be used as the "language of the case".[47] In principle, the language is chosen by the applicant but there are some exceptions to this rule. Article 31 stipulates that the judgement of the ECJ is only authentic in the language of the case. However, the *de facto* working language of the ECJ is French. The judges normally deliberate in French and all judgements are drafted in French before being translated into the language of the case. In theory therefore the French text carries no special weight for the interpretation of a judgement, except when the language of the case happens to be French, but in practice it can be assumed that the French language version is the version which best expresses the opinion of the ECJ.[48]

A last example to illustrate that the language regime of the EU is by no means fully multilingual and the official languages, in practice, are not equal under all

[44] Van Calster, p.368.
[45] European Commission website on multilingualism <http://ec.europa.eu/education/languages/languages-of-europe/doc135_en.htm> accessed on 27 May 2010.
[46] *Ibidem.*
[47] Rules of Procedure of the European Court of Justice, consolidated version <http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt5_2008-09-25_17-33-27_904.pdf>, accessed on 27 May.
[48] Derlén, M., *Multilingual Interpretation of European Union Law*, Alphen aan den Rijn: Kluwer Law International, 2009, p. 5.

circumstances is provided by the *Kik* case.[49] In this appeal case the ECJ held that the linguistic regime as laid down in the Treaty and Regulation 1/58 does not amount to a Community law principle of equality between the official languages.[50]

1.4 Conclusion

As the overview provided above makes clear, language plays an important role in the EU in different ways and under different denominators, such as linguistic diversity, linguistic equality and multilingualism. These concepts concern language-related aspects as wide apart as the promotion of language learning, the language to be used in the communication between the EU and people living in the Member States and the internal arrangements of the institutions with regard to translation and simultaneous interpretation. For the purpose of this thesis the most important consequence of the EU language regime is that EU legislation is equally authentic in all official languages and therefore all language versions of legal instruments are equally authoritative for the purpose of interpretation by the ECJ and the courts of the Member States.

[49] Case C-361/01 P, *Christina Kik v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2003] ECR I-8283.
[50] *Ibidem,* paras. 81-87.

Chapter 2

Multilingual Interpretation in the Vienna Convention on the Law of Treaties

2.1 General Rule of Interpretation and the Use of Supplementary Means

The interpretation of multilingual legal texts is a topic which is not only relevant in the context of EU law but has also attracted attention in public international law, especially in the area of treaty law. The 1969 Vienna Convention on the Law of Treaties (VCLT), which was drawn up by the International Law Commission (ILC) of the United Nations, contains three articles concerning the interpretation of treaties: a general rule of treaty interpretation, a rule on the use of supplementary means and a specific rule for the interpretation of multilingual treaties.

The VCLT is generally considered to be a codification of customary international law.[51] The ECJ has recognised this with regard to specific provisions in several judgements.[52] Therefore, it also considers itself competent to apply those provisions in cases involving agreements concluded by the EU with third countries. However, the ECJ does not adhere to the interpretation rules laid down in the VCLT when interpreting primary or secondary EU legislation, despite the fact that the Treaties fall within the scope of the VCLT. The most plausible explanation for this is that already in the *Van Gend & Loos* case[53] the ECJ considered the EU to be a new and autonomous legal order.[54] Nevertheless, a discussion of the interpretation rules laid down in the VCLT is relevant in the context of this thesis because they can serve as a reference point when analysing the way the ECJ interprets EU legislation. Indeed, the problems they are intended to solve are comparable to those encountered in EU law. This is especially true with regard to the specific article on the interpretation of multilingual treaties. Moreover, although the ECJ does not normally apply the interpretation rules it is clearly aware of their existence, which might influence its interpretation practice.[55]

The first paragraph of Article 31 VCLT contains the general rule of treaty interpretation:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The paragraph clarifies that when interpreting a treaty the interpreter is instructed to take the ordinary meaning of the terms used in a treaty as a starting point. However,

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[51] Harris, D.J. *Cases and Materials on International Law,* 2004, p. 786.
[52] E.g. Case C-162/92 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655.
[53] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.
[54] Dhondt, N.M.L. and Geursen, W.W. 'Over gedeelde bevoegdheden en hiërarchie in interpretatiemethoden' *Nederlands tijdschrift voor Europees recht*, 2008, p. 282.
[55] Dhondt and Geursen observe this influence in case T-374/04 *Federal Republic of Germany v Commission of the European Communities* [2007] ECR II-4431, although it is questionable whether the order in which the Court of First Instance applies different methods of interpretation is actually prescribed by the VCLT.

the "ordinary meaning" of a term does not necessarily follow from a purely linguistic analysis.[56] A term has to be understood in its context, which means *inter alia* that a treaty text must be read as a whole.[57] The meaning eventually assigned to a term by the interpreter must also be in line with the object and purpose of a treaty. These three elements of the general rule (ordinary meaning, context and object and purpose) correspond to three methods of interpretation: textual, systematic and teleological. These methods will be discussed in more detail in section 3.1. For now, it is important to note that the general rule refers to those three methods.

Article 32 VCLT concerns the use of so-called supplementary means of interpretation and corresponds to the historical method of interpretation. The supplementary means, which include the preparatory acts, can be used whenever the application of the general rule does not lead to a satisfactory result because it leaves the meaning ambiguous or obscure or it generates a result that is manifestly absurd or unreasonable. Because of the order in which the VCLT instructs interpreters to employ the rules, it seems to establish a clear hierarchy. Sinclair claims, however, that the VCLT does not so much create a hierarchical relationship between the general rule and the supplementary means but is more subtle than that. He understands it as an attempt to assess the relative value of the elements to be taken into account. In addition, he points out in response to criticism of the generality of the rules and the lack of priority given to any particular method, that the ILC never intended to formulated a comprehensive code of the methods of interpretation.[58] The articles 31 and 32 therefore indicate in general terms which elements should be taken into account in treaty interpretation and the relative value they should be accorded. This approach allows for flexible application of the rules to a concrete case.

2.2 Multilingual Treaties

Article 33 VCLT specifically concerns the interpretation of treaties authenticated in two or more languages or, in other words, multilingual treaties. The first paragraph of Article 33 VCLT provides:

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

Two remarks should be made about this paragraph. The first is that in order for two or more language versions of the same treaty to be equally binding they must have been authenticated.[59] This means that texts which have not been authenticated, such as official translations, are not relevant for interpretation purposes under the VCLT. This

[56] Sinclair, I. *The Vienna Convention on the Law of Treaties* Manchester: Manchester University Press, 1984, p. 121.
[57] *Ibidem,* p. 127.
[58] *Ibidem,* p. 117.
[59] Article 10 VCLT provides: "The text of a treaty is established as authentic and definitive: (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or (b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

corresponds to Article 55(2) of the EU Treaty. The second remark is that the parties to a treaty can derogate from the rule laid down in the VCLT.

This is equally true for the second paragraph of Article 33, which provides:

> "A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree."

Again, it is for the parties to come to an arrangement concerning the status they accord to a certain language version of the treaty they are parties to. The first two paragraphs leave room for all the different practices which states have adopted in relation to multilingual treaties. Sinclair lists examples of bilateral treaties drawn up in the respective languages of the states while a third language version prevails in case of divergences and of treaties authenticated in other languages than those of the parties.[60]

2.2.1 The Presumption of Similar Meaning

The third paragraph of Article 33 VCLT provides:

> "The terms of the treaty are presumed to have the same meaning in each authentic text."

This so-called presumption of similar meaning has been incorporated in the VCLT to safeguard the unity of the treaty. Even though treaties might be expressed in different languages it must be stressed there is still only one treaty to which the parties are bound. There is no room for the view advocated by O'Connell and Oppenheim that in case of discrepancies each party is only bound to the text in its own language.[61] According to the ILC the "presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another."[62]

Nevertheless, the effect of the presumption is that an interpreter does not routinely have to consult all the authentic language versions of a particular multilingual treaty when trying to establish the intention of the parties. In principle, interpretation can be based on one language version since the presumption creates a conditional right to rely on a single language version of a treaty. This approach has certain advantages, mainly of a practical nature, since comparison of the different language versions takes time and requires knowledge of the different languages in which the treaty is authenticated, as well as knowledge of different legal systems. Such practical considerations were cited by Sir Humphrey Waldock, special rapporteur of the ILC for the VCLT, as forming the basis for the incorporation of the presumption in the VCLT. He considered that developing countries, in particular, would not always have the necessary staff for dealing with multilingual treaties.[63] However, not everybody agreed with Sir Humphrey. Rosenne was in favour of incorporating an explicit duty to

[60] Sinclair, pp. 147-148.
[61] Shelton, p. 628.
[62] United Nations, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 226.
[63] United Nations, *Yearbook of the International Law Commission*, 1966, Vol. I, p. 211.

compare the different language versions claiming that "it was essential to refer to the comparison of authentic texts" in the VCLT.[64]

It is important to point out that the presumption does, of course, not totally preclude a comparison of different language versions. The presumption is fully rebuttable and ceases to be effective in case one of the parties to a dispute claims there is a discrepancy between authentic texts.[65] It might, however, raise questions about the exact moment when a comparison is called for.[66] In addition to a claim by one of the parties, various authors advocate deactivating the presumption of similar meaning when the language version to be interpreted is vague or ambiguous. In such a case the other language versions should be consulted to aid interpretation.[67]

There is a certain tension between texts being equally authentic, one the one hand, and the presumption that they express the same meaning, on the other, since – as was demonstrated in chapter 1 – exact equivalence of meaning between two or more texts in different languages will never be achieved. The general interpretation rule laid down in Article 31 VCLT instructs treaty interpreters to look for the "ordinary meaning" to be given to the terms of a treaty. If texts are authentic in several languages, this would seem to imply that this ordinary meaning should be established by considering the terms of all language versions.

Despite the extra work involved, an explicit duty to compare has certain advantages. As already noted in section 1.2, it can facilitate interpretation where one language version is ambiguous while others are clear. In addition, the accuracy of the interpretation process can be enhanced.[68] A further advantage is that divergences between language versions will be detected sooner. Kuner even calls the presumption a "time bomb" because if interpretation is only based on a single language version this can conceal differences which may lead to disputes later on.[69] A final advantage is that a duty to compare, resulting in an increased likelihood of divergences being detected, can increase the awareness of the actors involved in the drafting process with regard to the multilingual nature of the texts. This awareness will probably be beneficial for drafting quality.

An argument against a duty to compare is that the routine comparison of language versions "would make it impossible to rely on any single version of the treaty".[70] It is true that one version could in that case never provide absolute certainty, but that is inherent in the nature of equally authentic multilingual treaties. If states want to rely on only one version of a treaty they should not agree to draw up equally authentic language versions but use the possibilities provided for in the first two paragraphs of Article 33 VCLT to come to a different arrangement. Of course, this might not always

[64] *Ibidem*, p. 209.
[65] Germer, P. 'Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties' *Harvard International Law Journal* 11, p. 414.
[66] Tabory, M. *Multilingualism in International Law and Institutions* Alphen aan den Rijn: Sijthoff en Noordhoff, 1980, p.199.
[67] Hilf, M. *Die Auslegung mehrsprachiger Verträge,* Berlin: Springer, 1973, p. 80; Schübel-Pfister, p. 145-146.
[68] Hardy, J.'The Interpretation of Plurilingual Treaties by International Courts and Tribunals' *British Yearbook of International Law* 37, 1961, p. 139; Kuner, p. 958.
[69] Kuner, p. 963.
[70] *Ibidem,* p. 962.

be possible, for instance because of the language regime within an international organisation, the EU being a case in point. Furthermore, the practical difference between the presumption and routine comparison should not be exaggerated. Since the presumption is fully rebuttable absolute certainty can never be derived from one language version, because a party to a dispute can always point out an alleged divergence. It could even be argued that the presumption promotes a false sense of certainty by allowing states to rely on one language version up to a certain point.

All in all, in public international law a duty to compare is preferable to the presumption since comparison has clear advantages, while the disadvantages are mostly of a practical nature. However, as will be shown in chapter 3, the question whether there is a right to rely on one language version is also important in the context of EU law. The argument that requiring routine comparison makes it impossible to rely on a single language version carries more weight in that context because individuals can derive rights from EU legislation directly while it can also directly impose obligations upon them.[71] For individuals it is particularly relevant to know whether they can rely on a single language version because legal certainty requires that they must be able to acquaint themselves with their rights and obligations in their own language. This means that individuals might derive legitimate expectations from their own language version. In chapter 4 it will be investigated whether and under which circumstances such legitimate expectations deserve protection under the principle of legal certainty.

