

# CURRENT PRACTICES WITH REGARD TO THE INTERPRETATION OF MULTILINGUAL EU LAW: HOW TO DEAL WITH DIVERGING LANGUAGE VERSIONS?

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*European Union (EU) law is equally authentic in 24 language versions. While this multilingualism enhances legal certainty by enabling individuals to ascertain their rights and duties under EU law in their own language, it paradoxically also reduces legal certainty, as it entails that full trust may not be placed in any single language version of EU law. Indeed, according to the settled case law of the European Court of Justice (ECJ), the true meaning of EU law is to be established by means of a purposive/systematic interpretation in the light of all language versions. On the basis of court practices in the Netherlands, this article explores if, and to what extent, national judges take into account the multilingual aspect of EU law. It is assessed in that regard whether current practices raise issues of legal certainty, in particular in case of diverging language versions. It is argued that, in contrast to apparent current practices, language comparison should be a default step in the interpretation and application of EU law, as otherwise discrepancies between language versions of EU law may remain unnoticed. Moreover, national courts should refer such discrepancies to the ECJ. Lastly, national courts should use their margin of appreciation to attenuate any adverse effects for individuals who acted on the basis of a diverging language version.*

**Keywords:** EU law, multilingual law, equal authenticity, discrepancies, legal certainty, legality

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## I. INTRODUCTION

European Union (EU) law is equally authentic in 24 language versions. While this multilingualism enhances legal certainty by enabling individuals to ascertain their rights and duties under EU law in their own language, it paradoxically also reduces legal certainty, as it entails that full trust may not be placed in any single language version of EU law. Indeed, according to the settled case law of the European Court of Justice (ECJ),<sup>1</sup> EU law must be interpreted in a uniform way and the true meaning of EU law is to be established by means of a purposive/systematic interpretation in the light of all language versions. In recent years, this method of interpretation has increasingly attracted scholarly attention.<sup>2</sup> In this context, most authors

<sup>1</sup> In this article, references to the ECJ are to the Court of Justice as part of the Court of Justice of the European Union (CJEU) and therefore do not refer to the General Court or the CJEU as a whole.

<sup>2</sup> In the more distant past, legal issues linked to multilingualism received little attention (see Jacques Ziller, 'Multilingualism and its Consequences in European

focus their attention on the issue of legal certainty at EU level.<sup>3</sup> Considerably less consideration has been given to the practices of national courts when

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Union Law' in Hermann-Josef Blanke, Pedro Cruz Villalón, Tonio Klein and Jacques Ziller (eds), *Common European Legal Thinking – Essays in Honour of Albrecht Weber* (Springer 2015) 437-438; Anne Lise Kjær and Silvia Adamo, 'Linguistic Diversity and European Democracy' in Anne Lise Kjær and Silvia Adamo (eds), *Linguistic Diversity and European Democracy* (Ashgate 2011) 1; see on the issue of multilingual interpretation inter alia Cornelis J. W. Baaij, 'The Significance of Legal Translation for Legal Harmonization' in Cornelis J.W. Baaij (ed), *The Role of Legal Translation in Legal Harmonization* (Wolters Kluwer 2012) 1-24; Cornelis J.W. Baaij, 'Fifty Years of Multilingual Interpretation in the European Union' in Peter M. Tiersma and Lawrence M. Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 217-231; Joxerramon Bengoetxea Caballero, 'Multilingual and Multicultural Legal Reasoning: the European Court of Justice' in Kjær and Adamo (n 2) 97-122; Mattias Derlén, *Multilingual Interpretation of European Union Law* (Wolters Kluwer 2009); Lucie Pacho Aljanati, *The Court of Justice of the European Union's Case Law on Linguistic Divergences (2007-2013): Interpretation Criteria and Implications for the Translation of EU Legislation (PhD Thesis)*, Université de Genève, 2015, <<https://archive-ouverte.unige.ch/unige:76529>> accessed 9 August 2018; Barbara Pozzo, 'L'interpretazione della Corte del Lussemburgo del testo multilingue: una rassegna giurisprudenziale' in Elena Ioriatti Ferrari (ed), *Interpretazione e traduzione del diritto* (CEDAM 2008) 73-112; Karen McAuliffe, 'Language and Law in the European Union: the Multilingual Jurisprudence of the ECJ' in Tiersma and Solan (n 2) 200-216; Christoph Sobotta, 'Die Mehrsprachigkeit als Herausforderung und Chance bei der Auslegung des Unionsrechts' (2015) *Zeitschrift für Europäische Rechtslinguistik*, <<http://www.zerl.uni-koeln.de/christoph-sobotta/2015/mehrsprachigkeit-unionsrecht>> accessed 9 August 2018.

<sup>3</sup> See inter alia Elina Paunio, *Legal certainty in Multilingual EU law, Language discourse and Reasoning at the European Court of Justice* (Ashgate 2013); Elina Paunio, 'Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10 *German Law Journal* 1469-1493; Susan Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union' (2013) *International Journal of Law, Language and Discourse* 1-29; Theodor Schilling, 'Beyond Multilingualism: on Different Approaches to the Handling of Diverging Language Versions of a Community law' (2010) *European Law Journal* 47-66; Jérémie Van Meerbeek, 'The Principle of Legal certainty in the Case Law of the European

dealing with multilingual issues. As Bobek aptly remarks, this topic has largely remained 'beyond the textbooks'.<sup>4</sup> Yet, as national courts play a pivotal role in the interpretation and application of EU law, the methods they use seem well worth investigating in all EU Member States. In that regard, the most comprehensive scholarly study is that of Derlén who has assessed the issue in Denmark, England and Germany.<sup>5</sup> This paper supplements the available data by examining current court practices in the Netherlands. The purpose of this paper is, however, broader. In Section II, the current state of affairs regarding the interpretation of multilingual EU law will be discussed on the basis of case law of the ECJ. In Section III, current practices in national courts with regard to multilingual interpretation will be explored. In Section IV, the paper focuses on points of concern in current practices, such as the extent to which linguistic discrepancies may remain unnoticed by national judges and whether issues which are detected are, as a general rule, referred to the ECJ by means of a request for a preliminary ruling. Another point of concern is the possible lack of predictability and foreseeability of multilingual norms (in case of discrepancies between language versions). Section V explores how the rights of individuals could be enhanced in that regard. It will be argued that national courts should use their margin of appreciation to attenuate any adverse effects which may arise for individuals

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Court of Justice: From Certainty to Trust' (2016) *European Current Law (Yearbook)* 137-148.

<sup>4</sup> Michal Bobek, 'The Multilingualism of the European Union Law in the National Courts: Beyond the Textbooks' in Kjær and Adamo (n 2) 123-142.

<sup>5</sup> Derlén (n 2) discusses a total of 186 cases in which one or more foreign language versions have been used in the countries at issue. As to the United Kingdom, it is important to note that his survey is limited to England; see also Mattias Derlén, 'In Defence of (Limited) Multilingualism: Problems and Possibilities of the Multilingual Interpretation of European Union law in National Courts' in Kjær and Adamo (n 2) 143-166; Mattias Derlén, 'A Single Text or a Single Meaning: Multilingual Interpretation of EU legislation and CJEU Case Law in National Courts' in Susan Šarčević (ed), *Language and Culture in EU law: Multidisciplinary Perspectives* (Ashgate 2015) 53-72.

who acted, in good faith, on the basis of a diverging language version of EU law.

## II. INTERPRETATION OF MULTILINGUAL EU LAW: THE *STATUS QUAE*STIONIS

### 1. *Discrepancies between Language Versions*

EU primary law is equally authentic in 24 languages.<sup>6</sup> According to ECJ case law,<sup>7</sup> the same is true of EU secondary law.<sup>8</sup> Equal authenticity, a safeguard for legal certainty as it enables the addressees of the law to ascertain their rights and duties in their own language, may, however, rather paradoxically, also lead to interpretation disputes in case of alleged or real linguistic discrepancies between the language versions. In EU law, various scenarios may be discerned in this regard: discrepancies may occur between various versions of primary or secondary law, as well as, in the case of directives,

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<sup>6</sup> Art 55 Treaty on the European Union (TEU) and art 358 Treaty on the Functioning of the European Union (TFEU).

<sup>7</sup> ECJ, case 283/81 *CILFIT*, EU:C:1982:335, para 18. It should be noted that Regulation 1/1958, which lays down the language regime of EU institutions, stipulates in its article 4 that regulations and other documents of general application must be drafted in the EU official languages. It does, however, not explicitly grant equal authenticity to the language versions of secondary EU law (Council Regulation No 1/1958 determining the languages to be used by the European Economic Community, *OJ* English special edition: Series I Volume 1952-1958, 59 (lastly amended by Council Regulation (EU) No 517/2013 of 13 May 2013, *OJ* L 158/1)).