2.2.2 Reconciliation of Diverging Language Versions

The fourth paragraph of Article 33 VCLT provides:

> "Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

The first thing to remark is that the proviso at the beginning again confirms that states may themselves designate an authoritative text. The second is that the rule only comes into operation after it has proved impossible to remove a difference in meaning between two language versions of a treaty by using the general interpretation rule laid down in Article 31 and the secondary means of interpretation of Article 32 VCLT. Only when application of those articles has been unfruitful a choice may be made in favour of one of the texts and preference should then be given to the text with the meaning which best reconciles the texts, having regard to the object and purpose of the treaty. According to Linderfalk "[t]o reconcile two texts is to make their respective contents compatible; it is to arrange in some way so that both texts convey

[71] This is, firstly, a consequence of the direct applicability of EU regulations in the Member States. Secondly, the doctrine of direct effect enables individuals to derive rights from the Treaties and EU directives under certain conditions. In contrast, most treaties are merely agreements between states which do not impose obligations on individuals directly. The question whether individuals can directly derive rights from a treaty depends on the nature – monistic or dualistic – of the domestic legal order of the states party to a treaty.

the same meaning" He also points out that it is important to note that the texts should be reconciled and not the different meanings.[72] This leaves it up to the interpreter to choose between one of the possible meanings given while his choice needs to be guided by the object and purpose of the treaty. It is therefore the interpreter's task "to choose the meaning that, better than any other, leads to a realisation of the object and purpose of the treaty".[73] However, as Derlén points out, Linderfalk seems to assume here that the treaty has a single purpose. Since, in practice, treaties may have several, possibly conflicting purposes the choice between texts may not necessarily be facilitated by the rule in every case.[74]

Finally, it is important to realise that when interpretation involves reconciliation of diverging language versions with the aid of Article 33(4) the interpreter will have to consider the object and purpose of the treaty twice. First, when applying the general rule of Article 31 and secondly when applying Article 33(4). The difference is that in the first instance object and purpose are considered in relation to the terms of the treaty, while in the second instance this has already proved to be impossible exactly because of the existence of a divergence between language versions. It must be emphasised that application of Article 33(4) will only be necessary in the exceptional case that the diverging language versions are diametrically opposed and neither the context of the provision to be interpreted nor the object and purpose of the treaty gives any clue as to the correct interpretation. An example would be a divergence leading to the question whether information had to be received or sent before a certain time limit.[75] In such cases examination of the object and purpose of the treaty would probably not be helpful to decide which version is correct if according to one language version the time limit relates to the sending of information and according to the other to the receipt. In such exceptional cases the interpreter cannot but depart from the conflicting terms of the treaty and has to prefer one text to the other. This choice will have to be made by considering object and purpose again.

Because of the perceived difficulty or vagueness of Article 33(4) a question that has often been raised in the literature is whether the article in question allows more specific rules to be established in order to facilitate making a choice between two diverging language versions. In its commentary the ILC explicitly rejected incorporating various suggestions in the VCLT. The most elaborate rejection involved the rule that in case of divergences between language versions the most restrictive text should prevail.[76] This rule was, apparently incorrectly,[77] regarded as a generally applicable rule of interpretation on the basis of the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case.[78] The ILC also rejected legal presumptions in favour of the clearest text and the original version in which a treaty was drafted since they might not necessarily reflect the intentions of the parties.[79] In paragraph 3.4 the attitude of the ECJ towards several of those specific interpretation rules will be investigated.

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[72] Linderfalk, U. *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* Dordrecht: Springer, 2007, p. 362.
[73] *Ibidem*, p. 364.
[74] Derlén, p. 28.
[75] The example is based on the *Borgmann* case, which will be examined in more detain in section 4.2.1.
[76] United Nations, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 225.
[77] Hardy, p. 80.
[78] PCIJ (1924), Series A, No. 2, p. 19.
[79] United Nations, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 226.

2.3 Conclusion

The conclusion of this chapter is that the interpretation rules laid down in Articles 31-33 of the VCLT establish a general framework for interpreters to use as guidance for the interpretation of a particular treaty in a concrete case. It is an attempt to describe in a systematic way the task to be performed by the interpreter in order to facilitate interpretation without giving exact instructions as to the methods to be applied. The rules allow interpreters to combine several recognised methods of interpretation in a flexible way, although the ordinary meaning of the words used in the provision to be interpreted is clearly indicated as the starting point for any interpretation. With regard to the interpretation of equally authentic multilingual texts the ILC has chosen to include the presumption of similar meaning instead of a duty to compare. In addition, interpreters are instructed, when the general rule and the supplementary means do not reconcile diverging language versions in an adequate way, to use the object and purpose for interpretation purposes.

In the next chapter the interpretation practice of the ECJ will be examined. Several aspects of the interpretation rules laid down in the VCLT will be used as reference points for the description of the way the ECJ deals with the interpretation of multilingual EU legislation, especially the presumption of similar meaning and the use of object and purpose to reconcile diverging language versions. These aspects are also important for the notion of legal certainty, which will be discussed in chapter 4.

Chapter 3

The Interpretation of Multilingual EU Legislation by the European Court of Justice

3.1 Interpretation Methods Used by the European Court of Justice

In order to describe the way the ECJ deals with the interpretation of multilingual legislation it is necessary to introduce the various methods of interpretation employed by the ECJ. Generally, in the literature four methods are distinguished: the textual or grammatical method, the historical method, the systematic or contextual method and the teleological or purposive method. However, other classifications are used as well. Bredimas, for instance, distinguishes only three methods (textual, subjective, functional) while Schübel-Pfister adds the comparative law method to the four mentioned above.

For the purpose of this thesis the textual method of interpretation is the most significant. This method is based on the presumption that the will of the legislator has been expressed in a reliable manner in the legal instrument to be interpreted. Therefore, the ordinary meaning and any technical meanings can be detected by analysing the words and language used in the text.[80] As was seen in connection with the VCLT , however, when looking for the ordinary meaning of words in equally authentic texts it may be necessary to compare the different language versions. If such a comparison reveals divergences the correct meaning will have to be established with the aid of the other interpretation methods mentioned in Article 31 (systematic and teleological) and 32 VCLT (historical). If after application of those methods the divergence has not been removed Article 33(4) VCLT indicates that the most suitable interpretation method is in that case the teleological method.

Interpretation by way of the historical method implies that the legal meaning of a provision is deduced from the preparatory acts concerning a legal instrument.[81] Although this method originally did not play a significant role in the interpretation of the ECJ because the preparatory acts of, for example, the Treaties did not exist or were not published its importance is growing with the increasing availability of preparatory acts for EU secondary legislation.[82] However, the ECJ has developed certain conditions for the application of this method which limit the instances in which it can be used.[83]

The systematic method implies that the meaning of a certain provision is determined by looking at the position it occupies within the system established in the legal instrument of which it is a part i.e. by looking at the context. This context can also be seen in a broader way by including other instruments on the same topic and the factual context.

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[80] Bredimas, p. 15.
[81] Mertens de Wilmars, J. Methodes van interpretatie van het Hof van Justitie van de Europese Gemeenschappen Rotterdam: Erasmus Universiteit,1990, pp. 7-8.
[82] Dhondt and Geursen, p. 282.
[83] Opinion of Advocate General Darmon of 8 November 1990 in Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745, para. 27.

Interpretation by way of the teleological method means that, first, the object and purpose of a legal instrument are identified and then it is interpreted in such a way that effect is given to the object and purpose established.[84] The ECJ has often been criticised for its alleged activism, caused by relying on the teleological method too much while neglecting the wording of the provisions it was called upon to interpret.[85] Although it falls outside the scope of this thesis to go into this discussion in detail, some remarks must be made. A first remark is that although the ECJ might rely more on the teleological method than domestic courts it is certainly not the only method of interpretation it uses. There are well-known cases in which the ECJ gave decisive weight to the ordinary meaning of the words used in a legal text. An example is the *Faccini Dori* case in which the ECJ decided that directives were not binding on individuals because the relevant Treaty article, the current Article 288 TFEU, stipulates that a directive is only binding on the Member State to which it is addressed.[86]

A second remark is that there are several reasons why the teleological method is particularly suited for the interpretation of EU legislation. One of those reasons is that the structure of EU legal instruments, in particular of the Treaties, is characterised by open norms with a broad scope. A second reason, which is especially relevant for this thesis, is that the equal authenticity of the different language versions can complicate a purely textual interpretation or even render it impossible.[87] As such cases will not occur in countries with one official language it is logical that the ECJ will have to resort to other methods, such as the teleological method, comparatively often.

3.2 The Right to Rely on a Single Language Version

As was seen in the previous chapter, the interpretation of equally authentic texts raises the question whether it is possible to rely on a single language version. In the Vienna Convention the presumption of similar meaning was introduced instead of a duty to compare the different language versions in order to grant such a right until the presumption was rebutted. Since the ECJ does not follow any written interpretation rules the answer to this question will have to be deduced from its case-law. The question whether there is a duty to compare or a right to rely on one language version is an important preliminary question, which must be answered before the question as to how the ECJ deals with the interpretation of multilingual legislation is investigated. Indeed, divergences between language versions will only appear when an actual comparison takes place. In addition, the right to rely on a single language version is an important issue in relation to legal certainty and, more specifically, for the question whether the legitimate expectations of individuals derived from their own language version should be protected by the ECJ.

At first sight the ECJ appears in favour of a clear duty to compare, at least for the national courts. In the well-known *CILFIT* case the ECJ made clear under which circumstances a national court of last instance may refrain from requesting a

[84] Sinclair, p. 148.
[85] Dhondt and Geursen, p. 276.
[86] Case C-91/92 *Paola Faccini Dori v Recreb Srl.* [1994] ECR I-3325, paras. 22-25.
[87] Dhondt and Geursen, p. 283.

preliminary ruling under the current Article 267 TFEU when it is called upon to interpret or apply EU law. One of those circumstances occurs when the court has established that the correct application of Community law is "so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved".[88] This is known as the concept of *acte clair.* Although, on the one hand the ECJ gives the national courts the discretion to conclude that there is no need to refer preliminary questions when the answers to such questions are obvious, on the other hand it strictly limits this freedom. It does so by instructing the national courts to take into account a number of peculiarities of EU law before reaching the conclusion that the answer to a question is obvious. One of those peculiarities is the multilingual nature of EU legislation:

> "[…] it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions"[89]

The ECJ makes clear in this passage that national courts have a duty to compare all language versions of an EU legal text before they are allowed to reach the conclusion that there is no reasonable doubt with regard to its correct application. This is the logical consequence of the equal authenticity of the different language versions of EU legislation.

Although Derlén argues that the Italian language version of the judgement, which is the only authentic version, can be read in such a way that a comparison of a limited number of language versions could also be deemed sufficient,[90] the ECJ itself has confirmed in later judgements that the national courts are indeed required to compare all language versions.[91]

Obviously, this requirement places a heavy burden on the national courts, because in order to compare all language versions of a text special linguistic and legal knowledge is needed, which courts will rarely possess. As was seen in the previous chapter, such practical considerations also led to the inclusion of the presumption of similar meaning in the VCLT. Because the number of languages since *CILFIT* has increased significantly this burden has only become heavier. For this reason, Advocate General Jacobs already argued for reconsideration or refinement of this requirement when the number of official languages was only twelve. He considered the comparison of all language versions "a disproportionate effort on the part of the national courts".[92]

It is therefore not surprising that there is a clear gap between the theory set out above and the actual practice of national courts. After studying the practices of courts in Denmark, Germany and England, Derlén concludes that national courts pay limited attention to the multilingual interpretation of EU law. In the first place, many

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[88] *CILFIT,* para. 16.
[89] *CILFIT,* para. 18.
[90] Derlén, p. 70.
[91] Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8615, para. 47.
[92] Opinion of Advocate General Jacobs of 10 July 1997 in case C-338/95 *Wiener S.I. GmbH v Hauptzollamt Emmerich* [1997] ECR I-6495, para. 65.

judgements are interpreted without consulting other language versions than the text in the national official language. Secondly, when a comparison is performed this rarely happens on the initiative of the court itself but is usually triggered either by a party to the proceedings or by the fact that the national language version is unclear or ambiguous. Thirdly, many of the cases in which a comparison is performed concern special areas of EU law, such as the Sixth VAT Directive or the Customs Code. Finally, when several language versions are compared their number is relatively small and usually only well-known foreign languages are selected.[93] These conclusions clearly demonstrate that national courts are unable or unwilling to perform the full-blown comparison of all languages as required by the ECJ in *CILFIT.*

Returning to the question of the right to rely on one language version, it can be observed that parties who have argued the existence of such a right before the ECJ were unsuccessful. An example can be found in the *Kraaijeveld* case. In this case the Dutch government, in response to arguments based on the English text, stated that it regarded the Dutch version of the directive at issue, as far as it was concerned, as the only authentic language version.[94] However, the ECJ rejected this argument by referring to *CILFIT*: "interpretation of a provision of Community law involves a comparison of the language versions." [95]

Still, Derlén observes that the ECJ's approach is not entirely consistent.[96] In an early case in which language versions were compared, the *Van der Vecht* case, the ECJ held that:

> "the need for a uniform interpretation of Community regulations necessitates that this passage should not be considered in isolation, but that *in cases of doubt*, it should be interpreted and applied in the light of the versions existing in the other three languages."[97]

From this judgement it can be deduced that as long as there is no doubt about the interpretation of a provision because it is clear and unambiguous, it is possible to rely exclusively on one language version. Derlén calls this the criterion of doubt.[98] This criterion corresponds with one of the reasons for rebuttal of the presumption of similar meaning discussed in the context of the VCLT but is clearly not in line with *CILFIT.*

However, in other cases, such as *Bouchereau,* the ECJ does not refer to a criterion of doubt at all but apparently takes a comparison of the different language versions for granted. It simply states that:

> "the different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the

[93] Derlén, p. 350-351.
[94] Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-05403, para. 25.
[95] *Ibidem,* para. 28.
[96] Derlén, pp. 32-36.
[97] Case 19/67 *Bestuur der Sociale Verzekeringsbank v J. H. van der Vecht* [1967] ECR 353, emphasis added.
[98] Derlén, p. 34.

provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part." [99]

To complicate matters further, the ECJ sometimes uses the approach set out in *Van der Vecht* while referring to *Bouchereau* at the same time. An example is the *Cricket St. Thomas* case in which Cricket St. Thomas, an English producer of milk and milk products, explicitly argued that it should be allowed to rely exclusively on the English version of the regulation at issue because the provision to be interpreted was clear and unambiguous when read in isolation.[100] The ECJ did not agree. However, it only consulted the other language versions after it had found that the English version was not clear because it contained terminological discrepancies.[101] This approach is in line with *Van der Vecht* but seems unnecessary on the basis of *Bouchereau.*

In other cases the ECJ refers, albeit indirectly, to *Van der Vecht* but compares the different language versions without establishing whether the provision read in isolation gives rise to any doubt. An example is the *Ebony Maritime* case in which the provision at issue was clear despite containing a substantive error.[102] According to the Italian and Finnish texts goods could not be confiscated when the rules contained in the applicable regulation were breached, while all the other language versions did provide for the possibility of confiscation. The example shows that even a clear and unambiguous text can be defective. Since errors as these can only be detected by comparing the different language versions the case can serve as an argument against the right to rely on a single language version, because interpretation is enhanced by comparison in such cases.

In the *Ferriere* case the ECJ addressed exactly the same problem, but in a more explicit manner, thus shedding more light on the right to rely on one language version, or rather the absence of such a right.[103] The case concerned the cartel prohibition currently contained in Article 101 TFEU, which prohibits agreements which have as their object *or* effect the prevention, restriction or distortion of competition within the internal market. In the Italian language version of the provision, however, the coordinating conjunction "*e*" (and) was used. Therefore, the appellant argued that the criteria of an anti-competitive object and effect were cumulative requirements, the existence of which had to be proved by the Commission. Furthermore, it was argued on the basis of *Van der Vecht* that the other language versions should only be used to aid interpretation when the meaning of one version of a provision is not clear.[104] The ECJ disagreed and stated that it was settled case-law, referring to *Van der Vecht* and *CILFIT,* that "Community provisions must be interpreted and applied uniformly in the light of the versions existing in the other Community languages". It adds:

[99] Case 30/77 *Regina v Pierre Bouchereau* [1977] ECR 1999, para. 14.
[100] Case C-372/88 *Milk Marketing Board of England and Wales v Cricket St. Thomas Estate* [1990] ECR I-01345, para. 14.
[101] *Ibidem,* para. 15.
[102] Case C-177/95 *Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and others* [1997] ECR I-1111, paras. 29-31.
[103] C-219/95 P *Ferriere Nord SpA v Commission of the European Communities* [1999] I-4411.
[104] *Ibidem,* para. 13

> "This is unaffected by the fact that, as it happens, the Italian version […] considered on its own, is clear and unambiguous, since all the other language versions expressly render the condition […] in the form of an alternative".[105]

Apparently, this is the end of the criterion of doubt. However, the ECJ still refers to *Van der Vecht* as settled case-law and does not explicitly distance itself from it. Derlén considers the judgement as a "correction of earlier misunderstandings concerning the meaning of the *Van der Vecht* case."[106] Still, despite this correction not all confusion has been dispelled because in later cases the ECJ still applies the criterion of doubt.[107] Derlén even shows that the different language versions of the ECJ's own judgements are not clear on this point. In the authentic English version of the judgement in the *EMU Tabac* case the criterion is not used[108], while in the German and French translations it does appear. Although the English version is authentic, in later cases referring to *EMU Tabac* the ECJ still applies the criterion. This is probably due to the fact that the French version of the judgement is used in the deliberations of the judges.[109]

All in all, it is difficult to give a conclusive answer to the question whether it is possible to rely on a single language version. On the one hand the *Ferriere* judgement seems to indicate that such a right does not exist while the approach the ECJ adopted in later cases, on the other hand, points in the opposite direction. According to Derlén "no theory can comprehensively explain which methods are used by the court"[110]

Schübel-Pfister tries to explain the existence of different approaches by pointing to the various procedures in which divergences between language versions play a role. In infringement procedures between the Commission and the Member States and in procedures between two EU institutions a duty to compare is unproblematic because it does not automatically place the same burden on ordinary EU citizens. Prescribing such a duty in an action for annulment or a preliminary procedure, however, would mean that full comparison is expected of citizens as well. In addition, she points to certain peculiarities of the case at issue which may influence the approach used. In a preliminary procedure a question posed by the referring court may already concern a divergence noted by that court, which means that the criterion of doubt no longer plays a role. In the end, however, Schübel-Pfister admits that her attempts at explaining the different approaches used by the ECJ only account for part of the cases.[111]

The conclusion must therefore be that it is not clear whether the ECJ will in a particular case employ a criterion of doubt before proceeding to a comparison of the different language versions or whether it will simply require the comparison of all language versions when interpreting EU law. On the basis of *CILFIT* national courts are required by the ECJ to perform such a comparison when interpreting EU law.

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[105] *Ibidem,* para. 15.
[106] Derlén, p. 34.
[107] Derlén, p.35, footnote 20.
[108] Case C-296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* [1998] ECR I-1605, para. 36.
[109] Derlén, pp. 35-36.
[110] *Ibidem,* p. 36.
[111] Schübel-Pfister, pp. 341-343.

However, the question whether the same requirement also exists for individuals has not been answered conclusively by the ECJ because even after the judgement in the *Ferriere* case it has used the criterion of doubt. The uncertainty on this point is relevant for the question whether the interpretation practice of the ECJ in the case of divergences between language versions is compatible with the principle of legal certainty, as will be made clear in the next chapter.

3.3 The ECJ's Approaches to the Interpretation of Multilingual EU Legislation

In the literature various attempts have been undertaken at describing the approaches the ECJ uses to deal with the interpretation of divergences between equally authentic texts. Most authors emphasise that the ECJ employs different approaches when it is confronted with linguistic divergences, according to the weight which is given to the different interpretation methods discussed in section 3.1. However, there are also authors who claim the ECJ uses only one approach for all cases involving divergences. Stevens and Bredimas, for example, take the view that as soon as the ECJ is confronted with a divergence "the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part". This approach, which is a combination of teleological and systematic interpretation, was already encountered in *Bouchereau.*[112] Both authors emphasise the limited value the ECJ attaches to the words of the provision to be interpreted.[113]

There are also authors who put a great deal of emphasis on context and purpose but at the same time recognise this is not the only approach the ECJ employs. Jacobs states that interpretation problems caused by differences between language versions "can only rarely be resolved by purely linguistic means".[114] Apparently, he does not exclude the possibility that the textual method may yield a satisfactory result in an, admittedly, small number of cases. Vismara also emphasises objective and context for the purpose of interpretation but, in addition, refers to a case in which the ECJ used the principle of effectiveness to guide its interpretation.[115]

As stated above, most authors agree that the ECJ uses a variety of approaches. Arnull, for example, states that the ECJ normally uses the purpose and context of a provision as guidance after the ECJ has come to the conclusion that it is impossible to interpret it in a way which is consistent with all (or nearly all) of the language versions.[116] However, occasionally, the ECJ works the other way around and employs the

[112] *Bouchereau,* para. 14.
[113] Stevens, p. 277-278; Bredimas, p. 37-40.
[114] Jacobs, F. G. 'Approaches to Interpretation in a Plurilingual Legal System' in Hoskins, M & Robinson, W. (eds.) *A True European – Essays for Judge David Edward* Oxford: Hart, 2003, p. 304.
[115] Vismara, F. 'The Role of the Court of Justice of the European Communities in the Interpretation of Multilingual Texts' in Pozzo, B. & Jacometti, V. (eds.) *Multilingualism and the Harmonisation of European Law* Alphen aan den Rijn: Kluwer Law International, 2006, pp. 67-68; Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wein & Co. HandelsgesmbH v Oberösterreichische Landesregierung* [2000] ECR I-1157.
[116] Arnull, A. *The European Union and its Court of Justice* Oxford: Oxford University Press, 2006, p. 608.

teleological method first, the outcome of which is then checked against the different language versions.[117]

Van Calster observes that the ECJ uses the same methods of interpretation when confronted with diverging language versions as in cases in which this problem does not play a role. First the ECJ tries to find a solution through "thorough semantic analysis" and it does not abandon the language versions immediately when a divergence is discovered, as Stevens and Bredimas claim. Only when the textual method is unsuccessful the ECJ turns to the systematic and teleological methods.[118]

Schübel-Pfister claims the ECJ uses different approaches. Sometimes divergences are solved by a purely textual interpretation. Usually, the result of the textual interpretation is confirmed by using other methods of interpretation which do not, however, change the original outcome.[119] In other cases the ECJ gives decisive weight to other interpretation methods, such as the contextual, teleological and historical method.[120] She does not discern a uniform approach but concludes that the ECJ uses various arguments and interpretation methods depending on the peculiarities of the case.[121]

3.3.1 Classical Reconciliation

The most systematic attempt to classify the approaches of the ECJ to the reconciliation of divergences between language versions has been undertaken by Derlén. He distinguishes between at least three approaches. The first is the classical reconciliation approach. This approach entails that the ECJ performs a proper comparison of the language versions and then reconciles any divergences detected on the basis of a certain principle. The purpose of the provision in question is not discussed separately although the ECJ does sometimes mention it as an aid to interpretation.[122]

An example of this approach is the *Road Air* case.[123] The case involved the issue of customs duties on imports of goods from overseas countries and territories (OTC). The current Article 200 TFEU provides for the prohibition of such duties on "goods originating in" those OTC. The question, however, was whether this prohibition also extended to goods which were not actually produced in the OTC but were in free circulation there. Although it was a Dutch case, Road Air argued on the basis of the German text (*Waren aus den Ländern und Hoheitsgebieten*) that this prohibition did indeed extend to products in free circulation because this language version does not refer to the origin of the goods. However, most of the other texts used a more restrictive expression comparable to the English "goods originating in", such as the Dutch "*goederen van oorsprong uit*" in which the origin of the imported goods plays a key role. In the French, Italian and Portuguese versions the expressions used were