<sup>8</sup> Irish, a Treaty language since the accession of Ireland in 1973, became an EU official language only in 2005. However, a transitional derogation is in force (until 2022): only regulations adopted jointly by the European Parliament and the Council are translated in Irish (Council Regulation (EU, Euratom) 2015/2264 of 3 December 2015 extending and phasing out the temporary derogation measures (...) introduced by Regulation (EC) No 920/2005, *OJ* L 322/1). A similar transitional derogation applied to the Maltese language until 1 May 2007 (Council Regulation (EC) No 930/2004 of 1 May 2004 on temporary derogation measures relating to the drafting in Maltese of the acts of the institutions of the European Union, *OJ* L 169/1).

between a language version of a directive and the norm transposing into national law that directive in the same language.

Such discrepancies may be either textual or conceptual.<sup>9</sup> Textual divergences include legislative drafting issues<sup>10</sup> or, in the case of multilingual EU law, translation errors, which may give rise to structural-grammatical differences (punctuation, conjunctions, omissions or additions, etc.).<sup>11</sup> Conceptual or semantic divergences, on the other hand, concern the use of terms. For example, one language version might contain a polysemous term or a term with a more restrictive meaning or there may be a lack of consistency in the use of terms (e.g. different terms are used in one language version whereas in other languages one and the same term covers the concept at issue).<sup>12</sup> In a more general way, these forms of conceptual indeterminacy in a given language may be described as 'vagueness', or 'ambiguity'.<sup>13</sup> The conceptual incongruity may be the result of legislative or translation errors, but may also simply be unavoidable in multilingual law, namely where there is a lack of equivalence between corresponding legal concepts in different legal systems.<sup>14</sup> Furthermore, seemingly identical concepts may be incongruous not only between different national legal cultures, but also between national law and EU law.<sup>15</sup>

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<sup>9</sup> See, in that regard, Pachó (n 2) 124, 136, 236 et seq.

<sup>10</sup> Lawrence Solan, 'Linguistic Issues in Statutory Interpretation' in Tiersma and Solan (n 2) 96 et seq.

<sup>11</sup> Pachó (n 2) 124, 136, 236 et seq; Aleksander Peczenik, *On Law and Reason* (Kluwer Academic Publishers 1989) 24.

<sup>12</sup> Pachó, (n 2) 124, 136, 236 et seq.

<sup>13</sup> An expression is ambiguous if it has multiple meanings (e.g. a bank may be a river bank or a commercial bank). It is vague if the definition of the concept itself is not clear (e.g. what are 'undue' conditions?). See Peczenik (n 11) 21 and Ralf Poscher, 'Ambiguity and Vagueness in Legal Interpretation' in Tiersma and Solan (n 2) 129.

<sup>14</sup> Susan Šarčević, 'Challenges to the Legal Translator' in Tiersma and Solan (n 2) 194; Baaij (n 2) 225.

<sup>15</sup> Joël Rideau, 'Justice et langues dans l'Union européenne' in Cristina Mauro and Francesca Ruggieri (eds), *Droit pénal, langue et Union européenne* (Bruylant 2013) 41; Esther van Schagen, 'More Consistency and Legal Certainty in the Private Law

## 2. Case Law of the ECJ

There is extensive case law of the ECJ on the issue of linguistic discrepancies between language versions of EU law.<sup>16</sup> The Court first established its position half a century ago, when it was asked for the first time to rule on this issue.<sup>17</sup> Since then, the ECJ uses a more or less standardized formula whenever a linguistic discrepancy arises and consistently recalls that 'provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part'.<sup>18</sup> In addition, in

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Acquis: a Plea for Better Justification for the Harmonization of Private Law' (2012) *Maastricht Journal of European and Comparative Law* 56. See also ECJ, case 283/81 *CILFIT*, EU:C:1982:335, para 19: 'It must also be borne in mind that even where the different language versions are entirely in accord with one another, Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.'

<sup>16</sup> See the following footnotes, in particular n 18. For overviews of case law, see Baaij (n 2) 221 et seq; Bengoetxea Caballero (n 2) 97-122; Derlén (n 2) 43 et seq; Mc Auliffe (n 2) 200-216; Pacho (n 2) 136 et seq; Pozzo (n 2) 73-112; Šarčević (n 3) 13; Schilling (n 3) 55 et seq; Stefaan van der Jeught, *EU Language Law* (Europa Law Publishing 2015) 127 et seq.

<sup>17</sup> ECJ, case 19/67 *Van der Vecht* EU:C:1967:49, 354.

<sup>18</sup> Eg *ex pluribus* ECJ, case 29/26 *Erich Stauder v City of Ulm, Sozialamt* ECLI:EU:C:1969:57, para 3; ECJ, case 30/77 *Regina v Pierre Bouchereau*, ECLI:EU:C:1977:172, para 14; ECJ, case 283/81 *CILFIT* EU:C:1982:335, para 18; ECJ, case C-404/16 *Lombard Ingotlan Lizing* EU:C:2017:759, para 21; ECJ, case C-48/16 *ERGO Poist'ovňa* EU:C:2017:377, para 37; ECJ, joined cases C-443/14, *Ibrahim Alo* and C-444/14, *Amira Osso* EU:C:2016:127, para 27; ECJ, case C-74/13 *GSV* EU:C:2014:243, para 27; ECJ, case C-558/11 *Kurcums Metal* EU:C:2012:721, para 48. Baaij has identified a total of 30 judgments in the ECJ case law in which this stock phrase is used (Baaij (n 2), 218).

its landmark *CILFIT* judgment, the ECJ made it clear that this obligation also extends to national courts when applying and interpreting EU law.<sup>19</sup>

The standard formula seems to give the ECJ quite some leeway to assess cases of discrepancy in order to find adequate solutions and provide for a uniform interpretation of all the language versions. To achieve that aim, the ECJ may use a literal interpretation method (comparing and reconciling the wording of different language versions) or a teleological-systematic method (reasoning based on the general scheme and the purpose of the rules at issue).<sup>20</sup> One method does not exclude the other: both may be combined in one and the same interpretation process for a given provision.<sup>21</sup> According to Baaij, the literal method is the prevailing one, in particular in case of translation errors.<sup>22</sup> Moreover, when using the literal method, the ECJ may base its interpretation on the 'majority of languages' or, on the contrary, refer to the 'clarity' argument, i.e. favour an interpretation on the basis of one or more clear language versions.<sup>23</sup> On the other hand, the ECJ does not generally compare all language versions, at least not explicitly.<sup>24</sup> Although the ECJ does sometimes implicitly refer to all the language versions of the provision(s) at issue,<sup>25</sup> the most commonly used technique is, in current practice, that of a limited linguistic comparison whereby the provisions in the language of the case (which have given rise to the linguistic issue in the first place) are

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<sup>19</sup> ECJ, case 283/81 *CILFIT* EU:C:1982:335, para 18.

<sup>20</sup> See Pacho (n 2) 326; Derlén (n 2) 43 et seq.

<sup>21</sup> Solan argues, as to court practices in the US, that the categorical disagreement between purposive and literal interpretation is more a matter of degree. According to him, it's all about 'balancing the language, intent and broader goals of the legislation to produce an interpretation that is simultaneously as faithful as possible to all three considerations' (Lawrence Solan, 'Linguistic Issues in Statutory Interpretation' in Tiersma and Solan (n 2) 87-88).

<sup>22</sup> Baaij (n 2) 221, 229.

<sup>23</sup> Ibid.

<sup>24</sup> Sobotta (n 2) 18. It may be that a more extensive comparison is performed in internal discussions, see Rideau (n 15) 41.

<sup>25</sup> Eg ECJ, case C-168/14 *Grupo Itelevesa* EU:C:2015:685, para 42.

compared with a number of other language versions of the same provisions.<sup>26</sup> In practice, these reference languages are most often widely-known languages.<sup>27</sup> Other languages are sometimes included in the comparison, but there is no clear predictable pattern.<sup>28</sup>

Furthermore, in some of its case law as well as in the standardized formula used when dealing with linguistic discrepancies, in particular the phrase '[w]here there is divergence between the various language versions of an EU legislative text', the ECJ seems to suggest that the duty to consult other language versions of EU law is limited to cases in which there are reasons to question the accuracy of one language version.<sup>29</sup> In the same vein, an assessment of the ECJ case law by Baaij seems to indicate that language comparison is not necessarily a default step in the ECJ's own interpretation process, thus suggesting that it compares languages only when in doubt.<sup>30</sup> The

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<sup>26</sup> Eg ECJ, cases C-52/13 *Posteshop* EU:C:2014:150 para 20; C-46/15 *Ambisig* EU:C:2016:530, para 47; C-74/13 *GSV* EU:C:2014:243, para 28.

<sup>27</sup> In a reference period from 1.1.2012 to 31.12.2017, 13 judgments were identified, in which a linguistic comparison was performed (search on published judgments in that period, using the search term '*version linguistique*', by means of the search form on the website CURIA: <www.curia.europa.eu> (accessed 2.12.2018). In all cases (13), the French version was referred to. As to the other languages, explicit references were found to English (7), German (6), Spanish (5), Italian (4), and Portuguese (4). It should be taken into account that French is the internal working language of the ECJ (Karen Mc Auliffe, 'Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ' in Tiersma and Solan (n 2) 203; Rideau (n 15) 33-34; Van der Jeught (n 16) 188 et seq.).

<sup>28</sup> In the period included in the search, Danish (3), Bulgarian (2), Finnish (2), Swedish (2), Polish (2), Estonian (1), Dutch (1), Romanian (1), Czech (1) and Hungarian (1) were also mentioned. See, *ex pluribus*, how languages are checked without clear criteria: ECJ, case C-65/14 *Rosselle* EU:C:2015:339, para 38.

<sup>29</sup> See e.g. ECJ, cases 19/67 *Van der Vecht* EU:C:1967:49, 354; C-64/95 *Konservenfabrik Lubella*, EU:C:1996:388, para 17; C-640/15 *Vilkas*, EU:C:2017:39, para 47; C-559/15 *Onix Asigurari*, EU:C:2017:316, para 39.

<sup>30</sup> According to Baaij the ECJ included a comparison of language versions in the argumentation of 246 of its judgments (1960-2010). In 170 judgments thereof, the ECJ observed discrepancies between language versions. He asserts that a language

ECJ has, however, never explained the extent or the practical application of this 'criterion of doubt'.<sup>31</sup> On the other hand, other ECJ case law seems to indicate that it is mandatory in all instances to compare the various language versions of EU law, irrespective of whether the language version in question is clear and unambiguous.<sup>32</sup> At any rate, it is often only when language versions are compared that divergences are brought to light.

Finally, it follows from the literal or teleological-systematic interpretation methods used by the ECJ in case of linguistic discrepancies between language versions that, first, the uniform interpretation of a given provision of EU law may contradict the clear meaning of that norm in one or more languages<sup>33</sup> and that, second, national judges or individuals can therefore not rely solely on a single language version of EU law read in isolation.<sup>34</sup>

### III. CURRENT PRACTICES IN NATIONAL COURTS

As was already stated in the introduction, the available research on the current practices of national courts is rather limited. In this section, reference will mainly be made to Derlén's empirical findings on Denmark, England and Germany. This will be supplemented and compared with my own research on Dutch case law.<sup>35</sup>

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comparison was thus explicitly performed in only 3 % of all the ECJ judgments between 1960-2010) (Baaij (n 2) 219). Pacho, however, asserts that linguistic comparison is widely used as a method to support interpretation by the ECJ even when no divergences are present. According to her, such comparison takes place in 31% of the cases which she assessed (Pacho (n 2) 227, 234).

<sup>31</sup> Tamara Čapeta, 'Multilingual Law and Judicial Interpretation in the EU (2009) Croatian Yearbook of European Law and Policy 9.

<sup>32</sup> Eg ECJ, cases C-498/03 *Kingscrest* EU:C:2005:322, paras 21-27; C-219/95P *Ferriere Nord* EU:C:1997:375, para 15.

<sup>33</sup> Šarčević (n 3) 16; Schilling (n 3) 55.

<sup>34</sup> Paunio (n 3) 44.

<sup>35</sup> <[www.rechtspraak.nl](http://www.rechtspraak.nl)> (official website where Dutch case law is published). The research was carried out on 21.6.2017. It concerns the period from the beginning of the EEC (1.1.1958) until 21.06.2017. The research included judgments of the *Hoge*

In case of linguistic discrepancies in EU law, national courts may (or have to, in certain cases) seek guidance from the ECJ by means of a request for a preliminary ruling on the basis of article 267 TFEU. Though it is difficult to assess whether, and to what extent, national courts do actually refer questions to the ECJ on linguistic issues or whether they tend to resolve such issues themselves, some evidence seems to point to the latter.

First, the number of preliminary referrals from national courts to the ECJ regarding linguistic discrepancies in EU law is quite limited. According to Baaij, it is therefore unlikely that all cases involving language discrepancies before national courts made their way to the ECJ.<sup>36</sup> He demonstrates that discrepancies between language versions (from 1960 to 2010) gave rise to 170 judgments in which the ECJ acknowledged the existence of linguistic discrepancies. In 110 of these, discrepancies gave rise to interpretation problems. In the same vein, my own more limited survey shows that between 01.01.2011 and 01.12.2018, 42 cases involving discrepancies between language versions of regulations or directives have arisen before the ECJ (6 of these cases concerned furthermore the same linguistic issue in a given directive). Issues were usually raised in direct actions; only 10 cases concern requests for preliminary rulings.

Second, such language issues are only referred to the ECJ by courts from a limited number of Member States, mainly Germany, the Netherlands, the United Kingdom, and Lithuania.<sup>37</sup>

Third, even in these Member States, it is unlikely that all linguistic issues are referred to the ECJ. Derlén notes the reluctance of Danish and English judges to refer questions of this sort to the ECJ.<sup>38</sup> As concerns German case law, he cites judgments of the federal constitutional court upholding the judgments

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*Raad*, the *Raad van State*, the *Centrale Raad van Beroep*, the *College van Beroep voor het bedrijfsleven*, as well as other courts and tribunals (*Gerechtshoven/rechtbanken*) in all areas of law. The search term used was *taalversie* (language version).

<sup>36</sup> Baaij (n 2) 15-16.

<sup>37</sup> *Ćapeta* (n 31) 10.

<sup>38</sup> *Derlén* (n 2) 79 et seq; (n 4) 106-117.

of lower courts where no language comparison was performed and no question had been submitted to the ECJ.<sup>39</sup> Similarly, Dutch case law related to this issue suggests that there is no automatic referral to the ECJ and that in most cases courts deal with discrepancies themselves.<sup>40</sup>

Also, the available research seems to suggest that, in current practice, national judges do not habitually perform a language comparison when interpreting and applying EU law. It would seem that, as a general rule, they compare language versions of EU law only in cases in which an initial suspicion of a linguistic issue in their own language is raised.<sup>41</sup> This is the case when their own language version is unclear or ambiguous or when there is reason to believe that it does not accurately reflect the real intention of EU law makers (for instance in case of internal contradictions or incompatibility with a superior norm or when there are blatant translation errors or omissions).<sup>42</sup> My own research concerning case law in the Netherlands seems to confirm this assumption: no cases were found in which language comparison was an automatic step in the interpretation process. Bobek suggests that doubts about their own language version are often raised by the parties.<sup>43</sup> Similarly, Derlén reports cases in which lawyers submit their own (unofficial) translations of EU secondary law, established on the basis of other authentic language versions, to dispute the language version in the proceedings before the national court.<sup>44</sup> Lawyers may indeed follow a language strategy when other languages offer more possibilities, even when their own language is perfectly clear and unambiguous.<sup>45</sup>

Arguably, a general duty to compare their own language version of EU law with other versions in all cases would place a heavy burden on national courts in terms of time and resources. In current practice, however, it is not unlikely

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<sup>39</sup> Derlén (n 2) 87-92.

<sup>40</sup> See *infra*.

<sup>41</sup> Derlén (n 2) 119 et seq; 172 et seq.

<sup>42</sup> See, in this sense, Derlén (n 5) 153; Schilling (n 3) 61.

<sup>43</sup> Bobek (n 4) 136.

<sup>44</sup> Derlén (n 5) 154-155.

<sup>45</sup> Čapeta (n 31) 11.

that a number of language discrepancies remain unnoticed before national courts. Indeed, as language comparison is not a default step in the interpretation process and as it may be assumed that national courts primarily, if not exclusively, use their own language version of EU law, they may not be aware of any linguistic discrepancies.<sup>46</sup> Incidentally, it may also be that national judges simply do not have the necessary language skills to perform a multilingual interpretation. Interestingly, Derlén observes that, in a majority of cases, those judges performing multilingual interpretation did not explain the method they used to that effect (ranging from dictionaries to translations and comments by legal and language experts).<sup>47</sup> It should also be noted in that respect that even at the ECJ, which can draw on a translation service and multilingual legal staff, language divergences are not always easily discerned.<sup>48</sup> As a general rule, the issue is raised by the parties (in direct actions) or the national courts referring the case for a preliminary ruling (most probably also on the request of the parties themselves).<sup>49</sup> For national courts, which do not have the same resources at their disposal as the ECJ, it is much more difficult to detect linguistic discrepancies and deal with them.