[117] *Ibidem,* p. 611.
[118] Van Calster, p. 377.
[119] Schübel-Pfister, pp. 233-234.
[120] *Ibidem,* pp. 235-243.
[121] *Ibidem,* pp. 245-246.
[122] Derlén, p. 43.
[123] Case C-310/95 *Road Air BV v Inspecteur der Invoerrechten en Accijnzen* [1997] ECR I-2229.

vaguer, referring not to the origin of the goods but to the origin of the imports, but were still clearly compatible with a restrictive interpretation. On the basis of this comparison the ECJ decides that the broader, ambiguous German provision "must be interpreted in a manner conforming with the other language versions."[124] The ECJ does not refer to the purpose of the provision but apparently considers that the correct interpretation follows from the textual analysis. Although it does not explicitly state the principle on which its reconciliation of the different possible meanings is based, it seems to use a majority rule. It must be added, that the approach of the ECJ in this case differs from that of the Advocate General, whose textual analysis of the problem is the same[125] but who then relies on the context and purpose of the provision for his interpretation.[126]

3.3.2 Reconciliation and Examination of the Purpose

The second method Derlén distinguishes is reconciliation and examination of the purpose. In this approach the ECJ starts with classical reconciliation, as described above. The next step is then to examine whether the result obtained is compatible with the purpose and/or context of the provision.[127]

An example is the *Koschniske* case, concerning the interpretation of a regulation on social security for workers and their families.[128] Although the Dutch version of the regulation contained the word "*echtgenote*" (wife), the question was raised whether the provision in question also applied to a married man. Comparison of the different language versions revealed that all the other language versions used terms equivalent to the English word "spouse", which can refer to both married women and men, thus permitting the broader interpretation. This result was confirmed by an examination of the purpose of the provision.[129] Another example can be found in the *Denkavit* case.[130] In that case the comparison of a provision of a tax directive revealed that all language versions except for the Danish version were formulated in the present tense. This difference was relevant for the question whether the period during which a parent company had to maintain a holding in the capital of its subsidiary had to have expired before a tax exemption could be applied for. On the basis of the majority of the language versions expiry of the period was not a requirement and the ECJ concluded that this interpretation was "not invalidated by the fact that the Danish version uses a past tense". The ECJ then confirms the result of the comparison by looking at the purpose of the provision.[131]

3.3.3 Radical Teleological Method

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[124] *Ibidem,* paras. 31-36.
[125] Apart from the fact that, contrary to the ECJ, he places the German and Dutch versions in the same category.
[126] Opinion of Advocate General Ruiz-Jarabo Colomer of 14 January 1997 in Case C-310/95 *Road Air BV v Inspecteur der Invoerrechten en Accijnzen* [1997] ECR I-2229, para, 66.
[127] Derlén, p. 45.
[128] Case 9/79 *Marianne Wörsdorfer, née Koschniske, v Raad van Arbeid* [1979] ECR 2717.
[129] *Ibidem,* paras. 5-8.
[130] Joined cases C-283/94, C-291/94 and C-292/94 *Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v Bundesamt für Finanzen* [1996] ECR I-5063.
[131] *Ibidem,* paras. 24-26.

The third approach he distinguishes Derlén calls the radical teleological method. In this approach the emphasis is clearly on the purpose and/or context of the provision to be interpreted. There is no attempt to reconcile the diverging texts on the linguistic level. As soon as the ECJ is confronted by a divergence, this apparently disqualifies the wording of a text for interpretation purposes and the correct interpretation can only be arrived at by considering the purpose and/or context of a provision.[132]

A good example is the *Institute of the Motor Industry* case.[133] Again, the case involved the question whether a tax exemption was applicable. The relevant exemption from value added tax applied *inter alia* to trade unions. However, the term used in the French version and apparently also in other versions, although they are not explicitly mentioned, was broader. The French expression "*syndical*" can also refer to professional associations other than classical trade unions in the English sense. After this observation the ECJ states:

> "In the event of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part"[134]

The justification for this approach is the requirement of the uniform application of Community law.[135] Eventually, the ECJ adopted a restrictive interpretation on the basis of the purpose of the provision.

Derlén states that the ECJ also uses methods other than the three main approaches discussed above.[136] He points to a case decided on the basis of arguments *ex aequo et bono*[137] and cases in which the purpose of the provision to be interpreted was examined first after which the result was checked against the different language versions.[138]

The answer to the question how the ECJ deals with the interpretation of multilingual EU legislation in the case of divergences between language versions must therefore be that the ECJ does not use a single approach to reconcile the various language versions. Depending on the case at hand, it may choose to rely exclusively on the textual method in order to arrive at a uniform interpretation of the provision to be interpreted. In other cases the ECJ confirms the result of the textual method of interpretation by examining whether this outcome is compatible with an examination of the purpose and context of the relevant provision. In a third category of cases the ECJ discards the textual method all together as soon as a divergence is detected and relies exclusively on purpose and/or context. In addition, it occasionally uses other approaches as well.

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[132] Derlén, p. 47.
[133] Case C-149/97 *The Institute of the Motor Industry v Commissioners of Customs and Excise* [1998] ECR I-7053.
[134] *Ibidem,* para. 16.
[135] *Ibidem.*
[136] Derlén, p. 49.
[137] Case 291/87 *Volker Huber v Hauptzollamt Frankfurt am Main-Flughafen* [1988] ECR 6449.
[138] Case C-174/05 *Stichting Zuid-Hollandse Milieufederatie and Stichting Natuur en Milieu v College voor de toelating van bestrijdingsmiddelen* [2006] ECR I-2443, para. 19-23.

It should be added that, as was the case in the previous section, "it is not possible to create a watertight theory of when it will use which method."[139]

3.4 Specific Interpretation Rules to Reconcile Diverging Language Versions

In the previous section the approaches differ from each other according to the weight the ECJ gives to the textual interpretation method in comparison to the teleological and systematic methods. Another way of analysing the interpretation by the ECJ in the case of diverging language versions is by examining whether it uses specific interpretation rules to reconcile diverging language versions. Such rules can either be seen as special rules derived from *inter alia* public international law or as variations of the textual method of interpretation.[140] At the end of the second chapter three such rules were already mentioned: the rule that the most restrictive interpretation should prevail, the rule that the clearest text is presumed to convey the correct meaning and the rule that special weight should be attached to the language in which a text was originally drafted. In addition to those rules a number of other rules are discussed in the literature, for instance by Van Calster, Schübel-Pfister and Derlén. The latter adds the rules by which preference should be given to the majority meaning and the most liberal meaning. Van Calster, in addition, mentions the rules *in claris non fit interpretatio*, the theory of the language of the state and correction *ex officio*. Some of the rules are also explicitly mentioned in conclusions of the Advocates General.[141]

3.4.1 The Original Text

It is clear that a rule giving preference to the language in which a legislative instrument was originally drafted is incompatible with the whole concept of drafting equally authentic texts. Nevertheless, there is some support for it in the literature on public international law, especially when it is clear, for instance from the preparatory acts, that one of the texts of a treaty is the source text while the others are mere translations.[142] However, in the context of EU law this view is absent. The fact that the simultaneous drafting of EU legal instruments is a fiction does not alter this. Giving preference to an original is simply considered incompatible with the principle of linguistic equality. Apart from this legal argument, a practical problem with such a rule would be that it is not always known which language version served as the source text. Another problem is that, even when it is known which text was the source text, the special revision process by the lawyer-linguists might make it impossible to state with certainty whether a specific provision was actually translated on the basis of that source text or whether it was altered later on the basis of another text. In fact, the revision process undermines the whole idea of having one original text.

From a legal perspective, the ECJ clearly indicates in cases such as *CILFIT* that the equal authenticity of legal texts means that interpretation involves comparison of the

[139] Derlén, p. 49.
[140] *Ibidem*, p. 40.
[141] E.g. Opinion of Advocate General Stix-Hackl of 11 January 2005 in Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005] ECR I-2579.
[142] Hardy, p. 105; Hilf, p. 93-94.

language versions.[143] In other cases the ECJ emphasises that it would be "be incompatible with the requirement of the uniform application of Community law" if one language version were to override the others.[144] Despite these practical and legal arguments against the rule, Van Calster points out that occasionally a variation on the rule is advocated. This variation involves the idea that more weight should be given to the texts in the languages which were official at the time the legislation was adopted.[145] However, apart from the legal problems already mentioned, this rule would cause considerable practical problems. Not only would it become necessary for the ECJ to verify whether the legal instrument was adopted before or after the accession of a particular Member State, it would also have to check when the specific provision to be interpreted was included in it. It is very well possible that a specific provision was included or amended after the accession of a Member State while the legal instrument of which it forms a part was already in force before its accession. All in all, the rule is not and cannot be accepted in EU law.

3.4.2 The Language of the State

The rule that a country is only bound by the text of a legal text drafted in its own official language is equally incompatible with giving texts an equally authentic status. Although support for the rule has occasionally been expressed in the literature on international public law, notably by Oppenheim, it has received little support.[146] As pointed out above, a party to a multilingual treaty is party to all authentic versions of that treaty. As far as secondary EU legislation is concerned the rule would be incompatible with the uniform interpretation and application of EU law, since it could lead to different rules applying in different EU Member States depending on language. This would of course be contrary to the whole notion of European integration and the approximation of the legal systems within the EU.[147]

Two unsuccessful attempts to rely solely on their own official language were already encountered. Both in *Kraaijeveld* and *Cricket St. Thomas* the ECJ dismissed the rule, in the latter case by explicitly referring to the need to give the different language versions a uniform interpretation.[148] However, as explained in section 3.2, despite several explicit rejections of the rule, the continued application of a criterion of doubt by the ECJ means that it might under certain circumstances be possible to rely on the language version of the Member State up to a certain point.

3.4.3 *In Claris Non Fit Interpretatio*

The rule *in claris non fit interpretatio* means that if a text is clear and unambiguous it does not need to be interpreted.[149] According to Van Calster the scope of this rule in the EU context is limited to those situations in which all texts are clear. Nevertheless,

[143] *CILFIT,* para. 18.
[144] *Institute of the Motor Industry,* para. 16.
[145] Van Calster, p. 381.
[146] Shelton, p. 628.
[147] Van Calster, p. 381.
[148] *Cricket St. Thomas*, para. 19.
[149] Bredimas, p. 15.

he claims that the ECJ has never left this approach although it tends to confirm even clear texts by examining other elements.[150] However, it is questionable whether this claim can still be maintained in the light of cases in which the ECJ adopted an interpretation contrary to the clear and unambiguous wording used in all language versions. An example is the case *Commission v France*.[151] This case involved the imposition of financial penalties under the current Article 260 TFEU for a failure to comply with an earlier judgement of the ECJ under the infringement procedure of the current Article 258 TFEU. Despite the fact that according to the wording of Article 260 TFEU the ECJ "may impose a lump sum *or* penalty payment" on a Member State which has not complied with its earlier judgement, the ECJ held that on the basis of the objective of the procedure the Article did not preclude the cumulative imposition of both penalties.[152] It must be noted, however, that the clarity of the word "or" is disputed by the ECJ, following the Advocate General, who claims "it is linguistically possible to regard" the word "as being inclusive", without really substantiating this claim, except by pointing out that the ECJ has interpreted other Treaty articles in the same manner.[153]

3.4.4 Correction *ex officio*

Correction *ex officio* is not uncommon in international jurisprudence.[154] It is used to correct obvious translation errors when there can be no doubt about the meaning actually intended by the drafters of a text. According to Van Calster the ECJ applies the rule as well, although he does not give examples.[155]

3.4.5 The Clear Text

Because of the equal status of the texts, giving preference to the clear text when interpreting a provision is problematic. The ILC indicated that a presumption in favour of the clearest text should not be included in the VCLT since it might not necessarily reflect the intentions of the parties.[156] This argument is also valid in the EU context because the inclusion of an ambiguous provision might have been necessary to achieve consensus at some point in the lawmaking process. After all, EU law is a form of negotiated law. It cannot be excluded that a translator, unaware of the political reasons for the deliberate vague wording of a certain provision, has used a translation which makes the provision clearer in comparison to other language versions. This might have been a conscious decision but could also be the result of a lack of an equally ambiguous linguistic equivalent in the target language. Most authors agree, therefore, that the rule is not applicable in EU law.[157] Schübel-Pfister, on the other hand, argues that the rule is frequently used by the ECJ[158] but in a