Significantly in this regard, Dutch case law shows an increasing trend in the number of linguistic issues with regard to EU law. Out of a relatively small total number of cases which gave rise to linguistic discrepancies with regard to EU law (84) in the reference period, only 20 date from before 2011; the

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<sup>46</sup> Emilia Mišćenić, 'Legal Translation vs. Legal Certainty in EU Law' in Emilia Mišćenić and Aurélien Raccach (eds), *Legal Risks in EU Law* (Springer 2016) 94, 96. See also Ziller (n 2) 447.

<sup>47</sup> Derlén (n 2) 293.

<sup>48</sup> Schilling (n 3), 59; Sobotta (n 2) 28-29; Čapeta (n 31) 10-11. Language discrepancies may in particular be discovered when those working on the case at the ECJ have proficiency in various languages: their mother tongue, French (the internal working language of the ECJ), as well as the language of the case. The probability of such a multilingual setting is particularly high in some Advocate General's chambers (Advocate Generals draft their Opinions in several languages, in principle in French, English, German, Italian or Spanish). Likewise, translation of procedural documents as well as judgments and opinions may reveal language discrepancies.

<sup>49</sup> Bengoetxea Caballero (n 2) 97; Sobotta (n 2) 28-29; Čapeta (n 31) 10.

remaining 64 cases are from after that year.<sup>50</sup> This increase is, however, not reflected in the number of referrals to the ECJ, which may suggest that linguistic discrepancies could remain to some extent undetected.

Another factor worth mentioning is criticism voiced in legal scholarship concerning incoherent terminology in EU law, in particular with regard to private law.<sup>51</sup> It is asserted that many terms are translated differently and interpreted in quite different ways according to the various legal contexts in which they are used, as there are no general definitions of these concepts in EU law.<sup>52</sup> As Ioriatti-Ferrari aptly notes, EU law is essentially drafted by sector-specific experts or translators, who do not necessarily have legal training, and is only at the final stage revised by legal experts. She argues that this 'law without lawyers' may work well for technical topics but is more problematic in private law, as EU law does not necessarily use the terminology of the various national legal cultures.<sup>53</sup> Furthermore, judges may

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<sup>50</sup> See n 35.

<sup>51</sup> Baaij (n 2) 7; Barbara Pozzo, 'Multilingualism, Legal Terminology and the Problems of Harmonising European Private Law' in Barbara Pozzo and Valentina Jacometti (eds), *Multilingualism and the Harmonisation of European Law* (Kluwer Law International 2006) 13. As Šarčević observes, 'the link between language, law and cultural identity is traditionally the strongest in private law' (Susan Šarčević, 'Creating a pan-European legal language' in Maurizio Gotti and Collin Williams (eds), *Legal Discourse across Languages and Cultures* (Lang 2010) 23.

<sup>52</sup> Ioriatti Ferrari (n 2) 149; Van Schagen (n 15) 37-62; Šarčević (n 51) 28 et seq. At the request of the European Commission experts have drafted a Common Frame of Reference to define inter alia fundamental concepts of private law (Christian von Bar, Eric Clive, Hans Schulte-Nölke, Hugh Beale, Johnny Herre, Jérôme Huet, Peter Schlechtriem, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), prepared by the Study Group on a European Civil Code and the European Research Group on Existing EC Private Law (Acquis Group)* (2009) available at <<https://www.law.kuleuven.be/personal/mstorme/DCFR.html>> accessed 2 December 2018.

<sup>53</sup> '*Diritto senza giurista*' (Ioriatti Ferrari (n 2) 85).

be unaware of conceptual divergences in meaning between language versions and simply apply the concepts they know from their legal culture.

If a language comparison takes place, which languages are compared? Obviously, the idea of comparing all language versions, difficult even for the ECJ, seems completely unrealistic for national judges. Derlén did not identify a single case in which judges in his survey of Denmark, England and Germany consulted all language versions of EU law.<sup>54</sup> Rather, Derlén suggests that, in current practice, national judges compare (in case of doubt) their own language version with a limited number of other languages, predominantly (in 75% of cases) English and French.<sup>55</sup> Dutch case law seems to corroborate these findings as to the limited number of reference languages used, yet suggests an even stronger position of English, while German precedes French, albeit by a narrow margin.<sup>56</sup> At any rate, English is the default language with which the Dutch version of EU law is compared in all cases where linguistic issues arise (with the exception of two cases in which only German was used), while in about half of the cases there is an additional comparison with German and/or French.<sup>57</sup> Similarly, Bobek observes that in Central Europe (the Czech and Slovak Republics, Poland and Hungary), the first reference languages would be 'either English or German'.<sup>58</sup> Besides these widely-known languages, other languages may of course also be used. Bobek

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<sup>54</sup> Derlén (n 2) 288 et seq.

<sup>55</sup> Ibid.

<sup>56</sup> The difference as to the position of French in the research by Derlén could be explained by the fact that, as the author states, French is the best known foreign language to most English judges. Another element in favour of French is that many cases concern customs classifications (Combined Nomenclature) where French (together with English) has special significance. The use of German by Danish judges lags far behind English and French (Derlén (n 2) 289 et seq).

<sup>57</sup> See n 35. On a total number of 84 cases involving language discrepancies, the following references were found: English (84), German (44), French (43), Spanish (4), Italian (3), Danish (2), Finnish (1), Swedish (1). Sometimes there is also a general reference to 'other language versions' without specification.

<sup>58</sup> Bobek (n 4) 138.

suggests that judges may refer to languages which are similar to their own: a Czech judge could, for instance, use the Slovak and Polish versions.<sup>59</sup>

Derlén also gives examples of Danish, German and English courts referring to the English or French version<sup>60</sup> as the original drafting languages. It is indeed common knowledge that English and French have a preeminent place in the legislative process in the EU.<sup>61</sup> One of these languages is used to draft the original text and amendments, as well as in discussions between representatives of the EU institutions involved. The other language versions are in essence translations.<sup>62</sup> The approach taken by some national judges is therefore understandable, although at variance with the guidelines of the ECJ which has, as far as could be ascertained, never referred to the drafting language.

#### IV. POINTS OF CONCERN

Clearly, a general point of concern in this context is quality control of EU legislation in all stages of its production. Indeed, it goes without saying that reducing (literal and conceptual) divergences would, to a large extent, prevent linguistic discrepancy problems. Suggestions include improving the quality of

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<sup>59</sup> Ibid 139.

<sup>60</sup> Derlén (n 5) 154.

<sup>61</sup> In 2013, English was the predominant drafting language (81%), against 4,5% for French and 2% for German. Historically, French was the main drafting language. In 1997, French was still almost at the same level as English (Aleksandra Čavoški, 'Interaction of law and language in the EU: Challenges of translating in multilingual environment' (2017) *The Journal of Specialised Translation* 62).

<sup>62</sup> Baaij (n 2) 12; Elena Ioriatti, *Interpretazione comparante e multilinguismo Europeo* (CEDAM, 2013) 66, 68; Manuela Guggeis, 'Multilingual legislation and the legal-linguistic revision in the Council of the European Union' in Pozzo and Jacometti (n 2) 114, 115.

drafting and translation,<sup>63</sup> increasing harmonization of terminology,<sup>64</sup> as well as making better use of IT-tools to detect language discrepancies.<sup>65</sup> Although these are important remedies to explore, it remains to be seen, however, if it is possible to completely prevent all issues of discrepancies between versions of EU law, as was shown in Section II.1. Moreover, as this article focuses on the application and interpretation of EU law by national courts, the scope of the discussion will be limited here to flaws in that regard, namely the detection of language discrepancies and referral practices to the ECJ. In addition, the issue of legal certainty must be explored, given the fact that individuals may not place full trust in their own language version of EU law (see Section II.2).

### *1. Detection of Language Discrepancies*

An important shortcoming in current interpretation practices in national courts is the possibility that language discrepancies remain unnoticed, which entails the risk of diverging case law in the Member States. Admittedly, the same risk exists to some extent also before the ECJ, but it is greater in (monolingual) national court procedures.

In scholarship, it has been suggested that authentic status should be limited to one or more language versions<sup>66</sup> or alternatively that English and French should be made 'mandatory consultation languages', which national judges would always have to consult as a default step when applying and interpreting EU law.<sup>67</sup> Although such solutions would definitely increase the chances of detecting linguistic issues and may enhance coherence in case law, there are

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<sup>63</sup> Šarčević (n 3) 21-22.

<sup>64</sup> Ibid 23-24. See also Lucie Pacho Aljanati, Promoting Multilingual Consistency for the Quality of EU Law (2017) *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique* 67-79.

<sup>65</sup> Sobotta (n 2) 85 et seq.

<sup>66</sup> See Schilling (n 3) 47.

<sup>67</sup> Derlén (n 2) 355-356; (n 4) 156 et seq.

also important legal and practical obstacles.<sup>68</sup> Arguably, the line between reducing the number of authentic languages and imposing one or more mandatory consultation languages is rather thin. In my view, it appears questionable whether all languages could still be considered equally authentic when special reference status is granted to one or more of them. More substantially, the ECJ would still continue to perform a multilingual interpretation 'on a broad scale', possibly using other languages as well.<sup>69</sup> There would therefore be no guarantee of similar outcomes. In addition, on a more practical note, it seems doubtful whether all judges in all EU Member States currently have sufficient language skills to perform a mandatory consultation of one or more foreign languages as a default step when applying EU law. If this is not certain for English, it is even more doubtful for French. The number of Europeans knowing more than one foreign language is relatively small, and national judges are probably not an exception in that respect.<sup>70</sup> Foreign language skills also vary greatly from one Member State to another.<sup>71</sup>

In any event, it would seem that more research is needed into current practices of multilingual interpretation by judges in the Member States and into their language skills. The Dutch example seems to show in any case that English is the *de facto* reference language among Dutch judges when applying

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<sup>68</sup> As Sobotta argues, EU citizens cannot be expected to follow the law in another language than their own, as an expression of the principle of legal certainty. In addition, he invokes the principle of non-discrimination on the basis of language (art. 21(1) Charter of Fundamental Rights of the EU) and asserts that multilingualism is partially a constitutional principle of the EU (art. 22 Charter). Moreover, he argues that making only one or a few languages authentic, would reduce the quality of other language versions (Sobotta (n 2) 82; see also Rideau (n 15) 69-70 and Šarčević (n 3) 20).

<sup>69</sup> Derlén (n 5) 157.

<sup>70</sup> The most widely spoken foreign languages in the EU are English (38%), French (12%) and German (11%). As far as could be ascertained there are no figures on linguistic skills of judges (but even among 'higher social classes' only about one third has a second foreign language) (European Commission, Europeans and their languages, *Special Eurobarometer 386*, 2012).

<sup>71</sup> Ibid.

and interpreting EU law. It would be important to have empirical data on the situation in all the Member States in that regard. Language training for national judges as well as for law students as part of their curriculum is in any case of the utmost importance.<sup>72</sup> National judges must at the very least be able to assess whether their language version is in line with other language versions, otherwise they cannot apply and interpret EU law correctly.

## *2. Referral to the ECJ*

As shown in Section III, there seems to be no clear and predictable use by the national courts (in the Member States for which data is available) of the ECJ preliminary ruling procedure in cases of linguistic discrepancies. This situation raises concerns as to the uniform application of EU law. Indeed, it seems doubtful that national courts, if they have detected a language discrepancy, are able to provide for an effective and adequate solution in all cases. Furthermore, the literal method (comparing language versions) is not easy to perform for national courts and will, in most cases, consist of a limited comparison, with English and maybe also French or German. Similarly, it is doubtful that a purposive interpretation approach, which incidentally does not seem to be the general method in national courts, could lead to similar outcomes in all the Member States, or, for that matter, in the ECJ. Another reason to resolve discrepancy issues on the EU level may be that problems are often not limited to only one language version, which requires interpretation by the ECJ. Accordingly, it seems preferable to always refer such issues to the ECJ.

Such an approach is also in line with the *CILFIT* case law of the ECJ, entailing that courts and tribunals against whose decisions no legal remedies are

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<sup>72</sup> See Allan F. Tatham, 'The Impact of Training and Language Competence on Judicial Application of EU Law in Hungary' (2012) *European Law Journal* 577 et seq. See also European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme, 2010/2080(INI), §I. See also Georg Kathrein, 'Auslegungsprobleme bei verschiedenen Sprachfassungen', in Gerte Reichelt, *Sprache und Recht* (Ludwig Boltzmann 2006) 77-78.

available may abstain from referring questions to the ECJ only when there is no 'reasonable doubt' as regards the correct application of EU law. Whether or not there is a 'reasonable doubt' must be assessed 'in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community'.<sup>73</sup> Arguably, a 'reasonable doubt' about the correct interpretation and application of EU law exists in cases of a linguistic discrepancy, in particular at the conceptual level and, accordingly, such issues should be referred, as a general rule, to the ECJ.

### 3. *Legal Certainty*

EU multilingualism seems to create a paradox. While it is designed to enhance legal certainty so as to ensure that individuals may ascertain their rights and obligations under EU law in their own language, it also inevitably creates some degree of uncertainty as individuals cannot rely on their own language version alone. Arguably, the lack of full trust in one's own language version could be incompatible with the requirement that the consequences of legal provisions should be predictable and foreseeable to individuals. These are important aspects of the concept commonly known as legal certainty.<sup>74</sup>

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<sup>73</sup> ECJ, case 283/81 *CILFIT* EU:C:1982:335, para 21.

<sup>74</sup> *Rechtssicherheit* in German and as such also known in other continental legal systems. Some authors use the more general term 'rule of law' (Peczenik (n 11) 31). Other authors use the term 'legality' or the broad notion of 'lawfulness' in English (Leonard Besselink, Frans Pennings and Sacha Prechal, 'Introduction: Legality in Multiple Legal Orders' in Leonard Besselink, Frans Pennings and Sacha Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Wolters Kluwer 2011) 6-7). The term 'legality' is, however, also used to define legal certainty in criminal matters (Georg C. Langheld, 'Multilingual Norms in European Criminal Law' (2016) *European criminal law review* 47). As such, legal certainty is also considered to be an aspect of the rule of law (Ubaldo de Vries and Lyana Francot-Timmermans, 'As good as It Gets: On Risk, Legality and the Precautionary Principle' in Besselink et al (n 74) 11) or a consequence thereof (Annika Suominen, 'What Role for Legal certainty in Criminal Law Within the Area of Freedom, Security and Justice in the EU?' (2014) 2 *Bergen Journal of Criminal Law and Criminal Justice* 7). The latter view is also shared

In order to fully grasp the challenge of multilingual interpretation with regard to legal certainty, it is essential to briefly explore in the following paragraphs some relevant aspects and scholarly views of this concept. Although legal certainty as such defies easy definition,<sup>75</sup> it is generally accepted that its main purpose is to regulate the use of power by public authorities<sup>76</sup> as an essential safeguard against arbitrary decisions with regard to individuals.<sup>77</sup> As such, legal certainty establishes the primacy of statute law by the legislature and finds its origin in continental Europe in the French Revolution, where it was established in an effort to limit the law-making role of the courts.<sup>78</sup>

The protection against arbitrariness may appear in both a formal and a substantive guise.<sup>79</sup> As a formal principle, the accessibility of the norm is essential: laws should be public and accessible to all addressees. As a more substantive principle, foreseeability and predictability of the application and consequences of the norm are essential: laws must be clear and precise so as to enable individuals to ascertain the extent of their rights and obligations and foresee the legal consequences of their acts.<sup>80</sup> Individuals must, in other

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by the European Commission (Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law (COM/2014/158), 11.3.2014). In its case law, the ECJ uses the term 'legal certainty'. That term will be used in this paper as well.

<sup>75</sup> Delphine Dero-Bugny, 'Les principes de sécurité juridique et de protection de la confiance légitime' in Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (eds), *Traité de droit administratif européen* (Bruylant 2014) 653; Suominen (n 74) 1.

<sup>76</sup> Besselink et al (n 74) 6-7.

<sup>77</sup> Erik Claes, Wouter Devroe, Bert Keirsbilck (eds), *Facing the Limits of the Law* (Springer 2009) 107; Suominen (n 74) 6.

<sup>78</sup> Besselink et al (n 74) 5-6.

<sup>79</sup> Leen Keus, 'The Principle of Legal Certainty' in Arthur Hartkamp, Carla Sieburgh, Leen Keus, Jeroen Kortmann & Mark Wissink (eds), *The influence of EU law on the National Private Law* (Kluwer 2014) 297.