[150] Van Calster, p. 376-377.
[151] Case C-304/02 *Commission of the European Communities v French Republic* [2005] ECR I-6263.
[152] *Ibidem,* paras. 80-83, emphasis added.
[153] *Ibidem,* para. 83; Opinion of Advocate General Geelhoed of 18 November 2004 in case C-304/02 *Commission of the European Communities v French Republic* [2005] ECR I-6263, para. 45.
[154] Hardy, p. 106.
[155] Van Calster, p. 385.
[156] United Nations, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 226.
[157] Van Calster, p. 378; Derlén, p. 41.
[158] E.g. in Case 33/65 *Adrianus Dekker v Bundesversicherungsanstalt für Angestellte* [1965] ECR 901.

majority of cases the result is confirmed by using other methods of interpretation, usually the teleological and/or systematic methods.[159]

3.4.6 The Most Liberal Interpretation

The rule by which preference should be given to the most liberal meaning means that the meaning which is least burdensome for an individual should be adopted.[160] The case which is usually cited as an example of the existence of this rule in the case-law of the ECJ is the *Stauder* case.[161] This case involved the conditions in which beneficiaries could profit from reduced prices for the sale of butter under certain social welfare schemes. According to the German version of the generally applicable decision it was necessary to show a coupon with a name, while other language versions only required a coupon referring to the person concerned, which does not necessarily mean that a name is divulged. The ECJ stated:

> "the most liberal interpretation must prevail, provided that it is sufficient to achieve the objectives pursued by the decision in question".[162]

Despite this clear statement there are only a few examples of cases in which the ECJ applied the same rule. Schübel-Pfister therefore concludes that the preference for the most liberal interpretation cannot be considered to be a general rule. The proviso indicates that the liberal interpretation can only prevail as long as the purpose of the provision allows it.[163] For this reason other authors have called the *Stauder* case an example of the teleological method.[164]

3.4.7 The Most Restrictive Interpretation

An interpretation rule giving extra or decisive weight to the most restrictive interpretation would mean that the meaning to be adopted is that meaning which all language versions have in common.[165] It is also called the theory of the maximum common content or the common denominator rule. This rule can be considered to be compatible with the equal status of the authentic languages because there is no single version overriding the others. However, as was seen in chapter 2, the ILC did not consider it to be a general rule of interpretation in international law, as was advocated by some. Van Calster rejects the rule *inter alia* because it "would slow down unification". His concern is that Member States will try to rely on the language version which imposes the least obligations on them and calls the rule too "sovereignty-friendly".[166] It is important to note that Van Calster focuses exclusively on the relationship between the EU and the Member States. His argument carries no weight when individuals are involved. In such cases application of the most restrictive

[159] Schübel-Pfister, p. 277-278.
[160] Derlén, p. 41.
[161] Case 29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] ECR 419.
[162] *Ibidem,* para. 4.
[163] Schübel-Pfister, p. 282.
[164] Derlén, p. 41.
[165] *Ibidem*.
[166] Van Calster, p. 378.

meaning could protect individuals against consequences of legislation they were unable to foresee on the basis of their own language version. When the provision to be interpreted imposes obligations on individuals the rule would in fact mean that the most liberal meaning were to prevail.[167] Schübel-Pfister discusses several judgements considered as examples of the use of this rule by the ECJ[168] but concludes that for the decision of the ECJ the purpose of the provision is at least as important as the fact that all language versions allow the relevant restrictive interpretation. In addition, she argues that the existence of such a rule must be contrasted to other judgements in which the ECJ explicitly favoured the broader meaning.[169]

3.4.8. The Majority Rule

A last and very simple rule which is discussed in the literature is that of giving preference to the majority meaning. This entails giving preference to that meaning which is supported by the greatest number of language versions.[170] Although it may appear a logical rule it must nevertheless be applied cautiously because a minority meaning is not necessarily incorrect and the rule is problematic in light of the equal status of all language versions.[171] Schübel-Pfister claims that although the rule is regarded as prohibited in EU law and the ECJ has said so in several judgements,[172] it is nevertheless used by the ECJ.[173] Jacobs criticises the rule because it could in theory mean that the interpretation of the same piece of legislation could differ depending on whether the interpretation takes place before or after the accession of new Member States.[174] Despite these problems most authors seem to agree with Van Calster that the ECJ uses the majority rule as an additional argument although the majority meaning "is not in itself decisive".[175]

The conclusion with regard to the use of specific interpretation rules must be that they are of limited added value for the description of the interpretation practice of the ECJ. Some of them are clearly incompatible with the linguistic equality of the texts or the need for a uniform interpretation and application of EU law. The existence of others in EU law is debated by some of the authors or they suffer from practical difficulties. At most, a number of rules can be said to play a role as a first step or one of the arguments the ECJ uses to interpret a provision of EU law in which a divergence between the language versions plays a role. None of the specific rules seems capable of reconciling diverging language versions on its own, so when they are used they are usually combined with an examination of the purpose and/or context of the provision.

3.5 Conclusion

[167] Van Calster rejects the application of this rule for the same reason, p. 385.
[168] E.g. Case 93/76 *Fernand Liegeois v Office national des pensions pour travailleurs salariés* [1977] ECR 543.
[169] Schübel-Pfister, p. 282-283.
[170] Derlén, p. 40.
[171] *Ibidem.*
[172] *EMU Tabac,* para. 36.
[173] Schübel-Pfister, p. 267.
[174] Jacobs, p. 304.
[175] Van Calster, p. 380.

The conclusion of this chapter is that the way the ECJ deals with the interpretation of multilingual EU legislation in case of diverging language versions is far from uniform, resulting in uncertainty on several points. In the first place, it is not entirely clear whether the interpretation of EU law requires performing a comparison of all language versions in each and every case. Although the ECJ has instructed the national courts to perform such a comparison in *CILFIT* it is unclear whether such a duty exists for individuals as well. Since the criterion of doubt has been explicitly rejected in the *Ferriere* case it may be assumed that parties explicitly relying on this criterion will be unsuccessful, which would mean that there is a general duty to compare. On the one hand, the ECJ has apparently employed the criterion of doubt even after *Ferriere.*

It should be noted on this point that the ILC favoured the inclusion of the presumption of similar meaning in the VCLT, thus creating a conditional right to relate on a single language version. Although, as indicated above, the difference between the presumption and a duty to compare should not be exaggerated because the presumption is fully rebuttable, it must be observed that the ECJ's approach is problematic because, in contrast to the ILC, it has not made an explicit choice, which results in uncertainty. This uncertainty is particularly unfortunate in the context of EU law because individuals can derive rights from EU legislation directly while it can also directly impose obligations upon them. It is quite paradoxical therefore that individuals would seem better off under the VCLT while the rules laid down in it were not intended to protect their interests but the interests of states.

A second point of uncertainty is that the ECJ uses different approaches to reconcile diverging texts. Linguistic divergences are sometimes reconciled on a purely linguistic level, while in other cases the result of the textual method is confirmed with the aid of the teleological and/or systematic method. In a third category of cases the textual method does not play a role at all and the ECJ relies exclusively on teleological and systematic arguments. In addition to the three main approaches it uses others as well.

It should be noted that the approaches of the ECJ are in principle encompassed by the interpretation rules laid down in Articles 31-33 of the VCLT. The methods the ECJ employs are the same as the methods embodied in those rules and, as indicated above, the framework provided by the VCLT has deliberately been designed to be flexible. Article 31 definitely allows for the approaches Derlén calls classical reconciliation and reconciliation and examination of the purpose since in those approaches, despite the divergences between language versions, the text is taken as a starting point for the interpretation. Depending on the case at hand, the ECJ is either capable of reconciling divergences entirely on the basis of linguistic arguments or it chooses to confirm the outcomes with the aid of the systematic and/or teleological methods. The radical teleological method seems to correspond to Article 33(4) because the purpose of the text is considered without really relating it to the, admittedly, diverging terms of the text. However, the VCLT specifically instructs interpreters to use this rule only if application of the other rules has not resulted in reconciliation of the diverging language versions. As indicated in section 2.2.2, Article 33(4) only comes into play in exceptional circumstances, while the ECJ seems to rely on the radical teleological method relatively often. A possible explanation is, of course, that because of the large number of languages it is statistically more likely that divergences between the

language versions will involve diametrically opposed meanings. However, the ECJ in some cases seems to decide to switch to the teleological method immediately when it detects a divergence between language versions. It certainly does so more quickly than the VCLT prescribes. The problem with this approach is that the ECJ gives little weight to the wording of provisions while individuals, and Member States for that matter, depend on the wording in their own language to acquaint themselves with their rights and obligations under EU law. This exacerbates the uncertainty caused by the use of different approaches even further.

The third point of uncertainty relates to the use of specific interpretation rules. Some rules are clearly incompatible with the linguistic equality of the equally authentic language versions and therefore the ECJ will not use them. However, there are also rules which have given rise to some controversy in the literature both with regard to the question whether the ECJ actually uses them and whether this is acceptable in the light of the equal authenticity of the different language versions. However, the uncertainty related to the use of specific interpretation rules is diminished by the fact that such rules are incapable of reconciling diverging language versions on their own.

The existence of these points of uncertainty warrants the question whether the way the ECJ deals with the interpretation of multilingual EU legislation in the case of diverging language versions is compatible with the principle of legal certainty. This question will be considered in the following chapter by investigating the consequences which the points of uncertainty observed above have for individuals. The focus will in particular be on the right to rely on a single language version and the use of the teleological method of interpretation to solve divergences between language versions.

A general remark with regard to legal certainty which can already be made is that the comparison between the interpretation rules laid down in the VCLT and the practice of the ECJ reveals that a systematic attempt to lay down interpretation rules is beneficial for legal certainty. Even though the rules in the VCLT are phrased in general terms to allow flexibility they are nevertheless the result of explicit choices, such as the inclusion of the presumption of similar meaning. They also indicate beforehand which elements interpreters are supposed to take into account when they interpret a provision and prescribe a clear order for their application. The analysis of the practice of the ECJ, in contrast, is characterised by uncertainty on similar points.

Chapter 4

Multilingual Interpretation and the Principle of Legal Certainty

4.1 Legal Certainty

In order to answer the question whether the way the ECJ deals with the interpretation of diverging language versions of multilingual EU legislation is compatible with the principle of legal certainty, this principle will first have to be examined in more detail. Although the principle of legal certainty and the related principle of legitimate expectations feature in many legal systems, including those of the Member States, their legal content may vary between countries.[176] The origin of such general principles of law can thus be traced to the legal systems of the Member States. The ECJ can be said to 'borrow' principles of law from the Member States. However, while borrowing a certain principle the ECJ will normally transform a national principle to fit the needs of the EU legal system. The legal basis for the application of general principles of law is constituted by Article 19 TEU, which states that the ECJ "shall ensure that in the interpretation and application of the Treaties the law is observed." The wording of this provision implies that there is more EU law than just Treaty law and the secondary law based on those Treaties. The general principles of law are an important category of this additional law.[177] In the European context they play an important role because the EU legal order, being relatively young, inevitably contains gaps and inconsistencies which can be filled with the aid of general principles. A second reason why general principles of law must sometimes be relied upon by the ECJ is the diplomatic law nature of EU legislation.[178]

According to Tridimas the exact content of the principle of legal certainty is "by its nature diffuse" and difficult to determine in the context of EU law. It has been used with creativity in the case-law to support different propositions both with regard to substantive and procedural law.[179] Moreover, in its case-law the ECJ does not always distinguish between the broader principle of legal certainty and the narrower principle of legitimate expectations.[180] Tridimas explains the difference on the basis of the time factor. The principle of legal certainty is static and entails that applicable rules are clear and precise for the benefit of the individual. The protection of legitimate expectations, on the other hand, requires authorities to exercise their powers over a period of time in such a way as to ensure that situations and relationships which have been legally created under EU law are not affected in a manner which could not have been foreseen by a diligent person. This difference also explains the different functions the principles have. Legitimate expectations can be a source of substantive rights while legal certainty is usually invoked in the context of interpretation.[181]

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[176] Craig, P. and De Búrca, G. *EU Law – Texts, Cases and Materials* Oxford: Oxford University Press, 2008, p. 551.
[177] Jans, J. H. *et al. Europeanisation of Public Law* Groningen: Europa Law Publishing, 2007, p. 116-117.
[178] *Ibidem,* p. 117.
[179] Tridimas, T. *The General Principles of EU Law* Oxford: Oxford University Press, 2006, p. 243.
[180] Tridimas, p. 242.
[181] *Ibidem,* p.252.

All authors agree that the most important aspect of the principle of legal certainty is that individuals must be able to know in advance what the legal consequences of their actions are.[182] This notion of predictability is also considered to be one of the basic tenets of the rule of law.[183] Since the rule of law has been recognised as one of the values on which the EU is founded (Article 2 TEU) the ECJ must respect it in its judgements.

Legal certainty and predictability play an important role in the context of this thesis in different ways. In order for individuals to know the future legal consequences of their behaviour it is, first of all, essential that they are able to know their rights and obligations. As a result of the direct applicability of EU regulations in the Member States and the doctrine of direct effect, individuals can derive rights from EU legislation directly while it can also directly impose obligations upon them. This makes legal certainty important for the publication of EU legislation. In the *Skoma-Lux* case, which concerned the legal effect of EU legislation in the event that one of the language versions was not published in the *Official Journal*, the ECJ held:

> "The principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies."[184]

The ECJ makes clear in this case that the principle of legal certainty requires official publication; unofficial forms of publication, for example on websites, are not sufficient. This follows *inter alia* from Regulation 1/58. Secondly, only if a legal instrument has been published in the official language of a Member State can it be enforced against individuals in that Member State.[185]

Legal certainty is also important for the drafting of EU legislation. In the 1998 Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation the relationship between legal certainty and legislation is described as follows:

> "according to the case-law of the Court of Justice,[186] the principle of legal certainty, which is part of the Community legal order, requires that Community legislation must be clear and precise and its application foreseeable by individuals. That requirement must be observed all the more strictly in the case of an act liable to have financial consequences and imposing obligations on individuals in order that those concerned may know precisely the extent of the obligations which it imposes on them."[187]

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[182] *Ibidem,* p. 242.
[183] Craig and De Búrca, p. 552.
[184] Case C-161/06 *Skoma-Lux sro v Celní ředitelství Olomouc* [2007] ECR I-10841, para. 38.
[185] *Ibidem,* para. 49.
[186] E.g. Case T-115/94 *Opel Austria GmbH v Council of the European Union* [1997] ECR II-39, para. 124.
[187] OJ C 73, 17.3.1999, p. 1.

This makes clear that publication alone is not enough; the published legislation also has to satisfy the qualitative criteria of clarity, precision and forseeability to enable individuals to act in accordance with EU law.

Legal certainty also plays an important role with regard to adjudication. In this context predictability means that courts have to ensure that arbitrary judgements are avoided. This aspect is called formal legal certainty. Indeed, only if the outcome of cases is predictable in the sense that similar cases are solved in a similar way, citizens can plan their actions rationally. In addition to formal legal certainty some authors distinguish a second element. Substantive legal certainty means that judicial decisions have to be acceptable. For the interpretation of legal texts this implies that courts must not only interpret in accordance with the law but also have to meet certain criteria of equity and justice.[188]

For this thesis the protection of legitimate expectations is the most important manifestation of the principle of legal certainty because, as will be shown below, individuals may derive expectations from reading EU legislation in their own language version. Although the ECJ rejects most claims based on breach of this principle it has protected legitimate expectations in various contexts.[189] Given the fact that predictability is such an important aspect of the principle of legal certainty it is obvious that rules with a retroactive effect are problematic. In cases involving such measures individuals are confronted with the legal consequences of rules which were not in force when the actual events took place and with which they could not acquaint themselves in advance.[190] The prohibition of retroactivity is absolute with regard to criminal measures. This follows from the Latin maxim *nullum crimen, nulla poena sine lege* which is incorporated in Article 7 of the European Convention on Human Rights.[191] With regard to non-criminal measures retroactivity is subject to strict conditions. An exception exists when two conditions are fulfilled: the purpose to be achieved by the measure must demand it and the legitimate expectations of those concerned must be respected.[192]

Another context in which legitimate expectations have been protected by the ECJ is when individuals based those expectations on previous legislation. The *Mulder* case concerned a dairy farmer who stopped marketing milk for a certain period. He was encouraged to do so by an EU regulation which intended to limit the surplus in milk production. However, the regulation was not effective enough so another regulation was adopted introducing milk quotas based on a reference period. Because Mulder had not produced milk in the period in question he did not qualify for a milk quota. Since this unfavourable treatment was the result of Mulder having used the possibilities offered by the first regulation the ECJ held that the legitimate expectation that he would be able to start producing milk again after the prescribed period of inactivity had to be protected.[193]

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[188] Paunio, E. 'The Tower of Babel and the Interpretation of EU Law' in Wilhemsson, T., Paunio, E. & Pohjolainen, A. (eds.) *Private Law and the Many Cultures of Europe* Alphen aan den Rijn: Kluwer Law International, 2007, p. 395.
[189] Tridimas, p. 251.
[190] Craig and De Búrca, p. 552.
[191] Tridimas, p. 253.
[192] Case 98/78 *A. Racke v Hauptzollamt Mainz* [1979] ECR 69, para. 86.
[193] Case 120/86 *J. Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321, para. 24-26.

A final example of a context in which the ECJ recognised legitimate expectations is that in which the legitimate expectations were based on the conduct of or on specific assurances given by the EU administration.[194]

It is important to note that the principle of legal certainty is not absolute but relative. Depending on the circumstances of a case it may have to give way to other considerations. For example, in the *Kühne & Heitz* case the ECJ held that national authorities may have to review a final administrative act to give effect to a later interpretation of EU law by the ECJ.[195] Clearly, the finality of administrative acts enhances legal certainty because it provides clarity. However, given the specific circumstances of the case the ECJ found that the principle of loyal cooperation was more important and required the national authorities to take a new decision in accordance with the subsequent interpretation of the ECJ.

With regard to legitimate expectations it is important to note that such expectations have to be reasonable. This means, for instance, that a trader must know the rules governing his line of business and cannot have legitimate expectations conflicting with those rules.[196] Reasonableness further entails that the legislation or conduct of an EU institution must be the proximate cause of the legitimate expectations. In addition, the EU or its agents must be responsible for frustrating those expectations.[197]

4.2 Legal Certainty in Case of Diverging Language Versions

Before turning to the question whether the way the ECJ deals with the interpretation of EU legislation in case of diverging language versions is compatible with the principle of legal certainty, the cause of the tension between the ECJ's approach and the principle of legal certainty will be investigated. In fact, the tension stems from two aspects of the interpretation practice of the ECJ which have already been encountered. The first is the duty to compare all language versions, the second the importance of the use of the teleological method.

4.2.1 Legal Certainty and the Right to Rely on a Single Language Version

As observed above, legal certainty is relevant for this thesis in different ways. First, it requires the EU legislature to draft clear and precise legal texts in order to inform individuals of their rights and obligations. Indeed, without such texts it would be impossible for them to know the law. The fact that it will often be necessary to request the assistance of a lawyer does not pose a problem for legal certainty.[198] Furthermore, it is a fact of life that the citizens subject to the EU's jurisdiction do not share one and the same language. Therefore, it is necessary that EU legislation is drafted and published in languages which the citizens of the Member States are able to

[194] Tridimas, p. 280.
[195] Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-837.
[196] Derlén, p. 54.
[197] Tridimas, p. 252
[198] Schilling, T. 'Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law' *European Law Journal* 16, 2010, p. 49.

understand. This follows from the Latin maxim *nemo ius ignorare censetur.* In addition, the principle of linguistic equality requires texts of general applicability to be drafted and published in all official languages and gives all these texts equal status for the purpose of interpretation. However, since exact equivalence between two language versions of a legal text cannot be attained, the choice to draft equally authentic texts in fact increases uncertainty and diminishes legal certainty. As Advocate General Lagrange noted in the *Bosch* case: "the four languages are equally authoritative which means, in the last analysis, that none is really decisive".[199] The existence of equally authentic texts thus allows individuals to read the texts in their own language but at the same time requires them to be able to read the other language versions as well to be absolutely certain about the meaning of a provision of EU legislation. Logically, legal certainty decreases when the number of texts to which authentic status is accorded is greater because the risk of divergences between one of the authentic texts and one or more others increases.

When the ECJ is called upon to interpret a provision of EU legislation in which a divergence between language versions occurs it usually draws attention to the principle of linguistic equality on the one hand and the need for uniform application and interpretation of EU law on the other. However, it is inevitable that the principle of linguistic equality is compromised to some extent in order to reach a uniform interpretation since the interpretation adopted by the ECJ will always be closer to some language versions than to others. This may lead to tension with the principle of legal certainty because the uniform interpretation the ECJ eventually adopts may differ to a greater or lesser extent from what was to be expected on the basis of one of the language versions of the relevant provision when read in isolation.

The ECJ has always been aware of the tension between the uniform application of multilingual EU legislation and legal certainty. In the *North Kerry Milk* case it describes the problem as follows:

> "The elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the concern for legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words. Consequently, it is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved".[200]

The paradox here is that on the one hand legal certainty requires EU legislation to be drawn up in languages individuals subject to that legislation can understand, while on the other hand the existence of several authentic language versions causes them to be bound by texts they cannot read.[201] In the case of divergences between texts this may mean that the ECJ adopts an interpretation which they could not have predicted on the basis of their own language version. Such an unpredictable outcome would clearly be incompatible with the principle of legal certainty. In view of the case-law of the ECJ

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[199] Opinion of Advocate General Lagrange of 27 February 1962 in Case 13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* [1962] ECR 45, 710, as quoted in Stevens, pp. 729-730.
[200] Case 80/76 *North Kerry Milk Products Ltd. v Minister for Agriculture and Fisheries* [1977] ECR 425, para. 13.
[201] Van Calster, p. 365 and p. 392.

in other contexts it would seem logical for the ECJ to protect the legitimate expectations individuals derive from reading their own language version, at least in cases when such an unpredictable interpretation would lead to unfavourable results for the individual, and especially, when it entails financial consequences. However, in the view of the ECJ, this would automatically mean that in such cases individuals would be given the right to rely on their own language version. As the discussion in paragraph 3.2 makes clear, the ECJ – despite the uncertainty noted on this point earlier – favours a general duty to compare all language versions over the right to rely on one language version, even for individuals. As will be discussed below, it has not yet allowed exceptions to this rule in order to protect legitimate expectations.

Still, this does not mean that the ECJ does not take the principle of legal certainty into account when reconciling diverging language versions. In the *Privat-Molkerei Borgmann* case the ECJ used legal certainty as an important argument to arrive at the interpretation that was most favourable for the individual, in this case a privately run dairy.[202] The case concerned the interpretation of the time limit which Borgmann had to respect with regard to the communication of certain information to the Principal Customs Office of Dortmund. Borgmann was fined because it had allegedly failed to observe the applicable time limit. However, the different language versions allowed for two opposing interpretations. Most versions indicated that the information had to be sent to the Principal Customs Office before the deadline, while according to three language versions the information had to be received by then. Since Borgmann had sent the information before the deadline but the Principal Customs Office had received it after this date the ECJ had to determine whether the fine imposed was justified or not. It relies exclusively on the purpose and context of the provision to conclude that the they do not preclude the deadline from being understood as a time-limit for dispatch. It then notes that in the interpretation of secondary EU law

> "preference should *as far as possible* be given to the interpretation which renders the provision consistent with the EC Treaty and the general principles of Community law […] and, more specifically, with the principle of legal certainty".[203]

The ECJ uses the principle of legal certainty in this case to justify the interpretation which is more favourable for the individual. This approach can be compared to that in the *Stauder* case in which the ECJ gave preference to the language version with the most liberal meaning. As in *Stauder,* however, there are limits to this approach in the form of the objectives of the provision. The words "as far as possible" make clear that the favourable interpretation is only possible because "none of the interpretations under consideration compromises the objectives pursued by that provision".[204] Had the interpretation suggested by legal certainty been contrary to the purpose of the provision, then the opposite interpretation would have been adopted. Therefore, legal certainty is helpful for an individual only to a certain extent. According to Derlén, in

[202] Case C-1/02, *Privat-Molkerei Borgmann GmbH & Co. KG v Hauptzollamt Dortmund* [2004] ECR I-3219. Another, very recent example, is Case C-340/08 *The Queen, on the application of M and Others v Her Majesty's Treasury* [2010] n.y.r. In this case the ECJ held that it would be incompatible with legal certainty and the purpose of the Regulation at issue for the UK Treasury to deny spouses of listed terrorism suspects access to social security and social assistance benefits.
[203] *Ibidem,* para. 30, emphasis added.
[204] *Ibidem,* para. 32.

the end "the principle of legal certainty will be sacrificed on the altar of legal integration".[205]

An example of this is found in the *Röser* case concerning the common market for wine.[206] Röser, a German wine manufacturer, was prosecuted because he had increased the alcohol rate in the product he had sold, so-called *Federweisser.* According to most language versions of the applicable regulation, increasing the alcohol rate was allowed but only in order to produce table wine, while *Federweisser* was not (yet) table wine but an intermediate product. However, Röser relied on the ambiguous German language version, which seemed to allow the increase of the alcohol rate also in case of intermediate products, and he accordingly argued that he had to be acquitted. The Commission intervened in this case and agreed with Röser because a broad interpretation of the prohibition would result in the criminal prosecution of an individual in his Member State. Without explicitly mentioning the principle of legal certainty or the protection of legitimate expectations the Commission is clearly implying that the ECJ should take this principle in account because of the criminal nature of the proceedings. The ECJ rejects this argument because the nature of the procedure in the Member State is irrelevant for interpretation in the context of a preliminary procedure. Moreover, the purpose of the provision at issue – stimulating the production of quality wines by enhancing the possibilities to monitor compliance with the rules establishing the common market for wine – was incompatible with the broad interpretation supported by the Commission.