<sup>80</sup> Paunio sees this as a formal requirement, the substantive aspect being related to 'acceptability' by the legal community (Paunio (n 3) 1469).

words, be able to rely on legislation: they have 'legitimate expectations' in that respect, which need to be protected by the courts.<sup>81</sup>

In that regard it is settled case law of the European Court of Human Rights (ECtHR) that the requirement of 'foreseeability' is fulfilled when a law is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his or her conduct.<sup>82</sup> The ECtHR performs a test of the quality of the legislation in that regard: a provision in national legislation should be phrased in clear terms, avoiding open and vague notions that may give the State authorities unfettered power and leave room for arbitrary interferences.<sup>83</sup>

Though not explicitly enshrined in primary or secondary EU law,<sup>84</sup> the ECJ has acknowledged 'legal certainty' as one of the fundamental general principles of EU law.<sup>85</sup> According to the ECJ, legal certainty requires that rules imposing obligations on individuals have to be clear and precise, avoiding any ambiguity, and that their application should be predictable.<sup>86</sup> On the formal level of legal certainty requirements (accessibility of the law), the ECJ has consistently held, notably in its landmark *Skoma-Lux* judgment, that an EU regulation is not enforceable against individuals in an EU Member State if that regulation has not been officially published in the language of

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<sup>81</sup> Šarčević (n 3) 6; Suominen (n 74) 8. A distinction may be made between 'legal certainty' and the principle of legitimate expectations: the former is 'objective' the latter is 'subjective' (Dero-Bugny (n 75) 655).

<sup>82</sup> Eg ECtHR, cases 37331/97 *Landvreugd*, para 59; 67335/01 *Achour*, para 54 and 75909/01 *Sud Fondi*, para 110.

<sup>83</sup> Aleidus Woltjer, 'The Quality of the Law as a Tool for Judicial Control' in Besselink et al (n 74) 102-105 and case law cited.

<sup>84</sup> Juha Raitio, *The principle of legal certainty in EC law* (Kluwer 2003) 125-266.

<sup>85</sup> Woltjer (n 83), 101. See, for instance, ECJ, cases C-231/15 *Prezes Urzędu Komunikacji Elektronicznej* EU:C:2016:769, para 29; C-98/14 *Berlington Hungary* EU:C:2015:386, para 77; C-201/08 *Plantanol* EU:C:2009:539, para 46.

<sup>86</sup> Woltjer (n 83) 99-101 and case law cited.

that Member State.<sup>87</sup> This applies even if the individuals concerned were able to acquaint themselves by other means with the provisions of the regulation at issue. Although the ECJ has, however, not yet addressed the more substantive issue of legal certainty with regard to linguistic discrepancies in EU law, it has hinted at an incompatibility between legal certainty and the need for a uniform interpretation of diverging language versions, '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'.<sup>88</sup>

The tension between multilingual interpretation and legal certainty seems clear. The extent to which this tension raises concerns should be assessed, however, against the backdrop of the theory of indeterminate terms, according to which, in a nutshell, all (legal) terms are indefinite and vague and require interpretation.<sup>89</sup> Moral acceptability of legal decisions is an important element: according to Peczenik, legal certainty in the material sense is 'the optimal compromise between predictability of legal decisions and their acceptability in view of other moral considerations'.<sup>90</sup>

As to multilingual EU law, scholars influenced by this school of thought defend the view that the trust placed in the ECJ bypasses the problem of possible language discrepancies and leads to an acceptable and trusted solution for all language versions. As Van Meerbeeck asserts, there should be a shift from the Cartesian logic of absolute legal certainty, which he deems unrealistic, towards a 'fiduciary logic'.<sup>91</sup> Likewise, Paunio suggests shifting the focus from clear and unequivocal rules to acceptability and judicial

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<sup>87</sup> ECJ, case C-161/06 *Skoma-Lux* EU:C:2007:773, paras 32 et seq; see also cases C-560/07 *Balbiino* EU:C:2009:341, para 29 and C-146/11 *Pimix* EU:C:2012:450, paras 42 et seq.

<sup>88</sup> ECJ, case 80-76 *North Kerry Milk Products* EU:C:1977:39, para 11; see also case C-340/08 *The Queen, on the application of M and Others v Her Majesty's Treasury* EU:C:2010:232, paras 64-65.

<sup>89</sup> For a discussion of these ideas in legal theory, see Brian H. Bix, 'Legal Interpretation and the Philosophy of Language' in Tiersma and Solan (n 2) 146-147.

<sup>90</sup> Peczenik (n 11) 32.

<sup>91</sup> Van Meerbeeck (n 3) 137, 139, 145.

reasoning.<sup>92</sup> According to her, the predictable reasoning of the ECJ, on the basis of pre-established interpretative criteria and taking into account not only the purposes of the text but also the underlying aim of the legal system in general, offers adequate safeguards for legal certainty.<sup>93</sup> Paunio is influenced by Habermas's 'theory of communicative action', according to which the law must be applied in a way that guarantees both certainty and rightness.<sup>94</sup> As such, legal certainty is a principle that must be weighed and balanced against other interests and principles in the case at hand.<sup>95</sup> She proposes the following formula for legal certainty: 'a predictable procedure plus a rationally acceptable and transparent legal reasoning in accordance with the underlying values of the legal community in question equals legal certainty'.<sup>96</sup>

Others argue, by contrast, that terms in legislation should be interpreted according to 'word meaning' rather than 'speaker meaning'. Terms used by law makers should be interpreted according to the current best understanding of their 'real nature'.<sup>97</sup> As to multilingual EU law, scholars that adopt the latter approach are inclined to consider discrepancies between language versions of EU law to be highly problematic. In that regard, Schilling asserts that the setting aside of the wording of a law and the general lack of detailed reasoning in doing so leaves the impression of a certain arbitrariness and is quite problematic under the aspect of foreseeability of legal consequences.<sup>98</sup>

The core concepts in this debate seem to be legal reasoning and trust. While it is true, however, that arguments in favour of trust rather than clear and

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<sup>92</sup> Paunio (n 3) 2, 193; Elina Paunio and Susanna Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) *European Law Journal* 395.

<sup>93</sup> Paunio (n 3) 194. See, in the same sense, Pacho (n 2) 112.

<sup>94</sup> Paunio (n 3) 1471-1472.

<sup>95</sup> Paunio (n 3) 1473.

<sup>96</sup> Paunio (n 3) 1492.

<sup>97</sup> Bix (n 89) 148.

<sup>98</sup> Schilling (n 3) 61. See also Derlén (n 2) 332 et seq; Čápetá (n 31) 14.

unequivocal norms may be convincing to some extent as far as the ECJ is concerned, they are less strong with regard to national courts. Some critical observations must be made in that regard.

First, as was shown in Section II, the ECJ applies a literal interpretation method in a majority of cases where linguistic discrepancies occur. As a general rule, national courts seem to take the same approach (at least in the Member States where data are available). Even when using a purposive or systematic interpretation, judges do not usually do so without any consideration for the wording of the law, which remains therefore of the utmost importance. Incidentally, national legal culture may also be relevant in that regard. Traditionally, common law English courts are, for instance, used to examining the words of legislation in meticulous detail, whereas in (some) civil law systems, courts have more freedom in interpreting it.<sup>99</sup> Judges in certain Member States may therefore feel uncomfortable interpreting EU law on the basis of metalinguistic arguments in a way that contradicts the wording in their own language version. The survey of Dutch case law (Section III) seems in any case to suggest that, in current practice, judges use a literal approach to deal with language discrepancies, comparing the Dutch version with English (and additionally, with German and/or French).

Second, the arguments of scholars influenced by indeterminacy theorists regarding 'acceptance' and 'trust' of the judicial decision-making process do not entirely convince in the context of national judicial decisions. Indeed, as it may be assumed that linguistic resources are more limited in national courts than at the ECJ, the risk of arbitrary decisions based on diverging EU law versions is greater. In any event, it is unlikely that multilingual interpretation by national courts in different EU Member States leads in all cases to similar outcomes. Arguably, such a situation is likely to increase distrust in national courts and EU law in circumstances where one's own language version is set aside. A concrete example may illustrate this point more clearly. In 2005, the Dutch stockbreeder Dirk Endendijk was prosecuted in the Netherlands

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<sup>99</sup> Silvia Ferreri, 'Multilingual Interpretation of European Union Law' (2015) CDCT Working Paper, <<http://www.cdct.it/workingpapers>> (accessed 20 June 2018) 14.

because he had tethered calves contrary to Dutch legislation adopted on the basis of an EU directive.<sup>100</sup> Endendijk argued in his defence that the Dutch language version of the annex to the directive referred to a metallic tether, using the word 'chains' (*kettingen*) several times, whereas he had used a rope for tethering. The Dutch judge referred a preliminary question in that respect to the ECJ.<sup>101</sup> The latter Court, however, dismissed the linguistic argument,<sup>102</sup> citing its settled case law as explained above, according to which the word in question could not be examined solely in the Dutch version. It pointed out that other language versions, such as the German (*Anbindevorrichtung*), the English (tether), the French (*attache*) and the Italian (*attacco*), referred to a more general term. The ECJ concluded therefore that the word 'chains' used in the Dutch version was contrary to the objective pursued by the EU legislature: a calf is tethered where it is tied by a rope, irrespective of the material, length and purpose of that rope. Accordingly, Endendijk had committed a punishable act.