So even in the context of a criminal procedure, a circumstance in which the ECJ normally attaches a great deal of weight to legitimate expectations, the ECJ is not prepared to protect the individual who relies on a language version which turns out to differ from others but gives decisive weight to the purpose of the legislation. As Schübel-Pfister notes, the ECJ solves the tension between general legal certainty – incorporated in the need for uniform interpretation and application of EU law – and individual legal certainty in favour of the former.[207]

The reason for this is that the ECJ equates the protection of legitimate expectations automatically with the right to rely on a single language.[208] Such a right is at odds with the duty to compare all language versions which exists also for individuals. In section 3.2 it was pointed out that the duty to compare all language versions is a heavy burden for the national courts. This is *a fortiori* the case for individuals. Still, the ECJ creates the assumption that citizens can read official EU languages, which is of course a fiction.[209]

It must be noted, however, that in another context, namely that of legislation which has not been published in one of the official languages, the ECJ does not require individuals to consult the other language versions to acquaint themselves with their

[205] Derlén, p. 55.
[206] Case 238/84 *Criminal proceedings against Hans Röser* [1986] ECR 975, other examples are *Cricket St. Thomas, EMU Tabac,* Case 803/79 *Criminal proceedings against Gérard Roudolff* [1980] ECR 2015 and Case 90/83 *Michael Paterson and others v W. Weddel & Company Limited and others* [1984] ECR 1567.
[207] Schübel-Pfister, p. 346.
[208] *Ibidem,* p. 353.
[209] Derlén, p. 58.

rights and obligations.[210] In such cases the unpublished language version cannot be enforced against individuals because doing so would mean that individuals were to bear the adverse effects of a failure by the EU administration to make EU legislation available in all official languages.[211] Apparently, a distinction must be made between a failure to publish a particular language version and the failure to avoid publishing diverging language versions. In the light of the inevitability of such divergences and the attention the EU pays to the multilingual nature of its legislation in the drafting process this distinction appears justified.

It is obvious that requiring individuals to compare 23 language versions is problematic in the light of legal certainty since it makes the outcome of interpretation unpredictable. Schilling, who adopts a slightly different approach based on the rule of law aspects of accessibility and forseeability, claims the duty to compare is problematic for both aspects. He points out that while the consultation of a lawyer by an individual poses no problem for the rule of law, a "citizen cannot be expected to require the professional assistance of a posse of translators to answer the question [whether there] "are substantive divergences between the 23 language versions of that law". Especially, if that question does not arise because a single language version is clear and unambiguous when read in isolation.[212]

However that may be, the question whether the ECJ has actually breached the principle of legal certainty in its case-law is not so easy to answer. Derlén and Paunio probably argue that this is the case but the terms in which they do so are quite cautious.[213] Schübel-Pfister and Schilling are both convinced that the practice of the ECJ is problematic and should be changed but seem reluctant to condemn it outright.

The explanation for this reluctance is given by Schilling who observes that in the cases the ECJ has dealt with until now it classifies the provision relied on by the individual as ambiguous or vague. This ambiguity is crucial because, as was seen in the context of public international law, it may rebut the presumption that all language versions have the same meaning. Therefore, such cases must be classified as exceptions to the general rule that provisions will be clear when read in isolation.[214] As noted above, it would be in line with the ECJ's case-law in other areas to protect the legitimate expectations of individuals derived from a provision which is clear when read in isolation. In such a case an individual must reasonably be allowed to trust his own language version and should be protected when confronted with an interpretation which differs from what could have been expected, even when his legitimate expectations compromise the aim of the provision in question.

In contrast, Schilling argues, legitimate expectations derived from a provision which is ambiguous when read in isolation are not worthy of protection. In such cases a duty to consult other language versions arises because the ECJ only offers protection of legitimate expectations to diligent persons who could not have foreseen the consequences of an unfavourable interpretation adopted by the ECJ due to diverging

[210] Case 160/84 *Oryzomyli Kavallas OEE and others v Commission of the European Communities* [1986] ECR 1633, paras, 11-21 and *Skoma-Lux*, para. 43-46.
[211] *Skoma-Lux,* para. 42.
[212] Schilling, p. 58.
[213] Derlén, p. 57; Paunio 2007, p. 401.
[214] Schilling, p. 64.

language versions. Relying on an ambiguous provision means that the requirement of diligence has not been fulfilled and therefore a duty to compare is justified. It is basically a question of risk allocation. If the provision to be interpreted is clear the risk of an unexpected and unfavourable interpretation should not have to be borne by an individual but by the EU, since it is the EU which is responsible for drafting high-quality legislation.[215]

Since, according to Schilling, the ECJ has until now only dealt with the exceptions to the rule, i.e. only with ambiguous and not with clear provisions, in cases where protection of legitimate expectations seemed justified, its interpretation practice cannot be said to be incompatible with legal certainty.

However, this raises the question how an individual is supposed to know that the provision he relies on is ambiguous. Derlén argues on the basis of the *EMU Tabac* case that the ECJ requires a comparison of all language versions before an individual can safely say whether a provision is ambiguous. This would of course undermine the distinction Schilling makes between clear and ambiguous provisions and seems to form the basis for Derlén's conclusion that the practice of the ECJ is incompatible with the principle of legal certainty. However, the judgement does not support Derlén's reading. In *EMU Tabac* the ECJ does not require consultation of all language versions for the removal of ambiguity but an examination of the context.[216] It rejects the argument of the plaintiff that the principle of legal certainty

> "implies that the Directive should be so construed as to give the benefit of any ambiguity to private individuals in so far as it is liable to entail financial consequences".

It concludes that the provision which can be seen as ambiguous when read in isolation – i.e. without looking at other language versions or the other provisions of the same directive – is in fact clear when the context is taken into account.[217] The context consists of the other provisions of the same directive in one language version. There is no indication that the ECJ requires a diligent individual to do more than read the whole text in his own language version before relying on one provision of that text. This is acceptable from the perspective of legal certainty because it is reasonable to require people to read the entire text of a piece of EU legislation and not only the provisions which are favourable for them. The same idea is expressed in Article 31 VCLT, which instructs interpreters to look for the ordinary meaning of terms when read in their context. By disregarding the context, whether deliberately or not, individuals incur the risk that the interpretation they consider to be correct will not be the one adopted by the ECJ.

In the end, the conclusion must be that the practice of the ECJ until now is not incompatible with the principle of legal certainty. However, this is only due to the fact that the question whether the legitimate expectations of individuals had to be protected has only been dealt with in relation to ambiguous provisions. If the ECJ in future cases were to deny such protection also to individuals relying on clear and unambiguous provisions because of the duty to compare all languages, this would

[215] Schilling, p. 61-63.
[216] *EMU Tabac,* para. 38.
[217] *Ibidem,* para. 40.

result in a violation of the principle of legal certainty. The judgement in the *Ferriere* case, in which the appellant argued it had a right to rely on its own language version – which was, of course, rejected – while legal certainty or legitimate expectations were not considered, is a clear indication that the ECJ will probably not change its problematic approach depending on the provision being clear or ambiguous. Therefore, it is recommended that the ECJ balances the legitimate expectations of individuals against the need for a uniform interpretation and application of EU law, at least when the provision is clear and an unpredictable interpretation would lead to unfavourable results for the individual.

One last remark on this issue is that it could be argued that a duty to compare all language versions would in all cases be contrary to legal certainty because such a requirement is disproportionate for individuals – regardless of the question whether the provision relied on is clear or ambiguous – in view of the large number of equally authentic languages. Although this is a valid argument the duty to compare all language versions results automatically from the fact that all 23 official languages have been given equal status. The problem could be solved by requiring individuals to perform a comparison involving only a limited number of language versions and in fact this is what the national courts often do. However, this is incompatible with the principle of linguistic equality and from a legal perspective this solution would require the EU language regime to be changed.

4.2.2 Legal Certainty and the Use of the Teleological Method

The second source of tension between the interpretation practice of the ECJ in case of diverging language versions and the principle of legal certainty is the use of the teleological method of interpretation. As indicated in section 3.1, there are several reasons why the ECJ uses the teleological method relatively often, one of them being the multilingual nature of EU legislation and more in particular the fact that all language versions of documents of general application are equally authentic. This fact diminishes the usefulness of the textual method in case of divergences between language versions. Since the ECJ adheres strictly to the principle of linguistic equality and always emphasises the need to protect the uniform interpretation of EU law it is very careful not to give priority to a particular language version. After all, none of the linguistic versions should be decisive.[218] The teleological method of interpretation is particularly suited to avoid preferring one text to another because the purpose of an EU legal instrument can be established independent of the languages in which the text is drafted. It should therefore be emphasised that the ECJ uses the teleological method to solve a problem which exists in EU law and which it cannot simply ignore. The cause of the problem is the equal authenticity of all language versions on the one hand and the task of the ECJ to interpret all texts in a uniform manner on the other.

Nevertheless, when the teleological method and the practice of the ECJ with regard to the use of this method are assessed from the perspective of legal certainty, some problems are encountered. The first problem is that the use of the teleological method diminishes the weight the court attaches to the wording of the provision to be interpreted. The ECJ strives to create a single uniform legal order regardless of

[218] Paunio 2007, p. 392.

linguistic diversity.[219] Although in the case of diverging language versions it is inevitable that the wording loses some of its significance at a certain point, the words of provisions are important for the principle of legal certainty. After all, legal certainty entails that individuals can acquaint themselves with their rights and obligations under EU law. That is also the reason that the principle of legal certainty requires provisions to be officially published and drafted in a clear and precise manner. This raises the question what use it is for individuals to be able to read clear and precise provisions of EU law in their own language if in case of divergences between language versions the ECJ decides to focus on object and purpose of the instrument and is prepared to adopt an unfavourable interpretation which is not supported by the wording in that language version. There is a clear risk that foreseeability and predictability will be undermined, because the ECJ might adopt an interpretation which individuals could not possibly have predicted on the basis of their own language version. Especially when a provision is clear and unambiguous in the language version which an individual is able to read, such an interpretation runs the risk of being contrary to the principle of legal certainty because it is not in line with their legitimate expectations. It should be added that this risk exists particularly when the ECJ uses the radical teleological method because in such cases it does not attempt to reconcile diverging texts on the basis of linguistic arguments.

A second problem is related to the fact that in the framework of the teleological method it is necessary to establish the purpose of the text in which the provision to be interpreted occurs. This is by no means an easy task. As has been observed before in the context of treaty law, legal instruments can have various, possibly conflicting, purposes which may have to be balanced against each other. In EU law this problem is particularly salient in relation to primary legislation, because the Treaties contain a large amount of open norms which might conflict in a concrete situation, but it occurs in secondary legislation as well. From the perspective of legal certainty problems could occur when the ECJ establishes the purpose of a provision in a way individuals could not have predicted.

This problem is exacerbated by the fact that the ECJ does not only take into account the purpose of the rules it needs to interpret but also the purpose of the legal context in which those rules exist, i.e. the EU legal order.[220] It should be noted that the purpose of a legal text is often found in the preamble while such broader purposes are defined by the ECJ itself and are therefore less accessible for individuals. The use of these broad objectives thus diminishes the predictability of the interpretation the ECJ will eventually adopt because it adds another element to its interpretation, which is difficult for individuals to asses even with the help of a lawyer. In public international law this approach, which has also been employed by the European Court of Human Rights (ECtHR), has been criticised, *inter alia* by Sinclair. He claims that the ECtHR gives effect to what he calls an "overriding" object and purpose "notwithstanding that the interpretation may do violence to the ordinary meaning of the provision in its context".[221]

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[219] *Ibidem.*
[220] Maduro, M. P. *Interpreting European law – Judicial Adjudication in a Context of Constitutional Pluralism.* 2008. <http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1134503> accessed on 9 July 2010.
[221] Sinclair, p. 133.

It should be noted that the problem is not limited to the use of broad objectives with which individuals will not be familiar. The broad interpretation by the ECJ of the purposes of a legal text may have the same effect. If the ECJ adopts a broad interpretation of the objective of a text this will, of course, influence the outcome of its teleological interpretation in case of diverging language versions since some versions will be more in line with a broad interpretation while others may support a narrower interpretation. If an individual could not have predicted the ECJ establishing the purpose of a legal instrument in such a broad manner this might be problematic for legal certainty.

To minimise this problem it is recommended that the ECJ, as far as possible, avoids relying exclusively on purposes which cannot be found in the text of a legal instrument. In addition, it should not interpret the purpose found in the text in an overly broad manner. In other words, consideration of object and purpose must be largely confined to the terms of the text to minimise the danger that the teleological method will involve an excessive departure from the text resulting in unpredictability for individuals.[222]

A second way in which the drawbacks of the use of the teleological method can be minimised is by basing judgements on solid legal reasoning. This means that the arguments on which the ECJ relies must be convincing and must be presented in a way that support the eventual outcome of the interpretation. Specifically with regard to the teleological method it means that the ECJ will have to explain how it establishes the objective of a text and why it might take other objectives into account as well. In addition, it will have to explain why the interpretation eventually adopted is better suited to achieve the object established than an alternative interpretation. In other words, the ECJ will have to recognise all relevant arguments in its reasoning and state reasons for its choice for a specific interpretation.[223]

By ensuring that its judgements are the result of convincing legal reasoning the ECJ can enhance predictability and thus legal certainty because it makes it easier to foresee how the ECJ will solve future disputes. However, predictability does not mean that every person will interpret a given provision in the same way. The criterion is rather whether clear agreement on an interpretation may be reached among authorised experts.[224] Convincing reasoning also diminishes the problem of objectives which cannot be found in the text of a legal instrument because these objectives can be traced in the case-law of the ECJ. Although there is no formal system of precedents, the ECJ will normally follow its own case-law, reducing the risk of unpredictable judgements.

It should be noted however, that the fact that the ECJ gives majority judgements without publishing dissenting opinions means that its legal reasoning is not always as convincing as it should ideally be. In cases in which the judges are divided on a certain question it is inevitable that the clarity of the legal reasoning will suffer because of the need to find consensus.

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[222] Sinclair, p. 118.
[223] Paunio, E. 'Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' *German Law Journal* 10, 2009, p. 1492.
[224] *Ibidem*, p. 1480.

An area in which the legal reasoning of the ECJ is insufficient is in fact the interpretation of multilingual EU legislation in case of diverging language versions. As was observed in section 3.2, the ECJ will in some cases use a criterion of doubt while in others it explicitly rejects this criterion. In section 3.3 it became clear that the ECJ uses different methods of reconciliation but it is impossible to create a theory to explain when it will use which method. It should be noted that, in itself, the use of different methods does not have to be a cause for uncertainty. The uncertainty noted earlier is actually the result of the insufficient justification provided by the ECJ as to why it uses a given method in a particular case.

Examples of defective legal reasoning by the ECJ can also be found in specific cases. It may be recalled that the case *Commission v France* mentioned in section 3.4.3 concerned the question whether it was possible to impose both a lump sum and a penalty payment on a Member State which did not comply with an earlier ECJ judgement. Despite the fact that the text of the provision contained the word "or" in all language versions the ECJ ruled that this should in fact be read as "and/or". The ECJ reasoned that because the conjunction "or" could linguistically be understood in an alternative or a cumulative sense, which was undisputed by the disagreeing Member States, it had to be interpreted in a cumulative sense in light of the objective pursued.[225] Although the reasoning appears logical it is not. It may perhaps be possible to use the conjunctions "and" and "or" interchangeably in certain types of sentences, however it does not logically follow that this is possible in every sentence. It certainly is not in the provision in question. The ordinary, unrestrained meaning of "or" refers to two alternatives. The ECJ reasons that because the special meaning "and/or" is not excluded *in abstracto* it can and even must be used here *in concreto.* This reasoning must be deemed in conflict with what in German is called the *Wortlautgrenze,* the limit imposed by the wording of a law to its interpretation. This limit follows directly from the requirement of forseeability and is accordingly important for legal certainty.[226] If judges disregard the *Wortlautgrenze* individuals, but the same is true for states, as in this case, are unable to foresee the legal consequences of a legal instrument on the basis of its wording.

A last remark on legal reasoning which must be made is that basing judgements on convincing legal reasoning is not only important for the predictability of adjudication but also for the acceptability of the ECJ's judgements, i.e. for substantive legal certainty. This, in turn, is important for the way national courts apply EU law and for the compliance with EU law by individuals.

4.3 Conclusion

The question whether the way the ECJ deals with the interpretation of EU legislation in case of diverging language versions is compatible with the principle of legal certainty is a difficult question to answer. However, it is undeniable that there is a considerable tension between the ECJ's approach and this principle. This tension stems from two aspects of the interpretation practice of the ECJ: the duty to compare all language versions and the importance of the use of the teleological method.

[225] *Commission v France,* para. 83.
[226] Schilling, p. 53.

With regard to the first aspect the conclusion must be that the practice of the ECJ until now is not incompatible with the principle of legal certainty. However, this is only due to the fact that the question whether the legitimate expectations of individuals had to be protected has only been dealt with in relation to ambiguous provisions. If the ECJ were to adopt the same approach in cases in which individuals rely on clear and unambiguous provisions, this would result in a violation of the principle of legal certainty.

With regard to the second aspect it must be emphasised that the ECJ uses the teleological method to solve a problem which exists in EU law because divergences between language version are inevitable while all versions are equally authentic and must be interpreted in a uniform way. However, its use may still be problematic from the perspective of legal certainty because it diminishes the weight the ECJ attaches to the wording of the provision to be interpreted while individuals depend on this wording to know their rights and obligations under EU law. In addition, use of the teleological method requires the ECJ to establish the purpose of the legal instrument it has been called upon to interpret. This raises two concerns: the ECJ may establish the purpose of a text in an overly broad manner and it may decide not only to consider the purpose of the rules but also the purpose of the EU legal order as a whole. Both concerns are problematic in light of the principle of legal certainty because they can reduce the predictability of ECJ judgements. In both cases the legitimate expectations individuals might derive from the wording of a certain provision or text may be infringed. The concerns raised can be minimised by avoiding exclusive reliance on purposes which are not mentioned in the text to be interpreted and by ensuring that judgements are based on solid legal reasoning. However, there are indications that the legal reasoning of the ECJ could be improved.

Conclusions and Recommendations

From the analysis of the way the ECJ deals with the interpretation of multilingual legislation in the case of diverging language versions the conclusion can be drawn that the ECJ's practice is far from uniform. In the first place, there is uncertainty surrounding the question whether the interpretation of EU law requires performing a comparison of all language versions in each and every case or whether there is a (conditional) right to rely on a single language version. A second point of uncertainty stems from the fact that the ECJ uses several approaches to reconcile diverging language versions, while it is not clear why the approach in question is used in a particular case.

A first recommendation is therefore that the ECJ makes explicit choices to eliminate these points of uncertainty. The need for such explicit choices follows clearly from the comparison of the ECJ's practice with the interpretation rules laid down in the VCLT. Indeed, those rules were explicitly adopted in an attempt to resolve similar points of uncertainty which existed in public international law. With regard to the first point the ECJ should make clear that it will no longer employ the so-called criterion of doubt. Alternatively, the ECJ could preserve the criterion of doubt but in that case it would have to describe exactly the category of cases in which the criterion would be applicable.

In connection with the three reconciliation approaches it is recommended that the ECJ's practice be systematised. Again, as in the VCLT, explicit choices should be made. The best option would be to use reconciliation and examination of the purpose as the standard approach. In this way it is clear in advance which elements – text, purpose and/or context – the ECJ will take into consideration while recognising that a linguistic approach in itself will usually not suffice when divergences are involved. Only in exceptional cases, that is to say when a linguistic analysis in combination with the examination of the purpose and/or context does not yield any result, recourse should be had to the radical teleological method. It should be added that the ECJ should always apply the two approaches in that order and that the radical teleological method should only be used when the meanings found in diverging language versions are mutually exclusive. The ECJ should prove this is the case instead of simply stating that a textual interpretation is to no avail when diverging language versions are involved. The recommended approach can be compared to the way the general rule of interpretation of Article 31 VCLT relates to the specific rule of Article 33(4) VCLT. This approach guarantees that even in case of diverging language version the text of a provision remains the starting point of any interpretation, which is important for legal certainty.

Another conclusion which can be drawn is that the practice of the ECJ cannot be said to be incompatible with the principle of legal certainty although there is considerable tension between the two. This tension stems from two aspects of the ECJ's interpretation practice: the duty to compare all language versions and the importance of the use of the teleological method. The first aspect is problematic because the principle of legal certainty requires that individuals should be able to acquaint themselves with their rights and obligations under EU law in their own language, while the practice of the ECJ reveals that it can arrive at an interpretation which

individuals could not have expected on the basis of their own language version. Despite this tension the practice of the ECJ until now cannot be said to be incompatible with the principle of legal certainty. However, this is only due to the fact that the question whether the legitimate expectations of individuals had to be protected has only been dealt with in relation to ambiguous provisions. If the ECJ were to adopt the same approach in cases in which individuals rely on clear and unambiguous provisions, this would result in a violation of the principle of legal certainty.

It is therefore recommended that the ECJ balances the legitimate expectations of individuals against the need for a uniform interpretation and application of EU law, at least when the provision is clear and when an interpretation which individuals could not have predicted on the basis of their own language version would lead to unfavourable results for the individual.

With regard to the relationship between legal certainty and the importance of the use of the teleological method it can be concluded that the teleological method raises two concerns: the ECJ may establish the purpose of a text in an overly broad manner and it may decide not only to consider the purpose of the rules but also the purpose of the EU legal order as a whole. The problem in both cases is that the predictability of ECJ judgements may be reduced. In both cases the legitimate expectations individuals might derive from the wording of a certain provision or text may be frustrated. The concerns raised can be minimised in different ways.

It is recommended, again, that the ECJ uses one standard approach for the interpretation of multilingual EU legislation in case of diverging language versions as far as possible. The approach recommended above diminishes the risk that the ECJ will depart too far from the text of the provision to be interpreted because it emphasises the role of the text as a starting point for its interpretation. This reduces the possibility of establishing the purpose of a text in an overly broad manner.

In addition it is recommended that the ECJ avoids relying too much on purposes which are not mentioned in the text to be interpreted. It should be noted that the legislature could enhance legal certainty in this regard by explicitly stating the purpose of EU legislation in the preamble. The ECJ itself can diminish this problem by limiting itself as far as possible to purposes which can be found in its own case-law.

A last recommendation is that the ECJ should always ensure that its judgements are based on solid legal reasoning. With regard to the teleological method this means that the ECJ will have to explain how exactly it has established the purpose of a text and why it has taken other objectives into account as well. In addition, it will have to explain why the interpretation eventually adopted is better suited to achieve the object established compared to an alternative interpretation.

A final remark that should be made with regard to the recommendations above is that they all relate to the practice of the ECJ. Another way to solve some of the problems observed would be to reform the EU language regime. Schilling, for instance, is in

favour of having one authentic text accompanied by 22 official translations.[227] Although the issue of reforming the EU language regime raises all sorts of interesting questions it is politically unfeasible at the moment and has therefore not been included in this thesis.

[227] Schilling, p. 66.

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