Although rationally fully acceptable at the EU level – the Dutch version was clearly the diverging one, a textual language comparison and purposive interpretation brought out the true meaning of the norm – this judgment

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<sup>100</sup>The applicable text was Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves, *OJ L* 340/28. The ECJ handed down its judgment on 3 April 2008. The Directive was later codified (Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves, *OJ L* 10/7). The Dutch version was rectified in 2015 (*OJ L* 10/46) removing the linguistic discrepancy (as established by the ECJ in its judgment).

<sup>101</sup> ECJ, case C-187/07 *Endendijk* EU:C:2008:197. See also case 238/84 *Röser* EU:C:1986:88 (para 22), where the ECJ concedes that the German version of a given provision (which is enforced by criminal law) is 'unclear' and 'open to another interpretation', yet states that the correct interpretation 'is apparent from a comparative examination of the different language versions, and in particular of the English, French and Italian versions, in which there is no ambiguity'. See also ECJ, case 250/80 *Schumacher* EU:C:1981:246.

<sup>102</sup> The Court dismissed the claim also on the grounds that the exception at issue applied only to group-housed calves at the time of feeding milk. That was not the case with *Endendijk's* calves, which were penned in individual boxes.

seems to raise questions about the acceptability of the decision on the national level, not least by the individual concerned. Indeed, particularly when one's own language version is clear and unambiguous and there are no apparent reasons to have doubts about it, there seems to be an issue of legal certainty. The question may indeed be raised whether it is reasonable, from the perspective of democratic legitimacy, to expect that the addressee of the law should make the effort of consulting other language versions than their own (authentic) version.<sup>103</sup> Furthermore, on a practical note, this obligation presupposes linguistic proficiency in one or more foreign languages, which is far from being general.<sup>104</sup>

Another important issue relates to the sphere of criminal law. In the case of *Endendijk*, national provisions which were adopted in the application of EU law were enforced through criminal sanctions.<sup>105</sup> In this regard the fundamental principle of legality, which is neatly encapsulated in the famous Latin maxim *nullum crimen sine lege, nulla poena sine lege* ('no crime without law, no punishment without law'), comes into play. This principle, which is intertwined with the concept of legal certainty,<sup>106</sup> is enshrined in article 11(2) of the Universal Declaration of Human Rights<sup>107</sup> and in article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>108</sup> as well as in article 49 of the Charter of Fundamental Rights of the EU.<sup>109</sup> Already established by Hobbes, who wrote that 'no law made after a fact done can make it a crime',<sup>110</sup> this human right entails that the law should

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<sup>103</sup> Sobotta (n 2) 82. See, in the same sense, Rideau (n 15) 69-70 and Šarčević (n 3) 20.

<sup>104</sup> See Section IV.1, in particular n 70.

<sup>105</sup> See for the scope of EU criminal law: Suominen (n 74) 2-6; Burkhard Jähnke and Edward Schramm, *Europäisches Strafrecht* (De Gruyter 2017) 4.

<sup>106</sup> Suominen (n 74) 8-9.

<sup>107</sup> 10 December 1948, 183<sup>th</sup> Plenary meeting of the UN General Assembly, *General Assembly Resolutions*, 3<sup>rd</sup> Session (1948-1949), A/RES/217(III), 71.

<sup>108</sup> 4 November 1950, *European Treaty Series* No 005.

<sup>109</sup> 7 December 2000, *OJ C* 202/389 of 7.6.2016.

<sup>110</sup> Thomas Hobbes, *Leviathan* (Oxford Clarendon Press, 1965, first edition 1651) 226.

make the scope of a criminal offence as precise as possible (*lex certa*):<sup>111</sup> individuals must be able to know from the wording of the provisions of the law, if need be with the assistance of the courts' interpretation, what acts and omissions will make them criminally liable.<sup>112</sup> The use of vague or ambiguous terms is, in other words, precluded.

Moreover, the principle of legality encompasses the rule of leniency.<sup>113</sup> In doubt, vague or ambiguous provisions are to be interpreted in favour of the defendant, a principle which is encapsulated in the Latin maxim *in dubio pro reo* ('when in doubt, for the accused').<sup>114</sup> It could therefore be argued that, in the area of criminal law, individuals should be granted the benefit of the doubt when their own language version diverges from the others.<sup>115</sup> At present, there is no case law of the ECtHR on the issue of multilingual norms and criminal liability. It therefore remains to be seen how it would rule in a case such as *Endendijk* and whether it would take issue with the fact that other languages must be consulted to determine the scope of criminal liability (possibly setting aside the wording of an individual's own language version).

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<sup>111</sup> Claes et al (n 77), 92; Mahmoud Cherif Bassiouni, *International Criminal Law volume I Sources, Subjects and Contents* (Martinus Nijhoff 2008) 73 et seq.

<sup>112</sup> ECtHR, case 10249/03 *Scoppola*, paras 93-94. An 'inevitable element of judicial interpretation' is acceptable 'provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen' (ECtHR, cases 34044/96, 35532/97 and 44801/98 *Streletz, Kessler and Krenz*, para 50).

<sup>113</sup> Cherif Bassiouni (n 111) 73.

<sup>114</sup> A. Ornowska, 'Introducing Hermeneutic Methods in Criminal Law Interpretation in Europe' in Joanna Jemielniak and Przemyslaw Mikłaszewicz (eds), *Interpretation of law in the Global World: From Particularism to a Universal Approach* (Springer 2010) 254.

<sup>115</sup> See, in the same sense, Langheld (n 74) 52.

## V. HOW TO ENHANCE THE RIGHTS OF INDIVIDUALS IN CASE OF LINGUISTIC DIVERGENCES?

### 1. *In the Field of EU Criminal Law: Unenforceability of the Divergent Norm?*

As Van Meerbeeck aptly observes, 'legal certainty should operate mainly for the benefit of the individual and not for the powers that be, namely the EU'.<sup>116</sup> Indeed, it seems anything but fair that a citizen such as Endendijk has to bear the negative consequences of a legal provision which was unclear in his own language. Incidentally, the ECJ reasoned along these lines in its *Skoma-Lux* judgment on the issue of formal legal certainty (the accessibility of the norm). It held that an approach allowing an act which had not been properly published to be enforceable would result in individuals 'bearing the adverse effects' of a failure by the EU administration.<sup>117</sup>

Could the case law in *Skoma-Lux* be applied to cases regarding substantial issues of legal certainty, so as to render a diverging language version unenforceable against individuals? Arguably, the circumstances in which a language version is not officially published, on the one hand, and those in which a language version diverges substantially, on the other, lead in the current state of affairs to quite different legal outcomes. The Czech enterprise *Skoma-Lux* could successfully argue that it did not have to follow EU provisions in the Czech Republic because they were not published in the Czech language. This held true irrespective of the fact that the Czech language version was made available by the Czech authorities in electronic form as well as in customs offices. It was also irrelevant whether *Skoma-Lux*, which had been operating for a long time in the field of international trade, knew the relevant provisions. By clear contrast, the Dutch stockbreeder

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<sup>116</sup> Van Meerbeeck (n 3) 138.

<sup>117</sup> ECJ, case C-161/06 *Skoma-Lux* EU:C:2007:773, para 42. See also ECJ case law on legal certainty and legitimate expectations, e.g. ECJ, cases C-1/02 *Borgmann* EU:C:2004:202, paras 30-31; C-236/02 *Slob* EU:C:2004:94, para 37; C-143/93 *Van Es* EU:C:1996:45, para 27; C-98/91 *Herbrink* EU:C:1994:24, para 9; C-81/91 *Twijstra* EU:C:1993:196, para 24.

Endendijk was unsuccessful despite arguing that he had followed to the letter the obligations laid down in the Dutch language version of the annex to the directive, as he should have consulted other language versions.

On the other hand, however, unenforceability of a diverging language version could severely jeopardize the uniform application of EU law in all the Member States. Arguably, it could make matters worse, as it would open a Pandora's Box of arguments for lawyers to challenge a given language version, in line with current linguistic strategies in litigation.<sup>118</sup> Therefore, such unenforceability should be limited, first and foremost, to the spheres of EU criminal law, to safeguard the legality principle.<sup>119</sup> Second, there should be an appropriate yardstick to determine whether a language discrepancy is such that it might render a given legal provision unenforceable. As was explained in Section II.1, various categories of linguistic discrepancies may be discerned. Clear editing mistakes in a certain language version, which are easy to detect by the persons concerned and which do not as such affect understandability of the provision at issue would remain enforceable.<sup>120</sup> Such circumstances would need to be assessed by national courts, using essentially the same criteria as for purely national criminal law.

Another question in that regard is whether national courts should base their decision solely on their own local official language or should also take into account the mother tongue of the accused. Derlén gives an example of a case concerning German citizens in Denmark, where the Danish judge held that the defendants had not been aware of the meaning in the Danish language version but had presumed the (diverging) German version to be correct. Therefore, no intentional infringement was established and the defendants were acquitted.<sup>121</sup> As a general rule though, it would seem that judges should

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<sup>118</sup> See Section III.

<sup>119</sup> See Section IV.3.

<sup>120</sup> Eg ECJ, case C-558/11 *Kurcums Metal* EU:C:2012:721. This case concerned an omission in the Latvian language version which the Court considered to be 'clearly an editing mistake' (para 50).

<sup>121</sup> Derlén (n 2) 335-336.

apply their own official language version. This is in line with the *Skoma-Lux* judgement, in which the ECJ held that regulations are enforceable against individuals only when published in the language of that Member State (although the issue was less complicated as the case concerned a Czech company in the Czech Republic). At any rate, in the current state of affairs, such unenforceability of a diverging language version would require legislative action or framing of a doctrine in that sense by the ECJ.

2. *A More Convenient Solution: Taking into Account Language Divergences as 'Mitigating Circumstances'*

There is a less radical alternative to unenforceability of the norm at issue: in their assessment of the case, national courts could take into account the fact that a given individual based his or her actions on a diverging language version and attenuate the adverse effects. As with unenforceability, an appropriate yardstick would have to be applied, by which national courts could determine whether the discrepancy affected correct understandability of the provision at issue.<sup>122</sup> Interestingly, that approach was eventually taken by the Dutch court in the *Endendijk* case. After the judgment in which the ECJ ruled that a 'chain' could also be a 'rope', the Dutch court had no choice but to establish that *Endendijk* had indeed committed a punishable act. Yet, as a mitigating circumstance, it took into account the fact that *Endendijk's* contribution had 'clarified the scope of EU rules' and did not impose a penalty.<sup>123</sup> Arguably, the scope of such a lenient approach could be broader than the sphere of criminal law. It could be applied in all cases of a diverging language version of EU law entailing adverse effects for individuals (such as tax liabilities, administrative sanctions, increased obligations or decreased rights, etc.), but exclusively in cases where the ECJ has established such a discrepancy.

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<sup>122</sup> See Section V.1.

<sup>123</sup> Rechtbank Zutphen, 20.10.2008, NL:RBZUT:2008:BG0605. Röser was also acquitted (criminal proceedings were canceled as the fault of the defendant was minor and there was no public interest in pursuing the case (Darlén (n 2) 337).

The question may be raised in that regard whether such 'leniency' would be in line with ECJ case law as it stands. The following example may illustrate this. The *Gerechtshof Amsterdam* held, in a tax law case, that it cannot be expected that a taxable person checks customs regulations in languages other than Dutch.<sup>124</sup> On appeal in 'cassation', the *Hoge Raad* (Supreme Court of the Netherlands) referred the issue to the ECJ for a preliminary ruling. The ECJ reiterated its standing case law and held that, although the Dutch version of the wording of the customs provision at issue, 'unlike a number of other language versions', did indeed not expressly specify the goods in question, other language versions did.<sup>125</sup> The ECJ thus gave a general and abstract interpretation of the EU law provision at issue for the sake of uniformity. Its judgment is limited, however, to the question that was submitted by the national court. It does not rule on other aspects of the case. Therefore, it may be argued that national courts still have the possibility to take into account the fact that the individual acted in good faith and was not able to foresee the consequences of his or her actions on the basis of a diverging own language version. In their rulings, national courts could therefore, in my view, endeavour to limit any adverse effects for the individual concerned while at the same time respecting the binding ECJ interpretation.

National courts may, however, appreciate some encouragement from the ECJ in that sense. The ECJ could expressly leave national courts a sufficient margin of appreciation to make an exception in the specific case at issue. Judges would then feel reassured by the ECJ that, in circumstances where a language version is held by the ECJ to be diverging and not correctly establishing the meaning of a given provision, there should be (as far as possible) no liability of the person concerned or other adverse effects. This may fall on fertile ground, as national courts may in any case be reluctant to enforce ECJ rulings against individuals acting in good faith on the basis of their own language version.

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<sup>124</sup> *Gerechtshof Amsterdam*, case 01/90096 DK X. B.V., NL:GHAMS:2004:AR7276, para 6.2.3.

<sup>125</sup> ECJ, case C-375/07 *Heuschen & Schrouff*, EU:C:2008:645, paras 45-46.

## VI. CONCLUDING REMARKS

In Thomas More's *Utopia*, laws are drafted using plain and unequivocal words so as to make sure that all citizens understand them, for 'it is all one, not to make a law at all, or to couch it in such terms that without a quick apprehension, and much study, a man cannot find out the true meaning of it'.<sup>126</sup> Difficult enough to accomplish in culturally and linguistically homogeneous societies, the achievement of this ideal in a multilingual and pluralistic legal order such as the EU is akin to the quest for the Holy Grail. *Utopia* did not take into account the emergence of a legal order in which laws are equally authentic in 24 languages which furthermore have to be interpreted and applied in a uniform manner in 28 Member States with different legal traditions.

The magnitude of this achievement cannot be underestimated. Great merit is due in that regard to the case law of the ECJ which has for more than half a century eliminated language discrepancies in EU law by means of a purposive and systematic interpretation, taking into account various language versions. As is rightly asserted in legal scholarship, trust in the ECJ and its legal reasoning to provide a uniform interpretation of diverging language versions is essential. Yet the situation may be quite different when national courts apply and interpret EU law. Research in the Netherlands suggests that they do so essentially on the basis of their own language version alone. When they have reasons to doubt that version, they do not automatically refer questions to the ECJ but try to resolve the issue by consulting, as a general rule, the English version (if possible also German and/or French).

Current practice seems to present some methodological flaws. First, it cannot be excluded that language discrepancies remain unnoticed. Language comparison should be a default step in the interpretation and application of EU law. Second, if a language discrepancy is detected, questions should be referred to the ECJ. Moreover, the limits of multilingual interpretation with regard to the concept of *Rechtssicherheit* (legal certainty) have remained largely

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<sup>126</sup> Thomas More, *Utopia* (Dover Thrift Editions, 1997, first edition 1516) 62.

undefined. This multilingualism paradox, where individuals have a right to their own language version, on the one hand, but cannot trust it entirely as they may not rely solely on it, on the other, remains unsolved. Trust in the ECJ and its legal reasoning may to some extent resolve this issue, as is in particular argued by 'indeterminate terms' theorists, who consider in essence that all legal norms are in any case indefinite and that full foreseeability of interpretation by courts of any given rule is an illusion. However, this theory, in my view, is not entirely convincing, in particular with regard to the application and interpretation of EU law by national courts. Indeed, in current practice, it is unlikely that multilingual interpretation by national courts in different EU Member States leads in all cases to similar outcomes. Arguably, such a situation is likely to increase distrust in national courts and EU law, not least in circumstances where the wording of one's own language version is set aside. This issue is of particular relevance with regard to the legality principle in the spheres of EU criminal law.

In that regard, the right of individuals to place trust in their own language version of EU law should be better protected than is currently the case. A radical approach would be, in criminal law, to hold a (seriously) diverging language version unenforceable against individuals, just as is the case when a language version is not published. There is, however, a more convenient and less radical alternative, which would consist of allowing national courts *in concreto*, in the individual case at issue before them, to show leniency and take into account that the individuals concerned acted in good faith on the basis of their own language version. Accordingly, no sanction would be imposed in criminal law and in other cases the adverse effects of a diverging language version would be alleviated as much as possible. This would not require a change in the current case law of the ECJ which would continue to provide a uniform interpretation *in abstracto*. The ECJ could, however, expressly leave national courts a margin of appreciation to encourage them to find adequate solutions *in concreto* to avoid adverse consequences for individuals who base their actions in good faith on a diverging language version.